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Filing date: **06/13/2023**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding no.	91272514
Party	Defendant Stoxdox, Inc.
Correspondence address	THOMAS G VARNUM BROOKS PIERCE MCLENDON HUMPHREY & LEONARD LLP 115 N 3RD STREET SUITE 301 WILMINGTON, NC 28401 UNITED STATES Primary email: tvarnum@brookspierce.com Secondary email(s): kwong@brookspierce.com, jlund@brookspierce.com, gwarren@brookspierce.com 910-444-2000
Submission	Testimony For Defendant
Filer's name	Katarina Wong
Filer's email	kwong@brookspierce.com
Signature	/Katarina Wong/
Date	06/13/2023
Attachments	Exhibits 283-284.pdf(2692809 bytes) Exhibits 287-293.pdf(4602737 bytes) Exhibit 294 - Part 1.pdf(5645863 bytes) Exhibit 294 - Part 2.pdf(4502447 bytes) Exhibit 294 - Part 3.pdf(3138908 bytes) Exhibit 294 - Part 4.pdf(3681136 bytes) Exhibit 294 - Part 5.pdf(3755738 bytes) Exhibit 294 - Part 6.pdf(4526114 bytes) Exhibit 294 - Part 7.pdf(4727801 bytes) Exhibits 295-299.pdf(2338957 bytes) Exhibit 300 Part 1.pdf(3293100 bytes) Exhibit 300 Part 2.pdf(4203804 bytes) Exhibits 301-302.pdf(949882 bytes) Exhibits 304-305.pdf(1757284 bytes)

EXHIBIT 283

Brian Kapp, CFA

Co-Founder and CEO
briankapp@stoxdox.com

Brian is the co-founder and CEO of stoxdox, Inc., a universal platform for investment research and perspective. He started in the investment industry in 1996 and spent the first half of his career as a portfolio manager at Merrill Lynch then UBS Financial Services. Later, he founded and served as the portfolio manager at both Kapp/Scanlon Financial Group and Oasis Capital.

Being an experienced investment strategist with 26 years of wisdom across the broad market is a key differentiator. The analyst side enables the creation of the highest quality, unbiased, and insightful analysis. The portfolio manager enables the design and delivery of timely and actionable information.

Brian is a CFA® charterholder and earned a BS in Industrial Management and a BS in Economics at Carnegie Mellon University. His experience combined with a strong foundation in strategic management and economics offers a uniquely full-spectrum, full-cycle, and global perspective.

Brian Kapp, CFA
Co-Founder and CEO at stoxdox

About

stoxdox, Inc. You've got to dox your stocks! Because information is power.

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1,955 followers

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1

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Brian Kapp, CFA
Co-Founder and CEO at stoxdox

Show all 7 experiences →

Education

Carnegie Mellon University
BS Industrial Management and BS Economics
1991 - 1995

Licenses & certifications

Chartered Financial Analyst (CFA)
CFA Institute
Issued Sep 2006

Series 7, 3, 9, 10, 6, 63, 65 (various dates)
FINRA
Issued Jul 1995 · Expired May 2009

Brian Kapp, CFA
Co-Founder and CEO at stoxdox

Experience

Co-Founder and CEO
stoxdox, Inc.
May 2020 - Present · 3 yrs 1 mo
Wilmington, North Carolina, United States

General Partner
Oasis Capital
May 2008 - Sep 2020 · 12 yrs 5 mos
Greater Pittsburgh Area

Director
PRISM Sustainability in the Built Environment
Feb 2016 - May 2020 · 4 yrs 4 mos
Greater Pittsburgh Area

Portfolio Manager, Principal
Kapp/Scanlon Financial Group
May 2009 - May 2016 · 7 yrs 1 mo
Greater Pittsburgh Area

Portfolio Manager
UBS
Jun 2002 - May 2009 · 7 yrs
Greater Pittsburgh Area

Account Executive, Financial Advisor
Merrill Lynch
Jun 1996 - Jun 2002 · 6 yrs 1 mo
Greater Pittsburgh Area

Account Executive
BISYS Fund Services
Jul 1995 - Jun 1996 · 1 yr
Greater Pittsburgh Area

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Brian Kapp, CFA · 1st

Co-Founder and CEO at stoxdox

Wilmington, North Carolina, United States · Contact info

500+ connections

Daniel Yauger, Marian Welsh, and 6 other mutual connections

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About

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EXHIBIT 284

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Data Science for Investment Professionals

New Certificate

Investment Foundations® Certificate

Complete the CFA Program

3

EXAMS

Covering 10 topics and providing hands-on practical skills

Earn the CFA Charter

4,000

HOURS WORK EXPERIENCE

Completed in a minimum of 36 months

Gain Global Recognition

162

MARKETS GLOBALLY

The gold standard of investment credentials

Join Investment Industry Leaders

190,000

ACTIVE CHARTERHOLDERS

Investment professionals influence markets around the world

CFA Program

Achieve one of the highest distinctions in the investment management profession: Become a Chartered Financial Analyst® (CFA®). As a CFA charterholder, you will have the knowledge and the skills to thrive in the competitive investing industry.

The CFA charter gives you expertise and real-world skills in investment analysis. Join more than 190,000 professionals who have been recognized globally for their commitment to ethics and professionalism.

Why the CFA Program Is Right for You

As an aspiring or practicing investment professional, you need the knowledge and skills to thrive in a highly competitive industry. The CFA Program is designed to equip you with the kind of expertise and real-world skills in investment analysis that will help you advance your career. Whether you are a practicing investment professional, a student, switching careers or looking to start a career in this field, the CFA Program offers a way to move forward and achieve your professional goals.

What Is a CFA Charter?

A Chartered Financial Analyst (CFA®) charter is a designation given to those who have completed the CFA® Program and completed acceptable work experience requirements.

The CFA Program is a three-part exam that tests the fundamentals of investment tools, valuing assets, portfolio management, and wealth planning. The CFA Program is typically completed by those with backgrounds in finance, accounting, economics, or business. CFA charterholders earn the right to use the CFA designation after program completion, application, and acceptance by CFA Institute. CFA charterholders are qualified to work in senior and executive positions in investment management, risk management, asset management, and more.

CFA Program Benefits

Demonstrating Your Expansive Knowledge and Skills

Designed with your future in mind, the CFA

Relevant in a Variety of Career Paths

CFA charterholders occupy a range of investment decision-making roles, typically as a research

Value in an Evolving Industry

As a globally recognized credential in the investment management profession, earning the

CFA Institute Programs

CFA Institute represents the industry gold-standard for effective and ethical investment management practices. Our educational programs are recognized and respected around the world as the ultimate commitment to clients' best interests and a firm's success. Challenge yourself, advance your career, and embark on your journey.

Programs Designed to Unlock Your Potential

From foundational knowledge to investment mastery, our industry acclaimed programs are developed to help professionals excel at all stages of their career. Explore three distinct educational programs to discover which one best aligns to your goals.

	CFA Program	CIPM Program	Certificate in ESG Investing
What is it for?	The Chartered Financial Analyst (CFA®) credential sets the standard as the most highly respected designation in the investment management profession.	The Certificate in Investment Performance Measurement (CIPM®) designation offers career distinction for all investment professionals charged with appraising and selecting portfolio managers, evaluating portfolio performance, and communicating	The CFA Institute Certificate in ESG Investing offers you both practical application and technical knowledge in the fast-growing field of ESG investing — an opportunity to both accelerate

What is it for?	The Chartered Financial Analyst (CFA®) credential sets the standard as the most highly respected designation in the investment management profession.	The Certificate in Investment Performance Measurement (CIPM®) designation offers career distinction for all investment professionals charged with appraising and selecting portfolio managers, evaluating portfolio performance, and communicating with clients.	The CFA Institute Certificate in ESG Investing offers you both practical application and technical knowledge in the fast-growing field of ESG investing — an opportunity to both accelerate progress and demonstrate purpose.
Who is it for?	Portfolio and wealth managers, investment and research analysts, professionals involved in the investment decision-making process, and finance students who want to work in the investment management profession	Portfolio managers, investment consultants, financial advisers, sales and client service professionals, and other investment professionals involved in selecting portfolio managers, evaluating portfolio performance, or communicating with clients	Analysts, portfolio managers, C-suite executives, or anyone with a foundation in investment management interested in mastering ESG investing
How long does it take?	A minimum of one year to complete three exams (Level I, II, and III), assuming 4,000 hours work experience requirement is already met	A minimum of one year to complete two exams (Level I and II), assuming 4,000 hours work experience requirement is already met	From the date of initial registration, candidates will have six months to sit for their exam
Are there prerequisites?	Yes. You must have **one** of the following: • A bachelor's (or equivalent) degree (or be within 23 months of your graduation month by the time you **sit** for your Level I exam) • Have a combination of 4,000 hours	No	No

Table of Contents

What Is a Chartered Financial Analyst (CFA)?

A chartered financial analyst (CFA) is a globally-recognized professional designation given by the CFA Institute, (formerly the AIMR (Association for Investment Management and Research)), that measures and certifies the competence and integrity of financial analysts. Candidates are required to pass three levels of exams covering areas, such as accounting, economics, ethics, money management, and security analysis.

From 1963 to the first half of 2022, more than two million candidates have sat for the Level I exam, with 291,500 candidates ultimately going on to pass the Level III exam, representing a weighted average completion rate of around 11%. In the last 10 years, the completion rate was slightly lower at 9.6%. [1]

Important: Historically the pass rates on each exam have been below 50%, making obtaining the CFA Charter one of the most difficult sets of financial certifications; a minimum of 300 hours of study is recommended for each exam.

- The CFA charter is one of the most respected designations in finance and is widely considered to be the gold standard in the field of investment analysis.
- To become a charter holder, candidates must pass three difficult exams, have a bachelors degree, and have at least four years of relevant professional experience. Passing the CFA Program exams requires strong discipline and an extensive amount of studying.
- There are more than 160,000 CFA charterholders worldwide in 164 countries and regions.
- The designation is handed out by the CFA Institute, which has nine offices worldwide and 156 local member societies.

Table of Contents

What Is STOXX?

STOXX, a subsidiary of Deutsche Boerse Group (stock symbol: DBOEF), is a leading provider of market indexes that are representative of European and global markets. Some of the more notable indexes provided by STOXX include Euro Stoxx 50, Stoxx Euro 600, Euro Stoxx 50 ESG, and the Stoxx Global 1800.

KEY TAKEAWAYS

- STOXX, a subsidiary of Deutsche Boerse Group (stock symbol: DBOEF), is a leading provider of market indexes that are representative of European and global markets.
- STOXX indices are licensed to more than 500 companies globally, which include the world's largest financial products issuers, capital owners, and asset managers.
- The most popular STOXX index is the Euro Stoxx 50 index, Europe's leading blue-chip index, covering 50 stocks from 8 eurozone countries: Belgium, Finland, France, Germany, Ireland, Italy, the Netherlands, and Spain.
- STOXX indices are used as the underlying instrument for financial products such as ETFs, futures and options, and structured products, but also for risk and performance measurement.

Understanding STOXX

Indices provided by STOXX cover a wide range of equity market segments, including the broad market, blue chips, individual sectors, and global indexes.

While global indexes are also included, the majority of STOXX indices place an emphasis on the European market. The STOXX indices were created out of a joint venture between Dow Jones, Deutsche Boerse AG, and the SIX Group (formerly SWX Group) in 1997 and launched their first products in 1998. [1]

Chartered Financial Analyst

16 languages

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Contents [hide]

The **Chartered Financial Analyst** (**CFA**) program is a postgraduate professional certification offered internationally by the American-based CFA Institute (formerly the Association for Investment Management and Research, or AIMR) to investment and financial professionals. The program teaches a wide range of subjects relating to advanced investment analysis—including security analysis, statistics, probability theory, fixed income, derivatives, economics, financial analysis, corporate finance, alternative investments, portfolio management—and provides a generalist knowledge of other areas of finance.

A candidate who successfully completes the program and meets other professional requirements is awarded the "CFA charter" and becomes a "CFA charterholder". As of November 2022, at least 190,000 people are charter-holders globally, growing 6% annually since 2012 (including effects of the pandemic).[1] Successful candidates take an average of four years to earn their CFA charter.[2][3]

The CFA exams are noted to be notoriously difficult, with low pass rates. During the period 2010–2021, pass rates for Levels 1-3 ranged from 22-56%.[4] The CFA Level 1 examination in May 2021 and July 2021 made news headlines after plummeting to a record-low pass rate of 25% and 22%, respectively,[5][6][7] and in August 2021, the level 2 pass rate fell to 29%.[8]

The top employers of CFA charter-holders globally include JP Morgan, UBS, Royal Bank of Canada, and Bank of America.[9]

History [edit]

The predecessor of the CFA Institute, the Financial Analysts Federation (FAF), was established in 1947 as a service organization for investment professionals. The FAF founded the Institute of Chartered Financial Analysts in 1962; the earliest CFA charter-holders were "grandfathered" in through work experience only, but then a series of three examinations was established along with a requirement to be a practitioner for several years before taking the exams. In 1990, in the hopes of boosting the credential's public profile, the CFA Institute (formerly the Association for Investment Management and Research) merged with the FAF and the Institute of Chartered Financial Analysts.

The CFA exam was first administered in 1963 and began in the United States and Canada, but has become global with many people becoming charter-holders across Europe, Asia, and Australia. By 2003, fewer than half the candidates in the CFA program were based in the United States and Canada, with most of the other candidates based in Asia or Europe. The number of charter-holders in India and China had increased by 25% and 53%, respectively, from 2005 to 2006.[11]

Sectors with the highest proportion of CFA Charter-holders[10]

Sector	%
Portfolio Management	25%
Research	12%
Consulting	10%
Chief level executive	9%
Investment strategy	7%
Risk management	7%
Wealth management	5%
Credit analysis	5%
Trading	4%
Accounting / audit	4%
Financial planning	3%
Others	9%

CFA Charter [edit]

The CFA designation is designed to demonstrate a strong foundation in advanced investment analysis and portfolio management, accompanied with a strict emphasis in ethical practice.

A charter-holder is held to the highest ethical standards. Once an investment professional obtains the charter, this individual also makes an annual commitment to uphold and abide by a strict professional code of conduct and ethical standards. Violations of the CFA code of ethics may result in industry related sanctions, suspension of the right to use the CFA designation, or a revocation of membership.

Requirements [edit]

STOXX

4 languages

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Contents [hide]

STOXX Ltd. is a Swiss globally integrated index provider, covering the world markets across all asset classes – developing, maintaining, distributing and marketing a comprehensive global family of strictly rules-based and transparent indices. STOXX is part of Qontigo, which was created in 2019 through the combination of STOXX, DAX and Axioma. Qontigo is part of Deutsche Börse Group, headquartered in Eschborn with key locations in New York, Zug and London. STOXX calculates more than 10,000 indices and in addition acts as the administrator for the DAXindices.

STOXX indices are licensed to financial institutions and other users for use with exchange-traded funds (ETFs), mutual funds, futures, options, structured products, and other purposes.

STOXX Ltd.

Type	Subsidiary
Industry	Financial services
Founded	1997
Headquarters	Zug, Switzerland
Key people	Sebastian Ceria (Chief Executive Officer of Qontigo) [1]
Services	stock market indices
Parent	Qontigo; Deutsche Börse Group
Website	www.qontigo.com

History [edit]

STOXX Limited was formed in 1997 and in 1998 the first STOXX indices were launched. In 2000 STOXX was the first index provider to implement free float market capitalization in all its indices. In December 2009 Deutsche Börse and SIX Group became sole shareholders of STOXX after Dow Jones exited the joint venture. Shortly after STOXX renamed all indices by removing the "DJ/Dow Jones" prefix. In July 2010 STOXX became the marketing agent for Deutsche Börse and SIX Swiss Exchange indices.[2]

In 2015 Deutsche Börse purchased the remaining 49.9% shares of STOXX from SIX Group along with the remaining shares of the joint venture Indexium AG at a cost of 650m Swiss Francs.

In 2019, STOXX was combined with Axioma Inc. to form Qontigo - a new investment intelligence company. Qontigo is headquartered in Eschborn, with key locations in New York, Zug and London."Qontigo - Press Releases". www.qontigo.com.

Indices [edit]

The STOXX Index family represents a wide range of stocks covering different market segments and different investment strategies. On a regional level the indices initially covered Europe, the Eurozone and Eastern Europe.

In 2011 STOXX expanded its index range by adding a consistent global index family for global regions and countries.

STOXX calculates and distributes the well-known EURO STOXX 50, STOXX Europe 50, and STOXX Europe 600 indices, which are used as the underlying indices for numerous derivative financial instruments such as options, futures and index funds.

Since 2013 with its GC Pooling index family STOXX offers a completely rules based interbank rate benchmark based on secured euro lending transactions.[3][4] The European Central Bank (ECB) uses the STOXX GC Pooling indices as new euro secured benchmarks.

In 2016, STOXX introduced its first fixed income index, the EURO STOXX 50 Corporate Bond Index. The index tracks the corporate debt of the EURO STOXX 50 companies.

In 2018 STOXX launched its ESG-screened versions of more than 40 benchmarks that meet the standard responsible-investing criteria of leading asset owners. The suite offers ESG-X versions of global, regional and emerging markets benchmarks, including ESG-X versions of the EURO STOXX 50® and the STOXX® Europe 600. The ESG-X indices incorporate standard norm- and product-based exclusions that aim to limit market and reputational risks

EXHIBIT 285

CFA Institute

CODE OF ETHICS AND STANDARDS OF PROFESSIONAL CONDUCT

PREAMBLE

The CFA Institute Code of Ethics and Standards of Professional Conduct are fundamental to the values of CFA Institute and essential to achieving its mission to lead the investment profession globally by promoting the highest standards of ethics, education, and professional excellence for the ultimate benefit of society. High ethical standards are critical to maintaining the public's trust in financial markets and in the investment profession. Since their creation in the 1960s, the Code and Standards have promoted the integrity of CFA Institute members and served as a model for measuring the ethics of investment professionals globally, regardless of job function, cultural differences, or local laws and regulations. All CFA Institute members (including holders of the Chartered Financial Analyst® [CFA®] designation) and CFA candidates must abide by the Code and Standards and are encouraged to notify their employer of this responsibility. Violations may result in disciplinary sanctions by CFA Institute. Sanctions can include revocation of membership, revocation of candidacy in the CFA Program, and revocation of the right to use the CFA designation.

THE CODE OF ETHICS

Members of CFA Institute (including CFA charterholders) and candidates for the CFA designation ("Members and Candidates") must:

- Act with integrity, competence, diligence, respect and in an ethical manner with the public, clients, prospective clients, employers, employees, colleagues in the investment profession, and other participants in the global capital markets.
- Place the integrity of the investment profession and the interests of clients above their own personal interests.
- Use reasonable care and exercise independent professional judgment when conducting investment analysis, making investment recommendations, taking investment actions, and engaging in other professional activities.
- Practice and encourage others to practice in a professional and ethical manner that will reflect credit on themselves and the profession.
- Promote the integrity and viability of the global capital markets for the ultimate benefit of society.
- Maintain and improve their professional competence and strive to maintain and improve the competence of other investment professionals.

STANDARDS OF PROFESSIONAL CONDUCT

I. PROFESSIONALISM

A. Knowledge of the Law. Members and Candidates must understand and comply with all applicable laws, rules, and regulations (including the CFA Institute Code of Ethics and Standards of Professional Conduct) of any government, regulatory organization, licensing agency, or professional association governing their professional activities. In the event of conflict, Members and Candidates must comply with the more strict law, rule, or regulation. Members and Candidates must not knowingly participate or assist in and must dissociate from any violation of such laws, rules, or regulations.

B. Independence and Objectivity. Members and Candidates must use reasonable care and judgment to achieve and maintain independence and objectivity in their professional activities. Members and Candidates must not offer, solicit, or accept any gift, benefit, compensation, or consideration that reasonably could be expected to compromise their own or another's independence and objectivity.

C. Misrepresentation. Members and Candidates must not knowingly make any misrepresentations relating to investment analysis, recommendations, actions, or other professional activities.

D. Misconduct. Members and Candidates must not engage in any professional conduct involving dishonesty, fraud, or deceit or commit any act that reflects adversely on their professional reputation, integrity, or competence.

II. INTEGRITY OF CAPITAL MARKETS

A. Material Nonpublic Information. Members and Candidates who possess material nonpublic information that could affect the value of an investment must not act or cause others to act on the information.

B. Market Manipulation. Members and Candidates must not engage in practices that distort prices or artificially inflate trading volume with the intent to mislead market participants.

III. DUTIES TO CLIENTS

A. Loyalty, Prudence, and Care. Members and Candidates have a duty of loyalty to their clients and must act with reasonable care and exercise prudent judgment. Members and Candidates must act for the benefit of their clients and place their clients' interests before their employer's or their own interests.

B. Fair Dealing. Members and Candidates must deal fairly and objectively with all clients when providing investment analysis, making investment recommendations, taking investment action, or engaging in other professional activities.

C. Suitability.

1. When Members and Candidates are in an advisory relationship with a client, they must:
   - **a.** Make a reasonable inquiry into a client's or prospective client's investment experience, risk and return objectives, and financial constraints prior to making any investment recommendation or taking investment action and must reassess and update this information regularly.
   - **b.** Determine that an investment is suitable to the client's financial situation and consistent with the client's written objectives, mandates, and constraints before making an investment recommendation or taking investment action.
   - **c.** Judge the suitability of investments in the context of the client's total portfolio.
2. When Members and Candidates are responsible for managing a portfolio to a specific mandate, strategy, or style, they must make only investment recommendations or take only investment actions that are consistent with the stated objectives and constraints of the portfolio.

D. Performance Presentation. When communicating investment performance information, Members and Candidates must make reasonable efforts to ensure that it is fair, accurate, and complete.

E. Preservation of Confidentiality. Members and Candidates must keep information about current, former, and prospective clients confidential unless:

1. The information concerns illegal activities on the part of the client or prospective client,
2. Disclosure is required by law, or
3. The client or prospective client permits disclosure of the information.

IV. DUTIES TO EMPLOYERS

A. Loyalty. In matters related to their employment, Members and Candidates must act for the benefit of their employer and not deprive their employer of the advantage of their skills and abilities, divulge confidential information, or otherwise cause harm to their employer.

B. Additional Compensation Arrangements. Members and Candidates must not accept gifts, benefits, compensation, or consideration that competes with or might reasonably be expected to create a conflict of interest with their employer's interest unless they obtain written consent from all parties involved.

C. Responsibilities of Supervisors. Members and Candidates must make reasonable efforts to ensure that anyone subject to their supervision or authority complies with applicable laws, rules, regulations, and the Code and Standards.

V. INVESTMENT ANALYSIS, RECOMMENDATIONS, AND ACTIONS

A. Diligence and Reasonable Basis. Members and Candidates must:

1. Exercise diligence, independence, and thoroughness in analyzing investments, making investment recommendations, and taking investment actions.
2. Have a reasonable and adequate basis, supported by appropriate research and investigation, for any investment analysis, recommendation, or action.

B. Communication with Clients and Prospective Clients. Members and Candidates must:

1. Disclose to clients and prospective clients the basic format and general principles of the investment processes they use to analyze investments, select securities, and construct portfolios and must promptly disclose any changes that might materially affect those processes.
2. Disclose to clients and prospective clients significant limitations and risks associated with the investment process.
3. Use reasonable judgment in identifying which factors are important to their investment analyses, recommendations, or actions and include those factors in communications with clients and prospective clients.
4. Distinguish between fact and opinion in the presentation of investment analysis and recommendations.

C. Record Retention. Members and Candidates must develop and maintain appropriate records to support their investment analyses, recommendations, actions, and other investment-related communications with clients and prospective clients.

VI. CONFLICTS OF INTEREST

A. Disclosure of Conflicts. Members and Candidates must make full and fair disclosure of all matters that could reasonably be expected to impair their independence and objectivity or interfere with respective duties to their clients, prospective clients, and employer. Members and Candidates must ensure that such disclosures are prominent, are delivered in plain language, and communicate the relevant information effectively.

B. Priority of Transactions. Investment transactions for clients and employers must have priority over investment transactions in which a Member or Candidate is the beneficial owner.

C. Referral Fees. Members and Candidates must disclose to their employer, clients, and prospective clients, as appropriate, any compensation, consideration, or benefit received from or paid to others for the recommendation of products or services.

VII. RESPONSIBILITIES AS A CFA INSTITUTE MEMBER OR CFA CANDIDATE

A. Conduct as Participants in CFA Institute Programs. Members and Candidates must not engage in any conduct that compromises the reputation or integrity of CFA Institute or the CFA designation or the integrity, validity, or security of the CFA Institute programs.

B. Reference to CFA Institute, the CFA Designation, and the CFA Program. When referring to CFA Institute, CFA Institute membership, the CFA designation, or candidacy in the CFA Program, Members and Candidates must not misrepresent or exaggerate the meaning or implications of membership in CFA Institute, holding the CFA designation, or candidacy in the CFA program.

EXHIBIT 286

STANDARDS OF PRACTICE HANDBOOK

2014
ELEVENTH EDITION

CFA Institute

Standards of Practice Handbook

ELEVENTH EDITION

2014

CFA Institute

ISBN: 978-0-938367-85-7
16 June 2014
(Corrected September 2014)

Contents

Preface

The *Standards of Practice Handbook* (*Handbook*) provides guidance to the people who grapple with real ethical dilemmas in the investment profession on a daily basis; the *Handbook* addresses the professional intersection where theory meets practice and where the concept of ethical behavior crosses from the abstract to the concrete. The *Handbook* is intended for a diverse and global audience: CFA Institute members navigating ambiguous ethical situations; supervisors and direct/indirect reports determining the nature of their responsibilities to each other, to existing and potential clients, and to the broader financial markets; and candidates preparing for the Chartered Financial Analyst (CFA) examinations.

Recent events in the global financial markets have tested the ethical mettle of financial market participants, including CFA Institute members. The standards taught in the CFA Program and by which CFA Institute members and candidates must abide represent timeless ethical principles and professional conduct for all market conditions. Through adherence to these standards, which continue to serve as the model for ethical behavior in the investment professional globally, each market participant does his or her part to improve the integrity and efficient operations of the financial markets.

The *Handbook* provides guidance in understanding the interconnectedness of the aspirational and practical principles and provisions of the Code of Ethics and Standards of Professional Conduct (Code and Standards). The Code contains high-level aspirational ethical principles that drive members and candidates to create a positive and reputable investment profession. The Standards contain practical ethical principles of conduct that members and candidates must follow to achieve the broader industry expectations. However, applying the principles individually may not capture the complexity of ethical requirements related to the investment industry. The Code and Standards should be viewed and interpreted as an interwoven tapestry of ethical requirements. Through members' and candidates' adherence to these principles as a whole, the integrity of and trust in the capital markets are improved.

Evolution of the CFA Institute Code of Ethics and Standards of Professional Conduct

Generally, changes to the Code and Standards over the years have been minor. CFA Institute has revised the language of the Code and Standards and occasionally added a new standard to address a prominent issue of the day. For instance, in 1992, CFA Institute added the standard addressing performance presentation to the existing list of standards.

Major changes came in 2005 with the ninth edition of the *Handbook*. CFA Institute adopted new standards, revised some existing standards, and reorganized the standards. The revisions were intended to clarify the requirements of

the Code and Standards and effectively convey to its global membership what constitutes "best practice" in a number of areas relating to the investment profession.

The Code and Standards must be regularly reviewed and updated if they are to remain effective and continue to represent the highest ethical standards in the global investment industry. CFA Institute strongly believes that revisions of the Code and Standards are not undertaken for cosmetic purposes but to add value by addressing legitimate concerns and improving comprehension.

Changes to the Code and Standards have far-reaching implications for the CFA Institute membership, the CFA Program, and the investment industry as a whole. CFA Institute members and candidates are *required* to adhere to the Code and Standards. In addition, the Code and Standards are increasingly being adopted, in whole or in part, by firms and regulatory authorities. Their relevance goes well beyond CFA Institute members and candidates.

Standards of Practice Handbook

The periodic revisions of the Code and Standards have come in conjunction with updates of the *Standards of Practice Handbook*. The *Handbook* is the fundamental element of the ethics education effort of CFA Institute and the primary resource for guidance in interpreting and implementing the Code and Standards. The *Handbook* seeks to educate members and candidates on how to apply the Code and Standards to their professional lives and thereby benefit their clients, employers, and the investing public in general. The *Handbook* explains the purpose of the Code and Standards and how they apply in a variety of situations. The sections discuss and amplify each standard and suggest procedures to prevent violations.

Examples in the "Application of the Standard" sections are meant to illustrate how the standard applies to hypothetical but factual situations. The names contained in the examples are fictional and are not meant to refer to any actual person or entity. Unless otherwise stated (e.g., one or more people specifically identified), individuals in each example are CFA Institute members and holders of the CFA designation. Because factual circumstances vary so widely and often involve gray areas, the explanatory material and examples are not intended to be all inclusive. Many examples set forth in the application sections involve standards that have legal counterparts; ***members are strongly urged to discuss with their supervisors and legal and compliance departments the content of the Code and Standards and the members' general obligations under the Code and Standards***.

CFA Institute recognizes that the presence of any set of ethical standards may create a false sense of security unless the documents are fully understood, enforced, and made a meaningful part of everyday professional activities. The *Handbook* is intended to provide a useful frame of reference that suggests ethical professional behavior in the investment decision-making process. This book cannot cover every contingency or circumstance, however, and it does not attempt to do so. The development and interpretation of the Code and Standards are evolving processes; the Code and Standards will be subject to continuing refinement.

Summary of Changes in the Eleventh Edition

The comprehensive review of the Code and Standards in 2005 resulted in principle requirements that remain applicable today. The review carried out for the eleventh edition focused on market practices that have evolved since the tenth edition. Along with updates to the guidance and examples within the *Handbook*, the eleventh edition includes an update to the Code of Ethics that embraces the members' role of maintaining the social contract between the industry and investors. Additionally, there are three changes to the Standards of Professional Conduct, which recognize the importance of proper supervision, clear communications with clients, and the expanding educational programs of CFA Institute.

Inclusion of Updated CFA Institute Mission

The CFA Institute Board of Governors approved an updated mission for the organization that is included in the Preamble to the Code and Standards. The new mission conveys the organization's conviction in the investment industry's role in the betterment of society at large.

Mission:

To lead the investment profession globally by promoting the highest standards of ethics, education, and professional excellence for the ultimate benefit of society.

Updated Code of Ethics Principle

One of the bullets in the Code of Ethics was updated to reflect the role that the capital markets have in the greater society. As members work to promote and maintain the integrity of the markets, their actions should also help maintain the social contract with investors.

Old:

Promote the integrity of and uphold the rules governing capital markets.

New:

Promote the integrity and viability of the global capital markets for the ultimate benefit of society.

New Standard Regarding Responsibilities of Supervisors [IV(C)]

The standard for members and candidates with supervision or authority over others within their firms was updated to bring about improvements in preventing illegal and unethical actions from occurring. The prior version of Standard IV(C) focused on the detection and prevention of violations. The updated version stresses broader compliance expectations, which include the detection and prevention aspects of the original version.

Old:

Members and Candidates must make reasonable efforts to detect and prevent violations of applicable laws, rules, regulations, and the Code and Standards by anyone subject to their supervision or authority.

New:

Members and Candidates must make reasonable efforts to ensure that anyone subject to their supervision or authority complies with applicable laws, rules, regulations, and the Code and Standards.

Additional Requirement under the Standard for Communication with Clients and Prospective Clients [V(B)]

Given the constant development of new and exotic financial instruments and strategies, the standard regarding communicating with clients now includes an implicit requirement to discuss the risks and limitations of recommendations being made to clients. The new principle and related guidance take into account the fact that levels of disclosure will differ between products and services. Members and candidates, along with their firms, must determine the specific disclosures their clients should receive while ensuring appropriate transparency of the individual firms' investment processes.

Addition:

Disclose to clients and prospective clients significant limitations and risks associated with the investment process.

Modification to Standard VII(A)

Since this standard was developed, CFA Institute has launched additional educational programs. The updated standard not only maintains the integrity of the CFA Program but also expands the same ethical considerations when members or candidates participate in such programs as the CIPM Program and the Claritas Investment Certificate. Whether participating as a member assisting with the curriculum or an examination or as a sitting candidate within a program, we expect them to engage in these programs as they would participate in the CFA Program.

Old:

Conduct as Members and Candidates in the CFA Program

Members and Candidates must not engage in any conduct that compromises the reputation or integrity of CFA Institute or the CFA designation or the integrity, validity, or security of the CFA examinations.

New:

Conduct as Participants in CFA Institute Programs

Members and Candidates must not engage in any conduct that compromises the reputation or integrity of CFA Institute or the CFA designation or the integrity, validity, or security of CFA Institute programs.

General Guidance and Example Revision

The guidance and examples were updated to reflect practices and scenarios applicable to today's investment industry. Two concepts that appear frequently in the updates in this edition relate to the increased use of social media for business communications and the use of and reliance on the output of quantitative models. The use of social media platforms has increased significantly since the publication of the tenth edition. And although financial modeling is not new to the industry, this update reflects upon actions that are viewed as possible contributing factors to the financial crises of the past decade.

CFA Institute Professional Conduct Program

All CFA Institute members and candidates enrolled in the CFA Program are required to comply with the Code and Standards. The CFA Institute Board of Governors maintains oversight and responsibility for the Professional Conduct Program (PCP), which, in conjunction with the Disciplinary Review Committee (DRC), is responsible for enforcement of the Code and Standards. The DRC is a volunteer committee of CFA charterholders who serve on panels to review conduct and partner with Professional Conduct staff to establish and review professional conduct policies. The CFA Institute Bylaws and Rules of Procedure for Professional Conduct (Rules of Procedure) form the basic structure for enforcing the Code and Standards. The Professional Conduct division is also responsible for enforcing testing policies of other CFA Institute education programs as well as the professional conduct of Certificate in Investment Performance Measurement (CIPM) certificants.

Professional Conduct inquiries come from a number of sources. First, members and candidates must self-disclose on the annual Professional Conduct Statement all matters that question their professional conduct, such as involvement in civil litigation or a criminal investigation or being the subject of a written complaint. Second, written complaints received by Professional Conduct staff can bring about an investigation. Third, CFA Institute staff may become aware of questionable conduct by a member or candidate through the media, regulatory notices, or another public source. Fourth, candidate conduct is monitored by proctors who complete reports on candidates suspected to have violated testing rules on exam day. Lastly, CFA Institute may also conduct analyses of scores and exam materials after the exam, as well as monitor online and social media to detect disclosure of confidential exam information.

When an inquiry is initiated, the Professional Conduct staff conducts an investigation that may include requesting a written explanation from the member or candidate; interviewing the member or candidate, complaining parties, and third parties; and collecting documents and records relevant to the investigation. Upon reviewing the material obtained during the investigation, the Professional Conduct staff may conclude the inquiry with no disciplinary sanction, issue a cautionary letter, or continue proceedings to discipline the member or candidate. If the Professional Conduct staff believes a violation of the Code and Standards or testing policies has occurred, the member or candidate has the opportunity to reject or accept any charges and the proposed sanctions.

If the member or candidate does not accept the charges and proposed sanction, the matter is referred to a panel composed of DRC members. Panels review materials and presentations from Professional Conduct staff and from the member or candidate. The panel's task is to determine whether a violation of the Code and Standards or testing policies occurred and, if so, what sanction should be imposed.

Sanctions imposed by CFA Institute may have significant consequences; they include public censure, suspension of membership and use of the CFA designation, and revocation of the CFA charter. Candidates enrolled in the CFA Program who have violated the Code and Standards or testing policies may be suspended or prohibited from further participation in the CFA Program.

Adoption of the Code and Standards

The Code and Standards apply to individual members of CFA Institute and candidates in the CFA Program. CFA Institute does encourage firms to adopt the Code and Standards, however, as part of their code of ethics. Those who claim compliance should fully understand the requirements of each of the principles of the Code and Standards.

Once a party—nonmember or firm—ensures its code of ethics meets the principles of the Code and Standards, that party should make the following statement whenever claiming compliance:

> "[Insert name of party] claims compliance with the CFA Institute Code of Ethics and Standards of Professional Conduct. This claim has not been verified by CFA Institute."

CFA Institute welcomes public acknowledgement, when appropriate, that firms are complying with the CFA Institute Code of Ethics and Standards of Professional Conduct and encourages firms to notify us of the adoption plans. For firms that would like to distribute the Code and Standards to clients and potential clients, attractive one-page copies of the Code and Standards, including translations, are available on the CFA Institute website (www.cfainstitute.org).

CFA Institute has also published the Asset Manager Code of Professional Conduct, which is designed, in part, to help asset managers comply with the regulations mandating codes of ethics for investment advisers. Whereas the Code and Standards are aimed at individual investment professionals who are members of CFA Institute or candidates in the CFA Program, the Asset Manager Code was

drafted specifically for firms. The Asset Manager Code provides specific, practical guidelines for asset managers in six areas: loyalty to clients, the investment process, trading, compliance, performance evaluation, and disclosure. The Asset Manager Code and the appropriate steps to acknowledge adoption or compliance can be found on the CFA Institute website (www.cfainstitute.org).

Acknowledgments

CFA Institute is a not-for-profit organization that is heavily dependent on the expertise and intellectual contributions of member volunteers. Members devote their time because they share a mutual interest in the organization's mission to promote and achieve ethical practice in the investment profession. CFA Institute owes much to the volunteers' abundant generosity and energy in extending ethical integrity.

The CFA Institute Standards of Practice Council (SPC), a group consisting of CFA charterholder volunteers from many different countries, is charged with maintaining and interpreting the Code and Standards and ensuring that they are effective. The SPC draws its membership from a broad spectrum of organizations in the securities field, including brokers, investment advisers, banks, and insurance companies. In most instances, the SPC members have important supervisory responsibilities within their firms.

The SPC continually evaluates the Code and Standards, as well as the guidance in the *Handbook*, to ensure that they are

- representative of high standards of professional conduct,
- relevant to the changing nature of the investment profession,
- globally applicable,
- sufficiently comprehensive, practical, and specific,
- enforceable, and
- testable for the CFA Program.

The SPC has spent countless hours reviewing and discussing revisions to the Code and Standards and updates to the guidance that make up the eleventh edition of the *Handbook*. Following is a list of the current and former members of the SPC who generously donated their time and energy to this effort.

James E. Hollis III, CFA, Chair
Rik Albrecht, CFA
Terence E. Burns, CFA
Laura Dagan, CFA
Samuel B. Jones, Jr., CFA
Ulrike Kaiser-Boeing, CFA
Jinliang (Jack) Li, CFA
Christopher C. Loop, CFA,
James M. Meeth, CFA
Guy G. Rutherfurd, Jr., CFA
Edouard Senechal, CFA
Wenliang (Richard) Wang, CFA
Peng Lian Wee, CFA

Ethics and the Investment Industry

Society ultimately benefits from efficient markets where capital can freely flow to the most productive or innovative destination. Well-functioning capital markets efficiently match those needing capital with those seeking to invest their assets in revenue-generating ventures. In order for capital markets to be efficient, investors must be able to trust that the markets are fair and transparent and offer them the opportunity to be rewarded for the risk they choose to take. Laws, regulations, and enforcement play a vital role but are insufficient alone to guarantee fair and transparent markets. The markets depend on an ethical foundation to guide participants' judgment and behavior. CFA Institute maintains and promotes the Code of Ethics and Standards of Professional Conduct in order to create a culture of ethics for the ultimate benefit of society.

Why Ethics Matters

Ethics can be defined as a set of moral principles or rules of conduct that provide guidance for our behavior when it affects others. Widely acknowledged fundamental ethical principles include honesty, fairness, diligence, and care and respect for others. Ethical conduct follows those principles and balances self-interest with both the direct and the indirect consequences of that behavior for other people.

Not only does unethical behavior by individuals have serious personal consequences—ranging from job loss and reputational damage to fines and even jail—but unethical conduct from market participants, investment professionals, and those who service investors can damage investor trust and thereby impair the sustainability of the global capital markets as a whole. Unfortunately, there seems to be an unending parade of stories bringing to light accounting frauds and manipulations, Ponzi schemes, insider-trading scandals, and other misdeeds. Not surprisingly, this has led to erosion in public confidence in investment professionals. Empirical evidence from numerous surveys documents the low standing in the eyes of the investing public of banks and financial services firms—the very institutions that are entrusted with the economic well-being and retirement security of society.

Governments and regulators have historically tried to combat misconduct in the industry through regulatory reform, with various levels of success. Global capital markets are highly regulated to protect investors and other market participants. However, compliance with regulation alone is insufficient to fully earn investor trust. Individuals and firms must develop a "culture of integrity" that permeates all levels of operations and promotes the ethical principles of stewardship of investor assets and working in the best interests of clients, above and beyond strict compliance with the law. A strong ethical culture that helps honest, ethical people engage in ethical behavior will foster the trust of investors, lead to robust global capital markets, and ultimately benefit society. That is why ethics matters.

Ethics, Society, and the Capital Markets

CFA Institute recently added the concept "for the ultimate benefit of society" to its mission. The premise is that we want to live in a socially, politically, and financially stable society that fosters individual well-being and welfare of the public. A key ingredient for this goal is global capital markets that facilitate the efficient allocation of resources so that the available capital finds its way to places where it most benefits that society. These investments are then used to produce goods and services, to fund innovation and jobs, and to promote improvements in standards of living. Indeed, such a function serves the interests of the society. Efficient capital markets, in turn, provide a host of benefits to those providing the investment capital. Investors are provided the opportunity to transfer and transform risk because the capital markets serve as an information exchange, create investment products, provide liquidity, and limit transaction costs.

However, a well-functioning and efficient capital market system is dependent on trust of the participants. If investors believe that capital market participants—investment professionals and firms—cannot be trusted with their financial assets or that the capital markets are unfair such that only insiders can be successful, they will be unlikely to invest or, at the very least, will require a higher risk premium. Decreased investment capital can reduce innovation and job creation and hurt the economy and society as a whole. Reduced trust in capital markets can also result in a less vibrant, if not smaller, investment industry.

Ethics for a global investment industry should be universal and ultimately support trust and integrity above acceptable local or regional customs and culture. Universal ethics for a global industry strongly supports the efficiency, values, and mission of the industry as a whole. Different countries may be at different stages of development in establishing standards of practice, but the end goal must be to achieve rules, regulations, and standards that support and promote fundamental ethical principles on a global basis.

Capital Market Sustainability and the Actions of One

Individuals and firms also have to look at the indirect impacts of their actions on the broader investment community. The increasingly interconnected nature of global finance brings to the fore an added consideration of market sustainability that was, perhaps, less appreciated in years past. In addition to committing to the highest levels of ethical behavior, today's investment professionals and their employers should consider the long-term health of the market as a whole.

As recent events have demonstrated, apparently isolated and unrelated decisions, however innocuous when considered on an individual basis, in aggregate can precipitate a market crisis. In an interconnected global economy and marketplace, each participant should strive to be aware of how his or her actions or the products he or she distributes may have an impact on capital market participants in other regions or countries.

Investment professionals should consider how their investment decision-making processes affect the global financial markets in the broader context of how they apply

their ethical and professional obligations. Those in positions of authority have a special responsibility to consider the broader context of market sustainability in their development and approval of corporate policies, particularly those involving risk management and product development. In addition, corporate compensation strategies should not encourage otherwise ethically sound individuals to engage in unethical or questionable conduct for financial gain. Ethics, sustainability, and properly functioning capital markets are components of the same concept of protecting the best interests of all. To always place the interests of clients ahead of both investment professionals' own interests and those of their employer remains a key ethos.

The Relationship between Ethics and Regulations

Some equate ethical behavior with legal behavior: If you are following the law, you must be acting appropriately. Ethical principles, like laws and regulations, prescribe appropriate constraints on our natural tendency to pursue self-interest that could harm the interests of others. Laws and regulations often attempt to guide people toward ethical behavior, but they do not cover all unethical behavior. Ethical behavior is often distinguished from legal conduct by describing legal behavior as what is required and ethical behavior as conduct that is morally correct. Ethical principles go beyond that which is legally sufficient and encompass what is the right thing to do.

Given many regulators' lack of sufficient resources to enforce well-conceived rules and regulations, relying on a regulatory framework to lead the charge in establishing ethical behavior has its challenges. Therefore, reliance on compliance with laws and regulation alone is insufficient to ensure ethical behavior of investment professionals or to create a truly ethical culture in the industry.

The recent past has shown us that some individuals will succeed at circumventing the regulatory rules for their personal gain. Only the application of strong ethical principles, at both the individual level and the firm level, will limit abuses. Knowing the rules or regulations to apply in a particular situation, although important, may not be sufficient to ensure ethical conduct. Individuals must be able both to recognize areas that are prone to ethical pitfalls and to identify and process those circumstances and influences that can impair ethical judgment.

Applying an Ethical Framework

Laws, regulations, professional standards, and codes of ethics can guide ethical behavior, but individual judgment is a critical ingredient in making principled choices and engaging in appropriate conduct. When faced with an ethical dilemma, individuals must have a well-developed set of principles; otherwise, their thought processes can lead to, at best, equivocation and indecision and, at worst, fraudulent conduct and destruction of the public trust. Establishing an ethical framework for an internal thought process prior to deciding to act is a crucial step in engaging in ethical conduct.

Most investment professionals are used to making decisions from a business (profit/loss) outlook. But given the importance of ethical behavior in carrying out

professional responsibilities, it is critical to also analyze decisions and potential conduct from an ethical perspective. Utilizing a framework for ethical decision making will help investment professionals effectively examine their conduct in the context of conflicting interests common to their professional obligations (e.g., researching and gathering information, developing investment recommendations, and managing money for others). Such a framework will allow investment professionals to analyze their conduct in a way that meets high standards of ethical behavior.

An ethical decision-making framework can come in many forms but should provide investment professionals with a tool for following the principles of the firm's code of ethics. Through analyzing the particular circumstances of each decision, investment professionals are able to determine the best course of action to fulfill their responsibilities in an ethical manner.

Commitment to Ethics by Firms

A firm's code of ethics risks becoming a largely ignored, dusty compilation if it is not truly integrated into the fabric of the business. The ability to relate an ethical decision-making framework to a firm's code of ethics allows investment professionals to bring the aspirations and principles of the code of ethics to life—transforming it from a compliance exercise to something that is at the heart of a firm's culture.

An investment professional's natural desire to "do the right thing" must be reinforced by building a culture of integrity in the workplace. Development, maintenance, and demonstration of a strong culture of integrity within the firm by senior management may be the single most important factor in promoting ethical behavior among the firm's employees. Adopting a code that clearly lays out the ethical principles that guide the thought processes and conduct the firm expects from its employees is a critical first step. But a code of ethics, while necessary, is insufficient.

Simply nurturing an inclination to do right is no match for the multitude of daily decisions that investment managers make. We need to exercise ethical decision-making skills to develop the muscle memory necessary for fundamentally ethical people to make good decisions despite the reality of agent conflicts. Just as coaching and practice transform our natural ability to run across a field into the technique and endurance required to run a race, teaching, reinforcing, and practicing ethical decision-making skills prepare us to confront the hard issues effectively. It is good for business, individuals, firms, the industry, and the markets, as well as society as a whole, to engage in the investment management profession in a highly ethical manner.

Ethical Commitment of CFA Institute

An important goal of CFA Institute is to ensure that the organization and its members and candidates develop, promote, and follow the highest ethical standards in the investment industry. The CFA Institute Code of Ethics (Code) and Standards of Professional Conduct (Standards) are the foundation supporting the organization's quest to uphold the industry's highest standards of individual and corporate practice and to help serve the greater good. The Code is a set of principles that define the overarching conduct CFA Institute expects from its members and CFA

Program candidates. The Code works in tandem with the Standards, which outline professional conduct that constitutes fair and ethical business practices.

For more than 50 years, CFA Institute members and candidates have been required to abide by the organization's Code and Standards. Periodically, CFA Institute has revised and updated its Code and Standards to ensure that they remain relevant to the changing nature of the investment profession and representative of the highest standard of professional conduct. Within this *Handbook*, CFA Institute addresses ethical principles for the profession, including individual professionalism; responsibilities to capital markets, clients, and employers; ethics involved in investment analysis, recommendations, and actions; and possible conflicts of interest. Although the investment world has become a far more complex place since the first publication of the *Standard of Practice Handbook*, distinguishing right from wrong remains the paramount principle of the Code and Standards.

New challenges will continually arise for members and candidates in applying the Code and Standards because many decisions are not unambiguously right or wrong. The dilemma exists because the choice between right and wrong is not always clear. Even well-intentioned investment professionals can find themselves in circumstances that may tempt them to cut corners. Situational influences can overpower the best of intentions.

CFA Institute has made a significant commitment to providing members and candidates with the resources to extend and deepen their understanding of how to appropriately apply the principles of the Code and Standards. The product offerings from CFA Institute offer a wealth of material. Through publications, conferences, webcasts, and podcasts, the ethical challenges of investment professionals are brought to light. Archived issues of these items are available on the CFA Institute website (www.cfainstitute.org).

By reviewing these resources and discussing with their peers, market participants can further enhance their abilities to apply an effective ethical decision-making framework. In time, this should help restore some of the trust recently lost by investors.

Markets function to an important extent on trust. Recent events have shown the fragility of this foundation and the devastating consequences that can ensue when it is fundamentally questioned. Investment professionals should remain mindful of the long-term health of financial markets and incorporate this concern for the market's sustainability in their investment decision making. CFA Institute and the Standards of Practice Council hope this edition of the *Handbook* will assist and guide investment professionals in meeting the ethical demands of the highly interconnected global capital markets for the ultimate benefit of society.

CFA Institute Code of Ethics and Standards of Professional Conduct

Preamble

The CFA Institute Code of Ethics and Standards of Professional Conduct are fundamental to the values of CFA Institute and essential to achieving its mission to lead the investment profession globally by promoting the highest standards of ethics, education, and professional excellence for the ultimate benefit of society. High ethical standards are critical to maintaining the public's trust in financial markets and in the investment profession. Since their creation in the 1960s, the Code and Standards have promoted the integrity of CFA Institute members and served as a model for measuring the ethics of investment professionals globally, regardless of job function, cultural differences, or local laws and regulations. All CFA Institute members (including holders of the Chartered Financial Analyst [CFA] designation) and CFA candidates have the personal responsibility to embrace and uphold the provisions of the Code and Standards and are encouraged to notify their employer of this responsibility. Violations may result in disciplinary sanctions by CFA Institute. Sanctions can include revocation of membership, revocation of candidacy in the CFA Program, and revocation of the right to use the CFA designation.

The Code of Ethics

Members of CFA Institute (including CFA charterholders) and candidates for the CFA designation ("Members and Candidates") must:

- Act with integrity, competence, diligence, and respect and in an ethical manner with the public, clients, prospective clients, employers, employees, colleagues in the investment profession, and other participants in the global capital markets.
- Place the integrity of the investment profession and the interests of clients above their own personal interests.
- Use reasonable care and exercise independent professional judgment when conducting investment analysis, making investment recommendations, taking investment actions, and engaging in other professional activities.
- Practice and encourage others to practice in a professional and ethical manner that will reflect credit on themselves and the profession.
- Promote the integrity and viability of the global capital markets for the ultimate benefit of society.
- Maintain and improve their professional competence and strive to maintain and improve the competence of other investment professionals.

Standards of Professional Conduct

I. PROFESSIONALISM

A. Knowledge of the Law

Members and Candidates must understand and comply with all applicable laws, rules, and regulations (including the CFA Institute Code of Ethics and Standards of Professional Conduct) of any government, regulatory organization, licensing agency, or professional association governing their professional activities. In the event of conflict, Members and Candidates must comply with the more strict law, rule, or regulation. Members and Candidates must not knowingly participate or assist in and must dissociate from any violation of such laws, rules, or regulations.

B. Independence and Objectivity

Members and Candidates must use reasonable care and judgment to achieve and maintain independence and objectivity in their professional activities. Members and Candidates must not offer, solicit, or accept any gift, benefit, compensation, or consideration that reasonably could be expected to compromise their own or another's independence and objectivity.

C. Misrepresentation

Members and Candidates must not knowingly make any misrepresentations relating to investment analysis, recommendations, actions, or other professional activities.

D. Misconduct

Members and Candidates must not engage in any professional conduct involving dishonesty, fraud, or deceit or commit any act that reflects adversely on their professional reputation, integrity, or competence.

II. INTEGRITY OF CAPITAL MARKETS

A. Material Nonpublic Information

Members and Candidates who possess material nonpublic information that could affect the value of an investment must not act or cause others to act on the information.

B. Market Manipulation

Members and Candidates must not engage in practices that distort prices or artificially inflate trading volume with the intent to mislead market participants.

III. DUTIES TO CLIENTS

A. Loyalty, Prudence, and Care

Members and Candidates have a duty of loyalty to their clients and must act with reasonable care and exercise prudent judgment. Members and Candidates must act for the benefit of their clients and place their clients' interests before their employer's or their own interests.

B. Fair Dealing

Members and Candidates must deal fairly and objectively with all clients when providing investment analysis, making investment recommendations, taking investment action, or engaging in other professional activities.

C. Suitability

1. When Members and Candidates are in an advisory relationship with a client, they must:
    a. Make a reasonable inquiry into a client's or prospective client's investment experience, risk and return objectives, and financial constraints prior to making any investment recommendation or taking investment action and must reassess and update this information regularly.
    b. Determine that an investment is suitable to the client's financial situation and consistent with the client's written objectives, mandates, and constraints before making an investment recommendation or taking investment action.
    c. Judge the suitability of investments in the context of the client's total portfolio.
2. When Members and Candidates are responsible for managing a portfolio to a specific mandate, strategy, or style, they must make only investment recommendations or take only investment actions that are consistent with the stated objectives and constraints of the portfolio.

D. Performance Presentation

When communicating investment performance information, Members and Candidates must make reasonable efforts to ensure that it is fair, accurate, and complete.

E. Preservation of Confidentiality

Members and Candidates must keep information about current, former, and prospective clients confidential unless:

1. The information concerns illegal activities on the part of the client or prospective client,
2. Disclosure is required by law, or
3. The client or prospective client permits disclosure of the information.

IV. DUTIES TO EMPLOYERS

A. Loyalty

In matters related to their employment, Members and Candidates must act for the benefit of their employer and not deprive their employer of the advantage of their skills and abilities, divulge confidential information, or otherwise cause harm to their employer.

B. Additional Compensation Arrangements

Members and Candidates must not accept gifts, benefits, compensation, or consideration that competes with or might reasonably be expected to create a conflict of interest with their employer's interest unless they obtain written consent from all parties involved.

C. Responsibilities of Supervisors

Members and Candidates must make reasonable efforts to ensure that anyone subject to their supervision or authority complies with applicable laws, rules, regulations, and the Code and Standards.

V. INVESTMENT ANALYSIS, RECOMMENDATIONS, AND ACTIONS

A. Diligence and Reasonable Basis

Members and Candidates must:

1. Exercise diligence, independence, and thoroughness in analyzing investments, making investment recommendations, and taking investment actions.
2. Have a reasonable and adequate basis, supported by appropriate research and investigation, for any investment analysis, recommendation, or action.

B. Communication with Clients and Prospective Clients

Members and Candidates must:

1. Disclose to clients and prospective clients the basic format and general principles of the investment processes they use to analyze

investments, select securities, and construct portfolios and must promptly disclose any changes that might materially affect those processes.

2. Disclose to clients and prospective clients significant limitations and risks associated with the investment process.

3. Use reasonable judgment in identifying which factors are important to their investment analyses, recommendations, or actions and include those factors in communications with clients and prospective clients.

4. Distinguish between fact and opinion in the presentation of investment analysis and recommendations.

C. Record Retention

Members and Candidates must develop and maintain appropriate records to support their investment analyses, recommendations, actions, and other investment-related communications with clients and prospective clients.

VI. CONFLICTS OF INTEREST

A. Disclosure of Conflicts

Members and Candidates must make full and fair disclosure of all matters that could reasonably be expected to impair their independence and objectivity or interfere with respective duties to their clients, prospective clients, and employer. Members and Candidates must ensure that such disclosures are prominent, are delivered in plain language, and communicate the relevant information effectively.

B. Priority of Transactions

Investment transactions for clients and employers must have priority over investment transactions in which a Member or Candidate is the beneficial owner.

C. Referral Fees

Members and Candidates must disclose to their employer, clients, and prospective clients, as appropriate, any compensation, consideration, or benefit received from or paid to others for the recommendation of products or services.

VII. RESPONSIBILITIES AS A CFA INSTITUTE MEMBER OR CFA CANDIDATE

A. Conduct as Participants in CFA Institute Programs

Members and Candidates must not engage in any conduct that compromises the reputation or integrity of CFA Institute or the CFA designation or the integrity, validity, or security of CFA Institute programs.

B. Reference to CFA Institute, the CFA Designation, and the CFA Program

When referring to CFA Institute, CFA Institute membership, the CFA designation, or candidacy in the CFA Program, Members and Candidates must not misrepresent or exaggerate the meaning or implications of membership in CFA Institute, holding the CFA designation, or candidacy in the CFA Program.

Standard I: Professionalism

Standard I(A) Knowledge of the Law

> Members and Candidates must understand and comply with all applicable laws, rules, and regulations (including the CFA Institute Code of Ethics and Standards of Professional Conduct) of any government, regulatory organization, licensing agency, or professional association governing their professional activities. In the event of conflict, Members and Candidates must comply with the more strict law, rule, or regulation. Members and Candidates must not knowingly participate or assist in and must dissociate from any violation of such laws, rules, or regulations.

Guidance

Highlights:

- *Relationship between the Code and Standards and Applicable Law*
- *Participation in or Association with Violations by Others*
- *Investment Products and Applicable Laws*

Members and candidates must understand the applicable laws and regulations of the countries and jurisdictions where they engage in professional activities. These activities may include, but are not limited to, trading of securities or other financial instruments, providing investment advice, conducting research, or performing other investment services. On the basis of their reasonable and good faith understanding, members and candidates must comply with the laws and regulations that directly govern their professional activities and resulting outcomes and that protect the interests of the clients.

When questions arise, members and candidates should know their firm's policies and procedures for accessing compliance guidance. This standard does not require members and candidates to become experts, however, in compliance. Additionally, members and candidates are not required to have detailed knowledge of or be experts on all the laws that could potentially govern their activities.

During times of changing regulations, members and candidates must remain vigilant in maintaining their knowledge of the requirements for their professional activities. New financial products and processes, along with uncovered ethical missteps, create an environment for recurring and potentially wide-ranging regulatory changes. Members and candidates are also continually provided improved and enhanced methods of communicating with both clients and potential clients, such as mobile applications and web-based social networking platforms. As new local, regional, and global requirements are updated to address these and other

changes, members, candidates, and their firms must adjust their procedures and practices to remain in compliance.

Relationship between the Code and Standards and Applicable Law

Some members or candidates may live, work, or provide investment services to clients living in a country that has no law or regulation governing a particular action or that has laws or regulations that differ from the requirements of the Code and Standards. When applicable law and the Code and Standards require different conduct, members and candidates must follow the more strict of the applicable law or the Code and Standards.

"Applicable law" is the law that governs the member's or candidate's conduct. Which law applies will depend on the particular facts and circumstances of each case. The "more strict" law or regulation is the law or regulation that imposes greater restrictions on the action of the member or candidate or calls for the member or candidate to exert a greater degree of action that protects the interests of investors. For example, applicable law or regulation may not require members and candidates to disclose referral fees received from or paid to others for the recommendation of investment products or services. Because the Code and Standards impose this obligation, however, members and candidates must disclose the existence of such fees.

Members and candidates must adhere to the following principles:

- Members and candidates must comply with applicable laws or regulations related to their professional activities.
- Members and candidates must not engage in conduct that constitutes a violation of the Code and Standards, even though it may otherwise be legal.
- In the absence of any applicable law or regulation or when the Code and Standards impose a higher degree of responsibility than applicable laws and regulations, members and candidates must adhere to the Code and Standards.

Applications of these principles are outlined in **Exhibit 1**.

The applicable laws governing the responsibilities of a member or candidate should be viewed as the minimal threshold of acceptable actions. When members and candidates take actions that exceed the minimal requirements, they further support the conduct required of Standard I(A).

CFA Institute members are obligated to abide by the CFA Institute Articles of Incorporation, Bylaws, Code of Ethics, Standards of Professional Conduct, Rules of Procedure, Membership Agreement, and other applicable rules promulgated by CFA Institute, all as amended periodically. CFA candidates who are not members must also abide by these documents (except for the Membership Agreement) as well as rules and regulations related to the administration of the CFA examination, the Candidate Responsibility Statement, and the Candidate Pledge.

Participation in or Association with Violations by Others

Members and candidates are responsible for violations in which they *knowingly* participate or assist. Although members and candidates are presumed to have knowledge of all applicable laws, rules, and regulations, CFA Institute acknowledges that members may not recognize violations if they are not aware of all the facts giving rise to the violations. Standard I(A) applies when members and candidates know or should know that their conduct may contribute to a violation of applicable laws, rules, or regulations or the Code and Standards.

If a member or candidate has reasonable grounds to believe that imminent or ongoing client or employer activities are illegal or unethical, the member or candidate must dissociate, or separate, from the activity. In extreme cases, dissociation may require a member or candidate to leave his or her employment. Members and candidates may take the following intermediate steps to dissociate from ethical violations of others when direct discussions with the person or persons committing the violation are unsuccessful. The first step should be to attempt to stop the behavior by bringing it to the attention of the employer through a supervisor or the firm's compliance department. If this attempt is unsuccessful, then members and candidates have a responsibility to step away and dissociate from the activity. Dissociation practices will differ on the basis of the member's or candidate's role in the investment industry. It may include removing one's name from written reports or recommendations, asking for a different assignment, or refusing to accept a new client or continue to advise a current client. Inaction combined with continuing association with those involved in illegal or unethical conduct may be construed as participation or assistance in the illegal or unethical conduct.

CFA Institute strongly encourages members and candidates to report potential violations of the Code and Standards committed by fellow members and candidates. Although a failure to report is less likely to be construed as a violation than a failure to dissociate from unethical conduct, the impact of inactivity on the integrity of capital markets can be significant. Although the Code and Standards do not compel members and candidates to report violations to their governmental or regulatory organizations unless such disclosure is mandatory under applicable law (voluntary reporting is often referred to as whistleblowing), such disclosure may be prudent under certain circumstances. Members and candidates should consult their legal and compliance advisers for guidance.

Additionally, CFA Institute encourages members, nonmembers, clients, and the investing public to report violations of the Code and Standards by CFA Institute members or CFA candidates by submitting a complaint in writing to the CFA Institute Professional Conduct Program via e-mail (pcprogram@cfainstitute.org) or the CFA Institute website (www.cfainstitute.org).

Investment Products and Applicable Laws

Members and candidates involved in creating or maintaining investment services or investment products or packages of securities and/or derivatives should be mindful of where these products or packages will be sold as well as their places of

origination. The applicable laws and regulations of the countries or regions of origination and expected sale should be understood by those responsible for the supervision of the services or creation and maintenance of the products or packages. Members or candidates should make reasonable efforts to review whether associated firms that are distributing products or services developed by their employing firm also abide by the laws and regulations of the countries and regions of distribution. Members and candidates should undertake the necessary due diligence when transacting cross-border business to understand the multiple applicable laws and regulations in order to protect the reputation of their firm and themselves.

Given the complexity that can arise with business transactions in today's market, there may be some uncertainty surrounding which laws or regulations are considered applicable when activities are being conducted in multiple jurisdictions. Members and candidates should seek the appropriate guidance, potentially including the firm's compliance or legal departments and legal counsel outside the organization, to gain a reasonable understanding of their responsibilities and how to implement them appropriately.

Exhibit 1 Global Application of the Code and Standards

Members and candidates who practice in multiple jurisdictions may be subject to varied securities laws and regulations. If applicable law is stricter than the requirements of the Code and Standards, members and candidates must adhere to applicable law; otherwise, they must adhere to the Code and Standards. The following chart provides illustrations involving a member who may be subject to the securities laws and regulations of three different types of countries:

NS: country with no securities laws or regulations
LS: country with ***less*** strict securities laws and regulations than the Code and Standards
MS: country with ***more*** strict securities laws and regulations than the Code and Standards

Applicable Law	Duties	Explanation
Member resides in NS country, does business in LS country; LS law applies.	Member must adhere to the Code and Standards.	Because applicable law is less strict than the Code and Standards, the member must adhere to the Code and Standards.

(continued)

Exhibit 1 Global Application of the Code and Standards (continued)

Applicable Law	Duties	Explanation
Member resides in NS country, does business in MS country; MS law applies.	Member must adhere to the law of MS country.	Because applicable law is stricter than the Code and Standards, member must adhere to the more strict applicable law.
Member resides in LS country, does business in NS country; LS law applies.	Member must adhere to the Code and Standards.	Because applicable law is less strict than the Code and Standards, member must adhere to the Code and Standards.
Member resides in LS country, does business in MS country; MS law applies.	Member must adhere to the law of MS country.	Because applicable law is stricter than the Code and Standards, member must adhere to the more strict applicable law.
Member resides in LS country, does business in NS country; LS law applies, but it states that law of locality where business is conducted governs.	Member must adhere to the Code and Standards.	Because applicable law states that the law of the locality where the business is conducted governs and there is no local law, the member must adhere to the Code and Standards.
Member resides in LS country, does business in MS country; LS law applies, but it states that law of locality where business is conducted governs.	Member must adhere to the law of MS country.	Because applicable law of the locality where the business is conducted governs and local law is stricter than the Code and Standards, member must adhere to the more strict applicable law.
Member resides in MS country, does business in LS country; MS law applies.	Member must adhere to the law of MS country.	Because applicable law is stricter than the Code and Standards, member must adhere to the more strict applicable law.

(continued)

Exhibit 1 Global Application of the Code and Standards (continued)

Applicable Law	Duties	Explanation
Member resides in MS country, does business in LS country; MS law applies, but it states that law of locality where business is conducted governs.	Member must adhere to the Code and Standards.	Because applicable law states that the law of the locality where the business is conducted governs and local law is less strict than the Code and Standards, member must adhere to the Code and Standards.
Member resides in MS country, does business in LS country with a client who is a citizen of LS country; MS law applies, but it states that the law of the client's home country governs.	Member must adhere to the Code and Standards.	Because applicable law states that the law of the client's home country governs (which is less strict than the Code and Standards), member must adhere to the Code and Standards.
Member resides in MS country, does business in LS country with a client who is a citizen of MS country; MS law applies, but it states that the law of the client's home country governs.	Member must adhere to the law of MS country.	Because applicable law states that the law of the client's home country governs and the law of the client's home country is stricter than the Code and Standards, the member must adhere to the more strict applicable law.

Recommended Procedures for Compliance

Members and Candidates

Suggested methods by which members and candidates can acquire and maintain understanding of applicable laws, rules, and regulations include the following:

- *Stay informed*: Members and candidates should establish or encourage their employers to establish a procedure by which employees are regularly informed about changes in applicable laws, rules, regulations, and case law. In many instances, the employer's compliance department or legal counsel can provide such information in the form of memorandums distributed to employees in the organization. Also, participation in an internal or external continuing education program is a practical method of staying current.

- *Review procedures*: Members and candidates should review, or encourage their employers to review, the firm's written compliance procedures on a regular basis to ensure that the procedures reflect current law and provide adequate guidance to employees about what is permissible conduct under the law and/or the Code and Standards. Recommended compliance procedures for specific items of the Code and Standards are discussed in this *Handbook* in the "Guidance" sections associated with each standard.
- *Maintain current files*: Members and candidates should maintain or encourage their employers to maintain readily accessible current reference copies of applicable statutes, rules, regulations, and important cases.

Distribution Area Laws

Members and candidates should make reasonable efforts to understand the applicable laws—both country and regional—for the countries and regions where their investment products are developed and are most likely to be distributed to clients.

Legal Counsel

When in doubt about the appropriate action to undertake, it is recommended that a member or candidate seek the advice of compliance personnel or legal counsel concerning legal requirements. If a potential violation is being committed by a fellow employee, it may also be prudent for the member or candidate to seek the advice of the firm's compliance department or legal counsel.

Dissociation

When dissociating from an activity that violates the Code and Standards, members and candidates should document the violation and urge their firms to attempt to persuade the perpetrator(s) to cease such conduct. To dissociate from the conduct, a member or candidate may have to resign his or her employment.

Firms

The formality and complexity of compliance procedures for firms depend on the nature and size of the organization and the nature of its investment operations. Members and candidates should encourage their firms to consider the following policies and procedures to support the principles of Standard I(A):

- *Develop and/or adopt a code of ethics*: The ethical culture of an organization starts at the top. Members and candidates should encourage their supervisors or managers to adopt a code of ethics. Adhering to a code of ethics facilitates solutions when people face ethical dilemmas and can prevent the need for employees to resort to a "whistleblowing" solution publicly alleging concealed misconduct. CFA Institute has published the *Asset Manager Code of Professional Conduct*, which firms may adopt or use as the basis for their codes (visit www.cfainstitute.org).

- *Provide information on applicable laws*: Pertinent information that highlights applicable laws and regulations might be distributed to employees or made available in a central location. Information sources might include primary information developed by the relevant government, governmental agencies, regulatory organizations, licensing agencies, and professional associations (e.g., from their websites); law firm memorandums or newsletters; and association memorandums or publications (e.g., *CFA Institute Magazine*).
- *Establish procedures for reporting violations*: Firms might provide written protocols for reporting suspected violations of laws, regulations, or company policies.

Application of the Standard

Example 1 (Notification of Known Violations):

Michael Allen works for a brokerage firm and is responsible for an underwriting of securities. A company official gives Allen information indicating that the financial statements Allen filed with the regulator overstate the issuer's earnings. Allen seeks the advice of the brokerage firm's general counsel, who states that it would be difficult for the regulator to prove that Allen has been involved in any wrongdoing.

> *Comment*: Although it is recommended that members and candidates seek the advice of legal counsel, the reliance on such advice does not absolve a member or candidate from the requirement to comply with the law or regulation. Allen should report this situation to his supervisor, seek an independent legal opinion, and determine whether the regulator should be notified of the error.

Example 2 (Dissociating from a Violation):

Lawrence Brown's employer, an investment banking firm, is the principal underwriter for an issue of convertible debentures by the Courtney Company. Brown discovers that the Courtney Company has concealed severe third-quarter losses in its foreign operations. The preliminary prospectus has already been distributed.

> *Comment*: Knowing that the preliminary prospectus is misleading, Brown should report his findings to the appropriate supervisory persons in his firm. If the matter is not remedied and Brown's employer does not dissociate from the underwriting, Brown should sever all his connections with the underwriting. Brown should also seek legal advice to determine whether additional reporting or other action should be taken.

Example 3 (Dissociating from a Violation):

Kamisha Washington's firm advertises its past performance record by showing the 10-year return of a composite of its client accounts. Washington discovers, however, that the composite omits the performance of accounts that have left the firm

during the 10-year period, whereas the description of the composite indicates the inclusion of all firm accounts. This omission has led to an inflated performance figure. Washington is asked to use promotional material that includes the erroneous performance number when soliciting business for the firm.

> *Comment*: Misrepresenting performance is a violation of the Code and Standards. Although she did not calculate the performance herself, Washington would be assisting in violating Standard I(A) if she were to use the inflated performance number when soliciting clients. She must dissociate herself from the activity. If discussing the misleading number with the person responsible is not an option for correcting the problem, she can bring the situation to the attention of her supervisor or the compliance department at her firm. If her firm is unwilling to recalculate performance, she must refrain from using the misleading promotional material and should notify the firm of her reasons. If the firm insists that she use the material, she should consider whether her obligation to dissociate from the activity requires her to seek other employment.

Example 4 (Following the Highest Requirements):

James Collins is an investment analyst for a major Wall Street brokerage firm. He works in a developing country with a rapidly modernizing economy and a growing capital market. Local securities laws are minimal—in form and content—and include no punitive prohibitions against insider trading.

> *Comment*: Collins must abide by the requirements of the Code and Standards, which might be more strict than the rules of the developing country. He should be aware of the risks that a small market and the absence of a fairly regulated flow of information to the market represent to his ability to obtain information and make timely judgments. He should include this factor in formulating his advice to clients. In handling material nonpublic information that accidentally comes into his possession, he must follow Standard II(A)–Material Nonpublic Information.

Example 5 (Following the Highest Requirements):

Laura Jameson works for a multinational investment adviser based in the United States. Jameson lives and works as a registered investment adviser in the tiny, but wealthy, island nation of Karramba. Karramba's securities laws state that no investment adviser registered and working in that country can participate in initial public offerings (IPOs) for the adviser's personal account. Jameson, believing that, as a US citizen working for a US-based company, she should comply only with US law, has ignored this Karrambian law. In addition, Jameson believes that as a charterholder, as long as she adheres to the Code and Standards requirement that she disclose her participation in any IPO to her employer and clients when such ownership creates a conflict of interest, she is meeting the highest ethical requirements.

Comment: Jameson is in violation of Standard I(A). As a registered investment adviser in Karramba, Jameson is prevented by Karrambian securities law from participating in IPOs regardless of the law of her home country. In addition, because the law of the country where she is working is stricter than the Code and Standards, she must follow the stricter requirements of the local law rather than the requirements of the Code and Standards.

Example 6 (Laws and Regulations Based on Religious Tenets):

Amanda Janney is employed as a fixed-income portfolio manager for a large international firm. She is on a team within her firm that is responsible for creating and managing a fixed-income hedge fund to be sold throughout the firm's distribution centers to high-net-worth clients. Her firm receives expressions of interest from potential clients from the Middle East who are seeking investments that comply with Islamic law. The marketing and promotional materials for the fixed-income hedge fund do not specify whether or not the fund is a suitable investment for an investor seeking compliance with Islamic law. Because the fund is being distributed globally, Janney is concerned about the reputation of the fund and the firm and believes disclosure of whether or not the fund complies with Islamic law could help minimize potential mistakes with placing this investment.

Comment: As the financial market continues to become globalized, members and candidates will need to be aware of the differences between cultural and religious laws and requirements as well as the different governmental laws and regulations. Janney and the firm could be proactive in their efforts to acknowledge areas where the new fund may not be suitable for clients.

Example 7 (Reporting Potential Unethical Actions):

Krista Blume is a junior portfolio manager for high-net-worth portfolios at a large global investment manager. She observes a number of new portfolios and relationships coming from a country in Europe where the firm did not have previous business and is told that a broker in that country is responsible for this new business. At a meeting on allocation of research resources to third-party research firms, Blume notes that this broker has been added to the list and is allocated payments for research. However, she knows the portfolios do not invest in securities in the broker's country, and she has not seen any research come from this broker. Blume asks her supervisor about the name being on the list and is told that someone in marketing is receiving the research and that the name being on the list is OK. She believes that what may be going on is that the broker is being paid for new business through the inappropriate research payments, and she wishes to dissociate from the misconduct.

Comment: Blume should follow the firm's policies and procedures for reporting potential unethical activity, which may include discussions with

her supervisor or someone in a designated compliance department. She should communicate her concerns appropriately while advocating for disclosure between the new broker relationship and the research payments.

Example 8 (Failure to Maintain Knowledge of the Law):

Colleen White is excited to use new technology to communicate with clients and potential clients. She recently began posting investment information, including performance reports and investment opinions and recommendations, to her Facebook page. In addition, she sends out brief announcements, opinions, and thoughts via her Twitter account (for example, "Prospects for future growth of XYZ company look good! #makingmoney4U"). Prior to White's use of these social media platforms, the local regulator had issued new requirements and guidance governing online electronic communication. White's communications appear to conflict with the recent regulatory announcements.

Comment: White is in violation of Standard I(A) because her communications do not comply with the existing guidance and regulation governing use of social media. White must be aware of the evolving legal requirements pertaining to new and dynamic areas of the financial services industry that are applicable to her. She should seek guidance from appropriate, knowledgeable, and reliable sources, such as her firm's compliance department, external service providers, or outside counsel, unless she diligently follows legal and regulatory trends affecting her professional responsibilities.

Standard I(B) Independence and Objectivity

> Members and Candidates must use reasonable care and judgment to achieve and maintain independence and objectivity in their professional activities. Members and Candidates must not offer, solicit, or accept any gift, benefit, compensation, or consideration that reasonably could be expected to compromise their own or another's independence and objectivity.

Guidance

Highlights:

- *Buy-Side Clients*
- *Fund Manager and Custodial Relationships*
- *Investment Banking Relationships*
- *Performance Measurement and Attribution*
- *Public Companies*
- *Credit Rating Agency Opinions*
- *Influence during the Manager Selection/Procurement Process*
- *Issuer-Paid Research*
- *Travel Funding*

Standard I(B) states the responsibility of CFA Institute members and candidates in the CFA Program to maintain independence and objectivity so that their clients will have the benefit of their work and opinions unaffected by any potential conflict of interest or other circumstance adversely affecting their judgment. Every member and candidate should endeavor to avoid situations that could cause or be perceived to cause a loss of independence or objectivity in recommending investments or taking investment action.

External sources may try to influence the investment process by offering analysts and portfolio managers a variety of benefits. Corporations may seek expanded research coverage, issuers and underwriters may wish to promote new securities offerings, brokers may want to increase commission business, and independent rating agencies may be influenced by the company requesting the rating. Benefits may include gifts, invitations to lavish functions, tickets, favors, or job referrals. One type of benefit is the allocation of shares in oversubscribed IPOs to investment managers for their personal accounts. This practice affords managers the opportunity to make quick profits that may not be available to their clients. Such a practice is prohibited under Standard I(B). Modest gifts and entertainment are acceptable,

but special care must be taken by members and candidates to resist subtle and not-so-subtle pressures to act in conflict with the interests of their clients. Best practice dictates that members and candidates reject any offer of gift or entertainment that could be expected to threaten their independence and objectivity.

Receiving a gift, benefit, or consideration from a *client* can be distinguished from gifts given by entities seeking to influence a member or candidate to the detriment of other clients. In a client relationship, the client has already entered some type of compensation arrangement with the member, candidate, or his or her firm. A gift from a client could be considered supplementary compensation. The potential for obtaining influence to the detriment of other clients, although present, is not as great as in situations where no compensation arrangement exists. When possible, prior to accepting "bonuses" or gifts from clients, members and candidates should disclose to their employers such benefits offered by clients. If notification is not possible prior to acceptance, members and candidates must disclose to their employer benefits previously accepted from clients. Disclosure allows the employer of a member or candidate to make an independent determination about the extent to which the gift may affect the member's or candidate's independence and objectivity.

Members and candidates may also come under pressure from their own firms to, for example, issue favorable research reports or recommendations for certain companies with potential or continuing business relationships with the firm. The situation may be aggravated if an executive of the company sits on the bank or investment firm's board and attempts to interfere in investment decision making. Members and candidates acting in a sales or marketing capacity must be especially mindful of their objectivity in promoting appropriate investments for their clients.

Left unmanaged, pressures that threaten independence place research analysts in a difficult position and may jeopardize their ability to act independently and objectively. One of the ways that research analysts have coped with these pressures in the past is to use subtle and ambiguous language in their recommendations or to temper the tone of their research reports. Such subtleties are lost on some investors, however, who reasonably expect research reports and recommendations to be straightforward and transparent and to communicate clearly an analyst's views based on unbiased analysis and independent judgment.

Members and candidates are personally responsible for maintaining independence and objectivity when preparing research reports, making investment recommendations, and taking investment action on behalf of clients. Recommendations must convey the member's or candidate's true opinions, free of bias from internal or external pressures, and be stated in clear and unambiguous language.

Members and candidates also should be aware that some of their professional or social activities within CFA Institute or its member societies may subtly threaten their independence or objectivity. When seeking corporate financial support for conventions, seminars, or even weekly society luncheons, the members or candidates responsible for the activities should evaluate both the actual effect of

such solicitations on their independence and whether their objectivity might be perceived to be compromised in the eyes of their clients.

Buy-Side Clients

One source of pressure on sell-side analysts is buy-side clients. Institutional clients are traditionally the primary users of sell-side research, either directly or with soft dollar brokerage. Portfolio managers may have significant positions in the security of a company under review. A rating downgrade may adversely affect the portfolio's performance, particularly in the short term, because the sensitivity of stock prices to ratings changes has increased in recent years. A downgrade may also affect the manager's compensation, which is usually tied to portfolio performance. Moreover, portfolio performance is subject to media and public scrutiny, which may affect the manager's professional reputation. Consequently, some portfolio managers implicitly or explicitly support sell-side ratings inflation.

Portfolio managers have a responsibility to respect and foster the intellectual honesty of sell-side research. Therefore, it is improper for portfolio managers to threaten or engage in retaliatory practices, such as reporting sell-side analysts to the covered company in order to instigate negative corporate reactions. Although most portfolio managers do not engage in such practices, the perception by the research analyst that a reprisal is possible may cause concern and make it difficult for the analyst to maintain independence and objectivity.

Fund Manager and Custodial Relationships

Research analysts are not the only people who must be concerned with maintaining their independence. Members and candidates who are responsible for hiring and retaining outside managers and third-party custodians should not accepts gifts, entertainment, or travel funding that may be perceived as impairing their decisions. The use of secondary fund managers has evolved into a common practice to manage specific asset allocations. The use of third-party custodians is common practice for independent investment advisory firms and helps them with trading capabilities and reporting requirements. Primary and secondary fund managers, as well as third-party custodians, often arrange educational and marketing events to inform others about their business strategies, investment process, or custodial services. Members and candidates must review the merits of each offer individually in determining whether they may attend yet maintain their independence.

Investment Banking Relationships

Some sell-side firms may exert pressure on their analysts to issue favorable research reports on current or prospective investment banking clients. For many of these firms, income from investment banking has become increasingly important to overall firm profitability because brokerage income has declined as a result of price competition. Consequently, firms offering investment banking services work hard to develop and maintain relationships with investment banking clients and prospects. These companies are often covered by the firm's research analysts because

companies often select their investment banks on the basis of the reputation of their research analysts, the quality of their work, and their standing in the industry.

In some countries, research analysts frequently work closely with their investment banking colleagues to help evaluate prospective investment banking clients. In other countries, because of past abuses in managing the obvious conflicts of interest, regulators have established clear rules prohibiting the interaction of these groups. Although collaboration between research analysts and investment banking colleagues may benefit the firm and enhance market efficiency (e.g., by allowing firms to assess risks more accurately and make better pricing assumptions), it requires firms to carefully balance the conflicts of interest inherent in the collaboration. Having analysts work with investment bankers is appropriate only when the conflicts are adequately and effectively managed and disclosed. Firm managers have a responsibility to provide an environment in which analysts are neither coerced nor enticed into issuing research that does not reflect their true opinions. Firms should require public disclosure of actual conflicts of interest to investors.

Members, candidates, and their firms must adopt and follow perceived best practices in maintaining independence and objectivity in the corporate culture and protecting analysts from undue pressure by their investment banking colleagues. The "firewalls" traditionally built between these two functions must be managed to minimize conflicts of interest; indeed, enhanced firewall policies may go as far as prohibiting all communications between these groups. A key element of an enhanced firewall is separate reporting structures for personnel on the research side and personnel on the investment banking side. For example, investment banking personnel should not have any authority to approve, disapprove, or make changes to research reports or recommendations. Another element should be a compensation arrangement that minimizes the pressures on research analysts and rewards objectivity and accuracy. Compensation arrangements should not link analyst remuneration directly to investment banking assignments in which the analyst may participate as a team member. Firms should also regularly review their policies and procedures to determine whether analysts are adequately safeguarded and to improve the transparency of disclosures relating to conflicts of interest. The highest level of transparency is achieved when disclosures are prominent and specific rather than marginalized and generic.

Performance Measurement and Attribution

Members and candidates working within a firm's investment performance measurement department may also be presented with situations that challenge their independence and objectivity. As performance analysts, their analyses may reveal instances where managers may appear to have strayed from their mandate. Additionally, the performance analyst may receive requests to alter the construction of composite indices owing to negative results for a selected account or fund. The member or candidate must not allow internal or external influences to affect their independence and objectivity as they faithfully complete their performance calculation and analysis-related responsibilities.

Public Companies

Analysts may be pressured to issue favorable reports and recommendations by the companies they follow. Not every stock is a "buy," and not every research report is favorable—for many reasons, including the cyclical nature of many business activities and market fluctuations. For instance, a "good company" does not always translate into a "good stock" rating if the current stock price is fully valued. In making an investment recommendation, the analyst is responsible for anticipating, interpreting, and assessing a company's prospects and stock price performance in a factual manner. Many company managers, however, believe that their company's stock is undervalued, and these managers may find it difficult to accept critical research reports or ratings downgrades. Company managers' compensation may also be dependent on stock performance.

Due diligence in financial research and analysis involves gathering information from a wide variety of sources, including public disclosure documents (such as proxy statements, annual reports, and other regulatory filings) and also company management and investor-relations personnel, suppliers, customers, competitors, and other relevant sources. Research analysts may justifiably fear that companies will limit their ability to conduct thorough research by denying analysts who have "negative" views direct access to company managers and/or barring them from conference calls and other communication venues. Retaliatory practices include companies bringing legal action against analysts personally and/or their firms to seek monetary damages for the economic effects of negative reports and recommendations. Although few companies engage in such behavior, the perception that a reprisal is possible is a reasonable concern for analysts. This concern may make it difficult for them to conduct the comprehensive research needed to make objective recommendations. For further information and guidance, members and candidates should refer to the CFA Institute publication *Best Practice Guidelines Governing Analyst/Corporate Issuer Relations* (www.cfainstitute.org).

Credit Rating Agency Opinions

Credit rating agencies provide a service by grading the fixed-income products offered by companies. Analysts face challenges related to incentives and compensation schemes that may be tied to the final rating and successful placement of the product. Members and candidates employed at rating agencies should ensure that procedures and processes at the agencies prevent undue influences from a sponsoring company during the analysis. Members and candidates should abide by their agencies' and the industry's standards of conduct regarding the analytical process and the distribution of their reports.

The work of credit rating agencies also raises concerns similar to those inherent in investment banking relationships. Analysts may face pressure to issue ratings at a specific level because of other services the agency offers companies—namely, advising on the development of structured products. The rating agencies need to develop the necessary firewalls and protections to allow the independent operations of their different business lines.

When using information provided by credit rating agencies, members and candidates should be mindful of the potential conflicts of interest. And because of the potential conflicts, members and candidates may need to independently validate the rating granted.

Influence during the Manager Selection/Procurement Process

Members and candidates may find themselves on either side of the manager selection process. An individual may be on the hiring side as a representative of a pension organization or an investment committee member of an endowment or a charitable organization. Additionally, other members may be representing their organizations in attempts to earn new investment allocation mandates. The responsibility of members and candidates to maintain their independence and objectivity extends to the hiring or firing of those who provide business services beyond investment management.

When serving in a hiring capacity, members and candidates should not solicit gifts, contributions, or other compensation that may affect their independence and objectivity. Solicitations do not have to benefit members and candidates personally to conflict with Standard I(B). Requesting contributions to a favorite charity or political organization may also be perceived as an attempt to influence the decision-making process. Additionally, members and candidates serving in a hiring capacity should refuse gifts, donations, and other offered compensation that may be perceived to influence their decision-making process.

When working to earn a new investment allocation, members and candidates should not offer gifts, contributions, or other compensation to influence the decision of the hiring representative. The offering of these items with the intent to impair the independence and objectivity of another person would not comply with Standard I(B). Such prohibited actions may include offering donations to a charitable organization or political candidate referred by the hiring representative.

A clear example of improperly influencing hiring representatives was displayed in the "pay-to-play" scandal involving government-sponsored pension funds in the United States. Managers looking to gain lucrative allocations from the large funds made requested donations to the political campaigns of individuals directly responsible for the hiring decisions. This scandal and other similar events have led to new laws requiring additional reporting concerning political contributions and bans on hiring—or hiring delays for—managers that made campaign contributions to representatives associated with the decision-making process.

Issuer-Paid Research

In light of the recent reduction of sell-side research coverage, many companies, seeking to increase visibility both in the financial markets and with potential investors, have hired analysts to produce research reports analyzing their companies. These reports bridge the gap created by the lack of coverage and can be an effective method of communicating with investors.

Issuer-paid research conducted by independent analysts, however, is fraught with potential conflicts. Depending on how the research is written and distributed, investors may be misled into believing that the research is from an independent source when, in reality, it has been paid for by the subject company.

Members and candidates must adhere to strict standards of conduct that govern how the research is to be conducted and what disclosures must be made in the report. Analysts must engage in thorough, independent, and unbiased analysis and must fully disclose potential conflicts of interest, including the nature of their compensation. Otherwise, analysts risk misleading investors.

Investors need clear, credible, and thorough information about companies, and they need research based on independent thought. At a minimum, issuer-paid research should include a thorough analysis of the company's financial statements based on publicly disclosed information, benchmarking within a peer group, and industry analysis. Analysts must exercise diligence, independence, and thoroughness in conducting their research in an objective manner. Analysts must distinguish between fact and opinion in their reports. Conclusions must have a reasonable and adequate basis and must be supported by appropriate research.

Independent analysts must also strictly limit the type of compensation that they accept for conducting issuer-paid research. Otherwise, the content and conclusions of the reports could reasonably be expected to be determined or affected by compensation from the sponsoring companies. Compensation that might influence the research report could be direct, such as payment based on the conclusions of the report, or indirect, such as stock warrants or other equity instruments that could increase in value on the basis of positive coverage in the report. In such instances, the independent analyst has an incentive to avoid including negative information or making negative conclusions. Best practice is for independent analysts, prior to writing their reports, to negotiate only a flat fee for their work that is not linked to their conclusions or recommendations.

Travel Funding

The benefits related to accepting paid travel extend beyond the cost savings to the member or candidate and his firm, such as the chance to talk exclusively with the executives of a company or learning more about the investment options provided by an investment organization. Acceptance also comes with potential concerns; for example, members and candidates may be influenced by these discussions when flying on a corporate or chartered jet or attending sponsored conferences where many expenses, including airfare and lodging, are covered. To avoid the appearance of compromising their independence and objectivity, best practice dictates that members and candidates always use commercial transportation at their expense or at the expense of their firm rather than accept paid travel arrangements from an outside company. Should commercial transportation be unavailable, members and candidates may accept modestly arranged travel to participate in appropriate information-gathering events, such as a property tour.

Recommended Procedures for Compliance

Members and candidates should adhere to the following practices and should encourage their firms to establish procedures to avoid violations of Standard I(B):

- *Protect the integrity of opinions*: Members, candidates, and their firms should establish policies stating that every research report concerning the securities of a corporate client should reflect the unbiased opinion of the analyst. Firms should also design compensation systems that protect the integrity of the investment decision process by maintaining the independence and objectivity of analysts.
- *Create a restricted list*: If the firm is unwilling to permit dissemination of adverse opinions about a corporate client, members and candidates should encourage the firm to remove the controversial company from the research universe and put it on a restricted list so that the firm disseminates only factual information about the company.
- *Restrict special cost arrangements*: When attending meetings at an issuer's headquarters, members and candidates should pay for commercial transportation and hotel charges. No corporate issuer should reimburse members or candidates for air transportation. Members and candidates should encourage issuers to limit the use of corporate aircraft to situations in which commercial transportation is not available or in which efficient movement could not otherwise be arranged. Members and candidates should take particular care that when frequent meetings are held between an individual issuer and an individual member or candidate, the issuer should not always host the member or candidate.
- *Limit gifts*: Members and candidates must limit the acceptance of gratuities and/or gifts to token items. Standard I(B) does not preclude customary, ordinary business-related entertainment as long as its purpose is not to influence or reward members or candidates. Firms should consider a strict value limit for acceptable gifts that is based on the local or regional customs and should address whether the limit is per gift or an aggregate annual value.
- *Restrict investments*: Members and candidates should encourage their investment firms to develop formal polices related to employee purchases of equity or equity-related IPOs. Firms should require prior approval for employee participation in IPOs, with prompt disclosure of investment actions taken following the offering. Strict limits should be imposed on investment personnel acquiring securities in private placements.
- *Review procedures*: Members and candidates should encourage their firms to implement effective supervisory and review procedures to ensure that analysts and portfolio managers comply with policies relating to their personal investment activities.
- *Independence policy*: Members, candidates, and their firms should establish a formal written policy on the independence and objectivity of research

and implement reporting structures and review procedures to ensure that research analysts do not report to and are not supervised or controlled by any department of the firm that could compromise the independence of the analyst. More detailed recommendations related to a firm's policies regarding research objectivity are set forth in the CFA Institute statement *Research Objectivity Standards* (www.cfainstitute.org).

- *Appointed officer*: Firms should appoint a senior officer with oversight responsibilities for compliance with the firm's code of ethics and all regulations concerning its business. Firms should provide every employee with the procedures and policies for reporting potentially unethical behavior, violations of regulations, or other activities that may harm the firm's reputation.

Application of the Standard

Example 1 (Travel Expenses):

Steven Taylor, a mining analyst with Bronson Brokers, is invited by Precision Metals to join a group of his peers in a tour of mining facilities in several western US states. The company arranges for chartered group flights from site to site and for accommodations in Spartan Motels, the only chain with accommodations near the mines, for three nights. Taylor allows Precision Metals to pick up his tab, as do the other analysts, with one exception—John Adams, an employee of a large trust company who insists on following his company's policy and paying for his hotel room himself.

Comment: The policy of the company where Adams works complies closely with Standard I(B) by avoiding even the appearance of a conflict of interest, but Taylor and the other analysts were not necessarily violating Standard I(B). In general, when allowing companies to pay for travel and/or accommodations in these circumstances, members and candidates must use their judgment. They must be on guard that such arrangements not impinge on a member's or candidate's independence and objectivity. In this example, the trip was strictly for business and Taylor was not accepting irrelevant or lavish hospitality. The itinerary required chartered flights, for which analysts were not expected to pay. The accommodations were modest. These arrangements are not unusual and did not violate Standard I(B) as long as Taylor's independence and objectivity were not compromised. In the final analysis, members and candidates should consider both whether they can remain objective and whether their integrity might be perceived by their clients to have been compromised.

Example 2 (Research Independence):

Susan Dillon, an analyst in the corporate finance department of an investment services firm, is making a presentation to a potential new business client that includes the promise that her firm will provide full research coverage of the potential client.

Comment: Dillon may agree to provide research coverage, but she must not commit her firm's research department to providing a favorable recommendation. The firm's recommendation (favorable, neutral, or unfavorable) must be based on an independent and objective investigation and analysis of the company and its securities.

Example 3 (Research Independence and Intrafirm Pressure):

Walter Fritz is an equity analyst with Hilton Brokerage who covers the mining industry. He has concluded that the stock of Metals & Mining is overpriced at its current level, but he is concerned that a negative research report will hurt the good relationship between Metals & Mining and the investment banking division of his firm. In fact, a senior manager of Hilton Brokerage has just sent him a copy of a proposal his firm has made to Metals & Mining to underwrite a debt offering. Fritz needs to produce a report right away and is concerned about issuing a less-than-favorable rating.

Comment: Fritz's analysis of Metals & Mining must be objective and based solely on consideration of company fundamentals. Any pressure from other divisions of his firm is inappropriate. This conflict could have been eliminated if, in anticipation of the offering, Hilton Brokerage had placed Metals & Mining on a restricted list for its sales force.

Example 4 (Research Independence and Issuer Relationship Pressure):

As in Example 3, Walter Fritz has concluded that Metals & Mining stock is overvalued at its current level, but he is concerned that a negative research report might jeopardize a close rapport that he has nurtured over the years with Metals & Mining's CEO, chief finance officer, and investment relations officer. Fritz is concerned that a negative report might result also in management retaliation—for instance, cutting him off from participating in conference calls when a quarterly earnings release is made, denying him the ability to ask questions on such calls, and/or denying him access to top management for arranging group meetings between Hilton Brokerage clients and top Metals & Mining managers.

Comment: As in Example 3, Fritz's analysis must be objective and based solely on consideration of company fundamentals. Any pressure from Metals & Mining is inappropriate. Fritz should reinforce the integrity of his conclusions by stressing that his investment recommendation is based on relative valuation, which may include qualitative issues with respect to Metals & Mining's management.

Example 5 (Research Independence and Sales Pressure):

As support for the sales effort of her corporate bond department, Lindsey Warner offers credit guidance to purchasers of fixed-income securities. Her compensation is closely linked to the performance of the corporate bond department. Near the quarter's end, Warner's firm has a large inventory position in the bonds of Milton,

Ltd., and has been unable to sell the bonds because of Milton's recent announcement of an operating problem. Salespeople have asked her to contact large clients to push the bonds.

Comment: Unethical sales practices create significant potential violations of the Code and Standards. Warner's opinion of the Milton bonds must not be affected by internal pressure or compensation. In this case, Warner must refuse to push the Milton bonds unless she is able to justify that the market price has already adjusted for the operating problem.

Example 6 (Research Independence and Prior Coverage):

Jill Jorund is a securities analyst following airline stocks and a rising star at her firm. Her boss has been carrying a "buy" recommendation on International Airlines and asks Jorund to take over coverage of that airline. He tells Jorund that under no circumstances should the prevailing buy recommendation be changed.

Comment: Jorund must be independent and objective in her analysis of International Airlines. If she believes that her boss's instructions have compromised her, she has two options: She can tell her boss that she cannot cover the company under these constraints, or she can take over coverage of the company, reach her own independent conclusions, and if they conflict with her boss's opinion, share the conclusions with her boss or other supervisors in the firm so that they can make appropriate recommendations. Jorund must issue only recommendations that reflect her independent and objective opinion.

Example 7 (Gifts and Entertainment from Related Party):

Edward Grant directs a large amount of his commission business to a New York–based brokerage house. In appreciation for all the business, the brokerage house gives Grant two tickets to the World Cup in South Africa, two nights at a nearby resort, several meals, and transportation via limousine to the game. Grant fails to disclose receiving this package to his supervisor.

Comment: Grant has violated Standard I(B) because accepting these substantial gifts may impede his independence and objectivity. Every member and candidate should endeavor to avoid situations that might cause or be perceived to cause a loss of independence or objectivity in recommending investments or taking investment action. By accepting the trip, Grant has opened himself up to the accusation that he may give the broker favored treatment in return.

Example 8 (Gifts and Entertainment from Client):

Theresa Green manages the portfolio of Ian Knowlden, a client of Tisbury Investments. Green achieves an annual return for Knowlden that is consistently

better than that of the benchmark she and the client previously agreed to. As a reward, Knowlden offers Green two tickets to Wimbledon and the use of Knowlden's flat in London for a week. Green discloses this gift to her supervisor at Tisbury.

Comment: Green is in compliance with Standard I(B) because she disclosed the gift from one of her clients in accordance with the firm's policies. Members and candidates may accept bonuses or gifts from clients as long as they disclose them to their employer because gifts in a client relationship are deemed less likely to affect a member's or candidate's objectivity and independence than gifts in other situations. Disclosure is required, however, so that supervisors can monitor such situations to guard against employees favoring a gift-giving client to the detriment of other fee-paying clients (such as by allocating a greater proportion of IPO stock to the gift-giving client's portfolio).

Best practices for monitoring include comparing the transaction costs of the Knowlden account with the costs of other accounts managed by Green and other similar accounts within Tisbury. The supervisor could also compare the performance returns with the returns of other clients with the same mandate. This comparison will assist in determining whether a pattern of favoritism by Green is disadvantaging other Tisbury clients or the possibility that this favoritism could affect her future behavior.

Example 9 (Travel Expenses from External Manager):

Tom Wayne is the investment manager of the Franklin City Employees Pension Plan. He recently completed a successful search for a firm to manage the foreign equity allocation of the plan's diversified portfolio. He followed the plan's standard procedure of seeking presentations from a number of qualified firms and recommended that his board select Penguin Advisors because of its experience, well-defined investment strategy, and performance record. The firm claims compliance with the Global Investment Performance Standards (GIPS) and has been verified. Following the selection of Penguin, a reporter from the *Franklin City Record* calls to ask if there was any connection between this action and the fact that Penguin was one of the sponsors of an "investment fact-finding trip to Asia" that Wayne made earlier in the year. The trip was one of several conducted by the Pension Investment Academy, which had arranged the itinerary of meetings with economic, government, and corporate officials in major cities in several Asian countries. The Pension Investment Academy obtains support for the cost of these trips from a number of investment managers, including Penguin Advisors; the Academy then pays the travel expenses of the various pension plan managers on the trip and provides all meals and accommodations. The president of Penguin Advisors was also one of the travelers on the trip.

Comment: Although Wayne can probably put to good use the knowledge he gained from the trip in selecting portfolio managers and in other

areas of managing the pension plan, his recommendation of Penguin Advisors may be tainted by the possible conflict incurred when he participated in a trip partly paid for by Penguin Advisors and when he was in the daily company of the president of Penguin Advisors. To avoid violating Standard I(B), Wayne's basic expenses for travel and accommodations should have been paid by his employer or the pension plan; contact with the president of Penguin Advisors should have been limited to informational or educational events only; and the trip, the organizer, and the sponsor should have been made a matter of public record. Even if his actions were not in violation of Standard I(B), Wayne should have been sensitive to the public perception of the trip when reported in the newspaper and the extent to which the subjective elements of his decision might have been affected by the familiarity that the daily contact of such a trip would encourage. This advantage would probably not be shared by firms competing with Penguin Advisors.

Example 10 (Research Independence and Compensation Arrangements):

Javier Herrero recently left his job as a research analyst for a large investment adviser. While looking for a new position, he was hired by an investor-relations firm to write a research report on one of its clients, a small educational software company. The investor-relations firm hopes to generate investor interest in the technology company. The firm will pay Herrero a flat fee plus a bonus if any new investors buy stock in the company as a result of Herrero's report.

Comment: If Herrero accepts this payment arrangement, he will be in violation of Standard I(B) because the compensation arrangement can reasonably be expected to compromise his independence and objectivity. Herrero will receive a bonus for attracting investors, which provides an incentive to draft a positive report regardless of the facts and to ignore or play down any negative information about the company. Herrero should accept only a flat fee that is not tied to the conclusions or recommendations of the report. Issuer-paid research that is objective and unbiased can be done under the right circumstances as long as the analyst takes steps to maintain his or her objectivity and includes in the report proper disclosures regarding potential conflicts of interest.

Example 11 (Recommendation Objectivity and Service Fees):

Two years ago, Bob Wade, trust manager for Central Midas Bank, was approached by Western Funds about promoting its family of funds, with special interest in the service-fee class of funds. To entice Central to promote this class, Western Funds offered to pay the bank a service fee of 0.25%. Without disclosing the fee being offered to the bank, Wade asked one of the investment managers to review Western's funds to determine whether they were suitable for clients of Central Midas Bank. The manager completed the normal due diligence review and determined that the

new funds were fairly valued in the market with fee structures on a par with competitors. Wade decided to accept Western's offer and instructed the team of portfolio managers to exclusively promote these funds and the service-fee class to clients seeking to invest new funds or transfer from their current investments.

Now, two years later, the funds managed by Western begin to underperform their peers. Wade is counting on the fees to reach his profitability targets and continues to push these funds as acceptable investments for Central's clients.

Comment: Wade is violating Standard I(B) because the fee arrangement has affected the objectivity of his recommendations. Wade is relying on the fee as a component of the department's profitability and is unwilling to offer other products that may affect the fees received.

See also Standard VI(A)–Disclosure of Conflicts.

Example 12 (Recommendation Objectivity):

Bob Thompson has been doing research for the portfolio manager of the fixed-income department. His assignment is to do sensitivity analysis on securitized subprime mortgages. He has discussed with the manager possible scenarios to use to calculate expected returns. A key assumption in such calculations is housing price appreciation (HPA) because it drives "prepays" (prepayments of mortgages) and losses. Thompson is concerned with the significant appreciation experienced over the previous five years as a result of the increased availability of funds from subprime mortgages. Thompson insists that the analysis should include a scenario run with –10% for Year 1, –5% for Year 2, and then (to project a worst-case scenario) 0% for Years 3 through 5. The manager replies that these assumptions are too dire because there has never been a time in their available database when HPA was negative.

Thompson conducts his research to better understand the risks inherent in these securities and evaluates these securities in the worst-case scenario, an unlikely but possible environment. Based on the results of the enhanced scenarios, Thompson does not recommend the purchase of the securitization. Against the general market trends, the manager follows Thompson's recommendation and does not invest. The following year, the housing market collapses. In avoiding the subprime investments, the manager's portfolio outperforms its peer group that year.

Comment: Thompson's actions in running the worst-case scenario against the protests of the portfolio manager are in alignment with the principles of Standard I(B). Thompson did not allow his research to be pressured by the general trends of the market or the manager's desire to limit the research to historical norms.

See also Standard V(A)–Diligence and Reasonable Basis.

Example 13 (Influencing Manager Selection Decisions):

Adrian Mandel, CFA, is a senior portfolio manager for ZZYY Capital Management who oversees a team of investment professionals who manage labor union pension funds. A few years ago, ZZYY sought to win a competitive asset manager search to manage a significant allocation of the pension fund of the United Doughnut and Pretzel Bakers Union (UDPBU). UDPBU's investment board is chaired by a recognized key decision maker and long-time leader of the union, Ernesto Gomez. To improve ZZYY's chances of winning the competition, Mandel made significant monetary contributions to Gomez's union reelection campaign fund. Even after ZZYY was hired as a primary manager of the pension, Mandel believed that his firm's position was not secure. Mandel continued to contribute to Gomez's reelection campaign chest as well as to entertain lavishly the union leader and his family at top restaurants on a regular basis. All of Mandel's outlays were routinely handled as marketing expenses reimbursed by ZZYY's expense accounts and were disclosed to his senior management as being instrumental in maintaining a strong close relationship with an important client.

> *Comment*: Mandel not only offered but actually gave monetary gifts, benefits, and other considerations that reasonably could be expected to compromise Gomez's objectivity. Therefore, Mandel was in violation of Standard I(B).

Example 14 (Influencing Manager Selection Decisions):

Adrian Mandel, CFA, had heard about the manager search competition for the UDPBU Pension Fund through a broker/dealer contact. The contact told him that a well-known retired professional golfer, Bobby "The Bear" Finlay, who had become a licensed broker/dealer serving as a pension consultant, was orchestrating the UDPBU manager search. Finlay had gained celebrity status with several labor union pension fund boards by entertaining their respective board members and regaling them with colorful stories of fellow pro golfers' antics in clubhouses around the world. Mandel decided to improve ZZYY's chances of being invited to participate in the search competition by befriending Finlay to curry his favor. Knowing Finlay's love of entertainment, Mandel wined and dined Finlay at high-profile bistros where Finlay could glow in the fan recognition lavished on him by all the other patrons. Mandel's endeavors paid off handsomely when Finlay recommended to the UDPBU board that ZZYY be entered as one of three finalist asset management firms in its search.

> *Comment*: Similar to Example 13, Mandel lavished gifts, benefits, and other considerations in the form of expensive entertainment that could reasonably be expected to influence the consultant to recommend the hiring of his firm. Therefore, Mandel was in violation of Standard I(B).

Example 15 (Fund Manager Relationships):

Amie Scott is a performance analyst within her firm with responsibilities for analyzing the performance of external managers. While completing her quarterly analysis, Scott notices a change in one manager's reported composite construction. The change concealed the bad performance of a particularly large account by placing that account into a new residual composite. This change allowed the manager to remain at the top of the list of manager performance. Scott knows her firm has a large allocation to this manager, and the fund's manager is a close personal friend of the CEO. She needs to deliver her final report but is concerned with pointing out the composite change.

> *Comment*: Scott would be in violation of Standard I(B) if she did not disclose the change in her final report. The analysis of managers' performance should not be influenced by personal relationships or the size of the allocation to the outside managers. By not including the change, Scott would not be providing an independent analysis of the performance metrics for her firm.

Example 16 (Intrafirm Pressure):

Jill Stein is head of performance measurement for her firm. During the last quarter, many members of the organization's research department were removed because of the poor quality of their recommendations. The subpar research caused one larger account holder to experience significant underperformance, which resulted in the client withdrawing his money after the end of the quarter. The head of sales requests that Stein remove this account from the firm's performance composite because the performance decline can be attributed to the departed research team and not the client's adviser.

> *Comment*: Pressure from other internal departments can create situations that cause a member or candidate to violate the Code and Standards. Stein must maintain her independence and objectivity and refuse to exclude specific accounts from the firm's performance composites to which they belong. As long as the client invested under a strategy similar to that of the defined composite, it cannot be excluded because of the poor stock selections that led to the underperformance and asset withdrawal.

Standard I(C) Misrepresentation

> Members and Candidates must not knowingly make any misrepresentations relating to investment analysis, recommendations, actions, or other professional activities.

Guidance

Highlights:

- *Impact on Investment Practice*
- *Performance Reporting*
- *Social Media*
- *Omissions*
- *Plagiarism*
- *Work Completed for Employer*

Trust is the foundation of the investment profession. Investors must be able to rely on the statements and information provided to them by those with whom the investors have trusted their financial well-being. Investment professionals who make false or misleading statements not only harm investors but also reduce the level of investor confidence in the investment profession and threaten the integrity of capital markets as a whole.

A misrepresentation is any untrue statement or omission of a fact or any statement that is otherwise false or misleading. A member or candidate must not knowingly omit or misrepresent information or give a false impression of a firm, organization, or security in the member's or candidate's oral representations, advertising (whether in the press or through brochures), electronic communications, or written materials (whether publicly disseminated or not). In this context, "knowingly" means that the member or candidate either knows or should have known that the misrepresentation was being made or that omitted information could alter the investment decision-making process.

Written materials include, but are not limited to, research reports, underwriting documents, company financial reports, market letters, newspaper columns, and books. Electronic communications include, but are not limited to, internet communications, webpages, mobile applications, and e-mails. Members and candidates who use webpages should regularly monitor materials posted on these sites to ensure that they contain current information. Members and candidates should also ensure that all reasonable precautions have been taken to protect the

site's integrity and security and that the site does not misrepresent any information and does provide full disclosure.

Standard I(C) prohibits members and candidates from guaranteeing clients any specific return on volatile investments. Most investments contain some element of risk that makes their return inherently unpredictable. For such investments, guaranteeing either a particular rate of return or a guaranteed preservation of investment capital (e.g., "I can guarantee that you will earn 8% on equities this year" or "I can guarantee that you will not lose money on this investment") is misleading to investors. Standard I(C) does not prohibit members and candidates from providing clients with information on investment products that have guarantees built into the structure of the products themselves or for which an institution has agreed to cover any losses.

Impact on Investment Practice

Members and candidates must not misrepresent any aspect of their practice, including (but not limited to) their qualifications or credentials, the qualifications or services provided by their firm, their performance record and the record of their firm, and the characteristics of an investment. Any misrepresentation made by a member or candidate relating to the member's or candidate's professional activities is a breach of this standard.

Members and candidates should exercise care and diligence when incorporating third-party information. Misrepresentations resulting from the use of the credit ratings, research, testimonials, or marketing materials of outside parties become the responsibility of the investment professional when it affects that professional's business practices.

Investing through outside managers continues to expand as an acceptable method of investing in areas outside a firm's core competencies. Members and candidates must disclose their intended use of external managers and must not represent those managers' investment practices as their own. Although the level of involvement of outside managers may change over time, appropriate disclosures by members and candidates are important in avoiding misrepresentations, especially if the primary activity is to invest directly with a single external manager. Standard V(B)–Communication with Clients and Prospective Clients discusses in further detail communicating the firm's investment practices.

Performance Reporting

The performance benchmark selection process is another area where misrepresentations may occur. Members and candidates may misrepresent the success of their performance record through presenting benchmarks that are not comparable to their strategies. Further, clients can be misled if the benchmark's results are not reported on a basis comparable to that of the fund's or client's results. Best practice is selecting the most appropriate available benchmark from a universe of available options. The transparent presentation of appropriate performance

benchmarks is an important aspect in providing clients with information that is useful in making investment decisions.

However, Standard I(C) does not require that a benchmark always be provided in order to comply. Some investment strategies may not lend themselves to displaying an appropriate benchmark because of the complexity or diversity of the investments included. Furthermore, some investment strategies may use reference indices that do not reflect the opportunity set of the invested assets—for example, a hedge fund comparing its performance with a "cash plus" basis. When such a benchmark is used, members and candidates should make reasonable efforts to ensure that they disclose the reasons behind the use of this reference index to avoid misrepresentations of their performance. Members and candidates should discuss with clients on a continuous basis the appropriate benchmark to be used for performance evaluations and related fee calculations.

Reporting misrepresentations may also occur when valuations for illiquid or non-traded securities are available from more than one source. When different options are available, members and candidates may be tempted to switch providers to obtain higher security valuations. The process of shopping for values may misrepresent a security's worth, lead to misinformed decisions to sell or hold an investment, and result in overcharging clients advisory fees.

Members and candidates should take reasonable steps to provide accurate and reliable security pricing information to clients on a consistent basis. Changing pricing providers should not be based solely on the justification that the new provider reports a higher current value of a security. Consistency in the reported information will improve the perception of the valuation process for illiquid securities. Clients will likely have additional confidence that they were able to make an informed decision about continuing to hold these securities in their portfolios.

Social Media

The advancement of online discussion forums and communication platforms, commonly referred to as "social media," is placing additional responsibilities on members and candidates. When communicating through social media channels, members and candidates should provide only the same information they are allowed to distribute to clients and potential clients through other traditional forms of communication. The online or interactive aspects of social media do not remove the need to be open and honest about the information being distributed.

Along with understanding and following existing and newly developing rules and regulations regarding the allowed use of social media, members and candidates should also ensure that all communications in this format adhere to the requirements of the Code and Standards. The perceived anonymity granted through these platforms may entice individuals to misrepresent their qualifications or abilities or those of their employer. Actions undertaken through social media that knowingly misrepresent investment recommendations or professional activities are considered a violation of Standard I(C).

Omissions

The omission of a fact or outcome can be misleading, especially given the growing use of models and technical analysis processes. Many members and candidates rely on such models and processes to scan for new investment opportunities, to develop investment vehicles, and to produce investment recommendations and ratings. When inputs are knowingly omitted, the resulting outcomes may provide misleading information to those who rely on it for making investment decisions. Additionally, the outcomes from models shall not be presented as fact because they represent the expected results based on the inputs and analysis process incorporated.

Omissions in the performance measurement and attribution process can also misrepresent a manager's performance and skill. Members and candidates should encourage their firms to develop strict policies for composite development to prevent cherry picking—situations in which selected accounts are presented as representative of the firm's abilities. The omission of any accounts appropriate for the defined composite may misrepresent to clients the success of the manager's implementation of its strategy.

Plagiarism

Standard I(C) also prohibits plagiarism in the preparation of material for distribution to employers, associates, clients, prospects, or the general public. Plagiarism is defined as copying or using in substantially the same form materials prepared by others without acknowledging the source of the material or identifying the author and publisher of such material. Members and candidates must not copy (or represent as their own) original ideas or material without permission and must acknowledge and identify the source of ideas or material that is not their own.

The investment profession uses a myriad of financial, economic, and statistical data in the investment decision-making process. Through various publications and presentations, the investment professional is constantly exposed to the work of others and to the temptation to use that work without proper acknowledgment.

Misrepresentation through plagiarism in investment management can take various forms. The simplest and most flagrant example is to take a research report or study done by another firm or person, change the names, and release the material as one's own original analysis. This action is a clear violation of Standard I(C). Other practices include (1) using excerpts from articles or reports prepared by others either verbatim or with only slight changes in wording without acknowledgment, (2) citing specific quotations as attributable to "leading analysts" and "investment experts" without naming the specific references, (3) presenting statistical estimates of forecasts prepared by others and identifying the sources but without including the qualifying statements or caveats that may have been used, (4) using charts and graphs without stating their sources, and (5) copying proprietary computerized spreadsheets or algorithms without seeking the cooperation or authorization of their creators.

In the case of distributing third-party, outsourced research, members and candidates may use and distribute such reports as long as they do not represent

themselves as the report's authors. Indeed, the member or candidate may add value for the client by sifting through research and repackaging it for clients. In such cases, clients should be fully informed that they are paying for the ability of the member or candidate to find the best research from a wide variety of sources. Members and candidates must not misrepresent their abilities, the extent of their expertise, or the extent of their work in a way that would mislead their clients or prospective clients. Members and candidates should disclose whether the research being presented to clients comes from another source—from either within or outside the member's or candidate's firm. This allows clients to understand who has the expertise behind the report or whether the work is being done by the analyst, other members of the firm, or an outside party.

Standard I(C) also applies to plagiarism in oral communications, such as through group meetings; visits with associates, clients, and customers; use of audio/video media (which is rapidly increasing); and telecommunications, including electronic data transfer and the outright copying of electronic media.

One of the most egregious practices in violation of this standard is the preparation of research reports based on multiple sources of information without acknowledging the sources. Examples of information from such sources include ideas, statistical compilations, and forecasts combined to give the appearance of original work. Although there is no monopoly on ideas, members and candidates must give credit where it is clearly due. Analysts should not use undocumented forecasts, earnings projections, asset values, and so on. Sources must be revealed to bring the responsibility directly back to the author of the report or the firm involved.

Work Completed for Employer

The preceding paragraphs address actions that would constitute a violation of Standard I(C). In some situations, however, members or candidates may use research conducted or models developed by others within the same firm without committing a violation. The most common example relates to the situation in which one (or more) of the original analysts is no longer with the firm. Research and models developed while employed by a firm are the property of the firm. The firm retains the right to continue using the work completed after a member or candidate has left the organization. The firm may issue future reports without providing attribution to the prior analysts. A member or candidate cannot, however, reissue a previously released report solely under his or her name.

Recommended Procedures for Compliance

Factual Presentations

Members and candidates can prevent unintentional misrepresentations of their qualifications or the services they or their firms provide if each member and candidate understands the limit of the firm's or individual's capabilities and the need to be accurate and complete in presentations. Firms can provide guidance for employees who make written or oral presentations to clients or potential clients by providing

a written list of the firm's available services and a description of the firm's qualifications. This list should suggest ways of describing the firm's services, qualifications, and compensation that are both accurate and suitable for client or customer presentations. Firms can also help prevent misrepresentation by specifically designating which employees are authorized to speak on behalf of the firm. Regardless of whether the firm provides guidance, members and candidates should make certain that they understand the services the firm can perform and its qualifications.

Qualification Summary

In addition, to ensure accurate presentations to clients, each member and candidate should prepare a summary of his or her own qualifications and experience and a list of the services the member or candidate is capable of performing. Firms can assist member and candidate compliance by periodically reviewing employee correspondence and documents that contain representations of individual or firm qualifications.

Verify Outside Information

When providing information to clients from a third party, members and candidates share a responsibility for the accuracy of the marketing and distribution materials that pertain to the third party's capabilities, services, and products. Misrepresentation by third parties can damage the member's or candidate's reputation, the reputation of the firm, and the integrity of the capital markets. Members and candidates should encourage their employers to develop procedures for verifying information of third-party firms.

Maintain Webpages

Members and candidates who publish a webpage should regularly monitor materials posted on the site to ensure that the site contains current information. Members and candidates should also ensure that all reasonable precautions have been taken to protect the site's integrity, confidentiality, and security and that the site does not misrepresent any information and provides full disclosure.

Plagiarism Policy

To avoid plagiarism in preparing research reports or conclusions of analysis, members and candidates should take the following steps:

- *Maintain copies*: Keep copies of all research reports, articles containing research ideas, material with new statistical methodologies, and other materials that were relied on in preparing the research report.
- *Attribute quotations*: Attribute to their sources any direct quotations, including projections, tables, statistics, model/product ideas, and new methodologies prepared by persons other than recognized financial and statistical reporting services or similar sources.
- *Attribute summaries*: Attribute to their sources any paraphrases or summaries of material prepared by others. For example, to support his analysis of

Brown Company's competitive position, the author of a research report on Brown might summarize another analyst's report on Brown's chief competitor, but the author of the Brown report must acknowledge in his own report the reliance on the other analyst's report.

Application of the Standard

Example 1 (Disclosure of Issuer-Paid Research):

Anthony McGuire is an issuer-paid analyst hired by publicly traded companies to electronically promote their stocks. McGuire creates a website that promotes his research efforts as a seemingly independent analyst. McGuire posts a profile and a strong buy recommendation for each company on the website indicating that the stock is expected to increase in value. He does not disclose the contractual relationships with the companies he covers on his website, in the research reports he issues, or in the statements he makes about the companies in internet chat rooms.

Comment: McGuire has violated Standard I(C) because the website is misleading to potential investors. Even if the recommendations are valid and supported with thorough research, his omissions regarding the true relationship between himself and the companies he covers constitute a misrepresentation. McGuire has also violated Standard VI(A)–Disclosure of Conflicts by not disclosing the existence of an arrangement with the companies through which he receives compensation in exchange for his services.

Example 2 (Correction of Unintentional Errors):

Hijan Yao is responsible for the creation and distribution of the marketing materials for his firm, which claims compliance with the GIPS standards. Yao creates and distributes a presentation of performance by the firm's Asian equity composite that states the composite has ¥350 billion in assets. In fact, the composite has only ¥35 billion in assets, and the higher figure on the presentation is a result of a typographical error. Nevertheless, the erroneous material is distributed to a number of clients before Yao catches the mistake.

Comment: Once the error is discovered, Yao must take steps to cease distribution of the incorrect material and correct the error by informing those who have received the erroneous information. Because Yao did not knowingly make the misrepresentation, however, he did not violate Standard I(C). Because his firm claims compliance with the GIPS standards, it must also comply with the GIPS Guidance Statement on Error Correction in relation to the error.

Example 3 (Noncorrection of Known Errors):

Syed Muhammad is the president of an investment management firm. The promotional material for the firm, created by the firm's marketing department, incorrectly claims that Muhammad has an advanced degree in finance from a prestigious business school in addition to the CFA designation. Although Muhammad attended the school for a short period of time, he did not receive a degree. Over the years, Muhammad and others in the firm have distributed this material to numerous prospective clients and consultants.

> *Comment*: Even though Muhammad may not have been directly responsible for the misrepresentation of his credentials in the firm's promotional material, he used this material numerous times over an extended period and should have known of the misrepresentation. Thus, Muhammad has violated Standard I(C).

Example 4 (Plagiarism):

Cindy Grant, a research analyst for a Canadian brokerage firm, has specialized in the Canadian mining industry for the past 10 years. She recently read an extensive research report on Jefferson Mining, Ltd., by Jeremy Barton, another analyst. Barton provided extensive statistics on the mineral reserves, production capacity, selling rates, and marketing factors affecting Jefferson's operations. He also noted that initial drilling results on a new ore body, which had not been made public, might show the existence of mineral zones that could increase the life of Jefferson's main mines, but Barton cited no specific data as to the initial drilling results. Grant called an officer of Jefferson, who gave her the initial drilling results over the telephone. The data indicated that the expected life of the main mines would be tripled. Grant added these statistics to Barton's report and circulated it within her firm as her own report.

> *Comment*: Grant plagiarized Barton's report by reproducing large parts of it in her own report without acknowledgment.

Example 5 (Misrepresentation of Information):

When Ricki Marks sells mortgage-backed derivatives called "interest-only strips" (IOs) to public pension plan clients, she describes them as "guaranteed by the US government." Purchasers of the IOs are entitled only to the interest stream generated by the mortgages, however, not the notional principal itself. One particular municipality's investment policies and local law require that securities purchased by its public pension plans be guaranteed by the US government. Although the underlying mortgages are guaranteed, neither the investor's investment nor the interest stream on the IOs is guaranteed. When interest rates decline, causing an increase in prepayment of mortgages, interest payments to the IOs' investors decline, and these investors lose a portion of their investment.

Comment: Marks violated Standard I(C) by misrepresenting the terms and character of the investment.

Example 6 (Potential Information Misrepresentation):

Khalouck Abdrabbo manages the investments of several high-net-worth individuals in the United States who are approaching retirement. Abdrabbo advises these individuals that a portion of their investments be moved from equity to bank-sponsored certificates of deposit and money market accounts so that the principal will be "guaranteed" up to a certain amount. The interest is not guaranteed.

Comment: Although there is risk that the institution offering the certificates of deposits and money market accounts could go bankrupt, in the United States, these accounts are insured by the US government through the Federal Deposit Insurance Corporation. Therefore, using the term "guaranteed" in this context is not inappropriate as long as the amount is within the government-insured limit. Abdrabbo should explain these facts to the clients.

Example 7 (Plagiarism):

Steve Swanson is a senior analyst in the investment research department of Ballard and Company. Apex Corporation has asked Ballard to assist in acquiring the majority ownership of stock in the Campbell Company, a financial consulting firm, and to prepare a report recommending that stockholders of Campbell agree to the acquisition. Another investment firm, Davis and Company, had already prepared a report for Apex analyzing both Apex and Campbell and recommending an exchange ratio. Apex has given the Davis report to Ballard officers, who have passed it on to Swanson. Swanson reviews the Davis report and other available material on Apex and Campbell. From his analysis, he concludes that the common stocks of Campbell and Apex represent good value at their current prices; he believes, however, that the Davis report does not consider all the factors a Campbell stockholder would need to know to make a decision. Swanson reports his conclusions to the partner in charge, who tells him to "use the Davis report, change a few words, sign your name, and get it out."

Comment: If Swanson does as requested, he will violate Standard I(C). He could refer to those portions of the Davis report that he agrees with if he identifies Davis as the source; he could then add his own analysis and conclusions to the report before signing and distributing it.

Example 8 (Plagiarism):

Claude Browning, a quantitative analyst for Double Alpha, Inc., returns from a seminar in great excitement. At that seminar, Jack Jorrely, a well-known quantitative analyst at a national brokerage firm, discussed one of his new models in great detail, and Browning is intrigued by the new concepts. He proceeds to test the

model, making some minor mechanical changes but retaining the concepts, until he produces some very positive results. Browning quickly announces to his supervisors at Double Alpha that he has discovered a new model and that clients and prospective clients should be informed of this positive finding as ongoing proof of Double Alpha's continuing innovation and ability to add value.

> *Comment*: Although Browning tested Jorrely's model on his own and even slightly modified it, he must still acknowledge the original source of the idea. Browning can certainly take credit for the final, practical results; he can also support his conclusions with his own test. The credit for the innovative thinking, however, must be awarded to Jorrely.

Example 9 (Plagiarism):

Fernando Zubia would like to include in his firm's marketing materials some "plain-language" descriptions of various concepts, such as the price-to-earnings (P/E) multiple and why standard deviation is used as a measure of risk. The descriptions come from other sources, but Zubia wishes to use them without reference to the original authors. Would this use of material be a violation of Standard I(C)?

> *Comment*: Copying verbatim any material without acknowledgement, including plain-language descriptions of the P/E multiple and standard deviation, violates Standard I(C). Even though these concepts are general, best practice would be for Zubia to describe them in his own words or cite the sources from which the descriptions are quoted. Members and candidates would be violating Standard I(C) if they either were responsible for creating marketing materials without attribution or knowingly use plagiarized materials.

Example 10 (Plagiarism):

Through a mainstream media outlet, Erika Schneider learns about a study that she would like to cite in her research. Should she cite both the mainstream intermediary source as well as the author of the study itself when using that information?

> *Comment*: In all instances, a member or candidate must cite the actual source of the information. Best practice for Schneider would be to obtain the information directly from the author and review it before citing it in a report. In that case, Schneider would not need to report how she found out about the information. For example, suppose Schneider read in the *Financial Times* about a study issued by CFA Institute; best practice for Schneider would be to obtain a copy of the study from CFA Institute, review it, and then cite it in her report. If she does not use any interpretation of the report from the *Financial Times* and the newspaper does not add value to the report itself, the newspaper is merely a conduit of the original information and does not need to be cited. If she does not obtain the report and review the information, Schneider runs the risk of relying

on second-hand information that may misstate facts. If, for example, the *Financial Times* erroneously reported some information from the original CFA Institute study and Schneider copied that erroneous information without acknowledging CFA Institute, she could be the object of complaints. Best practice would be either to obtain the complete study from its original author and cite only that author or to use the information provided by the intermediary and cite both sources.

Example 11 (Misrepresentation of Information):

Paul Ostrowski runs a two-person investment management firm. Ostrowski's firm subscribes to a service from a large investment research firm that provides research reports that can be repackaged by smaller firms for those firms' clients. Ostrowski's firm distributes these reports to clients as its own work.

Comment: Ostrowski can rely on third-party research that has a reasonable and adequate basis, but he cannot imply that he is the author of such research. If he does, Ostrowski is misrepresenting the extent of his work in a way that misleads the firm's clients or prospective clients.

Example 12 (Misrepresentation of Information):

Tom Stafford is part of a team within Appleton Investment Management responsible for managing a pool of assets for Open Air Bank, which distributes structured securities to offshore clients. He becomes aware that Open Air is promoting the structured securities as a much less risky investment than the investment management policy followed by him and the team to manage the original pool of assets. Also, Open Air has procured an independent rating for the pool that significantly overstates the quality of the investments. Stafford communicates his concerns to his supervisor, who responds that Open Air owns the product and is responsible for all marketing and distribution. Stafford's supervisor goes on to say that the product is outside of the US regulatory regime that Appleton follows and that all risks of the product are disclosed at the bottom of page 184 of the prospectus.

Comment: As a member of the investment team, Stafford is qualified to recognize the degree of accuracy of the materials that characterize the portfolio, and he is correct to be worried about Appleton's responsibility for a misrepresentation of the risks. Thus, he should continue to pursue the issue of Open Air's inaccurate promotion of the portfolio according to the firm's policies and procedures.

The Code and Standards stress protecting the reputation of the firm and the sustainability and integrity of the capital markets. Misrepresenting the quality and risks associated with the investment pool may lead to negative consequences for others well beyond the direct investors.

Example 13 (Avoiding a Misrepresentation):

Trina Smith is a fixed-income portfolio manager at a pension fund. She has observed that the market for highly structured mortgages is the focus of salespeople she meets and that these products represent a significant number of trading opportunities. In discussions about this topic with her team, Smith learns that calculating yields on changing cash flows within the deal structure requires very specialized vendor software. After more research, they find out that each deal is unique and that deals can have more than a dozen layers and changing cash flow priorities. Smith comes to the conclusion that, because of the complexity of these securities, the team cannot effectively distinguish between potentially good and bad investment options. To avoid misrepresenting their understanding, the team decides that the highly structured mortgage segment of the securitized market should not become part of the core of the fund's portfolio; they will allow some of the less complex securities to be part of the core.

> *Comment*: Smith is in compliance with Standard I(C) by not investing in securities that she and her team cannot effectively understand. Because she is not able to describe the risk and return profile of the securities to the pension fund beneficiaries and trustees, she appropriately limits the fund's exposure to this sector.

Example 14 (Misrepresenting Composite Construction):

Robert Palmer is head of performance for a fund manager. When asked to provide performance numbers to fund rating agencies, he avoids mentioning that the fund manager is quite liberal in composite construction. The reason accounts are included/excluded is not fully explained. The performance values reported to the rating agencies for the composites, although accurate for the accounts shown each period, may not present a true representation of the fund manager's ability.

> *Comment*: "Cherry picking" accounts to include in either published reports or information provided to rating agencies conflicts with Standard I(C). Moving accounts into or out of a composite to influence the overall performance results materially misrepresents the reported values over time. Palmer should work with his firm to strengthen its reporting practices concerning composite construction to avoid misrepresenting the firm's track record or the quality of the information being provided.

Example 15 (Presenting Out-of-Date Information):

David Finch is a sales director at a commercial bank, where he directs the bank's client advisers in the sale of third-party mutual funds. Each quarter, he holds a division-wide training session where he provides fact sheets on investment funds the bank is allowed to offer to clients. These fact sheets, which can be redistributed to potential clients, are created by the fund firms and contain information about the funds, including investment strategy and target distribution rates.

Finch knows that some of the fact sheets are out of date; for example, one long-only fund approved the use of significant leverage last quarter as a method to enhance returns. He continues to provide the sheets to the sales team without updates because the bank has no control over the marketing material released by the mutual fund firms.

Comment: Finch is violating Standard I(C) by providing information that misrepresents aspects of the funds. By not providing the sales team and, ultimately, the clients with the updated information, he is misrepresenting the potential risks associated with the funds with outdated fact sheets. Finch can instruct the sales team to clarify the deficiencies in the fact sheets with clients and ensure they have the most recent fund prospectus document before accepting orders for investing in any fund.

Example 16 (Overemphasis of Firm Results):

Bob Anderson is chief compliance officer for Optima Asset Management Company, a firm currently offering eight funds to clients. Seven of the eight had 10-year returns below the median for their respective sectors. Anderson approves a recent advertisement, which includes this statement: "Optima Asset Management is achieving excellent returns for its investors. The Optima Emerging Markets Equity fund, for example, has 10-year returns that exceed the sector median by more than 10%."

Comment: From the information provided it is difficult to determine whether a violation has occurred as long as the sector outperformance is correct. Anderson may be attempting to mislead potential clients by citing the performance of the sole fund that achieved such results. Past performance is often used to demonstrate a firm's skill and abilities in comparison to funds in the same sectors.

However, if all the funds outperformed their respective benchmarks, then Anderson's assertion that the company "is achieving excellent returns" may be factual. Funds may exhibit positive returns for investors, exceed benchmarks, and yet have returns below the median in their sectors.

Members and candidates need to ensure that their marketing efforts do not include statements that misrepresent their skills and abilities to remain compliant with Standard I(C). Unless the returns of a single fund reflect the performance of a firm as a whole, the use of a singular fund for performance comparisons should be avoided.

Standard I(D) Misconduct

> Members and Candidates must not engage in any professional conduct involving dishonesty, fraud, or deceit or commit any act that reflects adversely on their professional reputation, integrity, or competence.

Guidance

Whereas Standard I(A) addresses the obligation of members and candidates to comply with applicable law that governs their professional activities, Standard I(D) addresses *all* conduct that reflects poorly on the professional integrity, good reputation, or competence of members and candidates. Any act that involves lying, cheating, stealing, or other dishonest conduct is a violation of this standard if the offense reflects adversely on a member's or candidate's professional activities. Although CFA Institute discourages any sort of unethical behavior by members and candidates, the Code and Standards are primarily aimed at conduct and actions related to a member's or candidate's professional life.

Conduct that damages trustworthiness or competence may include behavior that, although not illegal, nevertheless negatively affects a member's or candidate's ability to perform his or her responsibilities. For example, abusing alcohol during business hours might constitute a violation of this standard because it could have a detrimental effect on the member's or candidate's ability to fulfill his or her professional responsibilities. Personal bankruptcy may not reflect on the integrity or trustworthiness of the person declaring bankruptcy, but if the circumstances of the bankruptcy involve fraudulent or deceitful business conduct, the bankruptcy may be a violation of this standard.

In some cases, the absence of appropriate conduct or the lack of sufficient effort may be a violation of Standard I(D). The integrity of the investment profession is built on trust. A member or candidate—whether an investment banker, rating or research analyst, or portfolio manager—is expected to conduct the necessary due diligence to properly understand the nature and risks of an investment before making an investment recommendation. By not taking these steps and, instead, relying on someone else in the process to perform them, members or candidates may violate the trust their clients have placed in them. This loss of trust may have a significant impact on the reputation of the member or candidate and the operations of the financial market as a whole.

Individuals may attempt to abuse the CFA Institute Professional Conduct Program by actively seeking CFA Institute enforcement of the Code and Standards, and Standard I(D) in particular, as a method of settling personal, political, or other disputes unrelated to professional ethics. CFA Institute is aware of this issue, and appropriate disciplinary policies, procedures, and enforcement mechanisms are in

place to address misuse of the Code and Standards and the Professional Conduct Program in this way.

Recommended Procedures for Compliance

In addition to ensuring that their own behavior is consistent with Standard I(D), to prevent general misconduct, members and candidates should encourage their firms to adopt the following policies and procedures to support the principles of Standard I(D):

- *Code of ethics*: Develop and/or adopt a code of ethics to which every employee must subscribe, and make clear that any personal behavior that reflects poorly on the individual involved, the institution as a whole, or the investment industry will not be tolerated.
- *List of violations*: Disseminate to all employees a list of potential violations and associated disciplinary sanctions, up to and including dismissal from the firm.
- *Employee references*: Check references of potential employees to ensure that they are of good character and not ineligible to work in the investment industry because of past infractions of the law.

Application of the Standard

Example 1 (Professionalism and Competence):

Simon Sasserman is a trust investment officer at a bank in a small affluent town. He enjoys lunching every day with friends at the country club, where his clients have observed him having numerous drinks. Back at work after lunch, he clearly is intoxicated while making investment decisions. His colleagues make a point of handling any business with Sasserman in the morning because they distrust his judgment after lunch.

> *Comment*: Sasserman's excessive drinking at lunch and subsequent intoxication at work constitute a violation of Standard I(D) because this conduct has raised questions about his professionalism and competence. His behavior reflects poorly on him, his employer, and the investment industry.

Example 2 (Fraud and Deceit):

Howard Hoffman, a security analyst at ATZ Brothers, Inc., a large brokerage house, submits reimbursement forms over a two-year period to ATZ's self-funded health insurance program for more than two dozen bills, most of which have been altered to increase the amount due. An investigation by the firm's director of employee benefits uncovers the inappropriate conduct. ATZ subsequently terminates Hoffman's employment and notifies CFA Institute.

Comment: Hoffman violated Standard I(D) because he engaged in intentional conduct involving fraud and deceit in the workplace that adversely reflected on his integrity.

Example 3 (Fraud and Deceit):

Jody Brink, an analyst covering the automotive industry, volunteers much of her spare time to local charities. The board of one of the charitable institutions decides to buy five new vans to deliver hot lunches to low-income elderly people. Brink offers to donate her time to handle purchasing agreements. To pay a long-standing debt to a friend who operates an automobile dealership—and to compensate herself for her trouble—she agrees to a price 20% higher than normal and splits the surcharge with her friend. The director of the charity ultimately discovers the scheme and tells Brink that her services, donated or otherwise, are no longer required.

Comment: Brink engaged in conduct involving dishonesty, fraud, and misrepresentation and has violated Standard I(D).

Example 4 (Personal Actions and Integrity):

Carmen Garcia manages a mutual fund dedicated to socially responsible investing. She is also an environmental activist. As the result of her participation in nonviolent protests, Garcia has been arrested on numerous occasions for trespassing on the property of a large petrochemical plant that is accused of damaging the environment.

Comment: Generally, Standard I(D) is not meant to cover legal transgressions resulting from acts of civil disobedience in support of personal beliefs because such conduct does not reflect poorly on the member's or candidate's professional reputation, integrity, or competence.

Example 5 (Professional Misconduct):

Meredith Rasmussen works on a buy-side trading desk of an investment management firm and concentrates on in-house trades for a hedge fund subsidiary managed by a team at the investment management firm. The hedge fund has been very successful and is marketed globally by the firm. From her experience as the trader for much of the activity of the fund, Rasmussen has become quite knowledgeable about the hedge fund's strategy, tactics, and performance. When a distinct break in the market occurs and many of the securities involved in the hedge fund's strategy decline markedly in value, Rasmussen observes that the reported performance of the hedge fund does not reflect this decline. In her experience, the lack of effect is a very unlikely occurrence. She approaches the head of trading about her concern and is told that she should not ask any questions and that the fund is big and successful and is not her concern. She is fairly sure something is not right, so she contacts the compliance officer, who also tells her to stay away from the issue of the hedge fund's reporting.

Comment: Rasmussen has clearly come across an error in policies, procedures, and compliance practices within the firm's operations. According to the firm's procedures for reporting potentially unethical activity, she should pursue the issue by gathering some proof of her reason for doubt. Should all internal communications within the firm not satisfy her concerns, Rasmussen should consider reporting the potential unethical activity to the appropriate regulator.

See also Standard IV(A) for guidance on whistleblowing and Standard IV(C) for the duties of a supervisor.

Standard II: Integrity of Capital Markets

Standard II(A) Material Nonpublic Information

> Members and Candidates who possess material nonpublic information that could affect the value of an investment must not act or cause others to act on the information.

Guidance

Highlights:

- *What Is "Material" Information?*
- *What Constitutes "Nonpublic" Information?*
- *Mosaic Theory*
- *Social Media*
- *Using Industry Experts*
- *Investment Research Reports*

Trading or inducing others to trade on material nonpublic information erodes confidence in capital markets, institutions, and investment professionals by supporting the idea that those with inside information and special access can take unfair advantage of the general investing public. Although trading on inside information may lead to short-term profits, in the long run, individuals and the profession as a whole suffer from such trading. These actions have caused and will continue to cause investors to avoid capital markets because the markets are perceived to be "rigged" in favor of the knowledgeable insider. When the investing public avoids capital markets, the markets and capital allocation become less efficient and less supportive of strong and vibrant economies. Standard II(A) promotes and maintains a high level of confidence in market integrity, which is one of the foundations of the investment profession.

The prohibition on using this information goes beyond the direct buying and selling of individual securities or bonds. Members and candidates must not use material nonpublic information to influence their investment actions related to derivatives (e.g., swaps or option contracts), mutual funds, or other alternative investments. *Any* trading based on material nonpublic information constitutes a violation of Standard II(A). The expansion of financial products and the increasing interconnectivity of financial markets globally have resulted in new potential opportunities for trading on material nonpublic information.

What Is "Material" Information?

Information is "material" if its disclosure would probably have an impact on the price of a security or if reasonable investors would want to know the information before making an investment decision. In other words, information is material if it would significantly alter the total mix of information currently available about a security in such a way that the price of the security would be affected.

The specificity of the information, the extent of its difference from public information, its nature, and its reliability are key factors in determining whether a particular piece of information fits the definition of material. For example, material information may include, but is not limited to, information on the following:

- earnings;
- mergers, acquisitions, tender offers, or joint ventures;
- changes in assets or asset quality;
- innovative products, processes, or discoveries (e.g., new product trials or research efforts);
- new licenses, patents, registered trademarks, or regulatory approval/rejection of a product;
- developments regarding customers or suppliers (e.g., the acquisition or loss of a contract);
- changes in management;
- change in auditor notification or the fact that the issuer may no longer rely on an auditor's report or qualified opinion;
- events regarding the issuer's securities (e.g., defaults on senior securities, calls of securities for redemption, repurchase plans, stock splits, changes in dividends, changes to the rights of security holders, and public or private sales of additional securities);
- bankruptcies;
- significant legal disputes;
- government reports of economic trends (employment, housing starts, currency information, etc.);
- orders for large trades before they are executed; and
- new or changing equity or debt ratings issued by a third party (e.g., sell-side recommendations and credit ratings).

In addition to the substance and specificity of the information, the source or relative reliability of the information also determines materiality. The less reliable a source, the less likely the information provided would be considered material.

For example, factual information from a corporate insider regarding a significant new contract for a company is likely to be material, whereas an assumption based on speculation by a competitor about the same contract is likely to be less reliable and, therefore, not material. Additionally, information about trials of a new drug, product, or service under development from qualified personnel involved in the trials is likely to be material, whereas educated conjecture by subject experts not connected to the trials is unlikely to be material.

Also, the more ambiguous the effect of the information on price, the less material that information is considered. If it is unclear whether and to what extent the information will affect the price of a security, the information may not be considered material. The passage of time may also render information that was once important immaterial.

What Constitutes "Nonpublic" Information?

Information is "nonpublic" until it has been disseminated or is available to the marketplace in general (as opposed to a select group of investors). "Disseminated" can be defined as "made known." For example, a company report of profits that is posted on the internet and distributed widely through a press release or accompanied by a filing has been effectively disseminated to the marketplace. Members and candidates must have a reasonable expectation that people have received the information before it can be considered public. It is not necessary, however, to wait for the slowest method of delivery. Once the information is disseminated to the market, it is public information that is no longer covered by this standard.

Members and candidates must be particularly aware of information that is selectively disclosed by corporations to a small group of investors, analysts, or other market participants. Information that is made available to analysts remains nonpublic until it is made available to investors in general. Corporations that disclose information on a limited basis create the potential for insider-trading violations.

Issues of selective disclosure often arise when a corporate insider provides material information to analysts in a briefing or conference call before that information is released to the public. Analysts must be aware that a disclosure made to a room full of analysts does not necessarily make the disclosed information "public." Analysts should also be alert to the possibility that they are selectively receiving material nonpublic information when a company provides them with guidance or interpretation of such publicly available information as financial statements or regulatory filings.

A member or candidate may use insider information provided legitimately by the source company for the specific purpose of conducting due diligence according to the business agreement between the parties for such activities as mergers, loan underwriting, credit ratings, and offering engagements. In such instances, the investment professional would not be considered in violation of Standard II(A) by using the material information. However, the use of insider information provided by the source company for other purposes, especially to trade or entice others to trade the securities of the firm, conflicts with this standard.

Mosaic Theory

A financial analyst gathers and interprets large quantities of information from many sources. The analyst may use significant conclusions derived from the analysis of public and nonmaterial nonpublic information as the basis for investment recommendations and decisions even if those conclusions would have been material inside information had they been communicated directly to the analyst by a company. Under the "mosaic theory," financial analysts are free to act on this collection, or mosaic, of information without risking violation.

The practice of financial analysis depends on the free flow of information. For the fair and efficient operation of the capital markets, analysts and investors must have the greatest amount of information possible to facilitate making well-informed investment decisions about how and where to invest capital. Accurate, timely, and intelligible communication is essential if analysts and investors are to obtain the data needed to make informed decisions about how and where to invest capital. These disclosures must go beyond the information mandated by the reporting requirements of the securities laws and should include specific business information about items used to guide a company's future growth, such as new products, capital projects, and the competitive environment. Analysts seek and use such information to compare and contrast investment alternatives.

Much of the information used by analysts comes directly from companies. Analysts often receive such information through contacts with corporate insiders, especially investor-relations staff and financial officers. Information may be disseminated in the form of press releases, through oral presentations by company executives in analysts' meetings or conference calls, or during analysts' visits to company premises. In seeking to develop the most accurate and complete picture of a company, analysts should also reach beyond contacts with companies themselves and collect information from other sources, such as customers, contractors, suppliers, and the companies' competitors.

Analysts are in the business of formulating opinions and insights that are not obvious to the general investing public about the attractiveness of particular securities. In the course of their work, analysts actively seek out corporate information not generally known to the market for the express purpose of analyzing that information, forming an opinion on its significance, and informing their clients, who can be expected to trade on the basis of the recommendation. Analysts' initiatives to discover and analyze information and communicate their findings to their clients significantly enhance market efficiency, thus benefiting all investors (see *Dirks v. Securities and Exchange Commission*). Accordingly, violations of Standard II(A) will *not* result when a perceptive analyst reaches a conclusion about a corporate action or event through an analysis of public information and items of nonmaterial nonpublic information.

Investment professionals should note, however, that although analysts are free to use mosaic information in their research reports, they should save and document all their research [see Standard V(C)–Record Retention]. Evidence of the analyst's knowledge of public and nonmaterial nonpublic information about a corporation

strengthens the assertion that the analyst reached his or her conclusions solely through appropriate methods rather than through the use of material nonpublic information.

Social Media

The continuing advancement in technology allows members, candidates, and the industry at large to exchange information at rates not previously available. It is important for investment professionals to understand the implications of using information from the internet and social media platforms because all such information may not actually be considered public.

Some social media platforms require membership in specific groups in order to access the published content. Members and candidates participating in groups with membership limitations should verify that material information obtained from these sources can also be accessed from a source that would be considered available to the public (e.g., company filings, webpages, and press releases).

Members and candidates may use social media platforms to communicate with clients or investors without conflicting with this standard. As long as the information reaches all clients or is open to the investing public, the use of these platforms would be comparable with other traditional forms of communications, such as e-mails and press releases. Members and candidates, as required by Standard I(A), should also complete all appropriate regulatory filings related to information distributed through social media platforms.

Using Industry Experts

The increased demand for insights for understanding the complexities of some industries has led to an expansion of engagement with outside experts. As the level of engagement increased, new businesses formed to connect analysts and investors with individuals who have specialized knowledge of their industry (e.g., technology or pharmaceuticals). These networks offer investors the opportunity to reach beyond their usual business circles to speak with experts regarding economic conditions, industry trends, and technical issues relating to specific products and services.

Members and candidates may provide compensation to individuals for their insights without violating this standard. However, members and candidates are ultimately responsible for ensuring that they are not requesting or acting on confidential information received from external experts, which is in violation of security regulations and laws or duties to others. As the recent string of insider-trading cases displayed, some experts are willing to provide confidential and protected information for the right incentive.

Firms connecting experts with members or candidates often require both parties to sign agreements concerning the disclosure of material nonpublic information. Even with the protections from such compliance practices, if an expert provides material nonpublic information, members and candidates would be prohibited from taking investment actions on the associated firm until the information became publicly known to the market.

Investment Research Reports

When a particularly well-known or respected analyst issues a report or makes changes to his or her recommendation, that information alone may have an effect on the market and thus may be considered material. Theoretically, under Standard II(A), such a report would have to be made public at the time it was distributed to clients. The analyst is not a company insider, however, and does not have access to inside information. Presumably, the analyst created the report from information available to the public (mosaic theory) and by using his or her expertise to interpret the information. The analyst's hard work, paid for by the client, generated the conclusions.

Simply because the public in general would find the conclusions material does not require that the analyst make his or her work public. Investors who are not clients of the analyst can either do the work themselves or become clients of the analyst to gain access to the analyst's expertise.

Recommended Procedures for Compliance

Achieve Public Dissemination

If a member or candidate determines that information is material, the member or candidate should make reasonable efforts to achieve public dissemination of the information. These efforts usually entail encouraging the issuing company to make the information public. If public dissemination is not possible, the member or candidate must communicate the information only to the designated supervisory and compliance personnel within the member's or candidate's firm and must not take investment action or alter current investment recommendations on the basis of the information. Moreover, members and candidates must not knowingly engage in any conduct that may induce company insiders to privately disclose material nonpublic information.

Adopt Compliance Procedures

Members and candidates should encourage their firms to adopt compliance procedures to prevent the misuse of material nonpublic information. Particularly important is improving compliance in such areas as the review of employee and proprietary trading, the review of investment recommendations, documentation of firm procedures, and the supervision of interdepartmental communications in multiservice firms. Compliance procedures should suit the particular characteristics of a firm, including its size and the nature of its business.

Members and candidates are encouraged to inform their supervisor and compliance personnel of suspected inappropriate use of material nonpublic information as the basis for security trading activities or recommendations being made within their firm.

Adopt Disclosure Procedures

Members and candidates should encourage their firms to develop and follow disclosure policies designed to ensure that information is disseminated to the marketplace in an equitable manner. For example, analysts from small firms should receive the same information and attention from a company as analysts from large firms receive. Similarly, companies should not provide certain information to buy-side analysts but not to sell-side analysts, or vice versa. Furthermore, a company should not discriminate among analysts in the provision of information or "blackball" particular analysts who have given negative reports on the company in the past.

Within investment and research firms, members and candidates should encourage the development of and compliance with procedures for distributing new and updated investment opinions to clients. Recommendations of this nature may represent material market-moving information that needs to be communicated to all clients fairly.

Issue Press Releases

Companies should consider issuing press releases prior to analyst meetings and conference calls and scripting those meetings and calls to decrease the chance that further information will be disclosed. If material nonpublic information is disclosed for the first time in an analyst meeting or call, the company should promptly issue a press release or otherwise make the information publicly available.

Firewall Elements

An information barrier commonly referred to as a "firewall" is the most widely used approach for preventing the communication of material nonpublic information within firms. It restricts the flow of confidential information to those who need to know the information to perform their jobs effectively. The minimum elements of such a system include, but are not limited to, the following:

- substantial control of relevant interdepartmental communications, preferably through a clearance area within the firm in either the compliance or legal department;
- review of employee trading through the maintenance of "watch," "restricted," and "rumor" lists;
- documentation of the procedures designed to limit the flow of information between departments and of the actions taken to enforce those procedures; and
- heightened review or restriction of proprietary trading while a firm is in possession of material nonpublic information.

Appropriate Interdepartmental Communications

Although documentation requirements must, for practical reasons, take into account the differences between the activities of small firms and those of large, multiservice

firms, firms of all sizes and types benefit by improving the documentation of their internal enforcement of firewall procedures. Therefore, even at small firms, procedures concerning interdepartmental communication, the review of trading activity, and the investigation of possible violations should be compiled and formalized.

Physical Separation of Departments

As a practical matter, to the greatest extent possible, firms should consider the physical separation of departments and files to prevent the communication of sensitive information that should not be shared. For example, the investment banking and corporate finance areas of a brokerage firm should be separated from the sales and research departments, and a bank's commercial lending department should be segregated from its trust and research departments.

Prevention of Personnel Overlap

There should be no overlap of personnel between the investment banking and corporate finance areas of a brokerage firm and the sales and research departments or between a bank's commercial lending department and its trust and research departments. For a firewall to be effective in a multiservice firm, an employee should be on only one side of the firewall at any time. Inside knowledge may not be limited to information about a specific offering or the current financial condition of a company. Analysts may be exposed to much information about the company, including new product developments or future budget projections that clearly constitute inside knowledge and thus preclude the analyst from returning to his or her research function. For example, an analyst who follows a particular company may provide limited assistance to the investment bankers under carefully controlled circumstances when the firm's investment banking department is involved in a deal with the company. That analyst must then be treated as though he or she were an investment banker; the analyst must remain on the investment banking side of the wall until any information he or she learns is publicly disclosed. In short, the analyst cannot use any information learned in the course of the project for research purposes and cannot share that information with colleagues in the research department.

A Reporting System

A primary objective of an effective firewall procedure is to establish a reporting system in which authorized people review and approve communications between departments. If an employee behind a firewall believes that he or she needs to share confidential information with someone on the other side of the wall, the employee should consult a designated compliance officer to determine whether sharing the information is necessary and how much information should be shared. If the sharing is necessary, the compliance officer should coordinate the process of "looking over the wall" so that the necessary information will be shared and the integrity of the procedure will be maintained.

A single supervisor or compliance officer should have the specific authority and responsibility of deciding whether information is material and whether it is

sufficiently public to be used as the basis for investment decisions. Ideally, the supervisor or compliance officer responsible for communicating information to a firm's research or brokerage area would not be a member of that area.

Personal Trading Limitations

Firms should consider restrictions or prohibitions on personal trading by employees and should carefully monitor both proprietary trading and personal trading by employees. Firms should require employees to make periodic reports (to the extent that such reporting is not already required by securities laws) of their own transactions and transactions made for the benefit of family members. Securities should be placed on a restricted list when a firm has or may have material nonpublic information. The broad distribution of a restricted list often triggers the sort of trading the list was developed to avoid. Therefore, a watch list shown to only the few people responsible for compliance should be used to monitor transactions in specified securities. The use of a watch list in combination with a restricted list is an increasingly common means of ensuring effective control of personal trading.

Record Maintenance

Multiservice firms should maintain written records of the communications between various departments. Firms should place a high priority on training and should consider instituting comprehensive training programs, particularly for employees in sensitive areas.

Proprietary Trading Procedures

Procedures concerning the restriction or review of a firm's proprietary trading while the firm possesses material nonpublic information will necessarily depend on the types of proprietary trading in which the firm may engage. A prohibition on all types of proprietary activity when a firm comes into possession of material nonpublic information is *not* appropriate. For example, when a firm acts as a market maker, a prohibition on proprietary trading may be counterproductive to the goals of maintaining the confidentiality of information and market liquidity. This concern is particularly important in the relationships between small, regional broker/dealers and small issuers. In many situations, a firm will take a small issuer public with the understanding that the firm will continue to be a market maker in the stock. In such instances, a withdrawal by the firm from market-making acts would be a clear tip to outsiders. Firms that continue market-making activity while in the possession of material nonpublic information should, however, instruct their market makers to remain passive with respect to the market—that is, to take only the contra side of unsolicited customer trades.

In risk-arbitrage trading, the case for a trading prohibition is more compelling than it is in the case of market making. The impetus for arbitrage trading is neither passive nor reactive, and the potential for illegal profits is greater than in market making. The most prudent course for firms is to suspend arbitrage activity when a security is placed on the watch list. Those firms that continue arbitrage

activity face a high hurdle in proving the adequacy of their internal procedures for preventing trading on material nonpublic information and must demonstrate a stringent review and documentation of firm trades.

Communication to All Employees

Members and candidates should encourage their employers to circulate written compliance policies and guidelines to all employees. Policies and guidelines should be used in conjunction with training programs aimed at enabling employees to recognize material nonpublic information. Such information is not always clearly identifiable.

Employees must be given sufficient training to either make an informed decision or to realize they need to consult a supervisor or compliance officer before engaging in questionable transactions. Appropriate policies reinforce that using material nonpublic information is illegal in many countries. Such trading activities based on material nonpublic information undermine the integrity of the individual, the firm, and the capital markets.

Application of the Standard

Example 1 (Acting on Nonpublic Information):

Frank Barnes, the president and controlling shareholder of the SmartTown clothing chain, decides to accept a tender offer and sell the family business at a price almost double the market price of its shares. He describes this decision to his sister (SmartTown's treasurer), who conveys it to her daughter (who owns no stock in the family company at present), who tells her husband, Staple. Staple, however, tells his stockbroker, Alex Halsey, who immediately buys SmartTown stock for himself.

> *Comment*: The information regarding the pending sale is both material and nonpublic. Staple has violated Standard II(A) by communicating the inside information to his broker. Halsey also has violated the standard by buying the shares on the basis of material nonpublic information.

Example 2 (Controlling Nonpublic Information):

Samuel Peter, an analyst with Scotland and Pierce Incorporated, is assisting his firm with a secondary offering for Bright Ideas Lamp Company. Peter participates, via telephone conference call, in a meeting with Scotland and Pierce investment banking employees and Bright Ideas' CEO. Peter is advised that the company's earnings projections for the next year have significantly dropped. Throughout the telephone conference call, several Scotland and Pierce salespeople and portfolio managers walk in and out of Peter's office, where the telephone call is taking place. As a result, they are aware of the drop in projected earnings for Bright Ideas. Before the conference call is concluded, the salespeople trade the stock of the company on behalf of the firm's clients and other firm personnel trade the stock in a firm proprietary account and in employees' personal accounts.

Comment: Peter has violated Standard II(A) because he failed to prevent the transfer and misuse of material nonpublic information to others in his firm. Peter's firm should have adopted information barriers to prevent the communication of nonpublic information between departments of the firm. The salespeople and portfolio managers who traded on the information have also violated Standard II(A) by trading on inside information.

Example 3 (Selective Disclosure of Material Information):

Elizabeth Levenson is based in Taipei and covers the Taiwanese market for her firm, which is based in Singapore. She is invited, together with the other 10 largest shareholders of a manufacturing company, to meet the finance director of that company. During the meeting, the finance director states that the company expects its workforce to strike next Friday, which will cripple productivity and distribution. Can Levenson use this information as a basis to change her rating on the company from "buy" to "sell"?

Comment: Levenson must first determine whether the material information is public. According to Standard II(A), if the company has not made this information public (a small group forum does not qualify as a method of public dissemination), she cannot use the information.

Example 4 (Determining Materiality):

Leah Fechtman is trying to decide whether to hold or sell shares of an oil-and-gas exploration company that she owns in several of the funds she manages. Although the company has underperformed the index for some time already, the trends in the industry sector signal that companies of this type might become takeover targets. While she is considering her decision, her doctor, who casually follows the markets, mentions that she thinks that the company in question will soon be bought out by a large multinational conglomerate and that it would be a good idea to buy the stock right now. After talking to various investment professionals and checking their opinions on the company as well as checking industry trends, Fechtman decides the next day to accumulate more stock in the oil-and-gas exploration company.

Comment: Although information on an expected takeover bid may be of the type that is generally material and nonpublic, in this case, the source of information is unreliable, so the information cannot be considered material. Therefore, Fechtman is not prohibited from trading the stock on the basis of this information.

Example 5 (Applying the Mosaic Theory):

Jagdish Teja is a buy-side analyst covering the furniture industry. Looking for an attractive company to recommend as a buy, he analyzes several furniture makers by studying their financial reports and visiting their operations. He also talks to some designers and retailers to find out which furniture styles are trendy and popular.

Although none of the companies that he analyzes are a clear buy, he discovers that one of them, Swan Furniture Company (SFC), may be in financial trouble. SFC's extravagant new designs have been introduced at substantial cost. Even though these designs initially attracted attention, the public is now buying more conservative furniture from other makers. Based on this information and on a profit-and-loss analysis, Teja believes that SFC's next quarter earnings will drop substantially. He issues a sell recommendation for SFC. Immediately after receiving that recommendation, investment managers start reducing the SFC stock in their portfolios.

> *Comment*: Information on quarterly earnings data is material and nonpublic. Teja arrived at his conclusion about the earnings drop on the basis of public information and on pieces of nonmaterial nonpublic information (such as opinions of designers and retailers). Therefore, trading based on Teja's correct conclusion is not prohibited by Standard II(A).

Example 6 (Applying the Mosaic Theory):

Roger Clement is a senior financial analyst who specializes in the European automobile sector at Rivoli Capital. Because he has been repeatedly nominated by many leading industry magazines and newsletters as a "best analyst" for the automobile industry, he is widely regarded as an authority on the sector. After speaking with representatives of Turgot Chariots—a European auto manufacturer with sales primarily in South Korea—and after conducting interviews with salespeople, labor leaders, his firm's Korean currency analysts, and banking officials, Clement analyzed Turgot Chariots and concluded that (1) its newly introduced model will probably not meet sales expectations, (2) its corporate restructuring strategy may well face serious opposition from unions, (3) the depreciation of the Korean won should lead to pressure on margins for the industry in general and Turgot's market segment in particular, and (4) banks could take a tougher-than-expected stance in the upcoming round of credit renegotiations with the company. For these reasons, he changes his conclusion about the company from "market outperform" to "market underperform." Clement retains the support material used to reach his conclusion in case questions later arise.

> *Comment*: To reach a conclusion about the value of the company, Clement has pieced together a number of nonmaterial or public bits of information that affect Turgot Chariots. Therefore, under the mosaic theory, Clement has not violated Standard II(A) in drafting the report.

Example 7 (Analyst Recommendations as Material Nonpublic Information):

The next day, Clement is preparing to be interviewed on a global financial news television program where he will discuss his changed recommendation on Turgot Chariots for the first time in public. While preparing for the program, he mentions to the show's producers and Mary Zito, the journalist who will be interviewing him, the information he will be discussing. Just prior to going on the air, Zito sells her

holdings in Turgot Chariots. She also phones her father with the information because she knows that he and other family members have investments in Turgot Chariots.

Comment: When Zito receives advance notice of Clement's change of opinion, she knows it will have a material impact on the stock price, even if she is not totally aware of Clement's underlying reasoning. She is not a client of Clement but obtains early access to the material nonpublic information prior to publication. Her trades are thus based on material nonpublic information and violate Standard II(A).

Zito further violates the Standard by relaying the information to her father. It would not matter if he or any other family member traded; the act of providing the information violates Standard II(A). The fact that the information is provided to a family member does not absolve someone of the prohibition of using or communicating material nonpublic information.

Example 8 (Acting on Nonpublic Information):

Ashton Kellogg is a retired investment professional who manages his own portfolio. He owns shares in National Savings, a large local bank. A close friend and golfing buddy, John Mayfield, is a senior executive at National. National has seen its stock price drop considerably, and the news and outlook are not good. In a conversation about the economy and the banking industry on the golf course, Mayfield relays the information that National will surprise the investment community in a few days when it announces excellent earnings for the quarter. Kellogg is pleasantly surprised by this information, and thinking that Mayfield, as a senior executive, knows the law and would not disclose inside information, he doubles his position in the bank. Subsequently, National announces that it had good operating earnings but had to set aside reserves for anticipated significant losses on its loan portfolio. The combined news causes the stock to go down 60%.

Comment: Even though Kellogg believes that Mayfield would not break the law by disclosing inside information and money was lost on the purchase, Kellogg should not have purchased additional shares of National. It is the member's or candidate's responsibility to make sure, before executing investment actions, that comments about earnings are not material nonpublic information. Kellogg has violated Standard II(A).

Example 9 (Mosaic Theory):

John Doll is a research analyst for a hedge fund that also sells its research to a select group of paying client investment firms. Doll's focus is medical technology companies and products, and he has been in the business long enough and has been successful enough to build up a very credible network of friends and experts in the business. Doll has been working on a major research report recommending Boyce Health, a medical device manufacturer. He recently ran into an old acquaintance at a wedding who is a senior executive at Boyce, and Doll asked

about the business. Doll was drawn to a statement that the executive, who has responsibilities in the new products area, made about a product: "I would not get too excited about the medium-term prospects; we have a lot of work to do first." Doll incorporated this and other information about the new Boyce product in his long-term recommendation of Boyce.

> *Comment*: Doll's conversation with the senior executive is part of the mosaic of information used in recommending Boyce. When holding discussions with a firm executive, Doll would need to guard against soliciting or obtaining material nonpublic information. Before issuing the report, the executive's statement about the continuing development of the product would need to be weighed against the other known public facts to determine whether it would be considered material.

Example 10 (Materiality Determination):

Larry Nadler, a trader for a mutual fund, gets a text message from another firm's trader, whom he has known for years. The message indicates a software company is going to report strong earnings when the firm publicly announces in two days. Nadler has a buy order from a portfolio manager within his firm to purchase several hundred thousand shares of the stock. Nadler is aggressive in placing the portfolio manager's order and completes the purchases by the following morning, a day ahead of the firm's planned earnings announcement.

> *Comment*: There are often rumors and whisper numbers before a release of any kind. The text message from the other trader would most likely be considered market noise. Unless Nadler knew that the trader had an ongoing business relationship with the public firm, he had no reason to suspect he was receiving material nonpublic information that would prevent him from completing the trading request of the portfolio manager.

Example 11 (Using an Expert Network):

Mary McCoy is the senior drug analyst at a mutual fund. Her firm hires a service that connects her to experts in the treatment of cancer. Through various phone conversations, McCoy enhances her understanding of the latest therapies for successful treatment. This information is critical to Mary making informed recommendations of the companies producing these drugs.

> *Comment*: McCoy is appropriately using the expert networks to enhance her evaluation process. She has neither asked for nor received information that may be considered material and nonpublic, such as preliminary trial results. McCoy is allowed to seek advice from professionals within the industry that she follows.

Example 12 (Using an Expert Network):

Tom Watson is a research analyst working for a hedge fund. To stay informed, Watson relies on outside experts for information on such industries as technology and pharmaceuticals, where new advancements occur frequently. The meetings with the industry experts often are arranged through networks or placement agents that have specific policies and procedures in place to deter the exchange of material nonpublic information.

Watson arranges a call to discuss future prospects for one of the fund's existing technology company holdings, a company that was testing a new semiconductor product. The scientist leading the tests indicates his disappointment with the performance of the new semiconductor. Following the call, Watson relays the insights he received to others at the fund. The fund sells its current position in the company and buys put options because the market is anticipating the success of the new semiconductor and the share price reflects the market's optimism.

Comment: Watson has violated Standard II(A) by passing along material nonpublic information concerning the ongoing product tests, which the fund used to trade in the securities and options of the related company. Watson cannot simply rely on the agreements signed by individuals who participate in expert networks that state that he has not received information that would prohibit his trading activity. He must make his own determination whether information he received through these arrangements reaches a materiality threshold that would affect his trading abilities.

Standard II(B) Market Manipulation

Members and Candidates must not engage in practices that distort prices or artificially inflate trading volume with the intent to mislead market participants.

Guidance

Highlights:

- *Information-Based Manipulation*
- *Transaction-Based Manipulation*

Standard II(B) requires that members and candidates uphold market integrity by prohibiting market manipulation. Market manipulation includes practices that distort security prices or trading volume with the intent to deceive people or entities that rely on information in the market. Market manipulation damages the interests of all investors by disrupting the smooth functioning of financial markets and lowering investor confidence.

Market manipulation may lead to a lack of trust in the fairness of the capital markets, resulting in higher risk premiums and reduced investor participation. A reduction in the efficiency of a local capital market may negatively affect the growth and economic health of the country and may also influence the operations of the globally interconnected capital markets. Although market manipulation may be less likely to occur in mature financial markets than in emerging markets, cross-border investing increasingly exposes all global investors to the potential for such practices.

Market manipulation includes (1) the dissemination of false or misleading information and (2) transactions that deceive or would be likely to mislead market participants by distorting the price-setting mechanism of financial instruments. The development of new products and technologies increases the incentives, means, and opportunities for market manipulation. Additionally, the increasing complexity and sophistication of the technologies used for communicating with market participants have created new avenues for manipulation.

Information-Based Manipulation

Information-based manipulation includes, but is not limited to, spreading false rumors to induce trading by others. For example, members and candidates must refrain from "pumping up" the price of an investment by issuing misleading positive information or overly optimistic projections of a security's worth only to later "dump" the investment (i.e., sell it) once the price, fueled by the misleading information's effect on other market participants, reaches an artificially high level.

Transaction-Based Manipulation

Transaction-based manipulation involves instances where a member or candidate knew or should have known that his or her actions could affect the pricing of a security. This type of manipulation includes, but is not limited to, the following:

- transactions that artificially affect prices or volume to give the impression of activity or price movement in a financial instrument, which represent a diversion from the expectations of a fair and efficient market, and
- securing a controlling, dominant position in a financial instrument to exploit and manipulate the price of a related derivative and/or the underlying asset.

Standard II(B) is not intended to preclude transactions undertaken on legitimate trading strategies based on perceived market inefficiencies. The intent of the action is critical to determining whether it is a violation of this standard.

Application of the Standard

Example 1 (Independent Analysis and Company Promotion):

The principal owner of Financial Information Services (FIS) entered into an agreement with two microcap companies to promote the companies' stock in exchange for stock and cash compensation. The principal owner caused FIS to disseminate e-mails, design and maintain several websites, and distribute an online investment newsletter—all of which recommended investment in the two companies. The systematic publication of purportedly independent analyses and recommendations containing inaccurate and highly promotional and speculative statements increased public investment in the companies and led to dramatically higher stock prices.

> *Comment*: The principal owner of FIS violated Standard II(B) by using inaccurate reporting and misleading information under the guise of independent analysis to artificially increase the stock price of the companies. Furthermore, the principal owner violated Standard V(A)–Diligence and Reasonable Basis by not having a reasonable and adequate basis for recommending the two companies and violated Standard VI(A)–Disclosure of Conflicts by not disclosing to investors the compensation agreements (which constituted a conflict of interest).

Example 2 (Personal Trading Practices and Price):

John Gray is a private investor in Belgium who bought a large position several years ago in Fame Pharmaceuticals, a German small-cap security with limited average trading volume. He has now decided to significantly reduce his holdings owing to the poor price performance. Gray is worried that the low trading volume for the stock may cause the price to decline further as he attempts to sell his large position.

Gray devises a plan to divide his holdings into multiple accounts in different brokerage firms and private banks in the names of family members, friends, and

even a private religious institution. He then creates a rumor campaign on various blogs and social media outlets promoting the company.

Gray begins to buy and sell the stock using the accounts in hopes of raising the trading volume and the price. He conducts the trades through multiple brokers, selling slightly larger positions than he bought on a tactical schedule, and over time, he is able to reduce his holding as desired without negatively affecting the sale price.

> *Comment*: John violated Standard II(B) by fraudulently creating the appearance that there was a greater investor interest in the stock through the online rumors. Additionally, through his trading strategy, he created the appearance that there was greater liquidity in the stock than actually existed. He was able to manipulate the price through both misinformation and trading practices.

Example 3 (Creating Artificial Price Volatility):

Matthew Murphy is an analyst at Divisadero Securities & Co., which has a significant number of hedge funds among its most important brokerage clients. Some of the hedge funds hold short positions on Wirewolf Semiconductor. Two trading days before the publication of a quarter-end report, Murphy alerts his sales force that he is about to issue a research report on Wirewolf that will include the following opinions:

- quarterly revenues are likely to fall short of management's guidance,
- earnings will be as much as 5 cents per share (or more than 10%) below consensus, and
- Wirewolf's highly respected chief financial officer may be about to join another company.

Knowing that Wirewolf has already entered its declared quarter-end "quiet period" before reporting earnings (and thus would be reluctant to respond to rumors), Murphy times the release of his research report specifically to sensationalize the negative aspects of the message in order to create significant downward pressure on Wirewolf's stock—to the distinct advantage of Divisadero's hedge fund clients. The report's conclusions are based on speculation, not on fact. The next day, the research report is broadcast to all of Divisadero's clients and to the usual newswire services.

Before Wirewolf's investor-relations department can assess the damage on the final trading day of the quarter and refute Murphy's report, its stock opens trading sharply lower, allowing Divisadero's clients to cover their short positions at substantial gains.

> *Comment*: Murphy violated Standard II(B) by aiming to create artificial price volatility designed to have a material impact on the price of an issuer's stock. Moreover, by lacking an adequate basis for the recommendation, Murphy also violated Standard V(A)–Diligence and Reasonable Basis.

Example 4 (Personal Trading and Volume):

Rajesh Sekar manages two funds—an equity fund and a balanced fund—whose equity components are supposed to be managed in accordance with the same model. According to that model, the funds' holdings in stock of Digital Design Inc. (DD) are excessive. Reduction of the DD holdings would not be easy, however, because the stock has low liquidity in the stock market. Sekar decides to start trading larger portions of DD stock back and forth between his two funds to slowly increase the price; he believes market participants will see growing volume and increasing price and become interested in the stock. If other investors are willing to buy the DD stock because of such interest, then Sekar will be able to get rid of at least some of his overweight position without inducing price decreases. In this way, the whole transaction will be for the benefit of fund participants, even if additional brokers' commissions are incurred.

> *Comment*: Sekar's plan would be beneficial for his funds' participants but is based on artificial distortion of both trading volume and the price of the DD stock and thus constitutes a violation of Standard II(B).

Example 5 ("Pump-Priming" Strategy):

ACME Futures Exchange is launching a new bond futures contract. To convince investors, traders, arbitrageurs, hedgers, and so on, to use its contract, the exchange attempts to demonstrate that it has the best liquidity. To do so, it enters into agreements with members in which they commit to a substantial minimum trading volume on the new contract over a specific period in exchange for substantial reductions of their regular commissions.

> *Comment*: The formal liquidity of a market is determined by the obligations set on market makers, but the actual liquidity of a market is better estimated by the actual trading volume and bid–ask spreads. Attempts to mislead participants about the actual liquidity of the market constitute a violation of Standard II(B). In this example, investors have been intentionally misled to believe they chose the most liquid instrument for some specific purpose, but they could eventually see the actual liquidity of the contract significantly reduced after the term of the agreement expires. If the ACME Futures Exchange fully discloses its agreement with members to boost transactions over some initial launch period, it will not violate Standard II(B). ACME's intent is not to harm investors but, on the contrary, to give them a better service. For that purpose, it may engage in a liquidity-pumping strategy, but the strategy must be disclosed.

Example 6 (Creating Artificial Price Volatility):

Emily Gordon, an analyst of household products companies, is employed by a research boutique, Picador & Co. Based on information that she has gathered during a trip through Latin America, she believes that Hygene, Inc., a major marketer

of personal care products, has generated better-than-expected sales from its new product initiatives in South America. After modestly boosting her projections for revenue and for gross profit margin in her worksheet models for Hygene, Gordon estimates that her earnings projection of US$2.00 per diluted share for the current year may be as much as 5% too low. She contacts the chief financial officer (CFO) of Hygene to try to gain confirmation of her findings from her trip and to get some feedback regarding her revised models. The CFO declines to comment and reiterates management's most recent guidance of US$1.95–US$2.05 for the year.

Gordon decides to try to force a comment from the company by telling Picador & Co. clients who follow a momentum investment style that consensus earnings projections for Hygene are much too low; she explains that she is considering raising her published estimate by an ambitious US$0.15 to US$2.15 per share. She believes that when word of an unrealistically high earnings projection filters back to Hygene's investor-relations department, the company will feel compelled to update its earnings guidance. Meanwhile, Gordon hopes that she is at least correct with respect to the earnings direction and that she will help clients who act on her insights to profit from a quick gain by trading on her advice.

> *Comment*: By exaggerating her earnings projections in order to try to fuel a quick gain in Hygene's stock price, Gordon is in violation of Standard II(B). Furthermore, by virtue of previewing her intentions of revising upward her earnings projections to only a select group of clients, she is in violation of Standard III(B)–Fair Dealing. However, it would have been acceptable for Gordon to write a report that
>
> - framed her earnings projection in a range of possible outcomes,
> - outlined clearly the assumptions used in her Hygene models that took into consideration the findings from her trip through Latin America, and
> - was distributed to all Picador & Co. clients in an equitable manner.

Example 7 (Pump and Dump Strategy):

In an effort to pump up the price of his holdings in Moosehead & Belfast Railroad Company, Steve Weinberg logs on to several investor chat rooms on the internet to start rumors that the company is about to expand its rail network in anticipation of receiving a large contract for shipping lumber.

> *Comment*: Weinberg has violated Standard II(B) by disseminating false information about Moosehead & Belfast with the intent to mislead market participants.

Example 8 (Manipulating Model Inputs):

Bill Mandeville supervises a structured financing team for Superior Investment Bank. His responsibilities include packaging new structured investment products

and managing Superior's relationship with relevant rating agencies. To achieve the best rating possible, Mandeville uses mostly positive scenarios as model inputs—scenarios that reflect minimal downside risk in the assets underlying the structured products. The resulting output statistics in the rating request and underwriting prospectus support the idea that the new structured products have minimal potential downside risk. Additionally, Mandeville's compensation from Superior is partially based on both the level of the rating assigned and the successful sale of new structured investment products but does not have a link to the long-term performance of the instruments.

Mandeville is extremely successful and leads Superior as the top originator of structured investment products for the next two years. In the third year, the economy experiences difficulties and the values of the assets underlying structured products significantly decline. The subsequent defaults lead to major turmoil in the capital markets, the demise of Superior Investment Bank, and the loss of Mandeville's employment.

> *Comment*: Mandeville manipulates the inputs of a model to minimize associated risk to achieve higher ratings. His understanding of structured products allows him to skillfully decide which inputs to include in support of the desired rating and price. This information manipulation for short-term gain, which is in violation of Standard II(B), ultimately causes significant damage to many parties and the capital markets as a whole. Mandeville should have realized that promoting a rating and price with inaccurate information could cause not only a loss of price confidence in the particular structured product but also a loss of investor trust in the system. Such loss of confidence affects the ability of the capital markets to operate efficiently.

Example 9 (Information Manipulation):

Allen King is a performance analyst for Torrey Investment Funds. King believes that the portfolio manager for the firm's small- and microcap equity fund dislikes him because the manager never offers him tickets to the local baseball team's games but does offer tickets to other employees. To incite a potential regulatory review of the manager, King creates user profiles on several online forums under the portfolio manager's name and starts rumors about potential mergers for several of the smaller companies in the portfolio. As the prices of these companies' stocks increase, the portfolio manager sells the position, which leads to an investigation by the regulator as King desired.

> *Comment*: King has violated Standard II(B) even though he did not personally profit from the market's reaction to the rumor. In posting the false information, King misleads others into believing the companies were likely to be acquired. Although his intent was to create trouble for the portfolio manager, his actions clearly manipulated the factual information that was available to the market.

Standard III: Duties to Clients

Standard III(A) Loyalty, Prudence, and Care

> Members and Candidates have a duty of loyalty to their clients and must act with reasonable care and exercise prudent judgment. Members and Candidates must act for the benefit of their clients and place their clients' interests before their employer's or their own interests.

Guidance

Highlights:

- *Understanding the Application of Loyalty, Prudence, and Care*
- *Identifying the Actual Investment Client*
- *Developing the Client's Portfolio*
- *Soft Commission Policies*
- *Proxy Voting Policies*

Standard III(A) clarifies that client interests are paramount. A member's or candidate's responsibility to a client includes a duty of loyalty and a duty to exercise reasonable care. Investment actions must be carried out for the sole benefit of the client and in a manner the member or candidate believes, given the known facts and circumstances, to be in the best interest of the client. Members and candidates must exercise the same level of prudence, judgment, and care that they would apply in the management and disposition of their own interests in similar circumstances.

Prudence requires caution and discretion. The exercise of prudence by investment professionals requires that they act with the care, skill, and diligence that a reasonable person acting in a like capacity and familiar with such matters would use. In the context of managing a client's portfolio, prudence requires following the investment parameters set forth by the client and balancing risk and return. Acting with care requires members and candidates to act in a prudent and judicious manner in avoiding harm to clients.

Standard III(A) sets minimum expectations for members and candidates when fulfilling their responsibilities to their clients. Regulatory and legal requirements for such duties can vary across the investment industry depending on a variety of factors, including job function of the investment professional, the existence of an adviser/client relationship, and the nature of the recommendations being offered. From the perspective of the end user of financial services, these different standards can be arcane and confusing, leaving investors unsure of what level of service to expect from investment professionals they employ. The single

standard of conduct described in Standard III(A) benefits investors by establishing a benchmark for the duties of loyalty, prudence, and care and clarifies that all CFA Institute members and candidates, regardless of job title, local laws, or cultural differences, are required to comply with these fundamental responsibilities. Investors hiring members or candidates who must adhere to the duty of loyalty, prudence, and care set forth in this standard can be confident that these responsibilities are a requirement regardless of any legally imposed fiduciary duties.

Standard III(A), however, is not a substitute for a member's or candidate's legal or regulatory obligations. As stated in Standard I(A), members and candidates must abide by the most strict requirements imposed on them by regulators or the Code and Standards, including any legally imposed fiduciary duty. Members and candidates must also be aware of whether they have "custody" or effective control of client assets. If so, a heightened level of responsibility arises. Members and candidates are considered to have custody if they have any direct or indirect access to client funds. Members and candidates must manage any pool of assets in their control in accordance with the terms of the governing documents (such as trust documents and investment management agreements), which are the primary determinant of the manager's powers and duties. Whenever their actions are contrary to provisions of those instruments or applicable law, members and candidates are at risk of violating Standard III(A).

Understanding the Application of Loyalty, Prudence, and Care

Standard III(A) establishes a minimum benchmark for the duties of loyalty, prudence, and care that are required of all members and candidates regardless of whether a legal fiduciary duty applies. Although fiduciary duty often encompasses the principles of loyalty, prudence, and care, Standard III(A) does not render all members and candidates fiduciaries. The responsibilities of members and candidates for fulfilling their obligations under this standard depend greatly on the nature of their professional responsibilities and the relationships they have with clients. The conduct of members and candidates may or may not rise to the level of being a fiduciary, depending on the type of client, whether the member or candidate is giving investment advice, and the many facts and circumstances surrounding a particular transaction or client relationship.

Fiduciary duties are often imposed by law or regulation when an individual or institution is charged with the duty of acting for the benefit of another party, such as managing investment assets. The duty required in fiduciary relationships exceeds what is acceptable in many other business relationships because a fiduciary is in an enhanced position of trust. Although members and candidates must comply with any legally imposed fiduciary duty, the Code and Standards neither impose such a legal responsibility nor require all members or candidates to act as fiduciaries. However, Standard III(A) requires members and candidates to work in the client's best interest no matter what the job function.

A member or candidate who does not provide advisory services to a client but who acts only as a trade execution professional must prudently work in the client's

interest when completing requested trades. Acting in the client's best interest requires these professionals to use their skills and diligence to execute trades in the most favorable terms that can be achieved. Members and candidates operating in such positions must use care to operate within the parameters set by the client's trading instructions.

Members and candidates may also operate in a blended environment where they execute client trades and offer advice on a limited set of investment options. The extent of the advisory arrangement and limitations should be outlined in the agreement with the client at the outset of the relationship. For instance, members and candidates should inform clients that the advice provided will be limited to the propriety products of the firm and not include other products available on the market. Clients who want access to a wider range of investment products would have the information necessary to decide not to engage with members or candidates working under these restrictions.

Members and candidates operating in this blended context would comply with their obligations by recommending the allowable products that are consistent with the client's objectives and risk tolerances. They would exercise care through diligently aligning the client's needs with the attributes of the products being recommended. Members and candidates should place the client's interests first by disregarding any firm or personal interest in motivating a recommended transaction.

There is a large variety of professional relationships that members and candidates have with their clients. Standard III(A) requires them to fulfill the obligations outlined explicitly or implicitly in the client agreements to the best of their abilities and with loyalty, prudence, and care. Whether a member or candidate is structuring a new securitization transaction, completing a credit rating analysis, or leading a public company, he or she must work with prudence and care in delivering the agreed-on services.

Identifying the Actual Investment Client

The first step for members and candidates in fulfilling their duty of loyalty to clients is to determine the identity of the "client" to whom the duty of loyalty is owed. In the context of an investment manager managing the personal assets of an individual, the client is easily identified. When the manager is responsible for the portfolios of pension plans or trusts, however, the client is not the person or entity who hires the manager but, rather, the beneficiaries of the plan or trust. The duty of loyalty is owed to the ultimate beneficiaries.

In some situations, an actual client or group of beneficiaries may not exist. Members and candidates managing a fund to an index or an expected mandate owe the duty of loyalty, prudence, and care to invest in a manner consistent with the stated mandate. The decisions of a fund's manager, although benefiting all fund investors, do not have to be based on an individual investor's requirements and risk profile. Client loyalty and care for those investing in the fund are the responsibility of members and candidates who have an advisory relationship with those individuals.

Situations involving potential conflicts of interest with respect to responsibilities to clients may be extremely complex because they may involve a number

of competing interests. The duty of loyalty, prudence, and care applies to a large number of persons in varying capacities, but the exact duties may differ in many respects in accord with the relationship with each client or each type of account in which the assets are managed. Members and candidates must not only put their obligations to clients first in all dealings but also endeavor to avoid all real or potential conflicts of interest.

Members and candidates with positions whose responsibilities do not include direct investment management also have "clients" that must be considered. Just as there are various types of advisory relationships, members and candidates must look at their roles and responsibilities when making a determination of who their clients are. Sometimes the client is easily identifiable; such is the case in the relationship between a company executive and the firm's public shareholders. At other times, the client may be the investing public as a whole, in which case the goals of independence and objectivity of research surpass the goal of loyalty to a single organization.

Developing the Client's Portfolio

The duty of loyalty, prudence, and care owed to the individual client is especially important because the professional investment manager typically possesses greater knowledge in the investment arena than the client does. This disparity places the individual client in a vulnerable position; the client must trust the manager. The manager in these situations should ensure that the client's objectives and expectations for the performance of the account are realistic and suitable to the client's circumstances and that the risks involved are appropriate. In most circumstances, recommended investment strategies should relate to the long-term objectives and circumstances of the client.

Particular care must be taken to detect whether the goals of the investment manager or the firm in conducting business, selling products, and executing security transactions potentially conflict with the best interests and objectives of the client. When members and candidates cannot avoid potential conflicts between their firm and clients' interests, they must provide clear and factual disclosures of the circumstances to the clients.

Members and candidates must follow any guidelines set by their clients for the management of their assets. Some clients, such as charitable organizations and pension plans, have strict investment policies that limit investment options to certain types or classes of investment or prohibit investment in certain securities. Other organizations have aggressive policies that do not prohibit investments by type but, instead, set criteria on the basis of the portfolio's total risk and return.

Investment decisions must be judged in the context of the total portfolio rather than by individual investment within the portfolio. The member's or candidate's duty is satisfied with respect to a particular investment if the individual has thoroughly considered the investment's place in the overall portfolio, the risk of loss and opportunity for gains, tax implications, and the diversification, liquidity, cash flow, and overall return requirements of the assets or the portion of the assets for which the manager is responsible.

Soft Commission Policies

An investment manager often has discretion over the selection of brokers executing transactions. Conflicts may arise when an investment manager uses client brokerage to purchase research services, a practice commonly called "soft dollars" or "soft commissions." A member or candidate who pays a higher brokerage commission than he or she would normally pay to allow for the purchase of goods or services, without corresponding benefit to the client, violates the duty of loyalty to the client.

From time to time, a client will direct a manager to use the client's brokerage to purchase goods or services for the client, a practice that is commonly called "directed brokerage." Because brokerage commission is an asset of the client and is used to benefit that client, not the manager, such a practice does not violate any duty of loyalty. However, a member or candidate is obligated to seek "best price" and "best execution" and be assured by the client that the goods or services purchased from the brokerage will benefit the account beneficiaries. "Best execution" refers to a trading process that seeks to maximize the value of the client's portfolio within the client's stated investment objectives and constraints. In addition, the member or candidate should disclose to the client that the client may not be getting best execution from the directed brokerage.

Proxy Voting Policies

The duty of loyalty, prudence, and care may apply in a number of situations facing the investment professional besides those related directly to investing assets.

Part of a member's or candidate's duty of loyalty includes voting proxies in an informed and responsible manner. Proxies have economic value to a client, and members and candidates must ensure that they properly safeguard and maximize this value. An investment manager who fails to vote, casts a vote without considering the impact of the question, or votes blindly with management on nonroutine governance issues (e.g., a change in company capitalization) may violate this standard. Voting of proxies is an integral part of the management of investments.

A cost–benefit analysis may show that voting all proxies may not benefit the client, so voting proxies may not be necessary in all instances. Members and candidates should disclose to clients their proxy voting policies.

Recommended Procedures for Compliance

Regular Account Information

Members and candidates with control of client assets (1) should submit to each client, at least quarterly, an itemized statement showing the funds and securities in the custody or possession of the member or candidate plus all debits, credits, and transactions that occurred during the period, (2) should disclose to the client where the assets are to be maintained, as well as where or when they are moved, and (3) should separate the client's assets from any other party's assets, including the member's or candidate's own assets.

Client Approval

If a member or candidate is uncertain about the appropriate course of action with respect to a client, the member or candidate should consider what he or she would expect or demand if the member or candidate were the client. If in doubt, a member or candidate should disclose the questionable matter in writing to the client and obtain client approval.

Firm Policies

Members and candidates should address and encourage their firms to address the following topics when drafting the statements or manuals containing their policies and procedures regarding responsibilities to clients:

- *Follow all applicable rules and laws*: Members and candidates must follow all legal requirements and applicable provisions of the Code and Standards.
- *Establish the investment objectives of the client*: Make a reasonable inquiry into a client's investment experience, risk and return objectives, and financial constraints prior to making investment recommendations or taking investment actions.
- *Consider all the information when taking actions*: When taking investment actions, members and candidates must consider the appropriateness and suitability of the investment relative to (1) the client's needs and circumstances, (2) the investment's basic characteristics, and (3) the basic characteristics of the total portfolio.
- *Diversify*: Members and candidates should diversify investments to reduce the risk of loss, unless diversification is not consistent with plan guidelines or is contrary to the account objectives.
- *Carry out regular reviews*: Members and candidates should establish regular review schedules to ensure that the investments held in the account adhere to the terms of the governing documents.
- *Deal fairly with all clients with respect to investment actions*: Members and candidates must not favor some clients over others and should establish policies for allocating trades and disseminating investment recommendations.
- *Disclose conflicts of interest*: Members and candidates must disclose all actual and potential conflicts of interest so that clients can evaluate those conflicts.
- *Disclose compensation arrangements*: Members and candidates should make their clients aware of all forms of manager compensation.
- *Vote proxies*: In most cases, members and candidates should determine who is authorized to vote shares and vote proxies in the best interests of the clients and ultimate beneficiaries.

- *Maintain confidentiality*: Members and candidates must preserve the confidentiality of client information.
- *Seek best execution*: Unless directed by the client as ultimate beneficiary, members and candidates must seek best execution for their clients. (Best execution is defined in the preceding text.)
- *Place client interests first*: Members and candidates must serve the best interests of clients.

Application of the Standard

Example 1 (Identifying the Client—Plan Participants):

First Country Bank serves as trustee for the Miller Company's pension plan. Miller is the target of a hostile takeover attempt by Newton, Inc. In attempting to ward off Newton, Miller's managers persuade Julian Wiley, an investment manager at First Country Bank, to purchase Miller common stock in the open market for the employee pension plan. Miller's officials indicate that such action would be favorably received and would probably result in other accounts being placed with the bank. Although Wiley believes the stock is overvalued and would not ordinarily buy it, he purchases the stock to support Miller's managers, to maintain Miller's good favor toward the bank, and to realize additional new business. The heavy stock purchases cause Miller's market price to rise to such a level that Newton retracts its takeover bid.

Comment: Standard III(A) requires that a member or candidate, in evaluating a takeover bid, act prudently and solely in the interests of plan participants and beneficiaries. To meet this requirement, a member or candidate must carefully evaluate the long-term prospects of the company against the short-term prospects presented by the takeover offer and by the ability to invest elsewhere. In this instance, Wiley, acting on behalf of his employer, which was the trustee for a pension plan, clearly violated Standard III(A). He used the pension plan to perpetuate existing management, perhaps to the detriment of plan participants and the company's shareholders, and to benefit himself. Wiley's responsibilities to the plan participants and beneficiaries should have taken precedence over any ties of his bank to corporate managers and over his self-interest. Wiley had a duty to examine the takeover offer on its own merits and to make an independent decision. The guiding principle is the appropriateness of the investment decision to the pension plan, not whether the decision benefited Wiley or the company that hired him.

Example 2 (Client Commission Practices):

JNI, a successful investment counseling firm, serves as investment manager for the pension plans of several large regionally based companies. Its trading activities generate a significant amount of commission-related business. JNI uses the brokerage and research services of many firms, but most of its trading activity is handled through a large brokerage company, Thompson, Inc., because the executives of the two firms have a close friendship. Thompson's commission structure is high in comparison with charges for similar brokerage services from other firms. JNI considers Thompson's research services and execution capabilities average. In exchange for JNI directing its brokerage to Thompson, Thompson absorbs a number of JNI overhead expenses, including those for rent.

> *Comment*: JNI executives are breaching their responsibilities by using client brokerage for services that do not benefit JNI clients and by not obtaining best price and best execution for their clients. Because JNI executives are not upholding their duty of loyalty, they are violating Standard III(A).

Example 3 (Brokerage Arrangements):

Charlotte Everett, a struggling independent investment adviser, serves as investment manager for the pension plans of several companies. One of her brokers, Scott Company, is close to consummating management agreements with prospective new clients whereby Everett would manage the new client accounts and trade the accounts exclusively through Scott. One of Everett's existing clients, Crayton Corporation, has directed Everett to place securities transactions for Crayton's account exclusively through Scott. But to induce Scott to exert efforts to send more new accounts to her, Everett also directs transactions to Scott from other clients without their knowledge.

> *Comment*: Everett has an obligation at all times to seek best price and best execution on all trades. Everett may direct new client trades exclusively through Scott Company as long as Everett receives best price and execution on the trades or receives a written statement from new clients that she is *not* to seek best price and execution and that they are aware of the consequence for their accounts. Everett may trade other accounts through Scott as a reward for directing clients to Everett only if the accounts receive best price and execution and the practice is disclosed to the accounts. Because Everett does not disclose the directed trading, Everett has violated Standard III(A).

Example 4 (Brokerage Arrangements):

Emilie Rome is a trust officer for Paget Trust Company. Rome's supervisor is responsible for reviewing Rome's trust account transactions and her monthly reports of personal stock transactions. Rome has been using Nathan Gray, a broker, almost exclusively for trust account brokerage transactions. When Gray makes a

market in stocks, he has been giving Rome a lower price for personal purchases and a higher price for sales than he gives to Rome's trust accounts and other investors.

> *Comment*: Rome is violating her duty of loyalty to the bank's trust accounts by using Gray for brokerage transactions simply because Gray trades Rome's personal account on favorable terms. Rome is placing her own interests before those of her clients.

Example 5 (Client Commission Practices):

Lauren Parker, an analyst with Provo Advisors, covers South American equities for her firm. She likes to travel to the markets for which she is responsible and decides to go on a trip to Chile, Argentina, and Brazil. The trip is sponsored by SouthAM, Inc., a research firm with a small broker/dealer affiliate that uses the clearing facilities of a larger New York brokerage house. SouthAM specializes in arranging South American trips for analysts during which they can meet with central bank officials, government ministers, local economists, and senior executives of corporations. SouthAM accepts commission dollars at a ratio of 2 to 1 against the hard-dollar costs of the research fee for the trip. Parker is not sure that SouthAM's execution is competitive, but without informing her supervisor, she directs the trading desk at Provo to start giving commission business to SouthAM so she can take the trip. SouthAM has conveniently timed the briefing trip to coincide with the beginning of Carnival season, so Parker also decides to spend five days of vacation in Rio de Janeiro at the end of the trip. Parker uses commission dollars to pay for the five days of hotel expenses.

> *Comment*: Parker is violating Standard III(A) by not exercising her duty of loyalty to her clients. She should have determined whether the commissions charged by SouthAM are reasonable in relation to the benefit of the research provided by the trip. She also should have determined whether best execution and prices could be received from SouthAM. In addition, the five extra days are not part of the research effort because they do not assist in the investment decision making. Thus, the hotel expenses for the five days should not be paid for with client assets.

Example 6 (Excessive Trading):

Vida Knauss manages the portfolios of a number of high-net-worth individuals. A major part of her investment management fee is based on trading commissions. Knauss engages in extensive trading for each of her clients to ensure that she attains the minimum commission level set by her firm. Although the securities purchased and sold for the clients are appropriate and fall within the acceptable asset classes for the clients, the amount of trading for each account exceeds what is necessary to accomplish the client's investment objectives.

> *Comment*: Knauss has violated Standard III(A) because she is using the assets of her clients to benefit her firm and herself.

Example 7 (Managing Family Accounts):

Adam Dill recently joined New Investments Asset Managers. To assist Dill in building a book of clients, both his father and brother opened new fee-paying accounts. Dill followed all the firm's procedures in noting his relationships with these clients and in developing their investment policy statements.

After several years, the number of Dill's clients has grown, but he still manages the original accounts of his family members. An IPO is coming to market that is a suitable investment for many of his clients, including his brother. Dill does not receive the amount of stock he requested, so to avoid any appearance of a conflict of interest, he does not allocate any shares to his brother's account.

Comment: Dill has violated Standard III(A) because he is not acting for the benefit of his brother's account as well as his other accounts. The brother's account is a regular fee-paying account comparable to the accounts of his other clients. By not allocating the shares proportionately across *all* accounts for which he thought the IPO was suitable, Dill is disadvantaging specific clients.

Dill would have been correct in not allocating shares to his brother's account if that account was being managed outside the normal fee structure of the firm.

Example 8 (Identifying the Client):

Donna Hensley has been hired by a law firm to testify as an expert witness. Although the testimony is intended to represent impartial advice, she is concerned that her work may have negative consequences for the law firm. If the law firm is Hensley's client, how does she ensure that her testimony will not violate the required duty of loyalty, prudence, and care to one's client?

Comment: In this situation, the law firm represents Hensley's employer and the aspect of "who is the client" is not well defined. When acting as an expert witness, Hensley is bound by the standard of independence and objectivity in the same manner as an independent research analyst would be bound. Hensley must not let the law firm influence the testimony she provides in the legal proceedings.

Example 9 (Identifying the Client):

Jon Miller is a mutual fund portfolio manager. The fund is focused on the global financial services sector. Wanda Spears is a private wealth manager in the same city as Miller and is a friend of Miller. At a local CFA Institute society meeting, Spears mentions to Miller that her new client is an investor in Miller's fund. She states that the two of them now share a responsibility to this client.

Comment: Spears' statement is not totally correct. Because she provides the advisory services to her new client, she alone is bound by the duty of

loyalty to this client. Miller's responsibility is to manage the fund according to the investment policy statement of the fund. His actions should not be influenced by the needs of any particular fund investor.

Example 10 (Client Loyalty):

After providing client account investment performance to the external-facing departments but prior to it being finalized for release to clients, Teresa Nguyen, an investment performance analyst, notices the reporting system missed a trade. Correcting the omission resulted in a large loss for a client that had previously placed the firm on "watch" for potential termination owing to underperformance in prior periods. Nguyen knows this news is unpleasant but informs the appropriate individuals that the report needs to be updated before releasing it to the client.

Comment: Nguyen's actions align with the requirements of Standard III(A). Even though the correction may to lead to the firm's termination by the client, withholding information on errors would not be in the best interest of the client.

Example 11 (Execution-Only Responsibilities):

Baftija Sulejman recently became a candidate in the CFA Program. He is a broker who executes client-directed trades for several high-net-worth individuals. Sulejman does not provide any investment advice and only executes the trading decisions made by clients. He is concerned that the Code and Standards impose a fiduciary duty on him in his dealing with clients and sends an e-mail to the CFA Ethics Helpdesk (ethics@cfainstitute.org) to seek guidance on this issue.

Comment: In this instance, Sulejman serves in an execution-only capacity and his duty of loyalty, prudence, and care is centered on the skill and diligence used when executing trades—namely, by seeking best execution and making trades within the parameters set by the clients (instructions on quantity, price, timing, etc.). Acting in the best interests of the client dictates that trades are executed on the most favorable terms that can be achieved for the client. Given this job function, the requirements of the Code and Standards for loyalty, prudence, and care clearly do not impose a fiduciary duty.

Standard III(B) Fair Dealing

> Members and Candidates must deal fairly and objectively with all clients when providing investment analysis, making investment recommendations, taking investment action, or engaging in other professional activities.

Guidance

Highlights:

- *Investment Recommendations*
- *Investment Action*

Standard III(B) requires members and candidates to treat all clients fairly when disseminating investment recommendations or making material changes to prior investment recommendations or when taking investment action with regard to general purchases, new issues, or secondary offerings. Only through the fair treatment of all parties can the investment management profession maintain the confidence of the investing public.

When an investment adviser has multiple clients, the potential exists for the adviser to favor one client over another. This favoritism may take various forms—from the quality and timing of services provided to the allocation of investment opportunities.

The term "fairly" implies that the member or candidate must take care not to discriminate against any clients when disseminating investment recommendations or taking investment action. Standard III(B) does not state "equally" because members and candidates could not possibly reach all clients at exactly the same time—whether by printed mail, telephone (including text messaging), computer (including internet updates and e-mail distribution), facsimile (fax), or wire. Each client has unique needs, investment criteria, and investment objectives, so not all investment opportunities are suitable for all clients. In addition, members and candidates may provide more personal, specialized, or in-depth service to clients who are willing to pay for premium services through higher management fees or higher levels of brokerage. Members and candidates may differentiate their services to clients, but different levels of service must not disadvantage or negatively affect clients. In addition, the different service levels should be disclosed to clients and prospective clients and should be available to everyone (i.e., different service levels should not be offered selectively).

Standard III(B) covers conduct in two broadly defined categories—investment recommendations and investment action.

Investment Recommendations

The first category of conduct involves members and candidates whose primary function is the preparation of investment recommendations to be disseminated either to the public or within a firm for the use of others in making investment decisions. This group includes members and candidates employed by investment counseling, advisory, or consulting firms as well as banks, brokerage firms, and insurance companies. The criterion is that the member's or candidate's primary responsibility is the preparation of recommendations to be acted on by others, including those in the member's or candidate's organization.

An investment recommendation is any opinion expressed by a member or candidate in regard to purchasing, selling, or holding a given security or other investment. The opinion may be disseminated to customers or clients through an initial detailed research report, through a brief update report, by addition to or deletion from a list of recommended securities, or simply by oral communication. A recommendation that is distributed to anyone outside the organization is considered a communication for general distribution under Standard III(B).

Standard III(B) addresses the manner in which investment recommendations or changes in prior recommendations are disseminated to clients. Each member or candidate is obligated to ensure that information is disseminated in such a manner that all clients have a fair opportunity to act on every recommendation. Communicating with all clients on a uniform basis presents practical problems for members and candidates because of differences in timing and methods of communication with various types of customers and clients. Members and candidates should encourage their firms to design an equitable system to prevent selective or discriminatory disclosure and should inform clients about what kind of communications they will receive.

The duty to clients imposed by Standard III(B) may be more critical when members or candidates change their recommendations than when they make initial recommendations. Material changes in a member's or candidate's prior investment recommendations because of subsequent research should be communicated to all current clients; particular care should be taken that the information reaches those clients who the member or candidate knows have acted on or been affected by the earlier advice. Clients who do not know that the member or candidate has changed a recommendation and who, therefore, place orders contrary to a current recommendation should be advised of the changed recommendation before the order is accepted.

Investment Action

The second category of conduct includes those members and candidates whose primary function is taking investment action (portfolio management) on the basis of recommendations prepared internally or received from external sources. Investment action, like investment recommendations, can affect market value. Consequently, Standard III(B) requires that members or candidates treat all clients fairly in light of their investment objectives and circumstances. For example, when making investments in new offerings or in secondary financings, members and

candidates should distribute the issues to all customers for whom the investments are appropriate in a manner consistent with the policies of the firm for allocating blocks of stock. If the issue is oversubscribed, then the issue should be prorated to all subscribers. This action should be taken on a round-lot basis to avoid odd-lot distributions. In addition, if the issue is oversubscribed, members and candidates should forgo any sales to themselves or their immediate families in order to free up additional shares for clients. If the investment professional's family-member accounts are managed similarly to the accounts of other clients of the firm, however, the family-member accounts should not be excluded from buying such shares.

Members and candidates must make every effort to treat all individual and institutional clients in a fair and impartial manner. A member or candidate may have multiple relationships with an institution; for example, the member or candidate may be a corporate trustee, pension fund manager, manager of funds for individuals employed by the customer, loan originator, or creditor. A member or candidate must exercise care to treat all clients fairly.

Members and candidates should disclose to clients and prospective clients the documented allocation procedures they or their firms have in place and how the procedures would affect the client or prospect. The disclosure should be clear and complete so that the client can make an informed investment decision. Even when complete disclosure is made, however, members and candidates must put client interests ahead of their own. A member's or candidate's duty of fairness and loyalty to clients can never be overridden by client consent to patently unfair allocation procedures.

Treating clients fairly also means that members and candidates should not take advantage of their position in the industry to the detriment of clients. For instance, in the context of IPOs, members and candidates must make bona fide public distributions of "hot issue" securities (defined as securities of a public offering that are trading at a premium in the secondary market whenever such trading commences because of the great demand for the securities). Members and candidates are prohibited from withholding such securities for their own benefit and must not use such securities as a reward or incentive to gain benefit.

Recommended Procedures for Compliance

Develop Firm Policies

Although Standard III(B) refers to a member's or candidate's responsibility to deal fairly and objectively with clients, members and candidates should also encourage their firms to establish compliance procedures requiring all employees who disseminate investment recommendations or take investment actions to treat customers and clients fairly. At the very least, a member or candidate should recommend appropriate procedures to management if none are in place. And the member or candidate should make management aware of possible violations of fair-dealing practices within the firm when they come to the attention of the member or candidate.

The extent of the formality and complexity of such compliance procedures depends on the nature and size of the organization and the type of securities

involved. An investment adviser who is a sole proprietor and handles only discretionary accounts might not disseminate recommendations to the public, but that adviser should have formal written procedures to ensure that all clients receive fair investment action.

Good business practice dictates that initial recommendations be made available to all customers who indicate an interest. Although a member or candidate need not communicate a recommendation to all customers, the selection process by which customers receive information should be based on suitability and known interest, not on any preferred or favored status. A common practice to assure fair dealing is to communicate recommendations simultaneously within the firm and to customers.

Members and candidates should consider the following points when establishing fair-dealing compliance procedures:

- *Limit the number of people involved*: Members and candidates should make reasonable efforts to limit the number of people who are privy to the fact that a recommendation is going to be disseminated.
- *Shorten the time frame between decision and dissemination*: Members and candidates should make reasonable efforts to limit the amount of time that elapses between the decision to make an investment recommendation and the time the actual recommendation is disseminated. If a detailed institutional recommendation that might take two or three weeks to publish is in preparation, a short summary report including the conclusion might be published in advance. In an organization where both a research committee and an investment policy committee must approve a recommendation, the meetings should be held on the same day if possible. The process of reviewing reports and printing and mailing them, faxing them, or distributing them by e-mail necessarily involves the passage of time, sometimes long periods of time. In large firms with extensive review processes, the time factor is usually not within the control of the analyst who prepares the report. Thus, many firms and their analysts communicate to customers and firm personnel the new or changed recommendations by an update or "flash" report. The communication technique might be fax, e-mail, wire, or short written report.
- *Publish guidelines for pre-dissemination behavior*: Members and candidates should encourage firms to develop guidelines that prohibit personnel who have prior knowledge of an investment recommendation from discussing or taking any action on the pending recommendation.
- *Simultaneous dissemination*: Members and candidates should establish procedures for the timing of dissemination of investment recommendations so that all clients are treated fairly—that is, are informed at approximately the same time. For example, if a firm is going to announce a new recommendation, supervisory personnel should time the announcement to avoid placing any client or group of clients at an unfair advantage relative to other clients. A communication to all branch offices should be sent at the time of

the general announcement. (When appropriate, the firm should accompany the announcement of a new recommendation with a statement that trading restrictions for the firm's employees are now in effect. The trading restrictions should stay in effect until the recommendation is widely distributed to all relevant clients.) Once this distribution has occurred, the member or candidate may follow up separately with individual clients, but members and candidates should not give favored clients advance information when such advance notification may disadvantage other clients.

- *Maintain a list of clients and their holdings*: Members and candidates should maintain a list of all clients and the securities or other investments each client holds in order to facilitate notification of customers or clients of a change in an investment recommendation. If a particular security or other investment is to be sold, such a list can be used to ensure that all holders are treated fairly in the liquidation of that particular investment.
- *Develop and document trade allocation procedures*: When formulating procedures for allocating trades, members and candidates should develop a set of guiding principles that ensure
  - fairness to advisory clients, both in priority of execution of orders and in the allocation of the price obtained in execution of block orders or trades,
  - timeliness and efficiency in the execution of orders, and
  - accuracy of the member's or candidate's records as to trade orders and client account positions.

With these principles in mind, members and candidates should develop or encourage their firm to develop written allocation procedures, with particular attention to procedures for block trades and new issues. Procedures to consider are as follows:

- requiring orders and modifications or cancellations of orders to be documented and time stamped;
- processing and executing orders on a first-in, first-out basis with consideration of bundling orders for efficiency as appropriate for the asset class or the security;
- developing a policy to address such issues as calculating execution prices and "partial fills" when trades are grouped, or in a block, for efficiency;
- giving all client accounts participating in a block trade the same execution price and charging the same commission;
- when the full amount of the block order is not executed, allocating partially executed orders among the participating client accounts pro rata on the basis of order size while not going below an established minimum lot size for some securities (e.g., bonds); and

- when allocating trades for new issues, obtaining advance indications of interest, allocating securities by client (rather than portfolio manager), and providing a method for calculating allocations.

Disclose Trade Allocation Procedures

Members and candidates should disclose to clients and prospective clients how they select accounts to participate in an order and how they determine the amount of securities each account will buy or sell. Trade allocation procedures must be fair and equitable, and disclosure of inequitable allocation methods does not relieve the member or candidate of this obligation.

Establish Systematic Account Review

Member and candidate supervisors should review each account on a regular basis to ensure that no client or customer is being given preferential treatment and that the investment actions taken for each account are suitable for each account's objectives. Because investments should be based on individual needs and circumstances, an investment manager may have good reasons for placing a given security or other investment in one account while selling it from another account and should fully document the reasons behind both sides of the transaction. Members and candidates should encourage firms to establish review procedures, however, to detect whether trading in one account is being used to benefit a favored client.

Disclose Levels of Service

Members and candidates should disclose to all clients whether the organization offers different levels of service to clients for the same fee or different fees. Different levels of service should not be offered to clients selectively.

Application of the Standard

Example 1 (Selective Disclosure):

Bradley Ames, a well-known and respected analyst, follows the computer industry. In the course of his research, he finds that a small, relatively unknown company whose shares are traded over the counter has just signed significant contracts with some of the companies he follows. After a considerable amount of investigation, Ames decides to write a research report on the small company and recommend purchase of its shares. While the report is being reviewed by the company for factual accuracy, Ames schedules a luncheon with several of his best clients to discuss the company. At the luncheon, he mentions the purchase recommendation scheduled to be sent early the following week to all the firm's clients.

> *Comment*: Ames has violated Standard III(B) by disseminating the purchase recommendation to the clients with whom he has lunch a week before the recommendation is sent to all clients.

Example 2 (Fair Dealing between Funds):

Spencer Rivers, president of XYZ Corporation, moves his company's growth-oriented pension fund to a particular bank primarily because of the excellent investment performance achieved by the bank's commingled fund for the prior five-year period. Later, Rivers compares the results of his pension fund with those of the bank's commingled fund. He is startled to learn that, even though the two accounts have the same investment objectives and similar portfolios, his company's pension fund has significantly underperformed the bank's commingled fund. Questioning this result at his next meeting with the pension fund's manager, Rivers is told that, as a matter of policy, when a new security is placed on the recommended list, Morgan Jackson, the pension fund manager, first purchases the security for the commingled account and then purchases it on a pro rata basis for all other pension fund accounts. Similarly, when a sale is recommended, the security is sold first from the commingled account and then sold on a pro rata basis from all other accounts. Rivers also learns that if the bank cannot get enough shares (especially of hot issues) to be meaningful to all the accounts, its policy is to place the new issues only in the commingled account.

Seeing that Rivers is neither satisfied nor pleased by the explanation, Jackson quickly adds that nondiscretionary pension accounts and personal trust accounts have a lower priority on purchase and sale recommendations than discretionary pension fund accounts. Furthermore, Jackson states, the company's pension fund had the opportunity to invest up to 5% in the commingled fund.

> *Comment*: The bank's policy does not treat all customers fairly, and Jackson has violated her duty to her clients by giving priority to the growth-oriented commingled fund over all other funds and to discretionary accounts over nondiscretionary accounts. Jackson must execute orders on a systematic basis that is fair to all clients. In addition, trade allocation procedures should be disclosed to all clients when they become clients. Of course, in this case, disclosure of the bank's policy would not change the fact that the policy is unfair.

Example 3 (Fair Dealing and IPO Distribution):

Dominic Morris works for a small regional securities firm. His work consists of corporate finance activities and investing for institutional clients. Arena, Ltd., is planning to go public. The partners have secured rights to buy an arena football league franchise and are planning to use the funds from the issue to complete the purchase. Because arena football is the current rage, Morris believes he has a hot issue on his hands. He has quietly negotiated some options for himself for helping convince Arena to do the financing through his securities firm. When he seeks expressions of interest, the institutional buyers oversubscribe the issue. Morris, assuming that the institutions have the financial clout to drive the stock up, then fills all orders (including his own) and decreases the institutional blocks.

Comment: Morris has violated Standard III(B) by not treating all customers fairly. He should not have taken any shares himself and should have prorated the shares offered among all clients. In addition, he should have disclosed to his firm and to his clients that he received options as part of the deal [see Standard VI(A)–Disclosure of Conflicts].

Example 4 (Fair Dealing and Transaction Allocation):

Eleanor Preston, the chief investment officer of Porter Williams Investments (PWI), a medium-size money management firm, has been trying to retain a client, Colby Company. Management at Colby, which accounts for almost half of PWI's revenues, recently told Preston that if the performance of its account did not improve, it would find a new money manager. Shortly after this threat, Preston purchases mortgage-backed securities (MBSs) for several accounts, including Colby's. Preston is busy with a number of transactions that day, so she fails to allocate the trades immediately or write up the trade tickets. A few days later, when Preston is allocating trades, she notes that some of the MBSs have significantly increased in price and some have dropped. Preston decides to allocate the profitable trades to Colby and spread the losing trades among several other PWI accounts.

Comment: Preston has violated Standard III(B) by failing to deal fairly with her clients in taking these investment actions. Preston should have allocated the trades prior to executing the orders, or she should have had a systematic approach to allocating the trades, such as pro rata, as soon as practical after they were executed. Among other things, Preston must disclose to the client that the adviser may act as broker for, receive commissions from, and have a potential conflict of interest regarding both parties in agency cross-transactions. After the disclosure, she should obtain from the client consent authorizing such transactions in advance.

Example 5 (Selective Disclosure):

Saunders Industrial Waste Management (SIWM) publicly indicates to analysts that it is comfortable with the somewhat disappointing earnings-per-share projection of US$1.16 for the quarter. Bernard Roberts, an analyst at Coffey Investments, is confident that SIWM management has understated the forecasted earnings so that the real announcement will cause an "upside surprise" and boost the price of SIWM stock. The "whisper number" (rumored) estimate based on extensive research and discussed among knowledgeable analysts is higher than US$1.16. Roberts repeats the US$1.16 figure in his research report to all Coffey clients but informally tells his large clients that he expects the earnings per share to be higher, making SIWM a good buy.

Comment: By not sharing his opinion regarding the potential for a significant upside earnings surprise with all clients, Roberts is not treating all clients fairly and has violated Standard III(B).

Example 6 (Additional Services for Select Clients):

Jenpin Weng uses e-mail to issue a new recommendation to all his clients. He then calls his three largest institutional clients to discuss the recommendation in detail.

> *Comment*: Weng has not violated Standard III(B) because he widely disseminated the recommendation and provided the information to all his clients prior to discussing it with a select few. Weng's largest clients received additional personal service because they presumably pay higher fees or because they have a large amount of assets under Weng's management. If Weng had discussed the report with a select group of clients prior to distributing it to all his clients, he would have violated Standard III(B).

Example 7 (Minimum Lot Allocations):

Lynn Hampton is a well-respected private wealth manager in her community with a diversified client base. She determines that a new 10-year bond being offered by Healthy Pharmaceuticals is appropriate for five of her clients. Three clients request to purchase US$10,000 each, and the other two request US$50,000 each. The minimum lot size is established at US$5,000, and the issue is oversubscribed at the time of placement. Her firm's policy is that odd-lot allocations, especially those below the minimum, should be avoided because they may affect the liquidity of the security at the time of sale.

Hampton is informed she will receive only US$55,000 of the offering for all accounts. Hampton distributes the bond investments as follows: The three accounts that requested US$10,000 are allocated US$5,000 each, and the two accounts that requested US$50,000 are allocated US$20,000 each.

> *Comment*: Hampton has not violated Standard III(B), even though the distribution is not on a completely pro rata basis because of the required minimum lot size. With the total allocation being significantly below the amount requested, Hampton ensured that each client received at least the minimum lot size of the issue. This approach allowed the clients to efficiently sell the bond later if necessary.

Example 8 (Excessive Trading):

Ling Chan manages the accounts for many pension plans, including the plan of his father's employer. Chan developed similar but not identical investment policies for each client, so the investment portfolios are rarely the same. To minimize the cost to his father's pension plan, he intentionally trades more frequently in the accounts of other clients to ensure the required brokerage is incurred to continue receiving free research for use by all the pensions.

> *Comment*: Chan is violating Standard III(B) because his trading actions are disadvantaging his clients to enhance a relationship with a preferred client. All clients are benefiting from the research being provided and should incur their fair portion of the costs. This does not mean that

additional trading should occur if a client has not paid an equal portion of the commission; trading should occur only as required by the strategy.

Example 9 (Limited Social Media Disclosures):

Mary Burdette was recently hired by Fundamental Investment Management (FIM) as a junior auto industry analyst. Burdette is expected to expand the social media presence of the firm because she is active with various networks, including Facebook, LinkedIn, and Twitter. Although Burdette's supervisor, Joe Graf, has never used social media, he encourages Burdette to explore opportunities to increase FIM's online presence and ability to share content, communicate, and broadcast information to clients. In response to Graf's encouragement, Burdette is working on a proposal detailing the advantages of getting FIM onto Twitter in addition to launching a company Facebook page.

As part of her auto industry research for FIM, Burdette is completing a report on the financial impact of Sun Drive Auto Ltd.'s new solar technology for compact automobiles. This research report will be her first for FIM, and she believes Sun Drive's technology could revolutionize the auto industry. In her excitement, Burdette sends a quick tweet to FIM Twitter followers summarizing her "buy" recommendation for Sun Drive Auto stock.

Comment: Burdette has violated Standard III(B) by sending an investment recommendation to a select group of contacts prior to distributing it to all clients. Burdette must make sure she has received the appropriate training about FIM's policies and procedures, including the appropriate business use of personal social media networks before engaging in such activities.

See Standard IV(C) for guidance related to the duties of the supervisor.

Example 10 (Fair Dealing between Clients):

Paul Rove, performance analyst for Alpha-Beta Investment Management, is describing to the firm's chief investment officer (CIO) two new reports he would like to develop to assist the firm in meeting its obligations to treat clients fairly. Because many of the firm's clients have similar investment objectives and portfolios, Rove suggests a report detailing securities owned across several clients and the percentage of the portfolio the security represents. The second report would compare the monthly performance of portfolios with similar strategies. The outliers within each report would be submitted to the CIO for review.

Comment: As a performance analyst, Rove likely has little direct contact with clients and thus has limited opportunity to treat clients differently. The recommended reports comply with Standard III(B) while helping the firm conduct after-the-fact reviews of how effectively the firm's advisers are dealing with their clients' portfolios. Reports that monitor the fair treatment of clients are an important oversight tool to ensure that clients are treated fairly.

Standard III(C) Suitability

1. When Members and Candidates are in an advisory relationship with a client, they must:
   a. Make a reasonable inquiry into a client's or prospective client's investment experience, risk and return objectives, and financial constraints prior to making any investment recommendation or taking investment action and must reassess and update this information regularly.
   b. Determine that an investment is suitable to the client's financial situation and consistent with the client's written objectives, mandates, and constraints before making an investment recommendation or taking investment action.
   c. Judge the suitability of investments in the context of the client's total portfolio.
2. When Members and Candidates are responsible for managing a portfolio to a specific mandate, strategy, or style, they must make only investment recommendations or take only investment actions that are consistent with the stated objectives and constraints of the portfolio.

Guidance

Highlights:

- *Developing an Investment Policy*
- *Understanding the Client's Risk Profile*
- *Updating an Investment Policy*
- *The Need for Diversification*
- *Addressing Unsolicited Trading Requests*
- *Managing to an Index or Mandate*

Standard III(C) requires that members and candidates who are in an investment advisory relationship with clients consider carefully the needs, circumstances, and objectives of the clients when determining the appropriateness and suitability of a given investment or course of investment action. An appropriate suitability determination will not, however, prevent some investments or investment actions from losing value.

In judging the suitability of a potential investment, the member or candidate should review many aspects of the client's knowledge, experience related to

investing, and financial situation. These aspects include, but are not limited to, the risk profile of the investment as compared with the constraints of the client, the impact of the investment on the diversity of the portfolio, and whether the client has the means or net worth to assume the associated risk. The investment professional's determination of suitability should reflect only the investment recommendations or actions that a prudent person would be willing to undertake. Not every investment opportunity will be suitable for every portfolio, regardless of the potential return being offered.

The responsibilities of members and candidates to gather information and make a suitability analysis prior to making a recommendation or taking investment action fall on those members and candidates who provide investment advice in the course of an advisory relationship with a client. Other members and candidates may be simply executing specific instructions for retail clients when buying or selling securities, such as shares in mutual funds. These members and candidates and some others, such as sell-side analysts, may not have the opportunity to judge the suitability of a particular investment for the ultimate client.

Developing an Investment Policy

When an advisory relationship exists, members and candidates must gather client information at the inception of the relationship. Such information includes the client's financial circumstances, personal data (such as age and occupation) that are relevant to investment decisions, attitudes toward risk, and objectives in investing. This information should be incorporated into a written investment policy statement (IPS) that addresses the client's risk tolerance, return requirements, and all investment constraints (including time horizon, liquidity needs, tax concerns, legal and regulatory factors, and unique circumstances). Without identifying such client factors, members and candidates cannot judge whether a particular investment or strategy is suitable for a particular client. The IPS also should identify and describe the roles and responsibilities of the parties to the advisory relationship and investment process, as well as schedules for review and evaluation of the IPS. After formulating long-term capital market expectations, members and candidates can assist in developing an appropriate strategic asset allocation and investment program for the client, whether these are presented in separate documents or incorporated in the IPS or in appendices to the IPS.

Understanding the Client's Risk Profile

One of the most important factors to be considered in matching appropriateness and suitability of an investment with a client's needs and circumstances is measuring that client's tolerance for risk. The investment professional must consider the possibilities of rapidly changing investment environments and their likely impact on a client's holdings, both individual securities and the collective portfolio. The risk of many investment strategies can and should be analyzed and quantified in advance.

The use of synthetic investment vehicles and derivative investment products has introduced particular issues of risk. Members and candidates should pay

careful attention to the leverage inherent in many of these vehicles or products when considering them for use in a client's investment program. Such leverage and limited liquidity, depending on the degree to which they are hedged, bear directly on the issue of suitability for the client.

Updating an Investment Policy

Updating the IPS should be repeated at least annually and also prior to material changes to any specific investment recommendations or decisions on behalf of the client. The effort to determine the needs and circumstances of each client is not a one-time occurrence. Investment recommendations or decisions are usually part of an ongoing process that takes into account the diversity and changing nature of portfolio and client characteristics. The passage of time is bound to produce changes that are important with respect to investment objectives.

For an individual client, important changes might include the number of dependents, personal tax status, health, liquidity needs, risk tolerance, amount of wealth beyond that represented in the portfolio, and extent to which compensation and other income provide for current income needs. With respect to an institutional client, such changes might relate to the magnitude of unfunded liabilities in a pension fund, the withdrawal privileges in an employee savings plan, or the distribution requirements of a charitable foundation. Without efforts to update information concerning client factors, one or more factors could change without the investment manager's knowledge.

Suitability review can be done most effectively when the client fully discloses his or her complete financial portfolio, including those portions not managed by the member or candidate. If clients withhold information about their financial portfolios, the suitability analysis conducted by members and candidates cannot be expected to be complete; it must be based on the information provided.

The Need for Diversification

The investment profession has long recognized that combining several different investments is likely to provide a more acceptable level of risk exposure than having all assets in a single investment. The unique characteristics (or risks) of an individual investment may become partially or entirely neutralized when it is combined with other individual investments within a portfolio. Some reasonable amount of diversification is thus the norm for many portfolios, especially those managed by individuals or institutions that have some degree of legal fiduciary responsibility.

An investment with high relative risk on its own may be a suitable investment in the context of the entire portfolio or when the client's stated objectives contemplate speculative or risky investments. The manager may be responsible for only a portion of the client's total portfolio, or the client may not have provided a full financial picture. Members and candidates can be responsible for assessing the suitability of an investment only on the basis of the information and criteria actually provided by the client.

Addressing Unsolicited Trading Requests

Members and candidates may receive requests from a client for trades that do not properly align with the risk and return objectives outlined in the client's investment policy statement. These transaction requests may be based on the client's individual biases or professional experience. Members and candidates will need to make reasonable efforts to balance their clients' trading requests with their responsibilities to follow the agreed-on investment policy statement.

In cases of unsolicited trade requests that a member or candidate knows are unsuitable for a client, the member or candidate should refrain from making the trade until he or she discusses the concerns with the client. The discussions and resulting actions may encompass a variety of scenarios depending on how the requested unsuitable investment relates to the client's full portfolio.

Many times, an unsolicited request may be expected to have only a minimum impact on the entire portfolio because the size of the requested trade is small or the trade would result in a limited change to the portfolio's risk profile. In discussing the trade, the member or candidate should focus on educating the investor on how the request deviates from the current policy statement. Following the discussion, the member or candidate may follow his or her firm's policies regarding the necessary client approval for executing unsuitable trades. At a minimum, the client should acknowledge the discussion and accept the conditions that make the recommendation unsuitable.

Should the unsolicited request be expected to have a material impact on the portfolio, the member or candidate should use this opportunity to update the investment policy statement. Doing so would allow the client to fully understand the potential effect of the requested trade on his or her current goals or risk levels.

Members and candidates may have some clients who decline to modify their policy statements while insisting an unsolicited trade be made. In such instances, members or candidates will need to evaluate the effectiveness of their services to the client. The options available to the members or candidates will depend on the services provided by their employer. Some firms may allow for the trade to be executed in a new unmanaged account. If alternative options are not available, members and candidates ultimately will need to determine whether they should continue the advisory arrangement with the client.

Managing to an Index or Mandate

Some members and candidates do not manage money for individuals but are responsible for managing a fund to an index or an expected mandate. The responsibility of these members and candidates is to invest in a manner consistent with the stated mandate. For example, a member or candidate who serves as the fund manager for a large-cap income fund would not be following the fund mandate by investing heavily in small-cap or start-up companies whose stock is speculative in nature. Members and candidates who manage pooled assets to a specific mandate are not responsible for determining the suitability of the *fund* as an investment for investors who may be purchasing shares in the fund. The responsibility for

determining the suitability of an investment for clients can be conferred only on members and candidates who have an advisory relationship with clients.

Recommended Procedures for Compliance

Investment Policy Statement

To fulfill the basic provisions of Standard III(C), a member or candidate should put the needs and circumstances of each client and the client's investment objectives into a written investment policy statement. In formulating an investment policy for the client, the member or candidate should take the following into consideration:

- client identification—(1) type and nature of client, (2) the existence of separate beneficiaries, and (3) approximate portion of total client assets that the member or candidate is managing;
- investor objectives—(1) return objectives (income, growth in principal, maintenance of purchasing power) and (2) risk tolerance (suitability, stability of values);
- investor constraints—(1) liquidity needs, (2) expected cash flows (patterns of additions and/or withdrawals), (3) investable funds (assets and liabilities or other commitments), (4) time horizon, (5) tax considerations, (6) regulatory and legal circumstances, (7) investor preferences, prohibitions, circumstances, and unique needs, and (8) proxy voting responsibilities and guidance; and
- performance measurement benchmarks.

Regular Updates

The investor's objectives and constraints should be maintained and reviewed periodically to reflect any changes in the client's circumstances. Members and candidates should regularly compare client constraints with capital market expectations to arrive at an appropriate asset allocation. Changes in either factor may result in a fundamental change in asset allocation. Annual review is reasonable unless business or other reasons, such as a major change in market conditions, dictate more frequent review. Members and candidates should document attempts to carry out such a review if circumstances prevent it.

Suitability Test Policies

With the increase in regulatory required suitability tests, members and candidates should encourage their firms to develop related policies and procedures. The procedures will differ according to the size of the firm and the scope of the services offered to its clients.

The test procedures should require the investment professional to look beyond the potential return of the investment and include the following:

- an analysis of the impact on the portfolio's diversification,

- a comparison of the investment risks with the client's assessed risk tolerance, and
- the fit of the investment with the required investment strategy.

Application of the Standard

Example 1 (Investment Suitability—Risk Profile):

Caleb Smith, an investment adviser, has two clients: Larry Robertson, 60 years old, and Gabriel Lanai, 40 years old. Both clients earn roughly the same salary, but Robertson has a much higher risk tolerance because he has a large asset base. Robertson is willing to invest part of his assets very aggressively; Lanai wants only to achieve a steady rate of return with low volatility to pay for his children's education. Smith recommends investing 20% of both portfolios in zero-yield, small-cap, high-technology equity issues.

> *Comment*: In Robertson's case, the investment may be appropriate because of his financial circumstances and aggressive investment position, but this investment is not suitable for Lanai. Smith is violating Standard III(C) by applying Robertson's investment strategy to Lanai because the two clients' financial circumstances and objectives differ.

Example 2 (Investment Suitability—Entire Portfolio):

Jessica McDowell, an investment adviser, suggests to Brian Crosby, a risk-averse client, that covered call options be used in his equity portfolio. The purpose would be to enhance Crosby's income and partially offset any untimely depreciation in the portfolio's value should the stock market or other circumstances affect his holdings unfavorably. McDowell educates Crosby about all possible outcomes, including the risk of incurring an added tax liability if a stock rises in price and is called away and, conversely, the risk of his holdings losing protection on the downside if prices drop sharply.

> *Comment*: When determining suitability of an investment, the primary focus should be the characteristics of the client's entire portfolio, not the characteristics of single securities on an issue-by-issue basis. The basic characteristics of the entire portfolio will largely determine whether investment recommendations are taking client factors into account. Therefore, the most important aspects of a particular investment are those that will affect the characteristics of the total portfolio. In this case, McDowell properly considers the investment in the context of the entire portfolio and thoroughly explains the investment to the client.

Example 3 (IPS Updating):

In a regular meeting with client Seth Jones, the portfolio managers at Blue Chip Investment Advisors are careful to allow some time to review his current needs

and circumstances. In doing so, they learn that some significant changes have recently taken place in his life. A wealthy uncle left Jones an inheritance that increased his net worth fourfold, to US$1 million.

> *Comment*: The inheritance has significantly increased Jones's ability (and possibly his willingness) to assume risk and has diminished the average yield required to meet his current income needs. Jones's financial circumstances have definitely changed, so Blue Chip managers must update Jones's investment policy statement to reflect how his investment objectives have changed. Accordingly, the Blue Chip portfolio managers should consider a somewhat higher equity ratio for his portfolio than was called for by the previous circumstances, and the managers' specific common stock recommendations might be heavily tilted toward low-yield, growth-oriented issues.

Example 4 (Following an Investment Mandate):

Louis Perkowski manages a high-income mutual fund. He purchases zero-dividend stock in a financial services company because he believes the stock is undervalued and is in a potential growth industry, which makes it an attractive investment.

> *Comment*: A zero-dividend stock does not seem to fit the mandate of the fund that Perkowski is managing. Unless Perkowski's investment fits within the mandate or is within the realm of allowable investments the fund has made clear in its disclosures, Perkowski has violated Standard III(C).

Example 5 (IPS Requirements and Limitations):

Max Gubler, chief investment officer of a property/casualty insurance subsidiary of a large financial conglomerate, wants to improve the diversification of the subsidiary's investment portfolio and increase its returns. The subsidiary's investment policy statement provides for highly liquid investments, such as large-cap equities and government, supranational, and corporate bonds with a minimum credit rating of AA and maturity of no more than five years. In a recent presentation, a venture capital group offered very attractive prospective returns on some of its private equity funds that provide seed capital to ventures. An exit strategy was already contemplated, but investors would have to observe a minimum three-year lockup period and a subsequent laddered exit option for a maximum of one-third of their shares per year. Gubler does not want to miss this opportunity. After extensive analysis, with the intent to optimize the return on the equity assets within the subsidiary's current portfolio, he invests 4% in this seed fund, leaving the portfolio's total equity exposure still well below its upper limit.

> *Comment*: Gubler is violating Standard III(A)–Loyalty, Prudence, and Care as well as Standard III(C). His new investment locks up part of the subsidiary's assets for at least three years and up to as many as five years

and possibly beyond. The IPS requires investments in highly liquid investments and describes accepted asset classes; private equity investments with a lockup period certainly do not qualify. Even without a lockup period, an asset class with only an occasional, and thus implicitly illiquid, market may not be suitable for the portfolio. Although an IPS typically describes objectives and constraints in great detail, the manager must also make every effort to understand the client's business and circumstances. Doing so should enable the manager to recognize, understand, and discuss with the client other factors that may be or may become material in the investment management process.

Example 6 (Submanager and IPS Reviews):

Paul Ostrowski's investment management business has grown significantly over the past couple of years, and some clients want to diversify internationally. Ostrowski decides to find a submanager to handle the expected international investments. Because this will be his first subadviser, Ostrowski uses the CFA Institute model "request for proposal" to design a questionnaire for his search. By his deadline, he receives seven completed questionnaires from a variety of domestic and international firms trying to gain his business. Ostrowski reviews all the applications in detail and decides to select the firm that charges the lowest fees because doing so will have the least impact on his firm's bottom line.

Comment: When selecting an external manager or subadviser, Ostrowski needs to ensure that the new manager's services are appropriate for his clients. This due diligence includes comparing the risk profile of the clients with the investment strategy of the manager. In basing the decision on the fee structure alone, Ostrowski may be violating Standard III(C).

When clients ask to diversify into international products, it is an appropriate time to review and update the clients' IPSs. Ostrowski's review may determine that the risk of international investments modifies the risk profiles of the clients or does not represent an appropriate investment.

See also Standard V(A)–Diligence and Reasonable Basis for further discussion of the review process needed in selecting appropriate submanagers.

Example 7 (Investment Suitability—Risk Profile):

Samantha Snead, a portfolio manager for Thomas Investment Counsel, Inc., specializes in managing public retirement funds and defined benefit pension plan accounts, all of which have long-term investment objectives. A year ago, Snead's employer, in an attempt to motivate and retain key investment professionals, introduced a bonus compensation system that rewards portfolio managers on the basis of quarterly performance relative to their peers and to certain benchmark indices. In an attempt to improve the short-term performance of her accounts, Snead changes her investment strategy and purchases several high-beta stocks for client portfolios. These purchases

are seemingly contrary to the clients' investment policy statements. Following their purchase, an officer of Griffin Corporation, one of Snead's pension fund clients, asks why Griffin Corporation's portfolio seems to be dominated by high-beta stocks of companies that often appear among the most actively traded issues. No change in objective or strategy has been recommended by Snead during the year.

Comment: Snead violated Standard III(C) by investing the clients' assets in high-beta stocks. These high-risk investments are contrary to the long-term risk profile established in the clients' IPSs. Snead has changed the investment strategy of the clients in an attempt to reap short-term rewards offered by her firm's new compensation arrangement, not in response to changes in clients' investment policy statements.

See also Standard VI(A)–Disclosure of Conflicts.

Example 8 (Investment Suitability):

Andre Shrub owns and operates Conduit, an investment advisory firm. Prior to opening Conduit, Shrub was an account manager with Elite Investment, a hedge fund managed by his good friend Adam Reed. To attract clients to a new Conduit fund, Shrub offers lower-than-normal management fees. He can do so because the fund consists of two top-performing funds managed by Reed. Given his personal friendship with Reed and the prior performance record of these two funds, Shrub believes this new fund is a winning combination for all parties. Clients quickly invest with Conduit to gain access to the Elite funds. No one is turned away because Conduit is seeking to expand its assets under management.

Comment: Shrub has violated Standard III(C) because the risk profile of the new fund may not be suitable for every client. As an investment adviser, Shrub needs to establish an investment policy statement for each client and recommend only investments that match each client's risk and return profile in the IPS. Shrub is required to act as more than a simple sales agent for Elite.

Although Shrub cannot disobey the direct request of a client to purchase a specific security, he should fully discuss the risks of a planned purchase and provide reasons why it might not be suitable for a client. This requirement may lead members and candidates to decline new customers if those customers' requested investment decisions are significantly out of line with their stated requirements.

See also Standard V(A)–Diligence and Reasonable Basis.

Standard III(D) Performance Presentation

> When communicating investment performance information, Members and Candidates must make reasonable efforts to ensure that it is fair, accurate, and complete.

Guidance

Standard III(D) requires members and candidates to provide credible performance information to clients and prospective clients and to avoid misstating performance or misleading clients and prospective clients about the investment performance of members or candidates or their firms. This standard encourages full disclosure of investment performance data to clients and prospective clients.

Standard III(D) covers any practice that would lead to misrepresentation of a member's or candidate's performance record, whether the practice involves performance presentation or performance measurement. This standard prohibits misrepresentations of past performance or reasonably expected performance. A member or candidate must give a fair and complete presentation of performance information whenever communicating data with respect to the performance history of individual accounts, composites or groups of accounts, or composites of an analyst's or firm's performance results. Furthermore, members and candidates should not state or imply that clients will obtain or benefit from a rate of return that was generated in the past.

The requirements of this standard are not limited to members and candidates managing separate accounts. Whenever a member or candidate provides performance information for which the manager is claiming responsibility, such as for pooled funds, the history must be accurate. Research analysts promoting the success or accuracy of their recommendations must ensure that their claims are fair, accurate, and complete.

If the presentation is brief, the member or candidate must make available to clients and prospects, on request, the detailed information supporting that communication. Best practice dictates that brief presentations include a reference to the limited nature of the information provided.

Recommended Procedures for Compliance

Apply the GIPS Standards

For members and candidates who are showing the performance history of the assets they manage, compliance with the GIPS standards is the best method to meet their obligations under Standard III(D). Members and candidates should encourage their firms to comply with the GIPS standards.

Compliance without Applying GIPS Standards

Members and candidates can also meet their obligations under Standard III(D) by

- considering the knowledge and sophistication of the audience to whom a performance presentation is addressed,
- presenting the performance of the weighted composite of similar portfolios rather than using a single representative account,
- including terminated accounts as part of performance history with a clear indication of when the accounts were terminated,
- including disclosures that fully explain the performance results being reported (for example, stating, when appropriate, that results are simulated when model results are used, clearly indicating when the performance record is that of a prior entity, or disclosing whether the performance is gross of fees, net of fees, or after tax), and
- maintaining the data and records used to calculate the performance being presented.

Application of the Standard

Example 1 (Performance Calculation and Length of Time):

Kyle Taylor of Taylor Trust Company, noting the performance of Taylor's common trust fund for the past two years, states in a brochure sent to his potential clients, "You can expect steady 25% annual compound growth of the value of your investments over the year." Taylor Trust's common trust fund did increase at the rate of 25% per year for the past year, which mirrored the increase of the entire market. The fund has never averaged that growth for more than one year, however, and the average rate of growth of all of its trust accounts for five years is 5% per year.

> *Comment*: Taylor's brochure is in violation of Standard III(D). Taylor should have disclosed that the 25% growth occurred only in one year. Additionally, Taylor did not include client accounts other than those in the firm's common trust fund. A general claim of firm performance should take into account the performance of all categories of accounts. Finally, by stating that clients can expect a steady 25% annual compound growth rate, Taylor is also violating Standard I(C)–Misrepresentation, which prohibits assurances or guarantees regarding an investment.

Example 2 (Performance Calculation and Asset Weighting):

Anna Judd, a senior partner of Alexander Capital Management, circulates a performance report for the capital appreciation accounts for the years 1988 through 2004. The firm claims compliance with the GIPS standards. Returns are not

calculated in accordance with the requirements of the GIPS standards, however, because the composites are not asset weighted.

Comment: Judd is in violation of Standard III(D). When claiming compliance with the GIPS standards, firms must meet *all* of the requirements, make mandatory disclosures, and meet any other requirements that apply to that firm's specific situation. Judd's violation is not from any misuse of the data but from a false claim of GIPS compliance.

Example 3 (Performance Presentation and Prior Fund/Employer):

Aaron McCoy is vice president and managing partner of the equity investment group of Mastermind Financial Advisors, a new business. Mastermind recruited McCoy because he had a proven six-year track record with G&P Financial. In developing Mastermind's advertising and marketing campaign, McCoy prepares an advertisement that includes the equity investment performance he achieved at G&P Financial. The advertisement for Mastermind does not identify the equity performance as being earned while at G&P. The advertisement is distributed to existing clients and prospective clients of Mastermind.

Comment: McCoy has violated Standard III(D) by distributing an advertisement that contains material misrepresentations about the historical performance of Mastermind. Standard III(D) requires that members and candidates make every reasonable effort to ensure that performance information is a fair, accurate, and complete representation of an individual's or firm's performance. As a general matter, this standard does not prohibit showing past performance of funds managed at a prior firm as part of a performance track record as long as showing that record is accompanied by appropriate disclosures about where the performance took place and the person's specific role in achieving that performance. If McCoy chooses to use his past performance from G&P in Mastermind's advertising, he should make full disclosure of the source of the historical performance.

Example 4 (Performance Presentation and Simulated Results):

Jed Davis has developed a mutual fund selection product based on historical information from the 1990–95 period. Davis tested his methodology by applying it retroactively to data from the 1996–2003 period, thus producing simulated performance results for those years. In January 2004, Davis's employer decided to offer the product and Davis began promoting it through trade journal advertisements and direct dissemination to clients. The advertisements included the performance results for the 1996–2003 period but did not indicate that the results were simulated.

Comment: Davis violated Standard III(D) by failing to clearly identify simulated performance results. Standard III(D) prohibits members and candidates from making any statements that misrepresent the

performance achieved by them or their firms and requires members and candidates to make every reasonable effort to ensure that performance information presented to clients is fair, accurate, and complete. Use of simulated results should be accompanied by full disclosure as to the source of the performance data, including the fact that the results from 1995 through 2003 were the result of applying the model retroactively to that time period.

Example 5 (Performance Calculation and Selected Accounts Only):

In a presentation prepared for prospective clients, William Kilmer shows the rates of return realized over a five-year period by a "composite" of his firm's discretionary accounts that have a "balanced" objective. This composite, however, consisted of only a few of the accounts that met the balanced criterion set by the firm, excluded accounts under a certain asset level without disclosing the fact of their exclusion, and included accounts that did not have the balanced mandate because those accounts would boost the investment results. In addition, to achieve better results, Kilmer manipulated the narrow range of accounts included in the composite by changing the accounts that made up the composite over time.

Comment: Kilmer violated Standard III(D) by misrepresenting the facts in the promotional material sent to prospective clients, distorting his firm's performance record, and failing to include disclosures that would have clarified the presentation.

Example 6 (Performance Attribution Changes):

Art Purell is reviewing the quarterly performance attribution reports for distribution to clients. Purell works for an investment management firm with a bottom-up, fundamentals-driven investment process that seeks to add value through stock selection. The attribution methodology currently compares each stock with its sector. The attribution report indicates that the value added this quarter came from asset allocation and that stock selection contributed negatively to the calculated return.

Through running several different scenarios, Purell discovers that calculating attribution by comparing each stock with its industry and then rolling the effect to the sector level improves the appearance of the manager's stock selection activities. Because the firm defines the attribution terms and the results better reflect the stated strategy, Purell recommends that the client reports should use the revised methodology.

Comment: Modifying the attribution methodology without proper notifications to clients would fail to meet the requirements of Standard III(D). Purrell's recommendation is being done solely for the interest of the firm to improve its perceived ability to meet the stated investment strategy. Such changes are unfair to clients and obscure the facts regarding the firm's abilities.

Had Purell believed the new methodology offered improvements to the original model, then he would have needed to report the results of both calculations to the client. The report should also include the reasons why the new methodology is preferred, which would allow the client to make a meaningful comparison to prior results and provide a basis for comparing future attributions.

Example 7 (Performance Calculation Methodology Disclosure):

While developing a new reporting package for existing clients, Alisha Singh, a performance analyst, discovers that her company's new system automatically calculates both time-weighted and money-weighted returns. She asks the head of client services and retention which value would be preferred given that the firm has various investment strategies that include bonds, equities, securities without leverage, and alternatives. Singh is told not to label the return value so that the firm may show whichever value is greatest for the period.

Comment: Following these instructions would lead to Singh violating Standard III(D). In reporting inconsistent return values, Singh would not be providing complete information to the firm's clients. Full information is provided when clients have sufficient information to judge the performance generated by the firm.

Example 8 (Performance Calculation Methodology Disclosure):

Richmond Equity Investors manages a long–short equity fund in which clients can trade once a week (on Fridays). For transparency reasons, a daily net asset value of the fund is calculated by Richmond. The monthly fact sheets of the fund report month-to-date and year-to-date performance. Richmond publishes the performance based on the higher of the last trading day of the month (typically, not the last business day) or the last business day of the month as determined by Richmond. The fact sheet mentions only that the data are as of the end of the month, without giving the exact date. Maggie Clark, the investment performance analyst in charge of the calculations, is concerned about the frequent changes and asks her supervisor whether they are appropriate.

Comment: Clark's actions in questioning the changing performance metric comply with Standard III(D). She has shown concern that these changes are not presenting an accurate and complete picture of the performance generated.

Standard III(E) Preservation of Confidentiality

Members and Candidates must keep information about current, former, and prospective clients confidential unless:

1. The information concerns illegal activities on the part of the client;
2. Disclosure is required by law; or
3. The client or prospective client permits disclosure of the information.

Guidance

Highlights:

- *Status of Client*
- *Compliance with Laws*
- *Electronic Information and Security*
- *Professional Conduct Investigations by CFA Institute*

Standard III(E) requires that members and candidates preserve the confidentiality of information communicated to them by their clients, prospective clients, and former clients. This standard is applicable when (1) the member or candidate receives information because of his or her special ability to conduct a portion of the client's business or personal affairs and (2) the member or candidate receives information that arises from or is relevant to that portion of the client's business that is the subject of the special or confidential relationship. If disclosure of the information is required by law or the information concerns illegal activities by the client, however, the member or candidate may have an obligation to report the activities to the appropriate authorities.

Status of Client

This standard protects the confidentiality of client information even if the person or entity is no longer a client of the member or candidate. Therefore, members and candidates must continue to maintain the confidentiality of client records even after the client relationship has ended. If a client or former client expressly authorizes the member or candidate to disclose information, however, the member or candidate may follow the terms of the authorization and provide the information.

Compliance with Laws

As a general matter, members and candidates must comply with applicable law. If applicable law requires disclosure of client information in certain circumstances, members and candidates must comply with the law. Similarly, if applicable law

requires members and candidates to maintain confidentiality, even if the information concerns illegal activities on the part of the client, members and candidates should not disclose such information. Additionally, applicable laws, such as inter-departmental communication restrictions within financial institutions, can impose limitations on information flow about a client within an entity that may lead to a violation of confidentiality. When in doubt, members and candidates should consult with their employer's compliance personnel or legal counsel before disclosing confidential information about clients.

Electronic Information and Security

Because of the ever-increasing volume of electronically stored information, members and candidates need to be particularly aware of possible accidental disclosures. Many employers have strict policies about how to electronically communicate sensitive client information and store client information on personal laptops, mobile devices, or portable disk/flash drives. In recent years, regulatory authorities have imposed stricter data security laws applying to the use of mobile remote digital communication, including the use of social media, that must be considered. Standard III(E) does not require members or candidates to become experts in information security technology, but they should have a thorough understanding of the policies of their employer. The size and operations of the firm will lead to differing policies for ensuring the security of confidential information maintained within the firm. Members and candidates should encourage their firm to conduct regular periodic training on confidentiality procedures for all firm personnel, including portfolio associates, receptionists, and other non-investment staff who have routine direct contact with clients and their records.

Professional Conduct Investigations by CFA Institute

The requirements of Standard III(E) are not intended to prevent members and candidates from cooperating with an investigation by the CFA Institute Professional Conduct Program (PCP). When permissible under applicable law, members and candidates shall consider the PCP an extension of themselves when requested to provide information about a client in support of a PCP investigation into their own conduct. Members and candidates are encouraged to cooperate with investigations into the conduct of others. Any information turned over to the PCP is kept in the strictest confidence. Members and candidates will not be considered in violation of this standard by forwarding confidential information to the PCP.

Recommended Procedures for Compliance

The simplest, most conservative, and most effective way to comply with Standard III(E) is to avoid disclosing any information received from a client except to authorized fellow employees who are also working for the client. In some instances, however, a member or candidate may want to disclose information received from clients that is

outside the scope of the confidential relationship and does not involve illegal activities. Before making such a disclosure, a member or candidate should ask the following:

- In what context was the information disclosed? If disclosed in a discussion of work being performed for the client, is the information relevant to the work?
- Is the information background material that, if disclosed, will enable the member or candidate to improve service to the client?

Members and candidates need to understand and follow their firm's electronic information communication and storage procedures. If the firm does not have procedures in place, members and candidates should encourage the development of procedures that appropriately reflect the firm's size and business operations.

Communicating with Clients

Technological changes are constantly enhancing the methods that are used to communicate with clients and prospective clients. Members and candidates should make reasonable efforts to ensure that firm-supported communication methods and compliance procedures follow practices designed for preventing accidental distribution of confidential information. Given the rate at which technology changes, a regular review of privacy protection measures is encouraged.

Members and candidates should be diligent in discussing with clients the appropriate methods for providing confidential information. It is important to convey to clients that not all firm-sponsored resources may be appropriate for such communications.

Application of the Standard

Example 1 (Possessing Confidential Information):

Sarah Connor, a financial analyst employed by Johnson Investment Counselors, Inc., provides investment advice to the trustees of City Medical Center. The trustees have given her a number of internal reports concerning City Medical's needs for physical plant renovation and expansion. They have asked Connor to recommend investments that would generate capital appreciation in endowment funds to meet projected capital expenditures. Connor is approached by a local businessman, Thomas Kasey, who is considering a substantial contribution either to City Medical Center or to another local hospital. Kasey wants to find out the building plans of both institutions before making a decision, but he does not want to speak to the trustees.

> *Comment*: The trustees gave Connor the internal reports so she could advise them on how to manage their endowment funds. Because the information in the reports is clearly both confidential and within the scope of the confidential relationship, Standard III(E) requires that Connor refuse to divulge information to Kasey.

Example 2 (Disclosing Confidential Information):

Lynn Moody is an investment officer at the Lester Trust Company. She has an advisory customer who has talked to her about giving approximately US$50,000 to charity to reduce her income taxes. Moody is also treasurer of the Home for Indigent Widows (HIW), which is planning its annual giving campaign. HIW hopes to expand its list of prospects, particularly those capable of substantial gifts. Moody recommends that HIW's vice president for corporate gifts call on her customer and ask for a donation in the US$50,000 range.

> *Comment*: Even though the attempt to help the Home for Indigent Widows was well intended, Moody violated Standard III(E) by revealing confidential information about her client.

Example 3 (Disclosing Possible Illegal Activity):

Government officials approach Casey Samuel, the portfolio manager for Garcia Company's pension plan, to examine pension fund records. They tell her that Garcia's corporate tax returns are being audited and the pension fund is being reviewed. Two days earlier, Samuel had learned in a regular investment review with Garcia officers that potentially excessive and improper charges were being made to the pension plan by Garcia. Samuel consults her employer's general counsel and is advised that Garcia has probably violated tax and fiduciary regulations and laws.

> *Comment*: Samuel should inform her supervisor of these activities, and her employer should take steps, with Garcia, to remedy the violations. If that approach is not successful, Samuel and her employer should seek advice of legal counsel to determine the appropriate steps to be taken. Samuel may well have a duty to disclose the evidence she has of the continuing legal violations and to resign as asset manager for Garcia.

Example 4 (Disclosing Possible Illegal Activity):

David Bradford manages money for a family-owned real estate development corporation. He also manages the individual portfolios of several of the family members and officers of the corporation, including the chief financial officer (CFO). Based on the financial records of the corporation and some questionable practices of the CFO that Bradford has observed, Bradford believes that the CFO is embezzling money from the corporation and putting it into his personal investment account.

> *Comment*: Bradford should check with his firm's compliance department or appropriate legal counsel to determine whether applicable securities regulations require reporting the CFO's financial records.

Example 5 (Accidental Disclosure of Confidential Information):

Lynn Moody is an investment officer at the Lester Trust Company (LTC). She has stewardship of a significant number of individually managed taxable accounts.

In addition to receiving quarterly written reports, about a dozen high-net-worth individuals have indicated to Moody a willingness to receive communications about overall economic and financial market outlooks directly from her by way of a social media platform. Under the direction of her firm's technology and compliance departments, she established a new group page on an existing social media platform specifically for her clients. In the instructions provided to clients, Moody asked them to "join" the group so they may be granted access to the posted content. The instructions also advised clients that all comments posted would be available to the public and thus the platform was not an appropriate method for communicating personal or confidential information.

Six months later, in early January, Moody posted LTC's year-end "Market Outlook." The report outlined a new asset allocation strategy that the firm is adding to its recommendations in the new year. Moody introduced the publication with a note informing her clients that she would be discussing the changes with them individually in their upcoming meetings.

One of Moody's clients responded directly on the group page that his family recently experienced a major change in their financial profile. The client described highly personal and confidential details of the event. Unfortunately, all clients that were part of the group were also able to read the detailed posting until Moody was able to have the comment removed.

Comment: Moody has taken reasonable steps for protecting the confidentiality of client information while using the social media platform. She provided instructions clarifying that all information posted to the site would be publically viewable to all group members and warned against using this method for communicating confidential information. The accidental disclosure of confidential information by a client is not under Moody's control. Her actions to remove the information promptly once she became aware further align with Standard III(E).

In understanding the potential sensitivity clients express surrounding the confidentiality of personal information, this event highlights a need for further training. Moody might advocate for additional warnings or controls for clients when they consider using social media platforms for two-way communications.

Standard IV: Duties to Employers

Standard IV(A) Loyalty

> In matters related to their employment, Members and Candidates must act for the benefit of their employer and not deprive their employer of the advantage of their skills and abilities, divulge confidential information, or otherwise cause harm to their employer.

Guidance

Highlights:

- *Employer Responsibilities*
- *Independent Practice*
- *Leaving an Employer*
- *Use of Social Media*
- *Whistleblowing*
- *Nature of Employment*

Standard IV(A) requires members and candidates to protect the interests of their firm by refraining from any conduct that would injure the firm, deprive it of profit, or deprive it of the member's or candidate's skills and ability. Members and candidates must always place the interests of clients above the interests of their employer but should also consider the effects of their conduct on the sustainability and integrity of the employer firm. In matters related to their employment, members and candidates must not engage in conduct that harms the interests of their employer. Implicit in this standard is the obligation of members and candidates to comply with the policies and procedures established by their employers that govern the employer–employee relationship—to the extent that such policies and procedures do not conflict with applicable laws, rules, or regulations or the Code and Standards.

This standard is not meant to be a blanket requirement to place employer interests ahead of personal interests in all matters. The standard does not require members and candidates to subordinate important personal and family obligations to their work. Members and candidates should enter into a dialogue with their employer about balancing personal and employment obligations when personal matters may interfere with their work on a regular or significant basis.

Employer Responsibilities

The employer–employee relationship imposes duties and responsibilities on both parties. Employers must recognize the duties and responsibilities that they owe to their employees if they expect to have content and productive employees.

Members and candidates are encouraged to provide their employer with a copy of the Code and Standards. These materials will inform the employer of the responsibilities of a CFA Institute member or a candidate in the CFA Program. The Code and Standards also serve as a basis for questioning employer policies and practices that conflict with these responsibilities.

Employers are not obligated to adhere to the Code and Standards. In expecting to retain competent employees who are members and candidates, however, they should not develop conflicting policies and procedures. The employer is responsible for a positive working environment, which includes an ethical workplace. Senior management has the additional responsibility to devise compensation structures and incentive arrangements that do not encourage unethical behavior.

Independent Practice

Included in Standard IV(A) is the requirement that members and candidates abstain from independent competitive activity that could conflict with the interests of their employer. Although Standard IV(A) does not preclude members or candidates from entering into an independent business while still employed, members and candidates who plan to engage in independent practice for compensation must notify their employer and describe the types of services they will render to prospective independent clients, the expected duration of the services, and the compensation for the services. Members and candidates should not render services until they receive consent from their employer to all of the terms of the arrangement. "Practice" means any service that the employer currently makes available for remuneration. "Undertaking independent practice" means engaging in competitive business, as opposed to making preparations to begin such practice.

Leaving an Employer

When members and candidates are planning to leave their current employer, they must continue to act in the employer's best interest. They must not engage in any activities that would conflict with this duty until their resignation becomes effective. It is difficult to define specific guidelines for those members and candidates who are planning to compete with their employer as part of a new venture. The circumstances of each situation must be reviewed to distinguish permissible preparations from violations of duty. Activities that might constitute a violation, especially in combination, include the following:

- misappropriation of trade secrets,
- misuse of confidential information,
- solicitation of the employer's clients prior to cessation of employment,

- self-dealing (appropriating for one's own property a business opportunity or information belonging to one's employer), and
- misappropriation of clients or client lists.

A departing employee is generally free to make arrangements or preparations to go into a competitive business before terminating the relationship with his or her employer as long as such preparations do not breach the employee's duty of loyalty. A member or candidate who is contemplating seeking other employment must not contact existing clients or potential clients prior to leaving his or her employer for purposes of soliciting their business for the new employer. Once notice is provided to the employer of the intent to resign, the member or candidate must follow the employer's policies and procedures related to notifying clients of his or her planned departure. In addition, the member or candidate must not take records or files to a new employer without the written permission of the previous employer.

Once an employee has left the firm, the skills and experience that an employee obtained while employed are not "confidential" or "privileged" information. Similarly, simple knowledge of the names and existence of former clients is generally not confidential information unless deemed such by an agreement or by law. Standard IV(A) does not prohibit experience or knowledge gained at one employer from being used at another employer. Firm records or work performed on behalf of the firm that is stored in paper copy or electronically for the member's or candidate's convenience while employed, however, should be erased or returned to the employer unless the firm gives permission to keep those records after employment ends.

The standard does not prohibit former employees from contacting clients of their previous firm as long as the contact information does not come from the records of the former employer or violate an applicable "noncompete agreement." Members and candidates are free to use public information after departing to contact former clients without violating Standard IV(A) as long as there is no specific agreement not to do so.

Employers often require employees to sign noncompete agreements that preclude a departing employee from engaging in certain conduct. Members and candidates should take care to review the terms of any such agreement when leaving their employer to determine what, if any, conduct those agreements may prohibit.

In some markets, there are agreements between employers within an industry that outline information that departing employees are permitted to take upon resignation, such as the "Protocol for Broker Recruiting" in the United States. These agreements ease individuals' transition between firms that have agreed to follow the outlined procedures. Members and candidates who move between firms that sign such agreements may rely on the protections provided as long as they faithfully adhere to all the procedures outlined.

For example, under the agreement between many US brokers, individuals are allowed to take some general client contact information when departing. To be protected, a copy of the information the individual is taking must be provided to the

local management team for review. Additionally, the specific client information may only be used by the departing employee and not others employed by the new firm.

Use of Social Media

The growth in various online networking platforms, such as LinkedIn, Twitter, and Facebook (commonly referred to as social media platforms), is providing new opportunities and challenges for businesses. Members and candidates should understand and abide by all applicable firm policies and regulations as to the acceptable use of social media platforms to interact with clients and prospective clients. This is especially important when a member or candidate is planning to leave an employer.

Social media use makes determining how and when departure notification is delivered to clients more complex. Members and candidates may have developed profiles on these platforms that include connections with individuals who are clients of the firm, as well as individuals unrelated to their employer. Communications through social media platforms that potentially reach current clients should adhere to the employer's policies and procedures regarding notification of departing employees.

Social media connections with clients are also raising questions concerning the differences between public information and firm property. Specific accounts and user profiles of members and candidates may be created for solely professional reasons, including firm-approved accounts for client engagements. Such firm-approved business-related accounts would be considered part of the firm's assets, thus requiring members and candidates to transfer or delete the accounts as directed by their firm's policies and procedures. Best practice for members and candidates is to maintain separate accounts for their personal and professional social media activities. Members and candidates should discuss with their employers how profiles should be treated when a single account includes personal connections and also is used to conduct aspects of their professional activities.

Whistleblowing

A member's or candidate's personal interests, as well as the interests of his or her employer, are secondary to protecting the integrity of capital markets and the interests of clients. Therefore, circumstances may arise (e.g., when an employer is engaged in illegal or unethical activity) in which members and candidates must act contrary to their employer's interests in order to comply with their duties to the market and clients. In such instances, activities that would normally violate a member's or candidate's duty to his or her employer (such as contradicting employer instructions, violating certain policies and procedures, or preserving a record by copying employer records) may be justified. Such action would be permitted only if the intent is clearly aimed at protecting clients or the integrity of the market, not for personal gain.

Nature of Employment

A wide variety of business relationships exists within the investment industry. For instance, a member or candidate may be an employee or an independent contractor. Members and candidates must determine whether they are employees or independent contractors in order to determine the applicability of Standard IV(A). This issue will be decided largely by the degree of control exercised by the employing entity over the member or candidate. Factors determining control include whether the member's or candidate's hours, work location, and other parameters of the job are set; whether facilities are provided to the member or candidate; whether the member's or candidate's expenses are reimbursed; whether the member or candidate seeks work from other employers; and the number of clients or employers the member or candidate works for.

A member's or candidate's duties within an independent contractor relationship are governed by the oral or written agreement between the member and the client. Members and candidates should take care to define clearly the scope of their responsibilities and the expectations of each client within the context of each relationship. Once a member or candidate establishes a relationship with a client, the member or candidate has a duty to abide by the terms of the agreement.

Recommended Procedures for Compliance

Employers may establish codes of conduct and operating procedures for their employees to follow. Members and candidates should fully understand the policies to ensure that they are not in conflict with the Code and Standards. The following topics identify policies that members and candidates should encourage their firms to adopt if the policies are not currently in place.

Competition Policy

A member or candidate must understand any restrictions placed by the employer on offering similar services outside the firm while employed by the firm. The policy may outline the procedures for requesting approval to undertake the outside service or may be a strict prohibition of such service. If a member's or candidate's employer elects to have its employees sign a noncompete agreement as part of the employment agreement, the member or candidate should ensure that the details are clear and fully explained prior to signing the agreement.

Termination Policy

Members and candidates should clearly understand the termination policies of their employer. Termination policies should establish clear procedures regarding the resignation process, including addressing how the termination will be disclosed to clients and staff and whether updates posted through social media platforms will be allowed. The firm's policy may also outline the procedures for transferring ongoing research and account management responsibilities. Finally,

the procedures should address agreements that allow departing employees to remove specific client-related information upon resignation.

Incident-Reporting Procedures

Members and candidates should be aware of their firm's policies related to whistleblowing and encourage their firm to adopt industry best practices in this area. Many firms are required by regulatory mandates to establish confidential and anonymous reporting procedures that allow employees to report potentially unethical and illegal activities in the firm.

Employee Classification

Members and candidates should understand their status within their employer firm. Firms are encouraged to adopt a standardized classification structure (e.g., part time, full time, outside contractor) for their employees and indicate how each of the firm's policies applies to each employee class.

Application of the Standard

Example 1 (Soliciting Former Clients):

Samuel Magee manages pension accounts for Trust Assets, Inc., but has become frustrated with the working environment and has been offered a position with Fiduciary Management. Before resigning from Trust Assets, Magee asks four big accounts to leave that firm and open accounts with Fiduciary. Magee also persuades several prospective clients to sign agreements with Fiduciary Management. Magee had previously made presentations to these prospects on behalf of Trust Assets.

> *Comment*: Magee violated the employee–employer principle requiring him to act solely for his employer's benefit. Magee's duty is to Trust Assets as long as he is employed there. The solicitation of Trust Assets' current clients and prospective clients is unethical and violates Standard IV(A).

Example 2 (Former Employer's Documents and Files):

James Hightower has been employed by Jason Investment Management Corporation for 15 years. He began as an analyst but assumed increasing responsibilities and is now a senior portfolio manager and a member of the firm's investment policy committee. Hightower has decided to leave Jason Investment and start his own investment management business. He has been careful not to tell any of Jason's clients that he is leaving; he does not want to be accused of breaching his duty to Jason by soliciting Jason's clients before his departure. Hightower is planning to copy and take with him the following documents and information he developed or worked on while at Jason: (1) the client list, with addresses, telephone numbers, and other pertinent client information; (2) client account statements; (3) sample marketing presentations to prospective clients containing Jason's performance record; (4) Jason's recommended list of securities; (5) computer models

to determine asset allocations for accounts with various objectives; (6) computer models for stock selection; and (7) personal computer spreadsheets for Hightower's major corporate recommendations, which he developed when he was an analyst.

> *Comment*: Except with the consent of their employer, departing members and candidates may not take employer property, which includes books, records, reports, and other materials, because taking such materials may interfere with their employer's business opportunities. Taking any employer records, even those the member or candidate prepared, violates Standard IV(A). Employer records include items stored in hard copy or any other medium (e.g., home computers, portable storage devices, cell phones).

Example 3 (Addressing Rumors):

Reuben Winston manages all-equity portfolios at Target Asset Management (TAM), a large, established investment counselor. Ten years previously, Philpott & Company, which manages a family of global bond mutual funds, acquired TAM in a diversification move. After the merger, the combined operations prospered in the fixed-income business but the equity management business at TAM languished. Lately, a few of the equity pension accounts that had been with TAM before the merger have terminated their relationships with TAM. One day, Winston finds on his voice mail the following message from a concerned client: "Hey! I just heard that Philpott is close to announcing the sale of your firm's equity management business to Rugged Life. What is going on?" Not being aware of any such deal, Winston and his associates are stunned. Their internal inquiries are met with denials from Philpott management, but the rumors persist. Feeling left in the dark, Winston contemplates leading an employee buyout of TAM's equity management business.

> *Comment*: An employee-led buyout of TAM's equity asset management business would be consistent with Standard IV(A) because it would rest on the permission of the employer and, ultimately, the clients. In this case, however, in which employees suspect the senior managers or principals are not truthful or forthcoming, Winston should consult legal counsel to determine appropriate action.

Example 4 (Ownership of Completed Prior Work):

Laura Clay, who is unemployed, wants part-time consulting work while seeking a full-time analyst position. During an interview at Bradley Associates, a large institutional asset manager, Clay is told that the firm has no immediate research openings but would be willing to pay her a flat fee to complete a study of the wireless communications industry within a given period of time. Clay would be allowed unlimited access to Bradley's research files and would be welcome to come to the offices and use whatever support facilities are available during normal working hours. Bradley's research director does not seek any exclusivity for Clay's output, and the two agree to the arrangement on a handshake. As Clay nears completion

of the study, she is offered an analyst job in the research department of Winston & Company, a brokerage firm, and she is pondering submitting the draft of her wireless study for publication by Winston.

Comment: Although she is under no written contractual obligation to Bradley, Clay has an obligation to let Bradley act on the output of her study before Winston & Company or Clay uses the information to their advantage. That is, unless Bradley gives permission to Clay and waives its rights to her wireless report, Clay would be in violation of Standard IV(A) if she were to immediately recommend to Winston the same transactions recommended in the report to Bradley. Furthermore, Clay must not take from Bradley any research file material or other property that she may have used.

Example 5 (Ownership of Completed Prior Work):

Emma Madeline, a recent college graduate and a candidate in the CFA Program, spends her summer as an unpaid intern at Murdoch and Lowell. The senior managers at Murdoch are attempting to bring the firm into compliance with the GIPS standards, and Madeline is assigned to assist in its efforts. Two months into her internship, Madeline applies for a job at McMillan & Company, which has plans to become GIPS compliant. Madeline accepts the job with McMillan. Before leaving Murdoch, she copies the firm's software that she helped develop because she believes this software will assist her in her new position.

Comment: Even though Madeline does not receive monetary compensation for her services at Murdoch, she has used firm resources in creating the software and is considered an employee because she receives compensation and benefits in the form of work experience and knowledge. By copying the software, Madeline violated Standard IV(A) because she misappropriated Murdoch's property without permission.

Example 6 (Soliciting Former Clients):

Dennis Elliot has hired Sam Chisolm, who previously worked for a competing firm. Chisolm left his former firm after 18 years of employment. When Chisolm begins working for Elliot, he wants to contact his former clients because he knows them well and is certain that many will follow him to his new employer. Is Chisolm in violation of Standard IV(A) if he contacts his former clients?

Comment: Because client records are the property of the firm, contacting former clients for any reason through the use of client lists or other information taken from a former employer without permission would be a violation of Standard IV(A). In addition, the nature and extent of the contact with former clients may be governed by the terms of any noncompete agreement signed by the employee and the former employer that covers contact with former clients after employment.

Simple knowledge of the names and existence of former clients is not confidential information, just as skills or experience that an employee obtains while employed are not "confidential" or "privileged" information. The Code and Standards do not impose a prohibition on the use of experience or knowledge gained at one employer from being used at another employer. The Code and Standards also do not prohibit former employees from contacting clients of their previous firm, in the absence of a noncompete agreement. Members and candidates are free to use public information about their former firm after departing to contact former clients without violating Standard IV(A).

In the absence of a noncompete agreement, as long as Chisolm maintains his duty of loyalty to his employer before joining Elliot's firm, does not take steps to solicit clients until he has left his former firm, and does not use material from his former employer without its permission after he has left, he is not in violation of the Code and Standards.

Example 7 (Starting a New Firm):

Geraldine Allen currently works at a registered investment company as an equity analyst. Without notice to her employer, she registers with government authorities to start an investment company that will compete with her employer, but she does not actively seek clients. Does registration of this competing company with the appropriate regulatory authorities constitute a violation of Standard IV(A)?

Comment: Allen's preparation for the new business by registering with the regulatory authorities does not conflict with the work for her employer if the preparations have been done on Allen's own time outside the office and if Allen will not be soliciting clients for the business or otherwise operating the new company until she has left her current employer.

Example 8 (Competing with Current Employer):

Several employees are planning to depart their current employer within a few weeks and have been careful to not engage in any activities that would conflict with their duty to their current employer. They have just learned that one of their employer's clients has undertaken a request for proposal (RFP) to review and possibly hire a new investment consultant. The RFP has been sent to the employer and all of its competitors. The group believes that the new entity to be formed would be qualified to respond to the RFP and be eligible for the business. The RFP submission period is likely to conclude before the employees' resignations are effective. Is it permissible for the group of departing employees to respond to the RFP for their anticipated new firm?

Comment: A group of employees responding to an RFP that their employer is also responding to would lead to direct competition between the employees and the employer. Such conduct violates Standard IV(A)

unless the group of employees receives permission from their employer as well as the entity sending out the RFP.

Example 9 (Externally Compensated Assignments):

Alfonso Mota is a research analyst with Tyson Investments. He works part time as a mayor for his hometown, a position for which he receives compensation. Must Mota seek permission from Tyson to serve as mayor?

Comment: If Mota's mayoral duties are so extensive and time-consuming that they might detract from his ability to fulfill his responsibilities at Tyson, he should discuss his outside activities with his employer and come to a mutual agreement regarding how to manage his personal commitments with his responsibilities to his employer.

Example 10 (Soliciting Former Clients):

After leaving her employer, Shawna McQuillen establishes her own money management business. While with her former employer, she did not sign a noncompete agreement that would have prevented her from soliciting former clients. Upon her departure, she does not take any of her client lists or contact information and she clears her personal computer of any employer records, including client contact information. She obtains the phone numbers of her former clients through public records and contacts them to solicit their business.

Comment: McQuillen is not in violation of Standard IV(A) because she has not used information or records from her former employer and is not prevented by an agreement with her former employer from soliciting her former clients.

Example 11 (Whistleblowing Actions):

Meredith Rasmussen works on a buy-side trading desk and concentrates on in-house trades for a hedge fund subsidiary managed by a team at the investment management firm. The hedge fund has been very successful and is marketed globally by the firm. From her experience as the trader for much of the activity of the fund, Rasmussen has become quite knowledgeable about the hedge fund's strategy, tactics, and performance. When a distinct break in the market occurs, however, and many of the securities involved in the hedge fund's strategy decline markedly in value, Rasmussen observes that the reported performance of the hedge fund does not reflect this decline. In her experience, the lack of any effect is a very unlikely occurrence. She approaches the head of trading about her concern and is told that she should not ask any questions and that the fund is big and successful and is not her concern. She is fairly sure something is not right, so she contacts the compliance officer, who also tells her to stay away from the issue of this hedge fund's reporting.

Comment: Rasmussen has clearly come upon an error in policies, procedures, and compliance practices in the firm's operations. Having been unsuccessful in finding a resolution with her supervisor and the compliance officer, Rasmussen should consult the firm's whistleblowing policy to determine the appropriate next step toward informing management of her concerns. The potentially unethical actions of the investment management division are appropriate grounds for further disclosure, so Rasmussen's whistleblowing would not represent a violation of Standard IV(A).

See also Standard I(D)–Misconduct and Standard IV(C)–Responsibilities of Supervisors.

Example 12 (Soliciting Former Clients):

Angel Crome has been a private banker for YBSafe Bank for the past eight years. She has been very successful and built a considerable client portfolio during that time but is extremely frustrated by the recent loss of reputation by her current employer and subsequent client insecurity. A locally renowned headhunter contacted Crome a few days ago and offered her an interesting job with a competing private bank. This bank offers a substantial signing bonus for advisers with their own client portfolios. Crome figures that she can solicit at least 70% of her clients to follow her and gladly enters into the new employment contract.

Comment: Crome may contact former clients upon termination of her employment with YBSafe Bank, but she is prohibited from using client records built by and kept with her in her capacity as an employee of YBSafe Bank. Client lists are proprietary information of her former employer and must not be used for her or her new employer's benefit. The use of written, electronic, or any other form of records other than publicly available information to contact her former clients at YBSafe Bank will be a violation of Standard IV(A).

Example 13 (Notification of Code and Standards):

Krista Smith is a relatively new assistant trader for the fixed-income desk of a major investment bank. She is on a team responsible for structuring collateralized debt obligations (CDOs) made up of securities in the inventory of the trading desk. At a meeting of the team, senior executives explain the opportunity to eventually separate the CDO into various risk-rated tranches to be sold to the clients of the firm. After the senior executives leave the meeting, the head trader announces various responsibilities of each member of the team and then says, "This is a good time to unload some of the junk we have been stuck with for a while and disguise it with ratings and a thick, unreadable prospectus, so don't be shy in putting this CDO together. Just kidding." Smith is worried by this remark and asks some of her colleagues what the head trader meant. They all respond that he was just kidding but

that there is some truth in the remark because the CDO is seen by management as an opportunity to improve the quality of the securities in the firm's inventory.

Concerned about the ethical environment of the workplace, Smith decides to talk to her supervisor about her concerns and provides the head trader with a copy of the Code and Standards. Smith discusses the principle of placing the client above the interest of the firm and the possibility that the development of the new CDO will not adhere to this responsibility. The head trader assures Smith that the appropriate analysis will be conducted when determining the appropriate securities for collateral. Furthermore, the ratings are assigned by an independent firm and the prospectus will include full and factual disclosures. Smith is reassured by the meeting, but she also reviews the company's procedures and requirements for reporting potential violations of company policy and securities laws.

> *Comment*: Smith's review of the company policies and procedures for reporting violations allows her to be prepared to report through the appropriate whistleblower process if she decides that the CDO development process involves unethical actions by others. Smith's actions comply with the Code and Standards principles of placing the client's interests first and being loyal to her employer. In providing her supervisor with a copy of the Code and Standards, Smith is highlighting the high level of ethical conduct she is required to adhere to in her professional activities.

Example 14 (Leaving an Employer):

Laura Webb just left her position as portfolio analyst at Research Systems, Inc. (RSI). Her employment contract included a non-solicitation agreement that requires her to wait two years before soliciting RSI clients for any investment-related services. Upon leaving, Webb was informed that RSI would contact clients immediately about her departure and introduce her replacement.

While working at RSI, Webb connected with clients, other industry associates, and friends through her LinkedIn network. Her business and personal relationships were intermingled because she considered many of her clients to be personal friends. Realizing that her LinkedIn network would be a valuable resource for new employment opportunities, she updated her profile several days following her departure from RSI. LinkedIn automatically sent a notification to Webb's entire network that her employment status had been changed in her profile.

> *Comment*: Prior to her departure, Webb should have discussed any client information contained in her social media networks. By updating her LinkedIn profile after RSI notified clients and after her employment ended, she has appropriately placed her employer's interests ahead of her own personal interests. In addition, she has not violated the non-solicitation agreement with RSI, unless it prohibited any contact with clients during the two-year period.

Example 15 (Confidential Firm Information):

Sanjay Gupta is a research analyst at Naram Investment Management (NIM). NIM uses a team-based research process to develop recommendations on investment opportunities covered by the team members. Gupta, like others, provides commentary for NIM's clients through the company blog, which is posted weekly on the NIM password-protected website. According to NIM's policy, every contribution to the website must be approved by the company's compliance department before posting. Any opinions expressed on the website are disclosed as representing the perspective of NIM.

Gupta also writes a personal blog to share his experiences with friends and family. As with most blogs, Gupta's personal blog is widely available to interested readers through various internet search engines. Occasionally, when he disagrees with the team-based research opinions of NIM, Gupta uses his personal blog to express his own opinions as a counterpoint to the commentary posted on the NIM website. Gupta believes this provides his readers with a more complete perspective on these investment opportunities.

Comment: Gupta is in violation of Standard IV(A) for disclosing confidential firm information through his personal blog. The recommendations on the firm's blog to clients are not freely available across the internet, but his personal blog post indirectly provides the firm's recommendations.

Additionally, by posting research commentary on his personal blog, Gupta is using firm resources for his personal advantage. To comply with Standard IV(A), members and candidates must receive consent from their employer prior to using company resources.

Standard IV(B) Additional Compensation Arrangements

> Members and Candidates must not accept gifts, benefits, compensation, or consideration that competes with or might reasonably be expected to create a conflict of interest with their employer's interest unless they obtain written consent from all parties involved.

Guidance

Standard IV(B) requires members and candidates to obtain permission from their employer before accepting compensation or other benefits from third parties for the services rendered to the employer or for any services that might create a conflict with their employer's interest. Compensation and benefits include direct compensation by the client and any indirect compensation or other benefits received from third parties. "Written consent" includes any form of communication that can be documented (for example, communication via e-mail that can be retrieved and documented).

Members and candidates must obtain permission for additional compensation/benefits because such arrangements may affect loyalties and objectivity and create potential conflicts of interest. Disclosure allows an employer to consider the outside arrangements when evaluating the actions and motivations of members and candidates. Moreover, the employer is entitled to have full knowledge of all compensation/benefit arrangements so as to be able to assess the true cost of the services members or candidates are providing.

There may be instances in which a member or candidate is hired by an employer on a "part-time" basis. "Part-time" status applies to employees who do not commit the full number of hours required for a normal work week. Members and candidates should discuss possible limitations to their abilities to provide services that may be competitive with their employer during the negotiation and hiring process. The requirements of Standard IV(B) would be applicable to limitations identified at that time.

Recommended Procedures for Compliance

Members and candidates should make an immediate written report to their supervisor and compliance officer specifying any compensation they propose to receive for services in addition to the compensation or benefits received from their employer. The details of the report should be confirmed by the party offering the additional compensation, including performance incentives offered by clients. This written report should state the terms of any agreement under which a member or candidate will receive additional compensation; "terms" include the nature of the compensation, the approximate amount of compensation, and the duration of the agreement.

Application of the Standard

Example 1 (Notification of Client Bonus Compensation):

Geoff Whitman, a portfolio analyst for Adams Trust Company, manages the account of Carol Cochran, a client. Whitman is paid a salary by his employer, and Cochran pays the trust company a standard fee based on the market value of assets in her portfolio. Cochran proposes to Whitman that "any year that my portfolio achieves at least a 15% return before taxes, you and your wife can fly to Monaco at my expense and use my condominium during the third week of January." Whitman does not inform his employer of the arrangement and vacations in Monaco the following January as Cochran's guest.

> *Comment*: Whitman violated Standard IV(B) by failing to inform his employer in writing of this supplemental, contingent compensation arrangement. The nature of the arrangement could have resulted in partiality to Cochran's account, which could have detracted from Whitman's performance with respect to other accounts he handles for Adams Trust. Whitman must obtain the consent of his employer to accept such a supplemental benefit.

Example 2 (Notification of Outside Compensation):

Terry Jones sits on the board of directors of Exercise Unlimited, Inc. In return for his services on the board, Jones receives unlimited membership privileges for his family at all Exercise Unlimited facilities. Jones purchases Exercise Unlimited stock for the client accounts for which it is appropriate. Jones does not disclose this arrangement to his employer because he does not receive monetary compensation for his services to the board.

> *Comment*: Jones has violated Standard IV(B) by failing to disclose to his employer benefits received in exchange for his services on the board of directors. The nonmonetary compensation may create a conflict of interest in the same manner as being paid to serve as a director.

Example 3 (Prior Approval for Outside Compensation):

Jonathan Hollis is an analyst of oil-and-gas companies for Specialty Investment Management. He is currently recommending the purchase of ABC Oil Company shares and has published a long, well-thought-out research report to substantiate his recommendation. Several weeks after publishing the report, Hollis receives a call from the investor-relations office of ABC Oil saying that Thomas Andrews, CEO of the company, saw the report and really liked the analyst's grasp of the business and his company. The investor-relations officer invites Hollis to visit ABC Oil to discuss the industry further. ABC Oil offers to send a company plane to pick Hollis up and arrange for his accommodations while visiting. Hollis, after

gaining the appropriate approvals, accepts the meeting with the CEO but declines the offered travel arrangements.

Several weeks later, Andrews and Hollis meet to discuss the oil business and Hollis's report. Following the meeting, Hollis joins Andrews and the investment relations officer for dinner at an upscale restaurant near ABC Oil's headquarters.

Upon returning to Specialty Investment Management, Hollis provides a full review of the meeting to the director of research, including a disclosure of the dinner attended.

Comment: Hollis's actions did not violate Standard IV(B). Through gaining approval before accepting the meeting and declining the offered travel arrangements, Hollis sought to avoid any potential conflicts of interest between his company and ABC Oil. Because the location of the dinner was not available prior to arrival and Hollis notified his company of the dinner upon his return, accepting the dinner should not impair his objectivity. By disclosing the dinner, Hollis has enabled Specialty Investment Management to assess whether it has any impact on future reports and recommendations by Hollis related to ABC Oil.

Standard IV(C) Responsibilities of Supervisors

> Members and Candidates must make reasonable efforts to ensure that anyone subject to their supervision or authority complies with applicable laws, rules, regulations, and the Code and Standards.

Guidance

Highlights:

- *System for Supervision*
- *Supervision Includes Detection*

Standard IV(C) states that members and candidates must promote actions by all employees under their supervision and authority to comply with applicable laws, rules, regulations, and firm policies and the Code and Standards.

Any investment professional who has employees subject to her or his control or influence—whether or not the employees are CFA Institute members, CFA charterholders, or candidates in the CFA Program—exercises supervisory responsibility. Members and candidates acting as supervisors must also have in-depth knowledge of the Code and Standards so that they can apply this knowledge in discharging their supervisory responsibilities.

The conduct that constitutes reasonable supervision in a particular case depends on the number of employees supervised and the work performed by those employees. Members and candidates with oversight responsibilities for large numbers of employees may not be able to personally evaluate the conduct of these employees on a continuing basis. These members and candidates may delegate supervisory duties to subordinates who directly oversee the other employees. A member's or candidate's responsibilities under Standard IV(C) include instructing those subordinates to whom supervision is delegated about methods to promote compliance, including preventing and detecting violations of laws, rules, regulations, firm policies, and the Code and Standards.

At a minimum, Standard IV(C) requires that members and candidates with supervisory responsibility make reasonable efforts to prevent and detect violations by ensuring the establishment of effective compliance systems. However, an effective compliance system goes beyond enacting a code of ethics, establishing policies and procedures to achieve compliance with the code and applicable law, and reviewing employee actions to determine whether they are following the rules.

To be effective supervisors, members and candidates should implement education and training programs on a recurring or regular basis for employees under their supervision. Such programs will assist the employees with meeting their professional obligations to practice in an ethical manner within the applicable legal system.

Further, establishing incentives—monetary or otherwise—for employees not only to meet business goals but also to reward ethical behavior offers supervisors another way to assist employees in complying with their legal and ethical obligations.

Often, especially in large organizations, members and candidates may have supervisory responsibility but not the authority to establish or modify firm-wide compliance policies and procedures or incentive structures. Such limitations should not prevent a member or candidate from working with his or her own superiors and within the firm structure to develop and implement effective compliance tools, including but not limited to:

- a code of ethics,
- compliance policies and procedures,
- education and training programs,
- an incentive structure that rewards ethical conduct, and
- adoption of firm-wide best practice standards (e.g., the GIPS standards, the CFA Institute Asset Manager Code of Professional Conduct).

A member or candidate with supervisory responsibility should bring an inadequate compliance system to the attention of the firm's senior managers and recommend corrective action. If the member or candidate clearly cannot discharge supervisory responsibilities because of the absence of a compliance system or because of an inadequate compliance system, the member or candidate should decline in writing to accept supervisory responsibility until the firm adopts reasonable procedures to allow adequate exercise of supervisory responsibility.

System for Supervision

Members and candidates with supervisory responsibility must understand what constitutes an adequate compliance system for their firms and make reasonable efforts to see that appropriate compliance procedures are established, documented, communicated to covered personnel, and followed. "Adequate" procedures are those designed to meet industry standards, regulatory requirements, the requirements of the Code and Standards, and the circumstances of the firm. Once compliance procedures are established, the supervisor must also make reasonable efforts to ensure that the procedures are monitored and enforced.

To be effective, compliance procedures must be in place prior to the occurrence of a violation of the law or the Code and Standards. Although compliance procedures cannot be designed to anticipate every potential violation, they should be designed to anticipate the activities most likely to result in misconduct. Compliance programs must be appropriate for the size and nature of the organization. The member or candidate should review model compliance procedures or other industry programs to ensure that the firm's procedures meet the minimum industry standards.

Once a supervisor learns that an employee has violated or may have violated the law or the Code and Standards, the supervisor must promptly initiate an

assessment to determine the extent of the wrongdoing. Relying on an employee's statements about the extent of the violation or assurances that the wrongdoing will not reoccur is not enough. Reporting the misconduct up the chain of command and warning the employee to cease the activity are also not enough. Pending the outcome of the investigation, a supervisor should take steps to ensure that the violation will not be repeated, such as placing limits on the employee's activities or increasing the monitoring of the employee's activities.

Supervision Includes Detection

Members and candidates with supervisory responsibility must also make reasonable efforts to detect violations of laws, rules, regulations, firm policies, and the Code and Standards. The supervisors exercise reasonable supervision by establishing and implementing written compliance procedures and ensuring that those procedures are followed through periodic review. If a member or candidate has adopted reasonable procedures and taken steps to institute an effective compliance program, then the member or candidate may not be in violation of Standard IV(C) if he or she does not detect violations that occur despite these efforts. The fact that violations do occur may indicate, however, that the compliance procedures are inadequate. In addition, in some cases, merely enacting such procedures may not be sufficient to fulfill the duty required by Standard IV(C). A member or candidate may be in violation of Standard IV(C) if he or she knows or should know that the procedures designed to promote compliance, including detecting and preventing violations, are not being followed.

Recommended Procedures for Compliance

Codes of Ethics or Compliance Procedures

Members and candidates are encouraged to recommend that their employers adopt a code of ethics. Adoption of a code of ethics is critical to establishing a strong ethical foundation for investment advisory firms and their employees. Codes of ethics formally emphasize and reinforce the client loyalty responsibilities of investment firm personnel, protect investing clients by deterring misconduct, and protect the firm's reputation for integrity.

There is a distinction, however, between codes of ethics and the specific policies and procedures needed to ensure compliance with the codes and with securities laws and regulations. Although both are important, codes of ethics should consist of fundamental, principle-based ethical and fiduciary concepts that are applicable to all of the firm's employees. In this way, firms can best convey to employees and clients the ethical ideals that investment advisers strive to achieve. These concepts need to be implemented, however, by detailed, firm-wide compliance policies and procedures. Compliance procedures assist the firm's personnel in fulfilling the responsibilities enumerated in the code of ethics and make probable that the ideals expressed in the code of ethics will be adhered to in the day-to-day operation of the firm.

Stand-alone codes of ethics should be written in plain language and should address general fiduciary concepts. They should be unencumbered by numerous detailed procedures. Codes presented in this way are the most effective in stressing to employees that they are in positions of trust and must act with integrity at all times. Mingling compliance procedures in the firm's code of ethics goes against the goal of reinforcing the ethical obligations of employees.

Separating the code of ethics from compliance procedures will also reduce, if not eliminate, the legal terminology and "boilerplate" language that can make the underlying ethical principles incomprehensible to the average person. Above all, to ensure the creation of a culture of ethics and integrity rather than one that merely focuses on following the rules, the principles in the code of ethics must be stated in a way that is accessible and understandable to everyone in the firm.

Members and candidates should encourage their employers to provide their codes of ethics to clients. In this case also, a simple, straightforward code of ethics will be best understood by clients. Unencumbered by the compliance procedures, the code of ethics will be effective in conveying that the firm is committed to conducting business in an ethical manner and in the best interests of the clients.

Adequate Compliance Procedures

A supervisor complies with Standard IV(C) by identifying situations in which legal violations or violations of the Code and Standards are likely to occur and by establishing and enforcing compliance procedures to prevent such violations. Adequate compliance procedures should

- be contained in a clearly written and accessible manual that is tailored to the firm's operations,
- be drafted so that the procedures are easy to understand,
- designate a compliance officer whose authority and responsibility are clearly defined and who has the necessary resources and authority to implement the firm's compliance procedures,
- describe the hierarchy of supervision and assign duties among supervisors,
- implement a system of checks and balances,
- outline the scope of the procedures,
- outline procedures to document the monitoring and testing of compliance procedures,
- outline permissible conduct, and
- delineate procedures for reporting violations and sanctions.

Once a compliance program is in place, a supervisor should

- disseminate the contents of the program to appropriate personnel,

- periodically update procedures to ensure that the measures are adequate under the law,
- continually educate personnel regarding the compliance procedures,
- issue periodic reminders of the procedures to appropriate personnel,
- incorporate a professional conduct evaluation as part of an employee's performance review,
- review the actions of employees to ensure compliance and identify violators, and
- take the necessary steps to enforce the procedures once a violation has occurred.

Once a violation is discovered, a supervisor should

- respond promptly,
- conduct a thorough investigation of the activities to determine the scope of the wrongdoing,
- increase supervision or place appropriate limitations on the wrongdoer pending the outcome of the investigation, and
- review procedures for potential changes necessary to prevent future violations from occurring.

Implementation of Compliance Education and Training

No amount of ethics education and awareness will deter someone determined to commit fraud for personal enrichment. But the vast majority of investment professionals strive to achieve personal success with dedicated service to their clients and employers.

Regular ethics and compliance training, in conjunction with adoption of a code of ethics, is critical to investment firms seeking to establish a strong culture of integrity and to provide an environment in which employees routinely engage in ethical conduct in compliance with the law. Training and education assist individuals in both recognizing areas that are prone to ethical and legal pitfalls and identifying those circumstances and influences that can impair ethical judgment.

By implementing educational programs, supervisors can train their subordinates to put into practice what the firm's code of ethics requires. Education helps employees make the link between legal and ethical conduct and the long-term success of the business; a strong culture of compliance signals to clients and potential clients that the firm has truly embraced ethical conduct as fundamental to the firm's mission to serve its clients.

Establish an Appropriate Incentive Structure

Even if individuals want to make the right choices and follow an ethical course of conduct and are aware of the obstacles that may trip them up, they can still be influenced to act improperly by a corporate culture that embraces a "succeed at all costs"

mentality, stresses results regardless of the methods used to achieve those results, and does not reward ethical behavior. Supervisors can reinforce an individual's natural desire to "do the right thing" by building a culture of integrity in the workplace.

Supervisors and firms must look closely at their incentive structure to determine whether the structure encourages profits and returns at the expense of ethically appropriate conduct. Reward structures may turn a blind eye to how desired outcomes are achieved and encourage dysfunctional or counterproductive behavior. Only when compensation and incentives are firmly tied to client interests and *how* outcomes are achieved, rather than *how much* is generated for the firm, will employees work to achieve a culture of integrity.

Application of the Standard

Example 1 (Supervising Research Activities):

Jane Mattock, senior vice president and head of the research department of H&V, Inc., a regional brokerage firm, has decided to change her recommendation for Timber Products from buy to sell. In line with H&V's procedures, she orally advises certain other H&V executives of her proposed actions before the report is prepared for publication. As a result of Mattock's conversation with Dieter Frampton, one of the H&V executives accountable to Mattock, Frampton immediately sells Timber's stock from his own account and from certain discretionary client accounts. In addition, other personnel inform certain institutional customers of the changed recommendation before it is printed and disseminated to all H&V customers who have received previous Timber reports.

> *Comment*: Mattock has violated Standard IV(C) by failing to reasonably and adequately supervise the actions of those accountable to her. She did not prevent or establish reasonable procedures designed to prevent dissemination of or trading on the information by those who knew of her changed recommendation. She must ensure that her firm has procedures for reviewing or recording any trading in the stock of a corporation that has been the subject of an unpublished change in recommendation. Adequate procedures would have informed the subordinates of their duties and detected sales by Frampton and selected customers.

Example 2 (Supervising Research Activities):

Deion Miller is the research director for Jamestown Investment Programs. The portfolio managers have become critical of Miller and his staff because the Jamestown portfolios do not include any stock that has been the subject of a merger or tender offer. Georgia Ginn, a member of Miller's staff, tells Miller that she has been studying a local company, Excelsior, Inc., and recommends its purchase. Ginn adds that the company has been widely rumored to be the subject of a merger study by a well-known conglomerate and discussions between them are under way. At Miller's request, Ginn prepares a memo recommending the

stock. Miller passes along Ginn's memo to the portfolio managers prior to leaving for vacation, and he notes that he has not reviewed the memo. As a result of the memo, the portfolio managers buy Excelsior stock immediately. The day Miller returns to the office, he learns that Ginn's only sources for the report were her brother, who is an acquisitions analyst with Acme Industries, the "well-known conglomerate," and that the merger discussions were planned but not held.

> *Comment*: Miller violated Standard IV(C) by not exercising reasonable supervision when he disseminated the memo without checking to ensure that Ginn had a reasonable and adequate basis for her recommendations and that Ginn was not relying on material nonpublic information.

Example 3 (Supervising Trading Activities):

David Edwards, a trainee trader at Wheeler & Company, a major national brokerage firm, assists a customer in paying for the securities of Highland, Inc., by using anticipated profits from the immediate sale of the same securities. Despite the fact that Highland is not on Wheeler's recommended list, a large volume of its stock is traded through Wheeler in this manner. Roberta Ann Mason is a Wheeler vice president responsible for supervising compliance with the securities laws in the trading department. Part of her compensation from Wheeler is based on commission revenues from the trading department. Although she notices the increased trading activity, she does nothing to investigate or halt it.

> *Comment*: Mason's failure to adequately review and investigate purchase orders in Highland stock executed by Edwards and her failure to supervise the trainee's activities violate Standard IV(C). Supervisors should be especially sensitive to actual or potential conflicts between their own self-interests and their supervisory responsibilities.

Example 4 (Supervising Trading Activities and Record Keeping):

Samantha Tabbing is senior vice president and portfolio manager for Crozet, Inc., a registered investment advisory and registered broker/dealer firm. She reports to Charles Henry, the president of Crozet. Crozet serves as the investment adviser and principal underwriter for ABC and XYZ public mutual funds. The two funds' prospectuses allow Crozet to trade financial futures for the funds for the limited purpose of hedging against market risks. Henry, extremely impressed by Tabbing's performance in the past two years, directs Tabbing to act as portfolio manager for the funds. For the benefit of its employees, Crozet has also organized the Crozet Employee Profit-Sharing Plan (CEPSP), a defined contribution retirement plan. Henry assigns Tabbing to manage 20% of the assets of CEPSP. Tabbing's investment objective for her portion of CEPSP's assets is aggressive growth. Unbeknownst to Henry, Tabbing frequently places S&P 500 Index purchase and sale orders for the funds and the CEPSP without providing the futures commission merchants (FCMs) who take the orders with any prior or simultaneous

designation of the account for which the trade has been placed. Frequently, neither Tabbing nor anyone else at Crozet completes an internal trade ticket to record the time an order was placed or the specific account for which the order was intended. FCMs often designate a specific account only after the trade, when Tabbing provides such designation. Crozet has no written operating procedures or compliance manual concerning its futures trading, and its compliance department does not review such trading. After observing the market's movement, Tabbing assigns to CEPSP the S&P 500 positions with more favorable execution prices and assigns positions with less favorable execution prices to the funds.

> *Comment*: Henry violated Standard IV(C) by failing to adequately supervise Tabbing with respect to her S&P 500 trading. Henry further violated Standard IV(C) by failing to establish record-keeping and reporting procedures to prevent or detect Tabbing's violations. Henry must make a reasonable effort to determine that adequate compliance procedures covering all employee trading activity are established, documented, communicated, and followed.

Example 5 (Accepting Responsibility):

Meredith Rasmussen works on a buy-side trading desk and concentrates on in-house trades for a hedge fund subsidiary managed by a team at the investment management firm. The hedge fund has been very successful and is marketed globally by the firm. From her experience as the trader for much of the activity of the fund, Rasmussen has become quite knowledgeable about the hedge fund's strategy, tactics, and performance. When a distinct break in the market occurs and many of the securities involved in the hedge fund's strategy decline markedly in value, however, Rasmussen observes that the reported performance of the hedge fund does not at all reflect this decline. From her experience, this lack of an effect is a very unlikely occurrence. She approaches the head of trading about her concern and is told that she should not ask any questions and that the fund is too big and successful and is not her concern. She is fairly sure something is not right, so she contacts the compliance officer and is again told to stay away from the hedge fund reporting issue.

> *Comment*: Rasmussen has clearly come upon an error in policies, procedures, and compliance practices within the firm's operations. According to Standard IV(C), the supervisor and the compliance officer have the responsibility to review the concerns brought forth by Rasmussen. Supervisors have the responsibility of establishing and encouraging an ethical culture in the firm. The dismissal of Rasmussen's question violates Standard IV(C) and undermines the firm's ethical operations.
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> See also Standard I(D)–Misconduct and, for guidance on whistleblowing, Standard IV(A)–Loyalty.

Example 6 (Inadequate Procedures):

Brendan Witt, a former junior sell-side technology analyst, decided to return to school to earn an MBA. To keep his research skills and industry knowledge sharp, Witt accepted a position with On-line and Informed, an independent internet-based research company. The position requires the publication of a recommendation and report on a different company every month. Initially, Witt is a regular contributor of new research and a participant in the associated discussion boards that generally have positive comments on the technology sector. Over time, his ability to manage his educational requirements and his work requirements begin to conflict with one another. Knowing a recommendation is due the next day for On-line, Witt creates a report based on a few news articles and what the conventional wisdom of the markets has deemed the "hot" security of the day.

Comment: Allowing the report submitted by Witt to be posted highlights a lack of compliance procedures by the research firm. Witt's supervisor needs to work with the management of On-line to develop an appropriate review process to ensure that all contracted analysts comply with the requirements.

See also Standard V(A)–Diligence and Reasonable Basis because it relates to Witt's responsibility for substantiating a recommendation.

Example 7 (Inadequate Supervision):

Michael Papis is the chief investment officer of his state's retirement fund. The fund has always used outside advisers for the real estate allocation, and this information is clearly presented in all fund communications. Thomas Nagle, a recognized sell-side research analyst and Papis's business school classmate, recently left the investment bank he worked for to start his own asset management firm, Accessible Real Estate. Nagle is trying to build his assets under management and contacts Papis about gaining some of the retirement fund's allocation. In the previous few years, the performance of the retirement fund's real estate investments was in line with the fund's benchmark but was not extraordinary. Papis decides to help out his old friend and also to seek better returns by moving the real estate allocation to Accessible. The only notice of the change in adviser appears in the next annual report in the listing of associated advisers.

Comment: Papis's actions highlight the need for supervision and review at all levels in an organization. His responsibilities may include the selection of external advisers, but the decision to change advisers appears arbitrary. Members and candidates should ensure that their firm has appropriate policies and procedures in place to detect inappropriate actions, such as the action taken by Papis.

See also Standard V(A)–Diligence and Reasonable Basis, Standard V(B)–Communication with Clients and Prospective Clients, and Standard VI(A)–Disclosure of Conflicts.

Example 8 (Supervising Research Activities):

Mary Burdette was recently hired by Fundamental Investment Management (FIM) as a junior auto industry analyst. Burdette is expected to expand the social media presence of the firm because she is active with various networks, including Facebook, LinkedIn, and Twitter. Although Burdette's supervisor, Joe Graf, has never used social media, he encourages Burdette to explore opportunities to increase FIM's online presence and ability to share content, communicate, and broadcast information to clients. In response to Graf's encouragement, Burdette is working on a proposal detailing the advantages of getting FIM onto Twitter in addition to launching a company Facebook page.

As part of her auto industry research for FIM, Burdette is completing a report on the financial impact of Sun Drive Auto Ltd.'s new solar technology for compact automobiles. This research report will be her first for FIM, and she believes Sun Drive's technology could revolutionize the auto industry. In her excitement, Burdette sends a quick tweet to FIM Twitter followers summarizing her "buy" recommendation for Sun Drive Auto stock.

Comment: Graf has violated Standard IV(C) by failing to reasonably supervise Burdette with respect to the contents of her tweet. He did not establish reasonable procedures to prevent the unauthorized dissemination of company research through social media networks. Graf must make sure all employees receive regular training about FIM's policies and procedures, including the appropriate business use of personal social media networks.

See Standard III(B) for additional guidance.

Example 9 (Supervising Research Activities):

Chen Wang leads the research department at YYRA Retirement Planning Specialists. Chen supervises a team of 10 analysts in a fast-paced and understaffed organization. He is responsible for coordinating the firm's approved process to review all reports before they are provided to the portfolio management team for use in rebalancing client portfolios.

One of Chen's direct reports, Huang Mei, covers the banking industry. Chen must submit the latest updates to the portfolio management team tomorrow morning. Huang has yet to submit her research report on ZYX Bank because she is uncomfortable providing a "buy" or "sell" opinion of ZYX on the basis of the completed analysis. Pressed for time and concerned that Chen will reject a "hold" recommendation, she researches various websites and blogs on the banking sector for whatever she can find on ZYX. One independent blogger provides a new

interpretation of the recently reported data Huang has analyzed and concludes with a strong "sell" recommendation for ZYX. She is impressed by the originality and resourcefulness of this blogger's report.

Very late in the evening, Huang submits her report and "sell" recommendation to Chen without any reference to the independent blogger's report. Given the late time of the submission and the competence of Huang's prior work, Chen compiles this report with the recommendations from each of the other analysts and meets with the portfolio managers to discuss implementation.

Comment: Chen has violated Standard IV(C) by neglecting to reasonably and adequately follow the firm's approved review process for Huang's research report. The delayed submission and the quality of prior work do not remove Chen's requirement to uphold the designated review process. A member or candidate with supervisory responsibility must make reasonable efforts to see that appropriate procedures are established, documented, communicated to covered personnel, and followed.

Standard V: Investment Analysis, Recommendations, and Actions

Standard V(A) Diligence and Reasonable Basis

Members and Candidates must:

1. Exercise diligence, independence, and thoroughness in analyzing investments, making investment recommendations, and taking investment actions.
2. Have a reasonable and adequate basis, supported by appropriate research and investigation, for any investment analysis, recommendation, or action.

Guidance

Highlights:

- *Defining Diligence and Reasonable Basis*
- *Using Secondary or Third-Party Research*
- *Using Quantitatively Oriented Research*
- *Developing Quantitatively Oriented Techniques*
- *Selecting External Advisers and Subadvisers*
- *Group Research and Decision Making*

The application of Standard V(A) depends on the investment philosophy the member, candidate, or firm is following, the role of the member or candidate in the investment decision-making process, and the support and resources provided by the member's or candidate's employer. These factors will dictate the nature of the diligence and thoroughness of the research and the level of investigation required by Standard V(A).

The requirements for issuing conclusions based on research will vary in relation to the member's or candidate's role in the investment decision-making process, but the member or candidate must make reasonable efforts to cover all pertinent issues when arriving at a recommendation. Members and candidates enhance transparency by providing or offering to provide supporting information to clients when recommending a purchase or sale or when changing a recommendation.

Defining Diligence and Reasonable Basis

Every investment decision is based on a set of facts known and understood at the time. Clients turn to members and candidates for advice and expect these advisers

to have more information and knowledge than they do. This information and knowledge is the basis from which members and candidates apply their professional judgment in taking investment actions and making recommendations.

At a basic level, clients want assurance that members and candidates are putting forth the necessary effort to support the recommendations they are making. Communicating the level and thoroughness of the information reviewed before the member or candidate makes a judgment allows clients to understand the reasonableness of the recommended investment actions.

As with determining the suitability of an investment for the client, the necessary level of research and analysis will differ with the product, security, or service being offered. In providing an investment service, members and candidates typically use a variety of resources, including company reports, third-party research, and results from quantitative models. A reasonable basis is formed through a balance of these resources appropriate for the security or decision being analyzed.

The following list provides some, but definitely not all, examples of attributes to consider while forming the basis for a recommendation:

- global, regional, and country macroeconomic conditions,
- a company's operating and financial history,
- the industry's and sector's current conditions and the stage of the business cycle,
- a mutual fund's fee structure and management history,
- the output and potential limitations of quantitative models,
- the quality of the assets included in a securitization, and
- the appropriateness of selected peer-group comparisons.

Even though an investment recommendation may be well informed, downside risk remains for any investment. Members and candidates can base their decisions only on the information available at the time decisions are made. The steps taken in developing a diligent and reasonable recommendation should minimize unexpected downside events.

Using Secondary or Third-Party Research

If members and candidates rely on secondary or third-party research, they must make reasonable and diligent efforts to determine whether such research is sound. Secondary research is defined as research conducted by someone else in the member's or candidate's firm. Third-party research is research conducted by entities outside the member's or candidate's firm, such as a brokerage firm, bank, or research firm. If a member or candidate has reason to suspect that either secondary or third-party research or information comes from a source that lacks a sound basis, the member or candidate must not rely on that information.

Members and candidates should make reasonable enquiries into the source and accuracy of all data used in completing their investment analysis and

recommendations. The sources of the information and data will influence the level of the review a member or candidate must undertake. Information and data taken from internet sources, such as personal blogs, independent research aggregation websites, or social media websites, likely require a greater level of review than information from more established research organizations.

Criteria that a member or candidate can use in forming an opinion on whether research is sound include the following:

- assumptions used,
- rigor of the analysis performed,
- date/timeliness of the research, and
- evaluation of the objectivity and independence of the recommendations.

A member or candidate may rely on others in his or her firm to determine whether secondary or third-party research is sound and use the information in good faith unless the member or candidate has reason to question its validity or the processes and procedures used by those responsible for the research. For example, a portfolio manager may not have a choice of a data source because the firm's senior managers conducted due diligence to determine which vendor would provide services; the member or candidate can use the information in good faith assuming the due diligence process was deemed adequate.

A member or candidate should verify that the firm has a policy about the timely and consistent review of approved research providers to ensure that the quality of the research continues to meet the necessary standards. If such a policy is not in place at the firm, the member or candidate should encourage the development and adoption of a formal review practice.

Using Quantitatively Oriented Research

Standard V(A) applies to the rapidly expanding use of quantitatively oriented research models and processes, such as computer-generated modeling, screening, and ranking of investment securities; the creation or valuation of derivative instruments; and quantitative portfolio construction techniques. These models and processes are being used for much more than the back testing of investment strategies, especially with continually advancing technology and techniques. The continued broad development of quantitative methods and models is an important part of capital market developments.

Members and candidates need to have an understanding of the parameters used in models and quantitative research that are incorporated into their investment recommendations. Although they are not required to become experts in every technical aspect of the models, they must understand the assumptions and limitations inherent in any model and how the results were used in the decision-making process.

The reliance on and potential limitations of financial models became clear through the investment crisis that unfolded in 2007 and 2008. In some cases, the financial models used to value specific securities and related derivative products

did not adequately demonstrate the level of associated risks. Members and candidates should make reasonable efforts to test the output of investment models and other pre-programed analytical tools they use. Such validation should occur before incorporating the process into their methods, models, or analyses.

Although not every model can test for every factor or outcome, members and candidates should ensure that their analyses incorporate a broad range of assumptions sufficient to capture the underlying characteristics of investments. The omission from the analysis of potentially negative outcomes or of levels of risk outside the norm may misrepresent the true economic value of an investment. The possible scenarios for analysis should include factors that are likely to have a substantial influence on the investment value and may include extremely positive and negative scenarios.

Developing Quantitatively Oriented Techniques

Individuals who create new quantitative models and services must exhibit a higher level of diligence in reviewing new products than the individuals who ultimately use the analytical output. Members and candidates involved in the development and oversight of quantitatively oriented models, methods, and algorithms must understand the technical aspects of the products they provide to clients. A thorough testing of the model and resulting analysis should be completed prior to product distribution.

Members and candidates need to consider the source and time horizon of the data used as inputs in financial models. The information from many commercially available databases may not effectively incorporate both positive and negative market cycles. In the development of a recommendation, the member or candidate may need to test the models by using volatility and performance expectations that represent scenarios outside the observable databases. In reviewing the computer models or the resulting output, members and candidates need to pay particular attention to the assumptions used in the analysis and the rigor of the analysis to ensure that the model incorporates a wide range of possible input expectations, including negative market events.

Selecting External Advisers and Subadvisers

Financial instruments and asset allocation techniques continue to develop and evolve. This progression has led to the use of specialized managers to invest in specific asset classes or diversification strategies that complement a firm's in-house expertise. Standard V(A) applies to the level of review necessary in selecting an external adviser or subadviser to manage a specifically mandated allocation. Members and candidates must review managers as diligently as they review individual funds and securities.

Members and candidates who are directly involved with the use of external advisers need to ensure that their firms have standardized criteria for reviewing these selected external advisers and managers. Such criteria would include, but would not be limited to, the following:

- reviewing the adviser's established code of ethics,

- understanding the adviser's compliance and internal control procedures,
- assessing the quality of the published return information, and
- reviewing the adviser's investment process and adherence to its stated strategy.

Codes, standards, and guides to best practice published by CFA Institute provide members and candidates with examples of acceptable practices for external advisers and advice in selecting a new adviser. The following guides are available at the CFA Institute website (www.cfainstitute.org): Asset Manager Code of Professional Conduct, Global Investment Performance Standards, and Model Request for Proposal (for equity, credit, or real estate managers).

Group Research and Decision Making

Commonly, members and candidates are part of a group or team that is collectively responsible for producing investment analysis or research. The conclusions or recommendations of the group report represent the consensus of the group and are not necessarily the views of the member or candidate, even though the name of the member or candidate is included on the report. In some instances, a member or candidate will not agree with the view of the group. If, however, the member or candidate believes that the consensus opinion has a reasonable and adequate basis and is independent and objective, the member or candidate need not decline to be identified with the report. If the member or candidate is confident in the process, the member or candidate does not need to dissociate from the report even if it does not reflect his or her opinion.

Recommended Procedures for Compliance

Members and candidates should encourage their firms to consider the following policies and procedures to support the principles of Standard V(A):

- Establish a policy requiring that research reports, credit ratings, and investment recommendations have a basis that can be substantiated as reasonable and adequate. An individual employee (a supervisory analyst) or a group of employees (a review committee) should be appointed to review and approve such items prior to external circulation to determine whether the criteria established in the policy have been met.
- Develop detailed, written guidance for analysts (research, investment, or credit), supervisory analysts, and review committees that establishes the due diligence procedures for judging whether a particular recommendation has a reasonable and adequate basis.
- Develop measurable criteria for assessing the quality of research, the reasonableness and adequacy of the basis for any recommendation or rating, and the accuracy of recommendations over time. In some cases, firms may consider

implementing compensation arrangements that depend on these measurable criteria and that are applied consistently to all related analysts.

- Develop detailed, written guidance that establishes minimum levels of scenario testing of all computer-based models used in developing, rating, and evaluating financial instruments. The policy should contain criteria related to the breadth of the scenarios tested, the accuracy of the output over time, and the analysis of cash flow sensitivity to inputs.
- Develop measurable criteria for assessing outside providers, including the quality of information being provided, the reasonableness and adequacy of the provider's collection practices, and the accuracy of the information over time. The established policy should outline how often the provider's products are reviewed.
- Adopt a standardized set of criteria for evaluating the adequacy of external advisers. The policy should include how often and on what basis the allocation of funds to the adviser will be reviewed.

Application of the Standard

Example 1 (Sufficient Due Diligence):

Helen Hawke manages the corporate finance department of Sarkozi Securities, Ltd. The firm is anticipating that the government will soon close a tax loophole that currently allows oil-and-gas exploration companies to pass on drilling expenses to holders of a certain class of shares. Because market demand for this tax-advantaged class of stock is currently high, Sarkozi convinces several companies to undertake new equity financings at once, before the loophole closes. Time is of the essence, but Sarkozi lacks sufficient resources to conduct adequate research on all the prospective issuing companies. Hawke decides to estimate the IPO prices on the basis of the relative size of each company and to justify the pricing later when her staff has time.

Comment: Sarkozi should have taken on only the work that it could adequately handle. By categorizing the issuers by general size, Hawke has bypassed researching all the other relevant aspects that should be considered when pricing new issues and thus has not performed sufficient due diligence. Such an omission can result in investors purchasing shares at prices that have no actual basis. Hawke has violated Standard V(A).

Example 2 (Sufficient Scenario Testing):

Babu Dhaliwal works for Heinrich Brokerage in the corporate finance group. He has just persuaded Feggans Resources, Ltd., to allow his firm to do a secondary equity financing at Feggans Resources' current stock price. Because the stock has been trading at higher multiples than similar companies with equivalent production, Dhaliwal presses the Feggans Resources managers to project what would be

the maximum production they could achieve in an optimal scenario. Based on these numbers, he is able to justify the price his firm will be asking for the secondary issue. During a sales pitch to the brokers, Dhaliwal then uses these numbers as the base-case production levels that Feggans Resources will achieve.

> *Comment*: When presenting information to the brokers, Dhaliwal should have given a range of production scenarios and the probability of Feggans Resources achieving each level. By giving the maximum production level as the likely level of production, he has misrepresented the chances of achieving that production level and seriously misled the brokers. Dhaliwal has violated Standard V(A).

Example 3 (Developing a Reasonable Basis):

Brendan Witt, a former junior sell-side technology analyst, decided to return to school to earn an MBA. To keep his research skills and industry knowledge sharp, Witt accepted a position with On-line and Informed, an independent internet-based research company. The position requires the publication of a recommendation and report on a different company every month. Initially, Witt is a regular contributor of new research and a participant in the associated discussion boards that generally have positive comments on the technology sector. Over time, his ability to manage his educational requirements and his work requirements begin to conflict with one another. Knowing a recommendation is due the next day for On-line, Witt creates a report based on a few news articles and what the conventional wisdom of the markets has deemed the "hot" security of the day.

> *Comment*: Witt's knowledge of and exuberance for technology stocks, a few news articles, and the conventional wisdom of the markets do not constitute, without more information, a reasonable and adequate basis for a stock recommendation that is supported by appropriate research and investigation. Therefore, Witt has violated Standard V(A).
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> See also Standard IV(C)–Responsibilities of Supervisors because it relates to the firm's inadequate procedures.

Example 4 (Timely Client Updates):

Kristen Chandler is an investment consultant in the London office of Dalton Securities, a major global investment consultant firm. One of her UK pension funds has decided to appoint a specialist US equity manager. Dalton's global manager of research relies on local consultants to cover managers within their regions and, after conducting thorough due diligence, puts their views and ratings in Dalton's manager database. Chandler accesses Dalton's global manager research database and conducts a screen of all US equity managers on the basis of a match with the client's desired philosophy/style, performance, and tracking-error targets. She selects the five managers that meet these criteria and puts them in a briefing report that is delivered to the client 10 days later. Between the time of

Chandler's database search and the delivery of the report to the client, Chandler is told that Dalton has updated the database with the information that one of the firms that Chandler has recommended for consideration lost its chief investment officer, the head of its US equity research, and the majority of its portfolio managers on the US equity product—all of whom have left to establish their own firm. Chandler does not revise her report with this updated information.

> *Comment*: Chandler has failed to satisfy the requirement of Standard V(A). Although Dalton updated the manager ratings to reflect the personnel turnover at one of the firms, Chandler did not update her report to reflect the new information.

Example 5 (Group Research Opinions):

Evelyn Mastakis is a junior analyst who has been asked by her firm to write a research report predicting the expected interest rate for residential mortgages over the next six months. Mastakis submits her report to the fixed-income investment committee of her firm for review, as required by firm procedures. Although some committee members support Mastakis's conclusion, the majority of the committee disagrees with her conclusion, and the report is significantly changed to indicate that interest rates are likely to increase more than originally predicted by Mastakis. Should Mastakis ask that her name be taken off the report when it is disseminated?

> *Comment*: The results of research are not always clear, and different people may have different opinions based on the same factual evidence. In this case, the committee may have valid reasons for issuing a report that differs from the analyst's original research. The firm can issue a report that is different from the original report of an analyst as long as there is a reasonable and adequate basis for its conclusions.
>
> Generally, analysts must write research reports that reflect their own opinion and can ask the firm not to put their name on reports that ultimately differ from that opinion. When the work is a group effort, however, not all members of the team may agree with all aspects of the report. Ultimately, members and candidates can ask to have their names removed from the report, but if they are satisfied that the process has produced results or conclusions that have a reasonable and adequate basis, members and candidates do not have to dissociate from the report even when they do not agree with its contents. If Mastakis is confident in the process, she does not need to dissociate from the report even if it does not reflect her opinion.

Example 6 (Reliance on Third-Party Research):

Gary McDermott runs a two-person investment management firm. McDermott's firm subscribes to a service from a large investment research firm that provides research reports. McDermott's firm makes investment recommendations on the basis of these reports.

Comment: Members and candidates can rely on third-party research but must make reasonable and diligent efforts to determine that such research is sound. If McDermott undertakes due diligence efforts on a regular basis to ensure that the research produced by the large firm is objective and reasonably based, McDermott can rely on that research when making investment recommendations to clients.

Example 7 (Due Diligence in Submanager Selection):

Paul Ostrowski's business has grown significantly over the past couple of years, and some clients want to diversify internationally. Ostrowski decides to find a submanager to handle the expected international investments. Because this will be his first subadviser, Ostrowski uses the CFA Institute model "request for proposal" to design a questionnaire for his search. By his deadline, he receives seven completed questionnaires from a variety of domestic and international firms trying to gain his business. Ostrowski reviews all the applications in detail and decides to select the firm that charges the lowest fees because doing so will have the least impact on his firm's bottom line.

Comment: The selection of an external adviser or subadviser should be based on a full and complete review of the adviser's services, performance history, and cost structure. In basing the decision on the fee structure alone, Ostrowski may be violating Standard V(A).

See also Standard III(C)–Suitability because it relates to the ability of the selected adviser to meet the needs of the clients.

Example 8 (Sufficient Due Diligence):

Michael Papis is the chief investment officer of his state's retirement fund. The fund has always used outside advisers for the real estate allocation, and this information is clearly presented in all fund communications. Thomas Nagle, a recognized sell-side research analyst and Papis's business school classmate, recently left the investment bank he worked for to start his own asset management firm, Accessible Real Estate. Nagle is trying to build his assets under management and contacts Papis about gaining some of the retirement fund's allocation. In the previous few years, the performance of the retirement fund's real estate investments was in line with the fund's benchmark but was not extraordinary. Papis decides to help out his old friend and also to seek better returns by moving the real estate allocation to Accessible. The only notice of the change in adviser appears in the next annual report in the listing of associated advisers.

Comment: Papis violated Standard V(A). His responsibilities may include the selection of the external advisers, but the decision to change advisers appears to have been arbitrary. If Papis was dissatisfied with the current real estate adviser, he should have conducted a proper solicitation to select the most appropriate adviser.

See also Standard IV(C)–Responsibilities of Supervisors, Standard V(B)–Communication with Clients and Prospective Clients, and Standard VI(A)–Disclosure of Conflicts.

Example 9 (Sufficient Due Diligence):

Andre Shrub owns and operates Conduit, an investment advisory firm. Prior to opening Conduit, Shrub was an account manager with Elite Investment, a hedge fund managed by his good friend Adam Reed. To attract clients to a new Conduit fund, Shrub offers lower-than-normal management fees. He can do so because the fund consists of two top-performing funds managed by Reed. Given his personal friendship with Reed and the prior performance record of these two funds, Shrub believes this new fund is a winning combination for all parties. Clients quickly invest with Conduit to gain access to the Elite funds. No one is turned away because Conduit is seeking to expand its assets under management.

Comment: Shrub violated Standard V(A) by not conducting a thorough analysis of the funds managed by Reed before developing the new Conduit fund. Shrub's reliance on his personal relationship with Reed and his prior knowledge of Elite are insufficient justification for the investments. The funds may be appropriately considered, but a full review of their operating procedures, reporting practices, and transparency are some elements of the necessary due diligence.

See also Standard III(C)–Suitability.

Example 10 (Sufficient Due Diligence):

Bob Thompson has been doing research for the portfolio manager of the fixed-income department. His assignment is to do sensitivity analysis on securitized subprime mortgages. He has discussed with the manager possible scenarios to use to calculate expected returns. A key assumption in such calculations is housing price appreciation (HPA) because it drives "prepays" (prepayments of mortgages) and losses. Thompson is concerned with the significant appreciation experienced over the previous five years as a result of the increased availability of funds from subprime mortgages. Thompson insists that the analysis should include a scenario run with –10% for Year 1, –5% for Year 2, and then (to project a worst-case scenario) 0% for Years 3 through 5. The manager replies that these assumptions are too dire because there has never been a time in their available database when HPA was negative.

Thompson conducts his research to better understand the risks inherent in these securities and evaluates these securities in the worst-case scenario, a less likely but possible environment. Based on the results of the enhanced scenarios, Thompson does not recommend the purchase of the securitization. Against the general market trends, the manager follows Thompson's recommendation and does not invest. The following year, the housing market collapses. In avoiding the subprime investments, the manager's portfolio outperforms its peer group that year.

Comment: Thompson's actions in running the scenario test with inputs beyond the historical trends available in the firm's databases adhere to the principles of Standard V(A). His concerns over recent trends provide a sound basis for further analysis. Thompson understands the limitations of his model, when combined with the limited available historical information, to accurately predict the performance of the funds if market conditions change negatively.

See also Standard I(B)–Independence and Objectivity.

Example 11 (Use of Quantitatively Oriented Models):

Espacia Liakos works in sales for Hellenica Securities, a firm specializing in developing intricate derivative strategies to profit from particular views on market expectations. One of her clients is Eugenie Carapalis, who has become convinced that commodity prices will become more volatile over the coming months. Carapalis asks Liakos to quickly engineer a strategy that will benefit from this expectation. Liakos turns to Hellenica's modeling group to fulfill this request. Because of the tight deadline, the modeling group outsources parts of the work to several trusted third parties. Liakos implements the disparate components of the strategy as the firms complete them.

Within a month, Carapalis is proven correct: Volatility across a range of commodities increases sharply. But her derivatives position with Hellenica returns huge losses, and the losses increase daily. Liakos investigates and realizes that although each of the various components of the strategy had been validated, they had never been evaluated as an integrated whole. In extreme conditions, portions of the model worked at cross-purposes with other portions, causing the overall strategy to fail dramatically.

Comment: Liakos violated Standard V(A). Members and candidates must understand the statistical significance of the results of the models they recommend and must be able to explain them to clients. Liakos did not take adequate care to ensure a thorough review of the whole model; its components were evaluated only individually. Because Carapalis clearly intended to implement the strategy as a whole rather than as separate parts, Liakos should have tested how the components of the strategy interacted as well as how they performed individually.

Example 12 (Successful Due Diligence/Failed Investment):

Alton Newbury is an investment adviser to high-net-worth clients. A client with an aggressive risk profile in his investment policy statement asks about investing in the Top Shelf hedge fund. This fund, based in Calgary, Alberta, Canada, has reported 20% returns for the first three years. The fund prospectus states that its strategy involves long and short positions in the energy sector and extensive leverage. Based on his analysis of the fund's track record, the principals involved in

managing the fund, the fees charged, and the fund's risk profile, Newbury recommends the fund to the client and secures a position in it. The next week, the fund announces that it has suffered a loss of 60% of its value and is suspending operations and redemptions until after a regulatory review. Newbury's client calls him in a panic and asks for an explanation.

> *Comment*: Newbury's actions were consistent with Standard V(A). Analysis of an investment that results in a reasonable basis for recommendation does not guarantee that the investment has no downside risk. Newbury should discuss the analysis process with the client while reminding him or her that past performance does not lead to guaranteed future gains and that losses in an aggressive investment portfolio should be expected.

Example 13 (Quantitative Model Diligence):

Barry Cannon is the lead quantitative analyst at CityCenter Hedge Fund. He is responsible for the development, maintenance, and enhancement of the proprietary models the fund uses to manage its investors' assets. Cannon reads several high-level mathematical publications and blogs to stay informed of current developments. One blog, run by Expert CFA, presents some intriguing research that may benefit one of CityCenter's current models. Cannon is under pressure from firm executives to improve the model's predictive abilities, and he incorporates the factors discussed in the online research. The updated output recommends several new investments to the fund's portfolio managers.

> *Comment*: Cannon has violated Standard V(A) by failing to have a reasonable basis for the new recommendations made to the portfolio managers. He needed to diligently research the effect of incorporating the new factors before offering the output recommendations. Cannon may use the blog for ideas, but it is his responsibility to determine the effect on the firm's proprietary models.
>
> See Standard VII(B) regarding the violation by "Expert CFA" in the use of the CFA designation.

Example 14 (Selecting a Service Provider):

Ellen Smith is a performance analyst at Artic Global Advisors, a firm that manages global equity mandates for institutional clients. She was asked by her supervisor to review five new performance attribution systems and recommend one that would more appropriately explain the firm's investment strategy to clients. On the list was a system she recalled learning about when visiting an exhibitor booth at a recent conference. The system is highly quantitative and something of a "black box" in how it calculates the attribution values. Smith recommended this option without researching the others because the sheer complexity of the process was sure to impress the clients.

Comment: Smith's actions do not demonstrate a sufficient level of diligence in reviewing this product to make a recommendation for selecting the service. Besides not reviewing or considering the other four potential systems, she did not determine whether the "black box" attribution process aligns with the investment practices of the firm, including its investments in different countries and currencies. Smith must review and understand the process of any software or system before recommending its use as the firm's attribution system.

Example 15 (Subadviser Selection):

Craig Jackson is working for Adams Partners, Inc., and has been assigned to select a hedge fund subadviser to improve the diversification of the firm's large fund-of-funds product. The allocation must be in place before the start of the next quarter. Jackson uses a consultant database to find a list of suitable firms that claim compliance with the GIPS standards. He calls more than 20 firms on the list to confirm their potential interest and to determine their most recent quarterly and annual total return values. Because of the short turnaround, Jackson recommends the firm with the greatest total return values for selection.

Comment: By considering only performance and GIPS compliance, Jackson has not conducted sufficient review of potential firms to satisfy the requirements of Standard V(A). A thorough investigation of the firms and their operations should be conducted to ensure that their addition would increase the diversity of clients' portfolios and that they are suitable for the fund-of-funds product.

Example 16 (Manager Selection):

Timothy Green works for Peach Asset Management, where he creates proprietary models that analyze data from the firm request for proposal questionnaires to identify managers for possible inclusion in the firm's fund-of-funds investment platform. Various criteria must be met to be accepted to the platform. Because of the number of respondents to the questionnaires, Green uses only the data submitted to make a recommendation for adding a new manager.

Comment: By failing to conduct any additional outside review of the information to verify what was submitted through the request for proposal, Green has likely not satisfied the requirements of Standard V(A). The amount of information requested from outside managers varies among firms. Although the requested information may be comprehensive, Green should ensure sufficient effort is undertaken to verify the submitted information before recommending a firm for inclusion. This requires that he go beyond the information provided by the manager on the request for proposal questionnaire and may include interviews with interested managers, reviews of regulatory filings, and discussions with the managers' custodian or auditor.

Example 17 (Technical Model Requirements):

Jérôme Dupont works for the credit research group of XYZ Asset Management, where he is in charge of developing and updating credit risk models. In order to perform accurately, his models need to be regularly updated with the latest market data.

Dupont does not interact with or manage money for any of the firm's clients. He is in contact with the firm's US corporate bond fund manager, John Smith, who has only very superficial knowledge of the model and who from time to time asks very basic questions regarding the output recommendations. Smith does not consult Dupont with respect to finalizing his clients' investment strategies.

Dupont's recently assigned objective is to develop a new emerging market corporate credit risk model. The firm is planning to expand into emerging credit, and the development of such a model is a critical step in this process. Because Smith seems to follow the model's recommendations without much concern for its quality as he develops his clients' investment strategies, Dupont decides to focus his time on the development of the new emerging market model and neglects to update the US model.

After several months without regular updates, Dupont's diagnostic statistics start to show alarming signs with respect to the quality of the US credit model. Instead of conducting the long and complicated data update, Dupont introduces new codes into his model with some limited new data as a quick "fix." He thinks this change will address the issue without needing to complete the full data update, so he continues working on the new emerging market model.

Several months following the quick "fix," another set of diagnostic statistics reveals nonsensical results and Dupont realizes that his earlier change contained an error. He quickly corrects the error and alerts Smith. Smith realizes that some of the prior trades he performed were due to erroneous model results. Smith rebalances the portfolio to remove the securities purchased on the basis of the questionable results without reporting the issue to anyone else.

Comment: Smith violated standard V(A) because exercising "diligence, independence, and thoroughness in analyzing investments, making investment recommendations, and taking investment actions" means that members and candidates must understand the technical aspects of the products they provide to clients. Smith does not understand the model he is relying on to manage money. Members and candidates should also make reasonable enquiries into the source and accuracy of all data used in completing their investment analysis and recommendations.

Dupont violated V(A) even if he does not trade securities or make investment decisions. Dupont's models give investment recommendations, and Dupont is accountable for the quality of those recommendations. Members and candidates should make reasonable efforts to test the output of pre-programed analytical tools they use. Such validation should occur before incorporating the tools into their decision-making process.

See also Standard V(B)–Communication with Clients and Prospective Clients.

Standard V(B) Communication with Clients and Prospective Clients

Members and Candidates must:

1. Disclose to clients and prospective clients the basic format and general principles of the investment processes they use to analyze investments, select securities, and construct portfolios and must promptly disclose any changes that might materially affect those processes.
2. Disclose to clients and prospective clients significant limitations and risks associated with the investment process.
3. Use reasonable judgment in identifying which factors are important to their investment analyses, recommendations, or actions and include those factors in communications with clients and prospective clients.
4. Distinguish between fact and opinion in the presentation of investment analyses and recommendations.

Guidance

Highlights:

- *Informing Clients of the Investment Process*
- *Different Forms of Communication*
- *Identifying Risk and Limitations*
- *Report Presentation*
- *Distinction between Facts and Opinions in Reports*

Standard V(B) addresses member and candidate conduct with respect to communicating with clients. Developing and maintaining clear, frequent, and thorough communication practices is critical to providing high-quality financial services to clients. When clients understand the information communicated to them, they also can understand exactly how members and candidates are acting on their behalf, which gives clients the opportunity to make well-informed decisions about their investments. Such understanding can be accomplished only through clear communication.

Standard V(B) states that members and candidates should communicate in a recommendation the factors that were instrumental in making the investment recommendation. A critical part of this requirement is to distinguish clearly between opinions and facts. In preparing a research report, the member or candidate must present the basic characteristics of the security(ies) being analyzed,

which will allow the reader to evaluate the report and incorporate information the reader deems relevant to his or her investment decision-making process.

Similarly, in preparing a recommendation about, for example, an asset allocation strategy, alternative investment vehicle, or structured investment product, the member or candidate should include factors that are relevant to the asset classes that are being discussed. Follow-up communication of significant changes in the risk characteristics of a security or asset strategy is required. Providing regular updates to any changes in the risk characteristics is recommended.

Informing Clients of the Investment Process

Members and candidates must adequately describe to clients and prospective clients the manner in which they conduct the investment decision-making process. Such disclosure should address factors that have positive and negative influences on the recommendations, including significant risks and limitations of the investment process used. The member or candidate must keep clients and other interested parties informed on an ongoing basis about changes to the investment process, especially newly identified significant risks and limitations. Only by thoroughly understanding the nature of the investment product or service can a client determine whether changes to that product or service could materially affect his or her investment objectives.

Understanding the basic characteristics of an investment is of great importance in judging the suitability of that investment on a standalone basis, but it is especially important in determining the impact each investment will have on the characteristics of a portfolio. Although the risk and return characteristics of a common stock might seem to be essentially the same for any investor when the stock is viewed in isolation, the effects of those characteristics greatly depend on the other investments held. For instance, if the particular stock will represent 90% of an individual's investments, the stock's importance in the portfolio is vastly different from what it would be to an investor with a highly diversified portfolio for whom the stock will represent only 2% of the holdings.

A firm's investment policy may include the use of outside advisers to manage various portions of clients' assets under management. Members and candidates should inform the clients about the specialization or diversification expertise provided by the external adviser(s). This information allows clients to understand the full mix of products and strategies being applied that may affect their investment objectives.

Different Forms of Communication

For purposes of Standard V(B), communication is not confined to a written report of the type traditionally generated by an analyst researching a security, company, or industry. A presentation of information can be made via any means of communication, including in-person recommendation or description, telephone conversation, media broadcast, or transmission by computer (e.g., on the internet).

Computer and mobile device communications have rapidly evolved over the past few years. Members and candidates using any social media service to

communicate business information must be diligent in their efforts to avoid unintended problems because these services may not be available to all clients. When providing information to clients through new technologies, members and candidates should take reasonable steps to ensure that such delivery would treat all clients fairly and, if necessary, be considered publicly disseminated.

The nature of client communications is highly diverse—from one word ("buy" or "sell") to in-depth reports of more than 100 pages. A communication may contain a general recommendation about the market, asset allocations, or classes of investments (e.g., stocks, bonds, real estate) or may relate to a specific security. If recommendations are contained in capsule form (such as a recommended stock list), members and candidates should notify clients that additional information and analyses are available from the producer of the report.

Identifying Risks and Limitations

Members and candidates must outline to clients and prospective clients significant risks and limitations of the analysis contained in their investment products or recommendations. The type and nature of significant risks will depend on the investment process that members and candidates are following and on the personal circumstances of the client. In general, the use of leverage constitutes a significant risk and should be disclosed.

Members and candidates must adequately disclose the general market-related risks and the risks associated with the use of complex financial instruments that are deemed significant. Other types of risks that members and candidates may consider disclosing include, but are not limited to, counterparty risk, country risk, sector or industry risk, security-specific risk, and credit risk.

Investment securities and vehicles may have limiting factors that influence a client's or potential client's investment decision. Members and candidates must report to clients and prospective clients the existence of limitations significant to the decision-making process. Examples of such factors and attributes include, but are not limited to, investment liquidity and capacity. Liquidity is the ability to liquidate an investment on a timely basis at a reasonable cost. Capacity is the investment amount beyond which returns will be negatively affected by new investments.

The appropriateness of risk disclosure should be assessed on the basis of what was known at the time the investment action was taken (often called an *ex ante* basis). Members and candidates must disclose significant risks known to them at the time of the disclosure. Members and candidates cannot be expected to disclose risks they are unaware of at the time recommendations or investment actions are made. In assessing compliance with Standard V(B), it is important to establish knowledge of a purported significant risk or limitation. A one-time investment loss that occurs after the disclosure does not constitute a pertinent factor in assessing whether significant risks and limitations were properly disclosed. Having no knowledge of a risk or limitation that subsequently triggers a loss may reveal a deficiency in the diligence and reasonable basis of the research of the member or candidate but may not reveal a breach of Standard V(B).

Report Presentation

Once the analytical process has been completed, the member or candidate who prepares the report must include those elements that are important to the analysis and conclusions of the report so that the reader can follow and challenge the report's reasoning. A report writer who has done adequate investigation may emphasize certain areas, touch briefly on others, and omit certain aspects deemed unimportant. For instance, a report may dwell on a quarterly earnings release or new-product introduction and omit other matters as long as the analyst clearly stipulates the limits to the scope of the report.

Investment advice based on quantitative research and analysis must be supported by readily available reference material and should be applied in a manner consistent with previously applied methodology. If changes in methodology are made, they should be highlighted.

Distinction between Facts and Opinions in Reports

Standard V(B) requires that opinion be separated from fact. Violations often occur when reports fail to separate the past from the future by not indicating that earnings estimates, changes in the outlook for dividends, or future market price information are *opinions* subject to future circumstances.

In the case of complex quantitative analyses, members and candidates must clearly separate fact from statistical conjecture and should identify the known limitations of an analysis. Members and candidates may violate Standard V(B) by failing to identify the limits of statistically developed projections because such omission leaves readers unaware of the limits of the published projections.

Members and candidates should explicitly discuss with clients and prospective clients the assumptions used in the investment models and processes to generate the analysis. Caution should be used in promoting the perceived accuracy of any model or process to clients because the ultimate output is merely an estimate of future results and not a certainty.

Recommended Procedures for Compliance

Because the selection of relevant factors is an analytical skill, determination of whether a member or candidate has used reasonable judgment in excluding and including information in research reports depends heavily on case-by-case review rather than a specific checklist.

Members and candidates should encourage their firms to have a rigorous methodology for reviewing research that is created for publication and dissemination to clients.

To assist in the after-the-fact review of a report, the member or candidate must maintain records indicating the nature of the research and should, if asked, be able to supply additional information to the client (or any user of the report) covering factors not included in the report.

Application of the Standard

Example 1 (Sufficient Disclosure of Investment System):

Sarah Williamson, director of marketing for Country Technicians, Inc., is convinced that she has found the perfect formula for increasing Country Technicians' income and diversifying its product base. Williamson plans to build on Country Technicians' reputation as a leading money manager by marketing an exclusive and expensive investment advice letter to high-net-worth individuals. One hitch in the plan is the complexity of Country Technicians' investment system—a combination of technical trading rules (based on historical price and volume fluctuations) and portfolio construction rules designed to minimize risk. To simplify the newsletter, she decides to include only each week's top five "buy" and "sell" recommendations and to leave out details of the valuation models and the portfolio structuring scheme.

> *Comment*: Williamson's plans for the newsletter violate Standard V(B). Williamson need not describe the investment system in detail in order to implement the advice effectively, but she must inform clients of Country Technicians' basic process and logic. Without understanding the basis for a recommendation, clients cannot possibly understand its limitations or its inherent risks.

Example 2 (Providing Opinions as Facts):

Richard Dox is a mining analyst for East Bank Securities. He has just finished his report on Boisy Bay Minerals. Included in his report is his own assessment of the geological extent of mineral reserves likely to be found on the company's land. Dox completed this calculation on the basis of the core samples from the company's latest drilling. According to Dox's calculations, the company has more than 500,000 ounces of gold on the property. Dox concludes his research report as follows: "Based on the fact that the company has 500,000 ounces of gold to be mined, I recommend a strong BUY."

> *Comment*: If Dox issues the report as written, he will violate Standard V(B). His calculation of the total gold reserves for the property based on the company's recent sample drilling is a quantitative opinion, not a fact. Opinion must be distinguished from fact in research reports.

Example 3 (Proper Description of a Security):

Olivia Thomas, an analyst at Government Brokers, Inc., which is a brokerage firm specializing in government bond trading, has produced a report that describes an investment strategy designed to benefit from an expected decline in US interest rates. The firm's derivative products group has designed a structured product that will allow the firm's clients to benefit from this strategy. Thomas's report describing the strategy indicates that high returns are possible if various scenarios for declining interest rates are assumed. Citing the proprietary nature of the structured product

underlying the strategy, the report does not describe in detail how the firm is able to offer such returns or the related risks in the scenarios, nor does the report address the likely returns of the strategy if, contrary to expectations, interest rates rise.

> *Comment*: Thomas has violated Standard V(B) because her report fails to describe properly the basic characteristics of the actual and implied risks of the investment strategy, including how the structure was created and the degree to which leverage was embedded in the structure. The report should include a balanced discussion of how the strategy would perform in the case of rising as well as falling interest rates, preferably illustrating how the strategies might be expected to perform in the event of a reasonable variety of interest rate and credit risk–spread scenarios. If liquidity issues are relevant with regard to the valuation of either the derivatives or the underlying securities, provisions the firm has made to address those risks should also be disclosed.

Example 4 (Notification of Fund Mandate Change):

May & Associates is an aggressive growth manager that has represented itself since its inception as a specialist at investing in small-cap US stocks. One of May's selection criteria is a maximum capitalization of US$250 million for any given company. After a string of successful years of superior performance relative to its peers, May has expanded its client base significantly, to the point at which assets under management now exceed US$3 billion. For liquidity purposes, May's chief investment officer (CIO) decides to lift the maximum permissible market-cap ceiling to US$500 million and change the firm's sales and marketing literature accordingly to inform prospective clients and third-party consultants.

> *Comment*: Although May's CIO is correct about informing potentially interested parties as to the change in investment process, he must also notify May's existing clients. Among the latter group might be a number of clients who not only retained May as a small-cap manager but also retained mid-cap and large-cap specialists in a multiple-manager approach. Such clients could regard May's change of criteria as a style change that distorts their overall asset allocations.

Example 5 (Notification of Fund Mandate Change):

Rather than lifting the ceiling for its universe from US$250 million to US$500 million, May & Associates extends its small-cap universe to include a number of non-US companies.

> *Comment*: Standard V(B) requires that May's CIO advise May's clients of this change because the firm may have been retained by some clients specifically for its prowess at investing in US small-cap stocks. Other changes that require client notification are introducing derivatives to emulate a certain market sector or relaxing various other constraints,

such as portfolio beta. In all such cases, members and candidates must disclose changes to all interested parties.

Example 6 (Notification of Changes to the Investment Process):

RJZ Capital Management is an active value-style equity manager that selects stocks by using a combination of four multifactor models. The firm has found favorable results when back testing the most recent 10 years of available market data in a new dividend discount model (DDM) designed by the firm. This model is based on projected inflation rates, earnings growth rates, and interest rates. The president of RJZ decides to replace its simple model that uses price to trailing 12-month earnings with the new DDM.

Comment: Because the introduction of a new and different valuation model represents a material change in the investment process, RJZ's president must communicate the change to the firm's clients. RJZ is moving away from a model based on hard data toward a new model that is at least partly dependent on the firm's forecasting skills. Clients would likely view such a model as a significant change rather than a mere refinement of RJZ's process.

Example 7 (Notification of Changes to the Investment Process):

RJZ Capital Management loses the chief architect of its multifactor valuation system. Without informing its clients, the president of RJZ decides to redirect the firm's talents and resources toward developing a product for passive equity management—a product that will emulate the performance of a major market index.

Comment: By failing to disclose to clients a substantial change to its investment process, the president of RJZ has violated Standard V(B).

Example 8 (Notification of Changes to the Investment Process):

At Fundamental Asset Management, Inc., the responsibility for selecting stocks for addition to the firm's "approved" list has just shifted from individual security analysts to a committee consisting of the research director and three senior portfolio managers. Eleanor Morales, a portfolio manager with Fundamental Asset Management, thinks this change is not important enough to communicate to her clients.

Comment: Morales must disclose the process change to all her clients. Some of Fundamental's clients might be concerned about the morale and motivation among the firm's best research analysts after such a change. Moreover, clients might challenge the stock-picking track record of the portfolio managers and might even want to monitor the situation closely.

Example 9 (Sufficient Disclosure of Investment System):

Amanda Chinn is the investment director for Diversified Asset Management, which manages the endowment of a charitable organization. Because of recent staff departures, Diversified has decided to limit its direct investment focus to large-cap securities and supplement the needs for small-cap and mid-cap management by hiring outside fund managers. In describing the planned strategy change to the charity, Chinn's update letter states, "As investment director, I will directly oversee the investment team managing the endowment's large-capitalization allocation. I will coordinate the selection and ongoing review of external managers responsible for allocations to other classes." The letter also describes the reasons for the change and the characteristics external managers must have to be considered.

Comment: Standard V(B) requires the disclosure of the investment process used to construct the portfolio of the fund. Changing the investment process from managing all classes of investments within the firm to the use of external managers is one example of information that needs to be communicated to clients. Chinn and her firm have embraced the principles of Standard V(B) by providing their client with relevant information. The charity can now make a reasonable decision about whether Diversified Asset Management remains the appropriate manager for its fund.

Example 10 (Notification of Changes to the Investment Process):

Michael Papis is the chief investment officer of his state's retirement fund. The fund has always used outside advisers for the real estate allocation, and this information is clearly presented in all fund communications. Thomas Nagle, a recognized sell-side research analyst and Papis's business school classmate, recently left the investment bank he worked for to start his own asset management firm, Accessible Real Estate. Nagle is trying to build his assets under management and contacts Papis about gaining some of the retirement fund's allocation. In the previous few years, the performance of the retirement fund's real estate investments was in line with the fund's benchmark but was not extraordinary. Papis decides to help out his old friend and also to seek better returns by moving the real estate allocation to Accessible. The only notice of the change in adviser appears in the next annual report in the listing of associated advisers.

Comment: Papis has violated Standard V(B). He attempted to hide the nature of his decision to change external managers by making only a limited disclosure. The plan recipients and the fund's trustees need to be aware when changes are made to ensure that operational procedures are being followed.

See also Standard IV(C)–Responsibilities of Supervisors, Standard V(A)–Diligence and Reasonable Basis, and Standard VI(A)–Disclosure of Conflicts.

Example 11 (Notification of Errors):

Jérôme Dupont works for the credit research group of XYZ Asset Management, where he is in charge of developing and updating credit risk models. In order to perform accurately, his models need to be regularly updated with the latest market data.

Dupont does not interact with or manage money for any of the firm's clients. He is in contact with the firm's US corporate bond fund manager, John Smith, who has only very superficial knowledge of the model and who from time to time asks very basic questions regarding the output recommendations. Smith does not consult Dupont with respect to finalizing his clients' investment strategies.

Dupont's recently assigned objective is to develop a new emerging market corporate credit risk model. The firm is planning to expand into emerging credit, and the development of such a model is a critical step in this process. Because Smith seems to follow the model's recommendations without much concern for its quality as he develops his clients' investment strategies, Dupont decides to focus his time on the development of the new emerging market model and neglects to update the US model.

After several months without regular updates, Dupont's diagnostic statistics start to show alarming signs with respect to the quality of the US credit model. Instead of conducting the long and complicated data update, Dupont introduces new codes into his model with some limited new data as a quick "fix." He thinks this change will address the issue without needing to complete the full data update, so he continues working on the new emerging market model.

Several months following the quick "fix," another set of diagnostic statistics reveals nonsensical results and Dupont realizes that his earlier change contained an error. He quickly corrects the error and alerts Smith. Smith realizes that some of the prior trades he performed were due to erroneous model results. Smith rebalances the portfolio to remove the securities purchased on the basis of the questionable results without reporting the issue to anyone else.

> *Comment*: Smith violated V(B) by not disclosing a material error in the investment process. Clients should have been informed about the error and the corrective actions the firm was undertaking on their behalf.
>
> See also Standard V(A)–Diligence and Reasonable Basis.

Example 12 (Notification of Risks and Limitations):

Quantitative analyst Yuri Yakovlev has developed an investment strategy that selects small-cap stocks on the basis of quantitative signals. Yakovlev's strategy typically identifies only a small number of stocks (10–20) that tend to be illiquid, but according to his backtests, the strategy generates significant risk-adjusted returns. The partners at Yakovlev's firm, QSC Capital, are impressed by these results. After a thorough examination of the strategy's risks, stress testing, historical back testing, and scenario analysis, QSC decides to seed the strategy with US$10 million of internal capital in order for Yakovlev to create a track record for the strategy.

After two years, the strategy has generated performance returns greater than the appropriate benchmark and the Sharpe ratio of the fund is close to 1.0. On the basis of these results, QSC decides to actively market the fund to large institutional investors. While creating the offering materials, Yakovlev informs the marketing team that the capacity of the strategy is limited. The extent of the limitation is difficult to ascertain with precision; it depends on market liquidity and other factors in his model that can evolve over time. Yakovlev indicates that given the current market conditions, investments in the fund beyond US$100 million of capital could become more difficult and negatively affect expected fund returns.

Alan Wellard, the manager of the marketing team, is a partner with 30 years of marketing experience and explains to Yakovlev that these are complex technical issues that will muddy the marketing message. According to Wellard, the offering material should focus solely on the great track record of the fund. Yakovlev does not object because the fund has only US$12 million of capital, very far from the US$100 million threshold.

Comment: Yakovlev and Wellard have not appropriately disclosed a significant limitation associated with the investment product. Yakovlev believes this limitation, once reached, will materially affect the returns of the fund. Although the fund is currently far from the US$100 million mark, current and prospective investors must be made aware of this capacity issue. If significant limitations are complicated to grasp and clients do not have the technical background required to understand them, Yakovlev and Wellard should either educate the clients or ascertain whether the fund is suitable for each client.

Example 13 (Notification of Risks and Limitations):

Brickell Advisers offers investment advisory services mainly to South American clients. Julietta Ramon, a risk analyst at Brickell, describes to clients how the firm uses value at risk (VaR) analysis to track the risk of its strategies. Ramon assures clients that calculating a VaR at a 99% confidence level, using a 20-day holding period, and applying a methodology based on an *ex ante* Monte Carlo simulation is extremely effective. The firm has never had losses greater than those predicted by this VaR analysis.

Comment: Ramon has not sufficiently communicated the risks associated with the investment process to satisfy the requirements of Standard V(B). The losses predicted by a VaR analysis depend greatly on the inputs used in the model. The size and probability of losses can differ significantly from what an individual model predicts. Ramon must disclose how the inputs were selected and the potential limitations and risks associated with the investment strategy.

Example 14 (Notification of Risks and Limitations):

Lily Smith attended an industry conference and noticed that John Baker, an investment manager with Baker Associates, attracted a great deal of attention from the conference participants. On the basis of her knowledge of Baker's reputation and the interest he received at the conference, Smith recommends adding Baker Associates to the approved manager platform. Her recommendation to the approval committee included the statement "John Baker is well respected in the industry, and his insights are consistently sought after by investors. Our clients are sure to benefit from investing with Baker Associates."

Comment: Smith is not appropriately separating facts from opinions in her recommendation to include the manager within the platform. Her actions conflict with the requirements of Standard V(B). Smith is relying on her opinions about Baker's reputation and the fact that many attendees were talking with him at the conference. Smith should also review the requirements of Standard V(A) regarding reasonable basis to determine the level of review necessary to recommend Baker Associates.

Standard V(C) Record Retention

> Members and Candidates must develop and maintain appropriate records to support their investment analyses, recommendations, actions, and other investment-related communications with clients and prospective clients.

Guidance

Highlights:

- *New Media Records*
- *Records Are Property of the Firm*
- *Local Requirements*

Members and candidates must retain records that substantiate the scope of their research and reasons for their actions or conclusions. The retention requirement applies to decisions to buy or sell a security as well as reviews undertaken that do not lead to a change in position. Which records are required to support recommendations or investment actions depends on the role of the member or candidate in the investment decision-making process. Records may be maintained either in hard copy or electronic form.

Some examples of supporting documentation that assists the member or candidate in meeting the requirements for retention are as follows:

- personal notes from meetings with the covered company,
- press releases or presentations issued by the covered company,
- computer-based model outputs and analyses,
- computer-based model input parameters,
- risk analyses of securities' impacts on a portfolio,
- selection criteria for external advisers,
- notes from clients from meetings to review investment policy statements, and
- outside research reports.

New Media Records

The increased use of new and evolving technological formats (e.g., social media) for gathering and sharing information creates new challenges in maintaining the appropriate records and files. The nature or format of the information does not

remove a member's or candidate's responsibility to maintain a record of information used in his or her analysis or communicated to clients.

Members and candidates should understand that although employers and local regulators are developing digital media retention policies, these policies may lag behind the advent of new communication channels. Such lag places greater responsibility on the individual for ensuring that all relevant information is retained. Examples of non-print media formats that should be retained include, but are not limited to,

- e-mails,
- text messages,
- blog posts, and
- Twitter posts.

Records Are Property of the Firm

As a general matter, records created as part of a member's or candidate's professional activity on behalf of his or her employer are the property of the firm. When a member or candidate leaves a firm to seek other employment, the member or candidate cannot take the property of the firm, including original forms or copies of supporting records of the member's or candidate's work, to the new employer without the express consent of the previous employer. The member or candidate cannot use historical recommendations or research reports created at the previous firm because the supporting documentation is unavailable. For future use, the member or candidate must re-create the supporting records at the new firm with information gathered through public sources or directly from the covered company and not from memory or sources obtained at the previous employer.

Local Requirements

Local regulators often impose requirements on members, candidates, and their firms related to record retention that must be followed. Firms may also implement policies detailing the applicable time frame for retaining research and client communication records. Fulfilling such regulatory and firm requirements satisfies the requirements of Standard V(C). In the absence of regulatory guidance or firm policies, CFA Institute recommends maintaining records for at least seven years.

Recommended Procedures for Compliance

The responsibility to maintain records that support investment action generally falls with the firm rather than individuals. Members and candidates must, however, archive research notes and other documents, either electronically or in hard copy, that support their current investment-related communications. Doing so will assist their firms in complying with requirements for preservation of internal or external records.

Application of the Standard

Example 1 (Record Retention and IPS Objectives and Recommendations):

One of Nikolas Lindstrom's clients is upset by the negative investment returns of his equity portfolio. The investment policy statement for the client requires that the portfolio manager follow a benchmark-oriented approach. The benchmark for the client includes a 35% investment allocation in the technology sector. The client acknowledges that this allocation was appropriate, but over the past three years, technology stocks have suffered severe losses. The client complains to the investment manager for allocating so much money to this sector.

> *Comment*: For Lindstrom, having appropriate records is important to show that over the past three years, the portion of technology stocks in the benchmark index was 35%, as called for in the IPS. Lindstrom should also have the client's IPS stating that the benchmark was appropriate for the client's investment objectives. He should also have records indicating that the investment has been explained appropriately to the client and that the IPS was updated on a regular basis. Taking these actions, Lindstrom would be in compliance with Standard V(C).

Example 2 (Record Retention and Research Process):

Malcolm Young is a research analyst who writes numerous reports rating companies in the luxury retail industry. His reports are based on a variety of sources, including interviews with company managers, manufacturers, and economists; on-site company visits; customer surveys; and secondary research from analysts covering related industries.

> *Comment*: Young must carefully document and keep copies of all the information that goes into his reports, including the secondary or third-party research of other analysts. Failure to maintain such files would violate Standard V(C).

Example 3 (Records as Firm, Not Employee, Property):

Martin Blank develops an analytical model while he is employed by Green Partners Investment Management, LLP (GPIM). While at the firm, he systematically documents the assumptions that make up the model as well as his reasoning behind the assumptions. As a result of the success of his model, Blank is hired to be the head of the research department of one of GPIM's competitors. Blank takes copies of the records supporting his model to his new firm.

> *Comment*: The records created by Blank supporting the research model he developed at GPIM are the records of GPIM. Taking the documents with him to his new employer without GPIM's permission violates Standard V(C). To use the model in the future, Blank must re-create the records supporting his model at the new firm.

Standard VI: Conflicts of Interest

Standard VI(A) Disclosure of Conflicts

Members and Candidates must make full and fair disclosure of all matters that could reasonably be expected to impair their independence and objectivity or interfere with respective duties to their clients, prospective clients, and employer. Members and Candidates must ensure that such disclosures are prominent, are delivered in plain language, and communicate the relevant information effectively.

Guidance

Highlights:

- *Disclosure of Conflicts to Employers*
- *Disclosure to Clients*
- *Cross-Departmental Conflicts*
- *Conflicts with Stock Ownership*
- *Conflicts as a Director*

Best practice is to avoid actual conflicts or the appearance of conflicts of interest when possible. Conflicts of interest often arise in the investment profession. Conflicts can occur between the interests of clients, the interests of employers, and the member's or candidate's own personal interests. Common sources for conflict are compensation structures, especially incentive and bonus structures that provide immediate returns for members and candidates with little or no consideration of long-term value creation.

Identifying and managing these conflicts is a critical part of working in the investment industry and can take many forms. When conflicts cannot be reasonably avoided, clear and complete disclosure of their existence is necessary.

Standard VI(A) protects investors and employers by requiring members and candidates to fully disclose to clients, potential clients, and employers all actual and potential conflicts of interest. Once a member or candidate has made full disclosure, the member's or candidate's employer, clients, and prospective clients will have the information needed to evaluate the objectivity of the investment advice or action taken on their behalf.

To be effective, disclosures must be prominent and must be made in plain language and in a manner designed to effectively communicate the information. Members and candidates have the responsibility of determining how often, in what manner, and in what particular circumstances the disclosure of conflicts

must be made. Best practices dictate updating disclosures when the nature of a conflict of interest changes materially—for example, if the nature of a conflict of interest worsens through the introduction of bonuses based on each quarter's profits as to opposed annual profits. In making and updating disclosures of conflicts of interest, members and candidates should err on the side of caution to ensure that conflicts are effectively communicated.

Disclosure of Conflicts to Employers

Disclosure of conflicts to employers may be appropriate in many instances. When reporting conflicts of interest to employers, members and candidates must give their employers enough information to assess the impact of the conflict. By complying with employer guidelines, members and candidates allow their employers to avoid potentially embarrassing and costly ethical or regulatory violations.

Reportable situations include conflicts that would interfere with rendering unbiased investment advice and conflicts that would cause a member or candidate to act not in the employer's best interest. The same circumstances that generate conflicts to be reported to clients and prospective clients also would dictate reporting to employers. Ownership of stocks analyzed or recommended, participation on outside boards, and financial or other pressures that could influence a decision are to be promptly reported to the employer so that their impact can be assessed and a decision on how to resolve the conflict can be made.

The mere appearance of a conflict of interest may create problems for members, candidates, and their employers. Therefore, many of the conflicts previously mentioned could be explicitly prohibited by an employer. For example, many employers restrict personal trading, outside board membership, and related activities to prevent situations that might not normally be considered problematic from a conflict-of-interest point of view but that could give the appearance of a conflict of interest. Members and candidates must comply with these restrictions. Members and candidates must take reasonable steps to avoid conflicts and, if they occur inadvertently, must report them promptly so that the employer and the member or candidate can resolve them as quickly and effectively as possible.

Standard VI(A) also deals with a member's or candidate's conflicts of interest that might be detrimental to the employer's business. Any potential conflict situation that could prevent clear judgment about or full commitment to the execution of a member's or candidate's duties to the employer should be reported to the member's or candidate's employer and promptly resolved.

Disclosure to Clients

Members and candidates must maintain their objectivity when rendering investment advice or taking investment action. Investment advice or actions may be perceived to be tainted in numerous situations. Can a member or candidate remain objective if, on behalf of the firm, the member or candidate obtains or assists in obtaining fees for services? Can a member or candidate give objective advice if he or she owns stock in the company that is the subject of an investment recommendation

or if the member or candidate has a close personal relationship with the company managers? Requiring members and candidates to disclose all matters that reasonably could be expected to impair the member's or candidate's objectivity allows clients and prospective clients to judge motives and possible biases for themselves.

Often in the investment industry, a conflict, or the perception of a conflict, cannot be avoided. The most obvious conflicts of interest, which should always be disclosed, are relationships between an issuer and the member, the candidate, or his or her firm (such as a directorship or consultancy by a member; investment banking, underwriting, and financial relationships; broker/dealer market-making activities; and material beneficial ownership of stock). For the purposes of Standard VI(A), members and candidates beneficially own securities or other investments if they have a direct or indirect pecuniary interest in the securities, have the power to vote or direct the voting of the shares of the securities or investments, or have the power to dispose or direct the disposition of the security or investment.

A member or candidate must take reasonable steps to determine whether a conflict of interest exists and disclose to clients any known conflicts of the member's or candidate's firm. Disclosure of broker/dealer market-making activities alerts clients that a purchase or sale might be made from or to the firm's principal account and that the firm has a special interest in the price of the stock.

Additionally, disclosures should be made to clients regarding fee arrangements, subadvisory agreements, or other situations involving nonstandard fee structures. Equally important is the disclosure of arrangements in which the firm benefits directly from investment recommendations. An obvious conflict of interest is the rebate of a portion of the service fee some classes of mutual funds charge to investors. Members and candidates should ensure that their firms disclose such relationships so clients can fully understand the costs of their investments and the benefits received by their investment manager's employer.

Cross-Departmental Conflicts

Other circumstances can give rise to actual or potential conflicts of interest. For instance, a sell-side analyst working for a broker/dealer may be encouraged, not only by members of her or his own firm but by corporate issuers themselves, to write research reports about particular companies. The buy-side analyst is likely to be faced with similar conflicts as banks exercise their underwriting and security-dealing powers. The marketing division may ask an analyst to recommend the stock of a certain company in order to obtain business from that company.

The potential for conflicts of interest also exists with broker-sponsored limited partnerships formed to invest venture capital. Increasingly, members and candidates are expected not only to follow issues from these partnerships once they are offered to the public but also to promote the issues in the secondary market after public offerings. Members, candidates, and their firms should attempt to resolve situations presenting potential conflicts of interest or disclose them in accordance with the principles set forth in Standard VI(A).

Conflicts with Stock Ownership

The most prevalent conflict requiring disclosure under Standard VI(A) is a member's or candidate's ownership of stock in companies that he or she recommends to clients or that clients hold. Clearly, the easiest method for preventing a conflict is to prohibit members and candidates from owning any such securities, but this approach is overly burdensome and discriminates against members and candidates.

Therefore, sell-side members and candidates should disclose any materially beneficial ownership interest in a security or other investment that the member or candidate is recommending. Buy-side members and candidates should disclose their procedures for reporting requirements for personal transactions. Conflicts arising from personal investing are discussed more fully in the guidance for Standard VI(B).

Conflicts as a Director

Service as a director poses three basic conflicts of interest. First, a conflict may exist between the duties owed to clients and the duties owed to shareholders of the company. Second, investment personnel who serve as directors may receive the securities or options to purchase securities of the company as compensation for serving on the board, which could raise questions about trading actions that might increase the value of those securities. Third, board service creates the opportunity to receive material nonpublic information involving the company. Even though the information is confidential, the perception could be that information not available to the public is being communicated to a director's firm—whether a broker, investment adviser, or other type of organization. When members or candidates providing investment services also serve as directors, they should be isolated from those making investment decisions by the use of firewalls or similar restrictions.

Recommended Procedures for Compliance

Members or candidates should disclose special compensation arrangements with the employer that might conflict with client interests, such as bonuses based on short-term performance criteria, commissions, incentive fees, performance fees, and referral fees. If the member's or candidate's firm does not permit such disclosure, the member or candidate should document the request and may consider dissociating from the activity.

Members' and candidates' firms are encouraged to include information on compensation packages in firms' promotional literature. If a member or candidate manages a portfolio for which the fee is based on capital gains or capital appreciation (a performance fee), this information should be disclosed to clients. If a member, a candidate, or a member's or candidate's firm has outstanding agent options to buy stock as part of the compensation package for corporate financing activities, the amount and expiration date of these options should be disclosed as a footnote to any research report published by the member's or candidate's firm.

Application of the Standard

Example 1 (Conflict of Interest and Business Relationships):

Hunter Weiss is a research analyst with Farmington Company, a broker and investment banking firm. Farmington's merger and acquisition department has represented Vimco, a conglomerate, in all of Vimco's acquisitions for 20 years. From time to time, Farmington officers sit on the boards of directors of various Vimco subsidiaries. Weiss is writing a research report on Vimco.

> *Comment*: Weiss must disclose in his research report Farmington's special relationship with Vimco. Broker/dealer management of and participation in public offerings must be disclosed in research reports. Because the position of underwriter to a company entails a special past and potential future relationship with a company that is the subject of investment advice, it threatens the independence and objectivity of the report writer and must be disclosed.

Example 2 (Conflict of Interest and Business Stock Ownership):

The investment management firm of Dover & Roe sells a 25% interest in its partnership to a multinational bank holding company, First of New York. Immediately after the sale, Margaret Hobbs, president of Dover & Roe, changes her recommendation for First of New York's common stock from "sell" to "buy" and adds First of New York's commercial paper to Dover & Roe's approved list for purchase.

> *Comment*: Hobbs must disclose the new relationship with First of New York to all Dover & Roe clients. This relationship must also be disclosed to clients by the firm's portfolio managers when they make specific investment recommendations or take investment actions with respect to First of New York's securities.

Example 3 (Conflict of Interest and Personal Stock Ownership):

Carl Fargmon, a research analyst who follows firms producing office equipment, has been recommending purchase of Kincaid Printing because of its innovative new line of copiers. After his initial report on the company, Fargmon's wife inherits from a distant relative US$3 million of Kincaid stock. He has been asked to write a follow-up report on Kincaid.

> *Comment*: Fargmon must disclose his wife's ownership of the Kincaid stock to his employer and in his follow-up report. Best practice would be to avoid the conflict by asking his employer to assign another analyst to draft the follow-up report.

Example 4 (Conflict of Interest and Personal Stock Ownership):

Betty Roberts is speculating in penny stocks for her own account and purchases 100,000 shares of Drew Mining, Inc., for US$0.30 a share. She intends to sell these shares at the sign of any substantial upward price movement of the stock. A week later, her employer asks her to write a report on penny stocks in the mining industry to be published in two weeks. Even without owning the Drew stock, Roberts would recommend it in her report as a "buy." A surge in the price of the stock to the US$2 range is likely to result once the report is issued.

> *Comment*: Although this holding may not be material, Roberts must disclose it in the report and to her employer before writing the report because the gain for her will be substantial if the market responds strongly to her recommendation. The fact that she has only recently purchased the stock adds to the appearance that she is not entirely objective.

Example 5 (Conflict of Interest and Compensation Arrangements):

Samantha Snead, a portfolio manager for Thomas Investment Counsel, Inc., specializes in managing public retirement funds and defined benefit pension plan accounts, all of which have long-term investment objectives. A year ago, Snead's employer, in an attempt to motivate and retain key investment professionals, introduced a bonus compensation system that rewards portfolio managers on the basis of quarterly performance relative to their peers and to certain benchmark indices. In an attempt to improve the short-term performance of her accounts, Snead changes her investment strategy and purchases several high-beta stocks for client portfolios. These purchases are seemingly contrary to the clients' investment policy statements. Following their purchase, an officer of Griffin Corporation, one of Snead's pension fund clients, asks why Griffin Corporation's portfolio seems to be dominated by high-beta stocks of companies that often appear among the most actively traded issues. No change in objective or strategy has been recommended by Snead during the year.

> *Comment*: Snead has violated Standard VI(A) by failing to inform her clients of the changes in her compensation arrangement with her employer, which created a conflict of interest between her compensation and her clients' IPSs. Firms may pay employees on the basis of performance, but pressure by Thomas Investment Counsel to achieve short-term performance goals is in basic conflict with the objectives of Snead's accounts.
>
> See also Standard III(C)–Suitability.

Example 6 (Conflict of Interest, Options, and Compensation Arrangements):

Wayland Securities works with small companies doing IPOs or secondary offerings. Typically, these deals are in the US$10 million to US$50 million range, and as a result, the corporate finance fees are quite small. To compensate for the small fees, Wayland Securities usually takes "agent options"—that is, rights (exercisable within

a two-year time frame) to acquire up to an additional 10% of the current offering. Following an IPO performed by Wayland for Falk Resources, Ltd., Darcy Hunter, the head of corporate finance at Wayland, is concerned about receiving value for her Falk Resources options. The options are due to expire in one month, and the stock is not doing well. She contacts John Fitzpatrick in the research department of Wayland Securities, reminds him that he is eligible for 30% of these options, and indicates that now would be a good time to give some additional coverage to Falk Resources. Fitzpatrick agrees and immediately issues a favorable report.

> *Comment*: For Fitzpatrick to avoid being in violation of Standard VI(A), he must indicate in the report the volume and expiration date of agent options outstanding. Furthermore, because he is personally eligible for some of the options, Fitzpatrick must disclose the extent of this compensation. He also must be careful to not violate his duty of independence and objectivity under Standard I(B).

Example 7 (Conflict of Interest and Compensation Arrangements):

Gary Carter is a representative with Bengal International, a registered broker/dealer. Carter is approached by a stock promoter for Badger Company, who offers to pay Carter additional compensation for sales of Badger Company's stock to Carter's clients. Carter accepts the stock promoter's offer but does not disclose the arrangements to his clients or to his employer. Carter sells shares of the stock to his clients.

> *Comment*: Carter has violated Standard VI(A) by failing to disclose to clients that he is receiving additional compensation for recommending and selling Badger stock. Because he did not disclose the arrangement with Badger to his clients, the clients were unable to evaluate whether Carter's recommendations to buy Badger were affected by this arrangement. Carter's conduct also violated Standard VI(A) by failing to disclose to his employer monetary compensation received in addition to the compensation and benefits conferred by his employer. Carter was required by Standard VI(A) to disclose the arrangement with Badger to his employer so that his employer could evaluate whether the arrangement affected Carter's objectivity and loyalty.

Example 8 (Conflict of Interest and Directorship):

Carol Corky, a senior portfolio manager for Universal Management, recently became involved as a trustee with the Chelsea Foundation, a large not-for-profit foundation in her hometown. Universal is a small money manager (with assets under management of approximately US$100 million) that caters to individual investors. Chelsea has assets in excess of US$2 billion. Corky does not believe informing Universal of her involvement with Chelsea is necessary.

> *Comment*: By failing to inform Universal of her involvement with Chelsea, Corky violated Standard VI(A). Given the large size of the endowment at

Chelsea, Corky's new role as a trustee can reasonably be expected to be time consuming, to the possible detriment of Corky's portfolio responsibilities with Universal. Also, as a trustee, Corky may become involved in the investment decisions at Chelsea. Therefore, Standard VI(A) obligates Corky to discuss becoming a trustee at Chelsea with her compliance officer or supervisor at Universal before accepting the position, and she should have disclosed the degree to which she would be involved in investment decisions at Chelsea.

Example 9 (Conflict of Interest and Personal Trading):

Bruce Smith covers eastern European equities for Marlborough Investments, an investment management firm with a strong presence in emerging markets. While on a business trip to Russia, Smith learns that investing in Russian equities directly is difficult but that equity-linked notes that replicate the performance of underlying Russian equities can be purchased from a New York–based investment bank. Believing that his firm would not be interested in such a security, Smith purchases a note linked to a Russian telecommunications company for his own account without informing Marlborough. A month later, Smith decides that the firm should consider investing in Russian equities by way of the equity-linked notes. He prepares a write-up on the market that concludes with a recommendation to purchase several of the notes. One note he recommends is linked to the same Russian telecom company that Smith holds in his personal account.

Comment: Smith has violated Standard VI(A) by failing to disclose his purchase and ownership of the note linked to the Russian telecom company. Smith is required by the standard to disclose the investment opportunity to his employer and look to his company's policies on personal trading to determine whether it was proper for him to purchase the note for his own account. By purchasing the note, Smith may or may not have impaired his ability to make an unbiased and objective assessment of the appropriateness of the derivative instrument for his firm, but Smith's failure to disclose the purchase to his employer impaired his employer's ability to decide whether his ownership of the security is a conflict of interest that might affect Smith's future recommendations. Then, when he recommended the particular telecom notes to his firm, Smith compounded his problems by not disclosing that he owned the notes in his personal account—a clear conflict of interest.

Example 10 (Conflict of Interest and Requested Favors):

Michael Papis is the chief investment officer of his state's retirement fund. The fund has always used outside advisers for the real estate allocation, and this information is clearly presented in all fund communications. Thomas Nagle, a recognized sell-side research analyst and Papis's business school classmate, recently left the investment bank he worked for to start his own asset management firm,

Accessible Real Estate. Nagle is trying to build his assets under management and contacts Papis about gaining some of the retirement fund's allocation. In the previous few years, the performance of the retirement fund's real estate investments was in line with the fund's benchmark but was not extraordinary. Papis decides to help out his old friend and also to seek better returns by moving the real estate allocation to Accessible. The only notice of the change in adviser appears in the next annual report in the listing of associated advisers.

Comment: Papis has violated Standard VI(A) by not disclosing to his employer his personal relationship with Nagle. Disclosure of his past history with Nagle would allow his firm to determine whether the conflict may have impaired Papis's independence in deciding to change managers.

See also Standard IV(C)–Responsibilities of Supervisors, Standard V(A)–Diligence and Reasonable Basis, and Standard V(B)–Communication with Clients and Prospective Clients.

Example 11 (Conflict of Interest and Business Relationships):

Bob Wade, trust manager for Central Midas Bank, was approached by Western Funds about promoting its family of funds, with special interest in the service-fee class. To entice Central to promote this class, Western Funds offered to pay the bank a service fee of 0.25%. Without disclosing the fee being offered to the bank, Wade asked one of the investment managers to review the Western Funds family of funds to determine whether they were suitable for clients of Central. The manager completed the normal due diligence review and determined that the funds were fairly valued in the market with fee structures on a par with their competitors. Wade decided to accept Western's offer and instructed the team of portfolio managers to exclusively promote these funds and the service-fee class to clients seeking to invest new funds or transfer from their current investments. So as to not influence the investment managers, Wade did not disclose the fee offer and allowed that income to flow directly to the bank.

Comment: Wade is violating Standard VI(A) by not disclosing the portion of the service fee being paid to Central. Although the investment managers may not be influenced by the fee, neither they nor the client have the proper information about Wade's decision to exclusively market this fund family and class of investments. Central may come to rely on the new fee as a component of the firm's profitability and may be unwilling to offer other products in the future that could affect the fees received.

See also Standard I(B)–Independence and Objectivity.

Example 12 (Disclosure of Conflicts to Employers):

Yehudit Dagan is a portfolio manager for Risk Management Bank (RMB), whose clients include retirement plans and corporations. RMB provides a defined

contribution retirement plan for its employees that offers 20 large diversified mutual fund investment options, including a mutual fund managed by Dagan's RMB colleagues. After being employed for six months, Dagan became eligible to participate in the retirement plan, and she intends to allocate her retirement plan assets in six of the investment options, including the fund managed by her RMB colleagues. Dagan is concerned that joining the plan will lead to a potentially significant amount of paperwork for her (e.g., disclosure of her retirement account holdings and needing preclearance for her transactions), especially with her investing in the in-house fund.

Comment: Standard VI(A) would not require Dagan to disclosure her personal or retirement investments in large diversified mutual funds, unless specifically required by her employer. For practical reasons, the standard does not require Dagan to gain preclearance for ongoing payroll deduction contributions to retirement plan account investment options.

Dagan should ensure that her firm does not have a specific policy regarding investment—whether personal or in the retirement account—for funds managed by the company's employees. These mutual funds may be subject to the company's disclosure, preclearance, and trading restriction procedures to identify possible conflicts prior to the execution of trades.

Standard VI(B) Priority of Transactions

> Investment transactions for clients and employers must have priority over investment transactions in which a Member or Candidate is the beneficial owner.

Guidance

Highlights:

- *Avoiding Potential Conflicts*
- *Personal Trading Secondary to Trading for Clients*
- *Standards for Nonpublic Information*
- *Impact on All Accounts with Beneficial Ownership*

Standard VI(B) reinforces the responsibility of members and candidates to give the interests of their clients and employers priority over their personal financial interests. This standard is designed to prevent any potential conflict of interest or the appearance of a conflict of interest with respect to personal transactions. Client interests have priority. Client transactions must take precedence over transactions made on behalf of the member's or candidate's firm or personal transactions.

Avoiding Potential Conflicts

Conflicts between the client's interest and an investment professional's personal interest may occur. Although conflicts of interest exist, nothing is inherently unethical about individual managers, advisers, or mutual fund employees making money from personal investments as long as (1) the client is not disadvantaged by the trade, (2) the investment professional does not benefit personally from trades undertaken for clients, and (3) the investment professional complies with applicable regulatory requirements.

Some situations occur where a member or candidate may need to enter a personal transaction that runs counter to current recommendations or what the portfolio manager is doing for client portfolios. For example, a member or candidate may be required at some point to sell an asset to make a college tuition payment or a down payment on a home, to meet a margin call, or so on. The sale may be contrary to the long-term advice the member or candidate is currently providing to clients. In these situations, the same three criteria given in the preceding paragraph should be applied in the transaction so as to not violate Standard VI(B).

Personal Trading Secondary to Trading for Clients

Standard VI(B) states that transactions for clients and employers must have priority over transactions in securities or other investments for which a member or candidate is the beneficial owner. The objective of the standard is to prevent personal transactions from adversely affecting the interests of clients or employers. A member or candidate having the same investment positions or being coinvested with clients does not always create a conflict. Some clients in certain investment situations require members or candidates to have aligned interests. Personal investment positions or transactions of members or candidates or their firm should never, however, adversely affect client investments.

Standards for Nonpublic Information

Standard VI(B) covers the activities of members and candidates who have knowledge of pending transactions that may be made on behalf of their clients or employers, who have access to nonpublic information during the normal preparation of research recommendations, or who take investment actions. Members and candidates are prohibited from conveying nonpublic information to any person whose relationship to the member or candidate makes the member or candidate a beneficial owner of the person's securities. Members and candidates must not convey this information to any other person if the nonpublic information can be deemed material.

Impact on All Accounts with Beneficial Ownership

Members or candidates may undertake transactions in accounts for which they are a beneficial owner only after their clients and employers have had adequate opportunity to act on a recommendation. Personal transactions include those made for the member's or candidate's own account, for family (including spouse, children, and other immediate family members) accounts, and for accounts in which the member or candidate has a direct or indirect pecuniary interest, such as a trust or retirement account. Family accounts that are client accounts should be treated like any other firm account and should neither be given special treatment nor be disadvantaged because of the family relationship. If a member or candidate has a beneficial ownership in the account, however, the member or candidate may be subject to preclearance or reporting requirements of the employer or applicable law.

Recommended Procedures for Compliance

Policies and procedures designed to prevent potential conflicts of interest, and even the appearance of a conflict of interest, with respect to personal transactions are critical to establishing investor confidence in the securities industry. Therefore, members and candidates should urge their firms to establish such policies and procedures. Because investment firms vary greatly in assets under management, types of clients, number of employees, and so on, each firm should have policies regarding

personal investing that are best suited to the firm. Members and candidates should then prominently disclose these policies to clients and prospective clients.

The specific provisions of each firm's standards will vary, but all firms should adopt certain basic procedures to address the conflict areas created by personal investing. These procedures include the following:

- *Limited participation in equity IPOs*: Some eagerly awaited IPOs rise significantly in value shortly after the issue is brought to market. Because the new issue may be highly attractive and sought after, the opportunity to participate in the IPO may be limited. Therefore, purchases of IPOs by investment personnel create conflicts of interest in two principal ways. First, participation in an IPO may have the appearance of taking away an attractive investment opportunity from clients for personal gain—a clear breach of the duty of loyalty to clients. Second, personal purchases in IPOs may have the appearance that the investment opportunity is being bestowed as an incentive to make future investment decisions for the benefit of the party providing the opportunity. Members and candidates can avoid these conflicts or appearances of conflicts of interest by not participating in IPOs.

  Reliable and systematic review procedures should be established to ensure that conflicts relating to IPOs are identified and appropriately dealt with by supervisors. Members and candidates should preclear their participation in IPOs, even in situations without any conflict of interest between a member's or candidate's participation in an IPO and the client's interests. Members and candidates should not benefit from the position that their clients occupy in the marketplace—through preferred trading, the allocation of limited offerings, or oversubscription.

- *Restrictions on private placements*: Strict limits should be placed on investment personnel acquiring securities in private placements, and appropriate supervisory and review procedures should be established to prevent noncompliance.

  Firms do not routinely use private placements for clients (e.g., venture capital deals) because of the high risk associated with them. Conflicts related to private placements are more significant to members and candidates who manage large pools of assets or act as plan sponsors because these managers may be offered special opportunities, such as private placements, as a reward or an enticement for continuing to do business with a particular broker.

  Participation in private placements raises conflict-of-interest issues that are similar to issues surrounding IPOs. Investment personnel should not be involved in transactions, including (but not limited to) private placements, that could be perceived as favors or gifts that seem designed to influence future judgment or to reward past business deals.

  Whether the venture eventually proves to be good or bad, managers have an immediate conflict concerning private placement opportunities. If and when the investments go public, participants in private placements have an

incentive to recommend the investments to clients regardless of the suitability of the investments for their clients. Doing so increases the value of the participants' personal portfolios.

- *Establish blackout/restricted periods*: Investment personnel involved in the investment decision-making process should establish blackout periods prior to trades for clients so that managers cannot take advantage of their knowledge of client activity by "front-running" client trades (trading for one's personal account before trading for client accounts).

  Individual firms must decide who within the firm should be required to comply with the trading restrictions. At a minimum, all individuals who are involved in the investment decision-making process should be subject to the same restricted period. Each firm must determine specific requirements related to blackout and restricted periods that are most relevant to the firm while ensuring that the procedures are governed by the guiding principles set forth in the Code and Standards. Size of firm and type of securities purchased are relevant factors. For example, in a large firm, a blackout requirement is, in effect, a total trading ban because the firm is continually trading in most securities. In a small firm, the blackout period is more likely to prevent the investment manager from front-running.

- *Reporting requirements*: Supervisors should establish reporting procedures for investment personnel, including disclosure of personal holdings/beneficial ownerships, confirmations of trades to the firm and the employee, and preclearance procedures. Once trading restrictions are in place, they must be enforced. The best method for monitoring and enforcing procedures to eliminate conflicts of interest in personal trading is through reporting requirements, including the following:

  - **Disclosure of holdings in which the employee has a beneficial interest**. Disclosure by investment personnel to the firm should be made upon commencement of the employment relationship and at least annually thereafter. To address privacy considerations, disclosure of personal holdings should be handled in a confidential manner by the firm.

  - **Providing duplicate confirmations of transactions**. Investment personnel should be required to direct their brokers to supply to firms duplicate copies or confirmations of all their personal securities transactions and copies of periodic statements for all securities accounts. The duplicate confirmation requirement has two purposes: (1) The requirement sends a message that there is independent verification, which reduces the likelihood of unethical behavior, and (2) it enables verification of the accounting of the flow of personal investments that cannot be determined from merely looking at holdings.

- **Preclearance procedures**. Investment personnel should examine all planned personal trades to identify possible conflicts prior to the execution of the trades. Preclearance procedures are designed to identify possible conflicts before a problem arises.

- *Disclosure of policies*: Upon request, members and candidates should fully disclose to investors their firm's policies regarding personal investing. The information about employees' personal investment activities and policies will foster an atmosphere of full and complete disclosure and calm the public's legitimate concerns about the conflicts of interest posed by investment personnel's personal trading. The disclosure must provide helpful information to investors; it should not be simply boilerplate language, such as "investment personnel are subject to policies and procedures regarding their personal trading."

Application of the Standard

Example 1 (Personal Trading):

Research analyst Marlon Long does not recommend purchase of a common stock for his employer's account because he wants to purchase the stock personally and does not want to wait until the recommendation is approved and the stock is purchased by his employer.

> *Comment*: Long has violated Standard VI(B) by taking advantage of his knowledge of the stock's value before allowing his employer to benefit from that information.

Example 2 (Trading for Family Member Account):

Carol Baker, the portfolio manager of an aggressive growth mutual fund, maintains an account in her husband's name at several brokerage firms with which the fund and a number of Baker's other individual clients do a substantial amount of business. Whenever a hot issue becomes available, she instructs the brokers to buy it for her husband's account. Because such issues normally are scarce, Baker often acquires shares in hot issues but her clients are not able to participate in them.

> *Comment*: To avoid violating Standard VI(B), Baker must acquire shares for her mutual fund first and acquire them for her husband's account only after doing so, even though she might miss out on participating in new issues via her husband's account. She also must disclose the trading for her husband's account to her employer because this activity creates a conflict between her personal interests and her employer's interests.

Example 3 (Family Accounts as Equals):

Erin Toffler, a portfolio manager at Esposito Investments, manages the retirement account established with the firm by her parents. Whenever IPOs become

available, she first allocates shares to all her other clients for whom the investment is appropriate; only then does she place any remaining portion in her parents' account, if the issue is appropriate for them. She has adopted this procedure so that no one can accuse her of favoring her parents.

> *Comment*: Toffler has violated Standard VI(B) by breaching her duty to her parents by treating them differently from her other accounts simply because of the family relationship. As fee-paying clients of Esposito Investments, Toffler's parents are entitled to the same treatment as any other client of the firm. If Toffler has beneficial ownership in the account, however, and Esposito Investments has preclearance and reporting requirements for personal transactions, she may have to preclear the trades and report the transactions to Esposito.

Example 4 (Personal Trading and Disclosure):

Gary Michaels is an entry-level employee who holds a low-paying job serving both the research department and the investment management department of an active investment management firm. He purchases a sports car and begins to wear expensive clothes after only a year of employment with the firm. The director of the investment management department, who has responsibility for monitoring the personal stock transactions of all employees, investigates and discovers that Michaels has made substantial investment gains by purchasing stocks just before they were put on the firm's recommended "buy" list. Michaels was regularly given the firm's quarterly personal transaction form but declined to complete it.

> *Comment*: Michaels violated Standard VI(B) by placing personal transactions ahead of client transactions. In addition, his supervisor violated Standard IV(C)–Responsibilities of Supervisors by permitting Michaels to continue to perform his assigned tasks without having signed the quarterly personal transaction form. Note also that if Michaels had communicated information about the firm's recommendations to a person who traded the security, that action would be a misappropriation of the information and a violation of Standard II(A)–Material Nonpublic Information.

Example 5 (Trading Prior to Report Dissemination):

A brokerage's insurance analyst, Denise Wilson, makes a closed-circuit TV report to her firm's branches around the country. During the broadcast, she includes negative comments about a major company in the insurance industry. The following day, Wilson's report is printed and distributed to the sales force and public customers. The report recommends that both short-term traders and intermediate investors take profits by selling that insurance company's stock. Seven minutes after the broadcast, however, Ellen Riley, head of the firm's trading department, had closed out a long "call" position in the stock. Shortly thereafter, Riley established a

sizable "put" position in the stock. When asked about her activities, Riley claimed she took the actions to facilitate anticipated sales by institutional clients.

Comment: Riley did not give customers an opportunity to buy or sell in the options market before the firm itself did. By taking action before the report was disseminated, Riley's firm may have depressed the price of the calls and increased the price of the puts. The firm could have avoided a conflict of interest if it had waited to trade for its own account until its clients had an opportunity to receive and assimilate Wilson's recommendations. As it is, Riley's actions violated Standard VI(B).

Standard VI(C) Referral Fees

> Members and Candidates must disclose to their employer, clients, and prospective clients, as appropriate, any compensation, consideration, or benefit received from or paid to others for the recommendation of products or services.

Guidance

Standard VI(C) states the responsibility of members and candidates to inform their employer, clients, and prospective clients of any benefit received for referrals of customers and clients. Such disclosures allow clients or employers to evaluate (1) any partiality shown in any recommendation of services and (2) the full cost of the services. Members and candidates must disclose when they pay a fee or provide compensation to others who have referred prospective clients to the member or candidate.

Appropriate disclosure means that members and candidates must advise the client or prospective client, before entry into any formal agreement for services, of any benefit given or received for the recommendation of any services provided by the member or candidate. In addition, the member or candidate must disclose the nature of the consideration or benefit—for example, flat fee or percentage basis, one-time or continuing benefit, based on performance, benefit in the form of provision of research or other noncash benefit—together with the estimated dollar value. Consideration includes all fees, whether paid in cash, in soft dollars, or in kind.

Recommended Procedures for Compliance

Members and candidates should encourage their employers to develop procedures related to referral fees. The firm may completely restrict such fees. If the firm does not adopt a strict prohibition of such fees, the procedures should indicate the appropriate steps for requesting approval.

Employers should have investment professionals provide to the clients notification of approved referral fee programs and provide the employer regular (at least quarterly) updates on the amount and nature of compensation received.

Application of the Standard

Example 1 (Disclosure of Referral Arrangements and Outside Parties):

Brady Securities, Inc., a broker/dealer, has established a referral arrangement with Lewis Brothers, Ltd., an investment counseling firm. In this arrangement, Brady Securities refers all prospective tax-exempt accounts, including pension, profit-sharing, and endowment accounts, to Lewis Brothers. In return, Lewis Brothers makes available to Brady Securities on a regular basis the security recommendations

and reports of its research staff, which registered representatives of Brady Securities use in serving customers. In addition, Lewis Brothers conducts monthly economic and market reviews for Brady Securities personnel and directs all stock commission business generated by referral accounts to Brady Securities.

Willard White, a partner in Lewis Brothers, calculates that the incremental costs involved in functioning as the research department of Brady Securities are US$20,000 annually.

Referrals from Brady Securities last year resulted in fee income of US$200,000 for Lewis Brothers, and directing all stock trades through Brady Securities resulted in additional costs to Lewis Brothers' clients of US$10,000.

Diane Branch, the chief financial officer of Maxwell Inc., contacts White and says that she is seeking an investment manager for Maxwell's profit-sharing plan. She adds, "My friend Harold Hill at Brady Securities recommended your firm without qualification, and that's good enough for me. Do we have a deal?" White accepts the new account but does not disclose his firm's referral arrangement with Brady Securities.

> *Comment*: White has violated Standard VI(C) by failing to inform the prospective customer of the referral fee payable in services and commissions for an indefinite period to Brady Securities. Such disclosure could have caused Branch to reassess Hill's recommendation and make a more critical evaluation of Lewis Brothers' services.

Example 2 (Disclosure of Interdepartmental Referral Arrangements):

James Handley works for the trust department of Central Trust Bank. He receives compensation for each referral he makes to Central Trust's brokerage department and personal financial management department that results in a sale. He refers several of his clients to the personal financial management department but does not disclose the arrangement within Central Trust to his clients.

> *Comment*: Handley has violated Standard VI(C) by not disclosing the referral arrangement at Central Trust Bank to his clients. Standard VI(C) does not distinguish between referral payments paid by a third party for referring clients to the third party and internal payments paid within the firm to attract new business to a subsidiary. Members and candidates must disclose all such referral fees. Therefore, Handley is required to disclose, at the time of referral, any referral fee agreement in place among Central Trust Bank's departments. The disclosure should include the nature and the value of the benefit and should be made in writing.

Example 3 (Disclosure of Referral Arrangements and Informing Firm):

Katherine Roberts is a portfolio manager at Katama Investments, an advisory firm specializing in managing assets for high-net-worth individuals. Katama's trading desk uses a variety of brokerage houses to execute trades on behalf of its clients. Roberts asks the trading desk to direct a large portion of its commissions

to Naushon, Inc., a small broker/dealer run by one of Roberts' business school classmates. Katama's traders have found that Naushon is not very competitive on pricing, and although Naushon generates some research for its trading clients, Katama's other analysts have found most of Naushon's research to be not especially useful. Nevertheless, the traders do as Roberts asks, and in return for receiving a large portion of Katama's business, Naushon recommends the investment services of Roberts and Katama to its wealthiest clients. This arrangement is not disclosed to either Katama or the clients referred by Naushon.

> *Comment*: Roberts is violating Standard VI(C) by failing to inform her employer of the referral arrangement.

Example 4 (Disclosure of Referral Arrangements and Outside Organizations):

Alex Burl is a portfolio manager at Helpful Investments, a local investment advisory firm. Burl is on the advisory board of his child's school, which is looking for ways to raise money to purchase new playground equipment for the school. Burl discusses a plan with his supervisor in which he will donate to the school a portion of his service fee from new clients referred by the parents of students at the school. Upon getting the approval from Helpful, Burl presents the idea to the school's advisory board and directors. The school agrees to announce the program at the next parent event and asks Burl to provide the appropriate written materials to be distributed. A week following the distribution of the flyers, Burl receives the first school-related referral. In establishing the client's investment policy statement, Burl clearly discusses the school's referral and outlines the plans for distributing the donation back to the school.

> *Comment*: Burl has not violated Standard VI(C) because he secured the permission of his employer, Helpful Investments, and the school prior to beginning the program and because he discussed the arrangement with the client at the time the investment policy statement was designed.

Example 5 (Disclosure of Referral Arrangements and Outside Parties):

The sponsor of a state employee pension is seeking to hire a firm to manage the pension plan's emerging market allocation. To assist in the review process, the sponsor has hired Thomas Arrow as a consultant to solicit proposals from various advisers. Arrow is contracted by the sponsor to represent its best interest in selecting the most appropriate new manager. The process runs smoothly, and Overseas Investments is selected as the new manager.

The following year, news breaks that Arrow is under investigation by the local regulator for accepting kickbacks from investment managers after they are awarded new pension allocations. Overseas Investments is included in the list of firms allegedly making these payments. Although the sponsor is happy with the performance of Overseas since it has been managing the pension plan's emerging market funds, the sponsor still decides to have an independent review of the proposals and the

selection process to ensure that Overseas was the appropriate firm for its needs. This review confirms that, even though Arrow was being paid by both parties, the recommendation of Overseas appeared to be objective and appropriate.

Comment: Arrow has violated Standard VI(C) because he did not disclose the fee being paid by Overseas. Withholding this information raises the question of a potential lack of objectivity in the recommendation of Overseas by Arrow; this aspect is in addition to questions about the legality of having firms pay to be considered for an allocation.

Regulators and governmental agencies may adopt requirements concerning allowable consultant activities. Local regulations sometimes include having a consultant register with the regulatory agency's ethics board. Regulator policies may include a prohibition on acceptance of payments from investment managers receiving allocations and require regular reporting of contributions made to political organizations and candidates. Arrow would have to adhere to these requirements as well as the Code and Standards.

Standard VII: Responsibilities as a CFA Institute Member or CFA Candidate

Standard VII(A) Conduct as Participants in CFA Institute Programs

> Members and Candidates must not engage in any conduct that compromises the reputation or integrity of CFA Institute or the CFA designation or the integrity, validity, or security of CFA Institute programs.

Guidance

Highlights:

- *Confidential Program Information*
- *Additional CFA Program Restrictions*
- *Expressing an Opinion*

Standard VII(A) covers the conduct of CFA Institute members and candidates involved with the CFA Program and prohibits any conduct that undermines the public's confidence that the CFA charter represents a level of achievement based on merit and ethical conduct. There is an array of CFA Institute programs beyond the CFA Program that provide additional educational and credentialing opportunities, including the Certificate in Investment Performance Measurement (CIPM) Program and the Claritas Investment Certificate. The standard's function is to hold members and candidates to a high ethical criterion while they are participating in or involved with any CFA Institute program. Conduct covered includes but is not limited to

- giving or receiving assistance (cheating) on any CFA Institute examinations;
- violating the rules, regulations, and testing policies of CFA Institute programs;
- providing confidential program or exam information to candidates or the public;
- disregarding or attempting to circumvent security measures established for any CFA Institute examinations;
- improperly using an association with CFA Institute to further personal or professional goals; and
- misrepresenting information on the Professional Conduct Statement or in the CFA Institute Continuing Education Program.

Confidential Program Information

CFA Institute is vigilant about protecting the integrity of CFA Institute programs' content and examination processes. CFA Institute program rules, regulations, and policies prohibit candidates from disclosing confidential material gained during the exam process.

Examples of information that cannot be disclosed by candidates sitting for an exam include but are not limited to

- specific details of questions appearing on the exam and
- broad topical areas and formulas tested or not tested on the exam.

All aspects of the exam, including questions, broad topical areas, and formulas, tested or not tested, are considered confidential until such time as CFA Institute elects to release them publicly. This confidentiality requirement allows CFA Institute to maintain the integrity and rigor of exams for future candidates. Standard VII(A) does not prohibit candidates from discussing nonconfidential information or curriculum material with others or in study groups in preparation for the exam.

Candidates increasingly use online forums and new technology as part of their exam preparations. CFA Institute actively polices blogs, forums, and related social networking groups for information considered confidential. The organization works with both individual candidates and the sponsors of online or offline services to promptly remove any and all violations. As noted in the discussion of Standard I(A)–Knowledge of the Law, candidates, members, and the public are encouraged to report suspected violations to CFA Institute.

Additional CFA Program Restrictions

The CFA Program rules, regulations, and policies define additional allowed and disallowed actions concerning the exams. Violating any of the testing policies, such as the calculator policy, personal belongings policy, or the Candidate Pledge, constitutes a violation of Standard VII(A). Candidates will find all of these policies on the CFA Program portion of the CFA Institute website (www.cfainstitute.org). **Exhibit 2** provides the Candidate Pledge, which highlights the respect candidates must have for the integrity, validity, and security of the CFA exam.

Members may participate as volunteers in various aspects of the CFA Program. Standard VII(A) prohibits members from disclosing and/or soliciting confidential material gained prior to or during the exam and grading processes with those outside the CFA exam development process.

Examples of information that cannot be shared by members involved in developing, administering, or grading the exams include but are not limited to

- questions appearing on the exam or under consideration,
- deliberation related to the exam process, and
- information related to the scoring of questions.

Members may also be asked to offer assistance with other CFA Institute programs, including but not limited to the CIPM and Claritas programs. Members participating in any CFA Institute program should do so with the same level of integrity and confidentiality as is required of participation in the CFA Program.

Expressing an Opinion

Standard VII(A) does *not* cover expressing opinions regarding CFA Institute, the CFA Program, or other CFA Institute programs. Members and candidates are free to disagree and express their disagreement with CFA Institute on its policies, its procedures, or any advocacy positions taken by the organization. When expressing a personal opinion, a candidate is prohibited from disclosing content-specific information, including any actual exam question and the information as to subject matter covered or not covered in the exam.

Exhibit 2 Sample of CFA Program Testing Policies

Candidate Pledge	As a candidate in the CFA Program, I am obligated to follow Standard VII(A) of the CFA Institute Standards of Professional Conduct, which states that members and candidates must not engage in any conduct that compromises the reputation or integrity of CFA Institute or the CFA designation or the integrity, validity, or security of the CFA exam. • Prior to this exam, I have not given or received information regarding the content of this exam. During this exam, I will not give or receive any information regarding the content of this exam. • After this exam, I will not disclose **ANY** portion of this exam and I will not remove **ANY** exam materials from the testing room in original or copied form. I understand that all exam materials, including my answers, are the property of CFA Institute and will not be returned to me in any form. • I will follow **ALL** rules of the CFA Program as stated on the CFA Institute website and the back cover of the exam book. My violation of any rules of the CFA Program will result in CFA Institute voiding my exam results and may lead to suspension or termination of my candidacy in the CFA Program.

Application of the Standard

Example 1 (Sharing Exam Questions):

Travis Nero serves as a proctor for the administration of the CFA examination in his city. In the course of his service, he reviews a copy of the Level II exam on the evening prior to the exam's administration and provides information concerning the exam questions to two candidates who use it to prepare for the exam.

> *Comment*: Nero and the two candidates have violated Standard VII(A). By giving information about the exam questions to two candidates, Nero provided an unfair advantage to the two candidates and undermined the integrity and validity of the Level II exam as an accurate measure of the knowledge, skills, and abilities necessary to earn the right to use the CFA designation. By accepting the information, the candidates also compromised the integrity and validity of the Level II exam and undermined the ethical framework that is a key part of the designation.

Example 2 (Bringing Written Material into Exam Room):

Loren Sullivan is enrolled to take the Level II CFA examination. He has been having difficulty remembering a particular formula, so prior to entering the exam room, he writes the formula on the palm of his hand. During the afternoon section of the exam, a proctor notices Sullivan looking at the palm of his hand. She asks to see his hand and finds the formula.

> *Comment*: Because Sullivan wrote down information from the Candidate Body of Knowledge (CBOK) and took that written information into the exam room, his conduct compromised the validity of his exam performance and violated Standard VII(A). Sullivan's conduct was also in direct contradiction with the rules and regulations of the CFA Program, the Candidate Pledge, and the CFA Institute Code and Standards.

Example 3 (Writing after Exam Period End):

At the conclusion of the morning section of the Level I CFA examination, the proctors announce, "Stop writing now." John Davis has not completed the exam, so he continues to randomly fill in ovals on his answer sheet. A proctor approaches Davis's desk and reminds him that he should stop writing immediately. Davis, however, continues to complete the answer sheet. After the proctor asks him to stop writing two additional times, Davis finally puts down his pencil.

> *Comment*: By continuing to complete his exam after time was called, Davis has violated Standard VII(A). By continuing to write, Davis took an unfair advantage over other candidates, and his conduct compromised the validity of his exam performance. Additionally, by not heeding the proctor's repeated instructions, Davis violated the rules and regulations of the CFA Program.

Example 4 (Sharing Exam Content):

After completing Level II of the CFA exam, Annabelle Rossi posts on her blog about her experience. She posts the following: "Level II is complete! I think I did fairly well on the exam. It was really difficult, but fair. I think I did especially well on the derivatives questions. And there were tons of them! I think I counted 18! The ethics questions were really hard. I'm glad I spent so much time on the Code and Standards. I was surprised to see there were no questions at all about IPO allocations. I expected there to be a couple. Well, off to celebrate getting through it. See you tonight?"

Comment: Rossi did not violate Standard VII(A) when she wrote about how difficult she found the exam or how well she thinks she may have done. By revealing portions of the CBOK covered on the exam and areas not covered, however, she did violate Standard VII(A) and the Candidate Pledge. Depending on the time frame in which the comments were posted, Rossi not only may have assisted future candidates but also may have provided an unfair advantage to candidates yet to sit for the same exam, thereby undermining the integrity and validity of the Level II exam.

Example 5 (Sharing Exam Content):

Level I candidate Etienne Gagne has been a frequent visitor to an internet forum designed specifically for CFA Program candidates. The week after completing the Level I examination, Gagne and several others begin a discussion thread on the forum about the most challenging questions and attempt to determine the correct answers.

Comment: Gagne has violated Standard VII(A) by providing and soliciting confidential exam information, which compromises the integrity of the exam process and violates the Candidate Pledge. In trying to determine correct answers to specific questions, the group's discussion included question-specific details considered to be confidential to the CFA Program.

Example 6 (Sharing Exam Content):

CFA4Sure is a company that produces test-preparation materials for CFA Program candidates. Many candidates register for and use the company's products. The day after the CFA examination, CFA4Sure sends an e-mail to all its customers asking them to share with the company the hardest questions from the exam so that CFA4Sure can better prepare its customers for the next exam administration. Marisol Pena e-mails a summary of the questions she found most difficult on the exam.

Comment: Pena has violated Standard VII(A) by disclosing a portion of the exam questions. The information provided is considered confidential until publicly released by CFA Institute. CFA4Sure is likely to use such feedback to refine its review materials for future candidates. Pena's sharing of the specific questions undermines the integrity of the exam while potentially making the exam easier for future candidates.

If the CFA4Sure employees who participated in the solicitation of confidential CFA Program information are CFA Institute members or candidates, they also have violated Standard VII(A).

Example 7 (Discussion of Exam Grading Guidelines and Results):

Prior to participating in grading CFA examinations, Wesley Whitcomb is required to sign a CFA Institute Grader Agreement. As part of the Grader Agreement, Whitcomb agrees not to reveal or discuss the exam materials with anyone except CFA Institute staff or other graders. Several weeks after the conclusion of the CFA exam grading, Whitcomb tells several colleagues who are candidates in the CFA Program which question he graded. He also discusses the guideline answer and adds that few candidates scored well on the question.

Comment: Whitcomb violated Standard VII(A) by breaking the Grader Agreement and disclosing information related to a specific question on the exam, which compromised the integrity of the exam process.

Example 8 (Compromising CFA Institute Integrity as a Volunteer):

Jose Ramirez is an investor-relations consultant for several small companies that are seeking greater exposure to investors. He is also the program chair for the CFA Institute society in the city where he works. Ramirez schedules only companies that are his clients to make presentations to the society and excludes other companies.

Comment: Ramirez, by using his volunteer position at CFA Institute to benefit himself and his clients, compromises the reputation and integrity of CFA Institute and thus violates Standard VII(A).

Example 9 (Compromising CFA Institute Integrity as a Volunteer):

Marguerite Warrenski is a member of the CFA Institute GIPS Executive Committee, which oversees the creation, implementation, and revision of the GIPS standards. As a member of the Executive Committee, she has advance knowledge of confidential information regarding the GIPS standards, including any new or revised standards the committee is considering. She tells her clients that her Executive Committee membership will allow her to better assist her clients in keeping up with changes to the Standards and facilitating their compliance with the changes.

Comment: Warrenski is using her association with the GIPS Executive Committee to promote her firm's services to clients and potential clients. In defining her volunteer position at CFA Institute as a strategic business advantage over competing firms and implying to clients that she would use confidential information to further their interests, Warrenski is compromising the reputation and integrity of CFA Institute and thus violating Standard VII(A). She may factually state her involvement with the Executive Committee but cannot infer any special advantage to her clients from such participation.

Standard VII(B) Reference to CFA Institute, the CFA Designation, and the CFA Program

When referring to CFA Institute, CFA Institute membership, the CFA designation, or candidacy in the CFA Program, Members and Candidates must not misrepresent or exaggerate the meaning or implications of membership in CFA Institute, holding the CFA designation, or candidacy in the CFA Program.

Guidance

Highlights:

- *CFA Institute Membership*
- *Using the CFA Designation*
- *Referring to Candidacy in the CFA Program*
- *Proper Usage of the CFA Marks*

Standard VII(B) is intended to prevent promotional efforts that make promises or guarantees that are tied to the CFA designation. Individuals may refer to their CFA designation, CFA Institute membership, or candidacy in the CFA Program but must not exaggerate the meaning or implications of membership in CFA Institute, holding the CFA designation, or candidacy in the CFA Program.

Standard VII(B) is not intended to prohibit factual statements related to the positive benefit of earning the CFA designation. However, statements referring to CFA Institute, the CFA designation, or the CFA Program that overstate the competency of an individual or imply, either directly or indirectly, that superior performance can be expected from someone with the CFA designation are not allowed under the standard.

Statements that highlight or emphasize the commitment of CFA Institute members, CFA charterholders, and CFA candidates to ethical and professional conduct or mention the thoroughness and rigor of the CFA Program are appropriate. Members and candidates may make claims about the relative merits of CFA Institute, the CFA Program, or the Code and Standards as long as those statements are implicitly or explicitly stated as the opinion of the speaker. Statements that do not express opinions have to be supported by facts.

Standard VII(B) applies to any form of communication, including but not limited to communications made in electronic or written form (such as on firm letterhead, business cards, professional biographies, directory listings, printed advertising, firm brochures, or personal resumes) and oral statements made to the public, clients, or prospects.

CFA Institute Membership

The term "CFA Institute member" refers to "regular" and "affiliate" members of CFA Institute who have met the membership requirements as defined in the CFA Institute Bylaws. Once accepted as a CFA Institute member, the member must satisfy the following requirements to maintain his or her status:

- remit annually to CFA Institute a completed Professional Conduct Statement, which renews the commitment to abide by the requirements of the Code and Standards and the CFA Institute Professional Conduct Program, and
- pay applicable CFA Institute membership dues on an annual basis.

If a CFA Institute member fails to meet any of these requirements, the individual is no longer considered an active member. Until membership is reactivated, individuals must not present themselves to others as active members. They may state, however, that they were CFA Institute members in the past or refer to the years when their membership was active.

Using the CFA Designation

Those who have earned the right to use the Chartered Financial Analyst designation may use the trademarks or registered marks "Chartered Financial Analyst" or "CFA" and are encouraged to do so but only in a manner that does not misrepresent or exaggerate the meaning or implications of the designation. The use of the designation may be accompanied by an accurate explanation of the requirements that have been met to earn the right to use the designation.

"CFA charterholders" are those individuals who have earned the right to use the CFA designation granted by CFA Institute. These people have satisfied certain requirements, including completion of the CFA Program and required years of acceptable work experience. Once granted the right to use the designation, individuals must also satisfy the CFA Institute membership requirements (see above) to maintain their right to use the designation.

If a CFA charterholder fails to meet any of the membership requirements, he or she forfeits the right to use the CFA designation. Until membership is reactivated, individuals must not present themselves to others as CFA charterholders. They may state, however, that they were charterholders in the past.

Given the growing popularity of social media, where individuals may anonymously express their opinions, pseudonyms or online profile names created to hide a member's identity should not be tagged with the CFA designation.

Referring to Candidacy in the CFA Program

Candidates in the CFA Program may refer to their participation in the CFA Program, but such references must clearly state that an individual is a *candidate* in the CFA Program and must not imply that the candidate has achieved any type of partial designation. A person is a candidate in the CFA Program if

- the person's application for registration in the CFA Program has been accepted by CFA Institute, as evidenced by issuance of a notice of acceptance, and the person is enrolled to sit for a specified examination or
- the registered person has sat for a specified examination but exam results have not yet been received.

If an individual is registered for the CFA Program but declines to sit for an exam or otherwise does not meet the definition of a candidate as described in the CFA Institute Bylaws, then that individual is no longer considered an active candidate. Once the person is enrolled to sit for a future examination, his or her CFA candidacy resumes.

CFA candidates must never state or imply that they have a partial designation as a result of passing one or more levels or cite an expected completion date of any level of the CFA Program. Final award of the charter is subject to meeting the CFA Program requirements and approval by the CFA Institute Board of Governors.

If a candidate passes each level of the exam in consecutive years and wants to state that he or she did so, that is not a violation of Standard VII(B) because it is a statement of fact. If the candidate then goes on to claim or imply superior ability by obtaining the designation in only three years, however, he or she is in violation of Standard VII(B).

Exhibit 3 provides examples of proper and improper references to the CFA designation.

Exhibit 3 Proper and Improper References to the CFA Designation

Proper References	Improper References
"Completion of the CFA Program has enhanced my portfolio management skills."	"CFA charterholders achieve better performance results."
"John Smith passed all three CFA examinations in three consecutive years."	"John Smith is among the elite, having passed all three CFA examinations in three consecutive attempts."
"The CFA designation is globally recognized and attests to a charterholder's success in a rigorous and comprehensive study program in the field of investment management and research analysis."	"As a CFA charterholder, I am the most qualified to manage client investments."
"The credibility that the CFA designation affords and the skills the CFA Program cultivates are key assets for my future career development."	"As a CFA charterholder, Jane White provides the best value in trade execution."

(continued)

Exhibit 3 Proper and Improper References to the CFA Designation (continued)

Proper References	Improper References
"I enrolled in the CFA Program to obtain the highest set of credentials in the global investment management industry."	"Enrolling as a candidate in the CFA Program ensures one of becoming better at valuing debt securities."
"I passed Level I of the CFA exam."	"CFA, Level II"
"I am a 2010 Level III candidate in the CFA Program."	"CFA, Expected 2011" "Level III CFA Candidate"
"I passed all three levels of the CFA Program and will be eligible for the CFA charter upon completion of the required work experience."	"CFA, Expected 2011" "John Smith, Charter Pending"
"As a CFA charterholder, I am committed to the highest ethical standards."	

Proper Usage of the CFA Marks

Upon obtaining the CFA charter from CFA Institute, charterholders are given the right to use the CFA marks, including Chartered Financial Analyst®, CFA®, and the CFA logo (a certification mark):

These marks are registered by CFA Institute in countries around the world.

The Chartered Financial Analyst and CFA marks must always be used either after a charterholder's name or as adjectives (never as nouns) in written documents or oral conversations. For example, to refer to oneself as "a CFA" or "a Chartered Financial Analyst" is improper.

Members and candidates must not use a pseudonym or fictitious phrase meant to hide their identity in conjunction with the CFA designation. CFA Institute can verify only that a specific individual has earned the designation according to the name that is maintained in the membership database.

The CFA logo certification mark is used by charterholders as a distinctive visual symbol of the CFA designation that can be easily recognized by employers, colleagues, and clients. As a certification mark, it must be used only to directly refer to an individual charterholder or group of charterholders.

Exhibit 4 provides examples of correct and incorrect use of the marks. CFA charterholders should refer to the complete guidelines published by CFA Institute for additional and up-to-date information and examples illustrating proper and improper use of the CFA logo, Chartered Financial Analyst mark, and CFA mark. These guidelines and the CFA logo are available on the CFA Institute website (www.cfainstitute.org).

Exhibit 4 Correct and Incorrect Use of the Chartered Financial Analyst and CFA Marks

Correct	Incorrect	Principle
He is one of two CFA charterholders in the company. He earned the right to use the Chartered Financial Analyst designation.	He is one of two CFAs in the company. He is a Chartered Financial Analyst.	The CFA and Chartered Financial Analyst designations must always be used as adjectives, never as nouns or common names.
Jane Smith, CFA	Jane Smith, C.F.A. John Doe, cfa	No periods. Always capitalize the letters "CFA".
John Jones, CFA	John, a CFA-type portfolio manager. The focus is on Chartered Financial Analysis. CFA-equivalent program. Swiss-CFA.	Do not alter the designation to create new words or phrases.
John Jones, Chartered Financial Analyst	Jones Chartered Financial Analysts, Inc.	The designation must not be used as part of the name of a firm.
Jane Smith, CFA John Doe, Chartered Financial Analyst	Jane Smith, **CFA** John Doe, **Chartered Financial Analyst**	The CFA designation should not be given more prominence (e.g., larger or bold font) than the charterholder's name.
Level I candidate in the CFA Program.	Chartered Financial Analyst (CFA), September 2011.	Candidates in the CFA Program must not cite the expected date of exam completion and award of charter.

(continued)

Exhibit 4 Correct and Incorrect Use of the Chartered Financial Analyst and CFA Marks (continued)

Correct	Incorrect	Principle
Passed Level I of the CFA examination in 2010.	CFA Level I. CFA degree expected in 2011.	No designation exists for someone who has passed Level I, Level II, or Level III of the exam. The CFA designation should not be referred to as a degree.
I have passed all three levels of the CFA Program and may be eligible for the CFA charter upon completion of the required work experience.	CFA (Passed Finalist) CFA Charter Pending Pending CFA Charterholder	A candidate who has passed Level III but has not yet received his or her charter cannot use the CFA or Chartered Financial Analyst designation.
CFA Charter, 2009, CFA Institute (optional: Charlottesville, Virginia, USA)	CFA Charter, 2009, CFA Society of the UK	In citing the designation in a resume, a charterholder should use the date that he or she received the designation and should cite CFA Institute as the conferring body.
John Smith, CFA	Crazy Bear CFA (Online social media user name)	Charterholders should not attach the CFA designation to anonymous or fictitious names meant to conceal their identity.

Recommended Procedures for Compliance

Misuse of a member's CFA designation or CFA candidacy or improper reference to it is common by those in a member's or candidate's firm who do not possess knowledge of the requirements of Standard VII(B). As an appropriate step to reduce this risk, members and candidates should disseminate written information about Standard VII(B) and the accompanying guidance to their firm's legal, compliance, public relations, and marketing departments (see www.cfainstitute.org).

For materials that refer to employees' affiliation with CFA Institute, members and candidates should encourage their firms to create templates that are approved by a central authority (such as the compliance department) as being consistent with Standard VII(B). This practice promotes consistency and accuracy in the firm of references to CFA Institute membership, the CFA designation, and CFA candidacy.

Application of the Standard

Example 1 (Passing Exams in Consecutive Years):

An advertisement for AZ Investment Advisors states that all the firm's principals are CFA charterholders and all passed the three examinations on their first attempt. The advertisement prominently links this fact to the notion that AZ's mutual funds have achieved superior performance.

> *Comment*: AZ may state that all principals passed the three examinations on the first try as long as this statement is true, but it must not be linked to performance or imply superior ability. Implying that (1) CFA charterholders achieve better investment results and (2) those who pass the exams on the first try may be more successful than those who do not violates Standard VII(B).

Example 2 (Right to Use CFA Designation):

Five years after receiving his CFA charter, Louis Vasseur resigns his position as an investment analyst and spends the next two years traveling abroad. Because he is not actively engaged in the investment profession, he does not file a completed Professional Conduct Statement with CFA Institute and does not pay his CFA Institute membership dues. At the conclusion of his travels, Vasseur becomes a self-employed analyst accepting assignments as an independent contractor. Without reinstating his CFA Institute membership by filing his Professional Conduct Statement and paying his dues, he prints business cards that display "CFA" after his name.

> *Comment*: Vasseur has violated Standard VII(B) because his right to use the CFA designation was suspended when he failed to file his Professional Conduct Statement and stopped paying dues. Therefore, he no longer is able to state or imply that he is an active CFA charterholder. When Vasseur files his Professional Conduct Statement, resumes paying CFA Institute dues to activate his membership, and completes the CFA Institute reinstatement procedures, he will be eligible to use the CFA designation.

Example 3 ("Retired" CFA Institute Membership Status):

After a 25-year career, James Simpson retires from his firm. Because he is not actively engaged in the investment profession, he does not file a completed Professional Conduct Statement with CFA Institute and does not pay his CFA

Institute membership dues. Simpson designs a plain business card (without a corporate logo) to hand out to friends with his new contact details, and he continues to put "CFA" after his name.

Comment: Simpson has violated Standard VII(B). Because he failed to file his Professional Conduct Statement and ceased paying dues, his membership has been suspended and he has given up the right to use the CFA designation. CFA Institute has procedures, however, for reclassifying a member and charterholder as "retired" and reducing the annual dues. If he wants to obtain retired status, he needs to file the appropriate paperwork with CFA Institute. When Simpson receives his notification from CFA Institute that his membership has been reclassified as retired and he resumes paying reduced dues, his membership will be reactivated and his right to use the CFA designation will be reinstated.

Example 4 (CFA Logo—Individual Use Only):

Asia Futures Ltd. is a small quantitative investment advisory firm. The firm takes great pride in the fact that all its employees are CFA charterholders. To underscore this fact, the firm's senior partner is proposing to change the firm's letterhead to include the following:

Asia Futures Ltd. 

Comment: The CFA logo is a certification mark intended to identify *individual* charterholders and must not be incorporated in a company name, confused with a company logo, or placed in such close proximity to a company name or logo as to give the reader the idea that the certification mark certifies the company. The only appropriate use of the CFA logo is on the business card or letterhead of each individual CFA charterholder.

Example 5 (Stating Facts about CFA Designation and Program):

Rhonda Reese has been a CFA charterholder since 2000. In a conversation with a friend who is considering enrolling in the CFA Program, she states that she has learned a great deal from the CFA Program and that many firms require their employees to be CFA charterholders. She would recommend the CFA Program to anyone pursuing a career in investment management.

Comment: Reese's comments comply with Standard VII(B). Her statements refer to facts: The CFA Program enhanced her knowledge, and many firms require the CFA designation for their investment professionals.

Example 6 (Order of Professional and Academic Designations):

Tatiana Prittima has earned both her CFA designation and a PhD in finance. She would like to cite both her accomplishments on her business card but is unsure of the proper method for doing so.

Comment: The order of designations cited on such items as resumes and business cards is a matter of personal preference. Prittima is free to cite the CFA designation either before or after citing her PhD.

Example 7 (Use of Fictitious Name):

Barry Glass is the lead quantitative analyst at CityCenter Hedge Fund. Glass is responsible for the development, maintenance, and enhancement of the proprietary models the fund uses to manage its investors' assets. Glass reads several high-level mathematical publications and blogs to stay informed on current developments. One blog, run by Expert CFA, presents some intriguing research that may benefit one of CityCenter's current models. Glass is under pressure from firm executives to improve the model's predictive abilities, and he incorporates the factors discussed in the online research. The updated output recommends several new investments to the fund's portfolio managers.

Comment: "Expert CFA" has violated Standard VII(B) by using the CFA designation inappropriately. As with any research report, authorship of online comments must include the charterholder's full name along with any reference to the CFA designation.

See also Standard V(A), which Glass has violated for guidance on diligence and reasonable basis.

Sample CFA Institute Standards of Practice Exam

Unless otherwise stated in the question, all individuals in the following questions are CFA Institute members or candidates in the CFA Program and, therefore, are subject to the CFA Institute Code of Ethics and Standards of Professional Conduct.

1. Smith, a research analyst with a brokerage firm, decides to change his recommendation for the common stock of Green Company, Inc., from a "buy" to a "sell." He mails this change in investment advice to all the firm's clients on Wednesday. The day after the mailing, a client calls with a buy order for 500 shares of Green Company. In this circumstance, Smith should:

   A. Accept the order.

   B. Advise the customer of the change in recommendation before accepting the order.

   C. Not accept the order because it is contrary to the firm's recommendation.

2. Which statement about a manager's use of client brokerage commissions violates the Code and Standards?

   A. A client may direct a manager to use that client's brokerage commissions to purchase goods and services for that client.

   B. Client brokerage commissions should be used to benefit the client and should be commensurate with the value of the brokerage and research services received.

   C. Client brokerage commissions may be directed to pay for the investment manager's operating expenses.

3. Jamison is a junior research analyst with Howard & Howard, a brokerage and investment banking firm. Howard & Howard's mergers and acquisitions department has represented the Britland Company in all of its acquisitions for the past 20 years. Two of Howard & Howard's senior officers are directors of various Britland subsidiaries. Jamison has been asked to write a research report on Britland. What is the best course of action for her to follow?

   A. Jamison may write the report but must refrain from expressing any opinions because of the special relationships between the two companies.

   B. Jamison should not write the report because the two Howard & Howard officers serve as directors for subsidiaries of Britland.

   C. Jamison may write the report if she discloses the special relationships with the company in the report.

4. Which of the following statements clearly *conflicts* with the recommended procedures for compliance presented in the CFA Institute *Standards of Practice Handbook*?

A. Firms should disclose to clients the personal investing policies and procedures established for their employees.

B. Prior approval must be obtained for the personal investment transactions of all employees.

C. For confidentiality reasons, personal transactions and holdings should not be reported to employers unless mandated by regulatory organizations.

5. Bronson provides investment advice to the board of trustees of a private university endowment fund. The trustees have provided Bronson with the fund's financial information, including planned expenditures. Bronson receives a phone call on Friday afternoon from Murdock, a prominent alumnus, requesting that Bronson fax him comprehensive financial information about the fund. According to Murdock, he has a potential contributor but needs the information that day to close the deal and cannot contact any of the trustees. Based on the CFA Institute Standards, Bronson should:

A. Send Murdock the information because disclosure would benefit the client.

B. Not send Murdock the information to preserve confidentiality.

C. Send Murdock the information, provided Bronson promptly notifies the trustees.

6. Miller heads the research department of a large brokerage firm. The firm has many analysts, some of whom are subject to the Code and Standards. If Miller delegates some supervisory duties, which statement best describes her responsibilities under the Code and Standards?

A. Miller's supervisory responsibilities do not apply to those subordinates who are not subject to the Code and Standards.

B. Miller no longer has supervisory responsibility for those duties delegated to her subordinates.

C. Miller retains supervisory responsibility for all subordinates despite her delegation of some duties.

7. Willier is the research analyst responsible for following Company X. All the information he has accumulated and documented suggests that the outlook for the company's new products is poor, so the stock should be rated a weak "hold." During lunch, however, Willier overhears a financial analyst from another firm whom he respects offer opinions that conflict with Willier's forecasts and expectations. Upon returning to his office, Willier releases a strong "buy" recommendation to the public. Willier:

A. Violated the Standards by failing to distinguish between facts and opinions in his recommendation.

B. Violated the Standards because he did not have a reasonable and adequate basis for his recommendation.

C. Was in full compliance with the Standards.

8. An investment management firm has been hired by ETV Corporation to work on an additional public offering for the company. The firm's brokerage unit now has a "sell" recommendation on ETV, but the head of the investment banking department has asked the head of the brokerage unit to change the recommendation from "sell" to "buy." According to the Standards, the head of the brokerage unit would be permitted to:

A. Increase the recommendation by no more than one increment (in this case, to a "hold" recommendation).

B. Place the company on a restricted list and give only factual information about the company.

C. Assign a new analyst to decide if the stock deserves a higher rating.

9. Albert and Tye, who recently started their own investment advisory business, have registered to take the Level III CFA examination. Albert's business card reads, "Judy Albert, CFA Level II." Tye has not put anything about the CFA designation on his business card, but promotional material that he designed for the business describes the CFA requirements and indicates that Tye participates in the CFA Program and has completed Levels I and II. According to the Standards:

A. Albert has violated the Standards, but Tye has not.

B. Tye has violated the Standards, but Albert has not.

C. Both Albert and Tye have violated the Standards.

10. Scott works for a regional brokerage firm. He estimates that Walkton Industries will increase its dividend by US$1.50 a share during the next year. He realizes that this increase is contingent on pending legislation that would, if enacted, give Walkton a substantial tax break. The US representative for Walkton's home district has told Scott that, although she is lobbying hard for the bill and prospects for its passage are favorable, concern of the US Congress over the federal deficit could cause the tax bill to be voted down. Walkton Industries has not made any statements about a change in dividend policy. Scott writes in his research report, "We expect Walkton's stock price to rise by at least US$8.00 a share by the end of the year because the dividend will increase by US$1.50 a share. Investors buying the stock at the current time should expect to realize a total return of at least 15% on the stock." According to the Standards:

A. Scott violated the Standards because he used material inside information.

B. Scott violated the Standards because he failed to separate opinion from fact.

C. Scott violated the Standards by basing his research on uncertain predictions of future government action.

11. Which one of the following actions will help to ensure the fair treatment of brokerage firm clients when a new investment recommendation is made?

A. Informing all people in the firm in advance that a recommendation is to be disseminated.

B. Distributing recommendations to institutional clients prior to individual accounts.

C. Minimizing the time between the decision and the dissemination of a recommendation.

12. The mosaic theory holds that an analyst:

A. Violates the Code and Standards if the analyst fails to have knowledge of and comply with applicable laws.

B. Can use material public information and nonmaterial nonpublic information in the analyst's analysis.

C. Should use all available and relevant information in support of an investment recommendation.

13. Jurgen is a portfolio manager. One of her firm's clients has told Jurgen that he will compensate her beyond the compensation provided by her firm on the basis of the capital appreciation of his portfolio each year. Jurgen should:

A. Turn down the additional compensation because it will result in conflicts with the interests of other clients' accounts.

B. Turn down the additional compensation because it will create undue pressure on her to achieve strong short-term performance.

C. Obtain permission from her employer prior to accepting the compensation arrangement.

14. One of the discretionary accounts managed by Farnsworth is the Jones Corporation employee profit-sharing plan. Jones, the company president, recently asked Farnsworth to vote the shares in the profit-sharing plan in favor of the slate of directors nominated by Jones Corporation and against the directors sponsored by a dissident stockholder group. Farnsworth does not want to lose this account because he directs all the account's trades to a brokerage firm that provides Farnsworth with useful information about tax-free investments. Although this information is not of value in managing the Jones Corporation account, it does help in managing several other accounts. The brokerage firm providing this information also offers the lowest commissions for trades and provides best execution. Farnsworth investigates the director issue, concludes

that the management-nominated slate is better for the long-run performance of the company than the dissident group's slate, and votes accordingly. Farnsworth:

A. Violated the Standards in voting the shares in the manner requested by Jones but not in directing trades to the brokerage firm.

B. Did not violate the Standards in voting the shares in the manner requested by Jones or in directing trades to the brokerage firm.

C. Violated the Standards in directing trades to the brokerage firm but not in voting the shares as requested by Jones.

15. Brown works for an investment counseling firm. Green, a new client of the firm, is meeting with Brown for the first time. Green used another counseling firm for financial advice for years, but she has switched her account to Brown's firm. After spending a few minutes getting acquainted, Brown explains to Green that she has discovered a highly undervalued stock that offers large potential gains. She recommends that Green purchase the stock. Brown has committed a violation of the Standards. What should she have done differently?

A. Brown should have determined Green's needs, objectives, and tolerance for risk before making a recommendation of any type of security.

B. Brown should have thoroughly explained the characteristics of the company to Green, including the characteristics of the industry in which the company operates.

C. Brown should have explained her qualifications, including her education, training, and experience and the meaning of the CFA designation.

16. Grey recommends the purchase of a mutual fund that invests solely in long-term US Treasury bonds. He makes the following statements to his clients:

I. "The payment of the bonds is guaranteed by the US government; therefore, the default risk of the bonds is virtually zero."

II. "If you invest in the mutual fund, you will earn a 10% rate of return each year for the next several years based on historical performance of the market."

Did Grey's statements violate the CFA Institute Code and Standards?

A. Neither statement violated the Code and Standards.

B. Only statement I violated the Code and Standards.

C. Only statement II violated the Code and Standards.

17. Anderb, a portfolio manager for XYZ Investment Management Company—a registered investment organization that advises investment firms and private accounts—was promoted to that position three years ago. Bates, her supervisor, is responsible for reviewing Anderb's portfolio account transactions and her

required monthly reports of personal stock transactions. Anderb has been using Jonelli, a broker, almost exclusively for brokerage transactions for the portfolio account. For securities in which Jonelli's firm makes a market, Jonelli has been giving Anderb lower prices for personal purchases and higher prices for personal sales than Jonelli gives to Anderb's portfolio accounts and other investors. Anderb has been filing monthly reports with Bates only for those months in which she has no personal transactions, which is about every fourth month. Which of the following is *most likely* to be a violation of the Code and Standards?

A. Anderb failed to disclose to her employer her personal transactions.

B. Anderb owned the same securities as those of her clients.

C. Bates allowed Anderb to use Jonelli as her broker for personal trades.

18. Which of the following is a correct statement of a member's or candidate's duty under the Code and Standards?

A. In the absence of specific applicable law or other regulatory requirements, the Code and Standards govern the member's or candidate's actions.

B. A member or candidate is required to comply only with applicable local laws, rules, regulations, or customs, even though the Code and Standards may impose a higher degree of responsibility or a higher duty on the member or candidate.

C. A member or candidate who trades securities in a securities market where no applicable local laws or stock exchange rules regulate the use of material nonpublic information may take investment action based on material nonpublic information.

19. Ward is scheduled to visit the corporate headquarters of Evans Industries. Ward expects to use the information he obtains there to complete his research report on Evans stock. Ward learns that Evans plans to pay all of Ward's expenses for the trip, including costs of meals, hotel room, and air transportation. Which of the following actions would be the *best* course for Ward to take under the Code and Standards?

A. Accept the expense-paid trip and write an objective report.

B. Pay for all travel expenses, including costs of meals and incidental items.

C. Accept the expense-paid trip but disclose the value of the services accepted in the report.

20. Which of the following statements is *correct* under the Code and Standards?

A. CFA Institute members and candidates are prohibited from undertaking independent practice in competition with their employer.

B. Written consent from the employer is necessary to permit independent practice that could result in compensation or other benefits in competition with a member's or candidate's employer.

C. Members and candidates are prohibited from making arrangements or preparations to go into a competitive business before terminating their relationship with their employer.

21. Smith is a financial analyst with XYZ Brokerage Firm. She is preparing a purchase recommendation on JNI Corporation. Which of the following situations is *most likely* to represent a conflict of interest for Smith that would have to be disclosed?

A. Smith frequently purchases items produced by JNI.

B. XYZ holds for its own account a substantial common stock position in JNI.

C. Smith's brother-in-law is a supplier to JNI.

22. Michelieu tells a prospective client, "I may not have a long-term track record yet, but I'm sure that you'll be very pleased with my recommendations and service. In the three years that I've been in the business, my equity-oriented clients have averaged a total return of more than 26% a year." The statement is true, but Michelieu only has a few clients, and one of his clients took a large position in a penny stock (against Michelieu's advice) and realized a huge gain. This large return caused the average of all of Michelieu's clients to exceed 26% a year. Without this one investment, the average gain would have been 8% a year. Has Michelieu violated the Standards?

A. No, because Michelieu is not promising that he can earn a 26% return in the future.

B. No, because the statement is a true and accurate description of Michelieu's track record.

C. Yes, because the statement misrepresents Michelieu's track record.

23. An investment banking department of a brokerage firm often receives material nonpublic information that could have considerable value if used in advising the firm's brokerage clients. In order to conform to the Code and Standards, which one of the following is the best policy for the brokerage firm?

A. Permanently prohibit both "buy" and "sell" recommendations of the stocks of clients of the investment banking department.

B. Establish physical and informational barriers within the firm to prevent the exchange of information between the investment banking and brokerage operations.

C. Monitor the exchange of information between the investment banking department and the brokerage operation.

24. Stewart has been hired by Goodner Industries, Inc., to manage its pension fund. Stewart's duty of loyalty, prudence, and care is owed to:

    A. The management of Goodner.

    B. The participants and beneficiaries of Goodner's pension plan.

    C. The shareholders of Goodner.

25. Which of the following statements is a stated purpose of disclosure in Standard VI(C)–Referral Fees?

    A. Disclosure will allow the client to request discounted service fees.

    B. Disclosure will help the client evaluate any possible partiality shown in the recommendation of services.

    C. Disclosure means advising a prospective client about the referral arrangement once a formal client relationship has been established.

26. Rose, a portfolio manager for a local investment advisory firm, is planning to sell a portion of his personal investment portfolio to cover the costs of his child's academic tuition. Rose wants to sell a portion of his holdings in Household Products, but his firm recently upgraded the stock to "strong buy." Which of the following describes Rose's options under the Code and Standards?

    A. Based on his firm's "buy" recommendation, Rose cannot sell the shares because he would be improperly prospering from the inflated recommendation.

    B. Rose is free to sell his personal holdings once his firm is properly informed of his intentions.

    C. Rose can sell his personal holdings but only when a client of the firm places an order to buy shares of Household.

27. A former hedge fund manager, Jackman, has decided to launch a new private wealth management firm. From his prior experiences, he believes the new firm needs to achieve US$1 million in assets under management in the first year. Jackman offers a $10,000 incentive to any adviser who joins his firm with the minimum of $200,000 in committed investments. Jackman places notice of the opening on several industry web portals and career search sites. Which of the following is *correct* according to the Code and Standards?

    A. A member or candidate is eligible for the new position and incentive if he or she can arrange for enough current clients to switch to the new firm and if the member or candidate discloses the incentive fee.

    B. A member or candidate may not accept employment with the new firm because Jackman's incentive offer violates the Code and Standards.

C. A member or candidate is not eligible for the new position unless he or she is currently unemployed because soliciting the clients of the member's or candidate's current employer is prohibited.

28. Carter works for Invest Today, a local asset management firm. A broker that provides Carter with proprietary research through client brokerage arrangements is offering a new trading service. The broker is offering low-fee, execution-only trades to complement its traditional full-service, execution-and-research trades. To entice Carter and other asset managers to send additional business its way, the broker will apply the commissions paid on the new service toward satisfying the brokerage commitment of the prior full-service arrangements. Carter has always been satisfied with the execution provided on the full-service trades, and the new low-fee trades are comparable to the fees of other brokers currently used for the accounts that prohibit soft dollar arrangements.

A. Carter can trade for his accounts that prohibit soft dollar arrangements under the new low-fee trading scheme.

B. Carter cannot use the new trading scheme because the commissions are prohibited by the soft dollar restrictions of the accounts.

C. Carter should trade only through the new low-fee scheme and should increase his trading volume to meet his required commission commitment.

29. Rule has worked as a portfolio manager for a large investment management firm for the past 10 years. Rule earned his CFA charter last year and has decided to open his own investment management firm. After leaving his current employer, Rule creates some marketing material for his new firm. He states in the material, "In earning the CFA charter, a highly regarded credential in the investment management industry, I further enhanced the portfolio management skills learned during my professional career. While completing the examination process in three consecutive years, I consistently received the highest possible scores on the topics of Ethics, Alternative Investments, and Portfolio Management." Has Rule violated Standard VII(B)–Reference to CFA Institute, the CFA Designation, and the CFA Program in his marketing material?

A. Rule violated Standard VII(B) in stating that he completed the exams in three consecutive years.

B. Rule violated Standard VII(B) in stating that he received the highest scores in the topics of Ethics, Alternative Investments, and Portfolio Management.

C. Rule did not violate Standard VII(B).

30. Stafford is a portfolio manager for a specialized real estate mutual fund. Her firm clearly describes in the fund's prospectus its soft dollar policies. Stafford decides that entering the CFA Program will enhance her investment decision-making skill and decides to use the fund's soft dollar account to pay

the registration and exam fees for the CFA Program. Which of the following statements is *most likely* correct?

A. Stafford did not violate the Code and Standards because the prospectus informed investors of the fund's soft dollar policies.

B. Stafford violated the Code and Standards because improving her investment skills is not a reasonable use of the soft dollar account.

C. Stafford violated the Code and Standards because the CFA Program does not meet the definition of research allowed to be purchased with brokerage commissions.

31. Long has been asked to be the keynote speaker at an upcoming investment conference. The event is being hosted by one of the third-party investment managers currently used by his pension fund. The manager offers to cover all conference and travel costs for Long and make the conference registrations free for three additional members of his investment management team. To ensure that the conference obtains the best speakers, the host firm has arranged for an exclusive golf outing for the day following the conference on a local championship-caliber course. Which of the following is *least likely* to violate Standard I(B)?

A. Long may accept only the offer to have his conference-related expenses paid by the host firm.

B. Long may accept the offer to have his conference-related expenses paid and may attend the exclusive golf outing at the expense of the hosting firm.

C. Long may accept the entire package of incentives offered to speak at this conference.

32. Andrews, a private wealth manager, is conducting interviews for a new research analyst for his firm. One of the candidates is Wright, an analyst with a local investment bank. During the interview, while Wright is describing his analytical skills, he mentions a current merger in which his firm is acting as the adviser. Andrews has heard rumors of a possible merger between the two companies, but no releases have been made by the companies concerned. Which of the following actions by Andrews is *least likely* a violation of the Code and Standards?

A. Waiting until the next day before trading on the information to allow time for it to become public.

B. Notifying all investment managers in his firm of the new information so none of their clients are disadvantaged.

C. Placing the securities mentioned as part of the merger on the firm's restricted trading list.

33. Pietro, president of Local Bank, has hired the bank's market maker, Vogt, to seek a merger partner. Local is currently listed on a stock exchange and has

not reported that it is seeking strategic alternatives. Vogt has discussed the possibility of a merger with several firms, but they have all decided to wait until after the next period's financial data are available. The potential buyers believe the results will be worse than the results of prior periods and will allow them to pay less for Local Bank.

Pietro wants to increase the likelihood of structuring a merger deal quickly. Which of the following actions would *most likely* be a violation of the Code and Standards?

A. Pietro could instruct Local Bank to issue a press release announcing that it has retained Vogt to find a merger partner.

B. Pietro could place a buy order for 2,000 shares (or four times the average weekly volume) through Vogt for his personal account.

C. After confirming with Local's chief financial officer, Pietro could instruct Local to issue a press release reaffirming the firm's prior announced earnings guidance for the full fiscal year.

34. ABC Investment Management acquires a new, very large account with two concentrated positions. The firm's current policy is to add new accounts for the purpose of performance calculation after the first full month of management. Cupp is responsible for calculating the firm's performance returns. Before the end of the initial month, Cupp notices that one of the significant holdings of the new accounts is acquired by another company, causing the value of the investment to double. Because of this holding, Cupp decides to account for the new portfolio as of the date of transfer, thereby allowing ABC Investment to reap the positive impact of that month's portfolio return.

A. Cupp did not violate the Code and Standards because the GIPS standards allow composites to be updated on the date of large external cash flows.

B. Cupp did not violate the Code and Standards because companies are allowed to determine when to incorporate new accounts into their composite calculation.

C. Cupp violated the Code and Standards because the inclusion of the new account produces an inaccurate calculation of the monthly results according to the firm's stated policies.

35. Cannan has been working from home on weekends and occasionally saves correspondence with clients and completed work on her home computer. Because of worsening market conditions, Cannan is one of several employees released by her firm. While Cannan is looking for a new job, she uses the files she saved at home to request letters of recommendation from former clients. She also provides to prospective clients some of the reports as examples of her abilities.

A. Cannan violated the Code and Standards because she did not receive permission from her former employer to keep or use the files after her employment ended.

B. Cannan did not violate the Code and Standards because the files were created and saved on her own time and computer.

C. Cannan violated the Code and Standards because she is prohibited from saving files on her home computer.

36. Quinn sat for the Level III CFA exam this past weekend. He updates his resume with the following statement: "In finishing the CFA Program, I improved my skills related to researching investments and managing portfolios. I will be eligible for the CFA charter upon completion of the required work experience."

A. Quinn violated the Code and Standards by claiming he improved his skills through the CFA Program.

B. Quinn violated the Code and Standards by incorrectly stating that he is eligible for the CFA charter.

C. Quinn did not violate the Code and Standards with his resume update.

37. During a round of golf, Rodriguez, chief financial officer of Mega Retail, mentions to Hart, a local investment adviser and long-time personal friend, that Mega is having an exceptional sales quarter. Rodriguez expects the results to be almost 10% above the current estimates. The next day, Hart initiates the purchase of a large stake in the local exchange-traded retail fund for her personal account.

A. Hart violated the Code and Standards by investing in the exchange-traded fund that included Mega Retail.

B. Hart did not violate the Code and Standards because she did not invest directly in securities of Mega Retail.

C. Rodriguez did not violate the Code and Standards because the comments made to Hart were not intended to solicit an investment in Mega Retail.

38. Park is very frustrated after taking her Level II exam. While she was studying for the exam, to supplement the curriculum provided, she ordered and used study material from a third-party provider. Park believes the additional material focused her attention on specific topic areas that were not tested while ignoring other areas. She posts the following statement on the provider's discussion board: "I am very dissatisfied with your firm's CFA Program Level II material. I found the exam extremely difficult and myself unprepared for specific questions after using your product. How could your service provide such limited instructional resources on the analysis of inventories and taxes when the exam had multiple questions about them? I will not recommend your products to other candidates."

A. Park violated the Code and Standards by purchasing third-party review material.

B. Park violated the Code and Standards by providing her opinion on the difficulty of the exam.

C. Park violated the Code and Standards by providing specific information on topics tested on the exam.

39. Paper was recently terminated as one of a team of five managers of an equity fund. The fund had two value-focused managers and terminated one of them to reduce costs. In a letter sent to prospective employers, Paper presents, with written permission of the firm, the performance history of the fund to demonstrate his past success.

A. Paper did not violate the Code and Standards.

B. Paper violated the Code and Standards by claiming the performance of the entire fund as his own.

C. Paper violated the Code and Standards by including the historical results of his prior employer.

40. Townsend was recently appointed to the board of directors of a youth golf program that is the local chapter of a national not-for-profit organization. The program is beginning a new fund-raising campaign to expand the number of annual scholarships it provides. Townsend believes many of her clients make annual donations to charity. The next week in her regular newsletter to all clients, she includes a small section discussing the fund-raising campaign and her position on the organization's board.

A. Townsend did not violate the Code and Standards.

B. Townsend violated the Code and Standards by soliciting donations from her clients through the newsletter.

C. Townsend violated the Code and Standards by not getting approval of the organization before soliciting her clients.

Exam Answers and Analysis

1. The correct answer is B. This question involves Standard III(B)–Fair Dealing. Smith disseminated a change in the stock recommendation to his clients but then received a request contrary to that recommendation from a client who probably had not yet received the recommendation. Prior to executing the order, Smith should take additional steps to ensure that the customer has received the change of recommendation. Answer A is incorrect because the client placed the order prior to receiving the recommendation and, therefore, does not have the benefit of Smith's most recent recommendation. Answer C is also incorrect; simply because the client request is contrary to the firm's recommendation does not mean a member can override a direct request by a client. After Smith contacts the client to ensure that the client has received the changed recommendation, if the client still wants to place a buy order for the shares, Smith is obligated to comply with the client's directive.

2. The correct answer is C. This question involves Standard III(A)–Loyalty, Prudence, and Care and the specific topic of soft dollars or soft commissions. Answer C is the correct choice because client brokerage commissions may not be directed to pay for the investment manager's operating expenses. Answer B describes how members and candidates should determine how to use brokerage commissions—that is, if the use is in the best interests of clients and is commensurate with the value of the services provided. Answer A describes a practice that is commonly referred to as "directed brokerage." Because brokerage is an asset of the client and is used to benefit the client, not the manager, such practice does not violate a duty of loyalty to the client. Members and candidates are obligated in all situations to disclose to clients their practices in the use of client brokerage commissions.

3. The correct answer is C. This question involves Standard VI(A)–Disclosure of Conflicts. The question establishes a conflict of interest in which an analyst, Jamison, is asked to write a research report on a company that is a client of the analyst's employer. In addition, two directors of the company are senior officers of Jamison's employer. Both facts establish that there are conflicts of interest that must be disclosed by Jamison in her research report. Answer B is incorrect because an analyst is not prevented from writing a report simply because of the special relationship the analyst's employer has with the company as long as that relationship is disclosed. Answer A is incorrect because whether or not Jamison expresses any opinions in the report is irrelevant to her duty to disclose a conflict of interest. Not expressing opinions does not relieve the analyst of the responsibility to disclose the special relationships between the two companies.

4. The correct answer is C. This question asks about compliance procedures relating to personal investments of members and candidates. The statement in answer C clearly conflicts with the recommended procedures in the *Standards*

of Practice Handbook. Employers should compare personal transactions of employees with those of clients on a regular basis regardless of the existence of a requirement by any regulatory organization. Such comparisons ensure that employees' personal trades do not conflict with their duty to their clients, and the comparisons can be conducted in a confidential manner. The statement in answer A does not conflict with the procedures in the *Handbook*. Disclosure of such policies will give full information to clients regarding potential conflicts of interest on the part of those entrusted to manage their money. Answer B is incorrect because firms are encouraged to establish policies whereby employees clear their personal holdings and transactions with their employers.

5. The correct answer is B. This question relates to Standard III(A)–Loyalty, Prudence, and Care and Standard III(E)–Preservation of Confidentiality. In this case, the member manages funds of a private endowment. Clients, who are, in this case, the trustees of the fund, must place some trust in members and candidates. Bronson cannot disclose confidential financial information to anyone without the permission of the fund, regardless of whether the disclosure may benefit the fund. Therefore, answer A is incorrect. Answer C is incorrect because Bronson must notify the fund and obtain the fund's permission before publicizing the information.

6. The correct answer is C. Under Standard IV(C)–Responsibilities of Supervisors, members and candidates may delegate supervisory duties to subordinates but such delegation does not relieve members or candidates of their supervisory responsibilities. As a result, answer B is incorrect. Moreover, whether or not Miller's subordinates are subject to the Code and Standards is irrelevant to her supervisory responsibilities. Therefore, answer A is incorrect.

7. The correct answer is B. This question relates to Standard V(A)–Diligence and Reasonable Basis. The opinion of another financial analyst is not an adequate basis for Willier's action in changing the recommendation. Answer C is thus incorrect. So is answer A because, although it is true that members and candidates must distinguish between facts and opinions in recommendations, the question does not illustrate a violation of that nature. If the opinion overheard by Willier had sparked him to conduct additional research and investigation that justified a change of opinion, then a changed recommendation would be appropriate.

8. The correct answer is B. This question relates to Standard I(B)–Independence and Objectivity. When asked to change a recommendation on a company stock to gain business for the firm, the head of the brokerage unit must refuse in order to maintain his independence and objectivity in making recommendations. He must not yield to pressure by the firm's investment banking department. To avoid the appearance of a conflict of interest, the firm should discontinue issuing recommendations about the company. Answer A is incorrect; changing the recommendation in any manner that is contrary to the analyst's opinion violates the duty to maintain independence and objectivity. Answer C is incorrect

because merely assigning a new analyst to decide whether the stock deserves a higher rating will not address the conflict of interest.

9. The correct answer is A. Standard VII(B)–Reference to CFA Institute, the CFA Designation, and the CFA Program is the subject of this question. The reference on Albert's business card implies that there is a "CFA Level II" designation; Tye merely indicates in promotional material that he is participating in the CFA Program and has completed Levels I and II. Candidates may not imply that there is some sort of partial designation earned after passing a level of the CFA exam. Therefore, Albert has violated Standard VII(B). Candidates may communicate that they are participating in the CFA Program, however, and may state the levels that they have completed. Therefore, Tye has not violated Standard VII(B).

10. The correct answer is B. This question relates to Standard V(B)–Communication with Clients and Prospective Clients. Scott has issued a research report stating that he expects the price of Walkton Industries stock to rise by US$8 a share "because the dividend will increase" by US$1.50 per share. He has made this statement knowing that the dividend will increase only if Congress enacts certain legislation, an uncertain prospect. By stating that the dividend will increase, Scott failed to separate fact from opinion.

    The information regarding passage of legislation is not material nonpublic information because it is conjecture, and the question does not state whether the US representative gave Scott her opinion on the passage of the legislation in confidence. She could have been offering this opinion to anyone who asked. Therefore, statement A is incorrect. It may be acceptable to base a recommendation, in part, on an expectation of future events, even though they may be uncertain. Therefore, answer C is incorrect.

11. The correct answer is C. This question, which relates to Standard III(B)–Fair Dealing, tests the knowledge of the procedures that will assist members and candidates in treating clients fairly when making investment recommendations. The step listed in C will help ensure the fair treatment of clients. Answer A may have negative effects on the fair treatment of clients. The more people who know about a pending change, the greater the chance that someone will inform some clients before the information's release. The firm should establish policies that limit the number of people who are aware in advance that a recommendation is to be disseminated. Answer B, distributing recommendations to institutional clients before distributing them to individual accounts, discriminates among clients on the basis of size and class of assets and is a violation of Standard III(B).

12. The correct answer is B. This question deals with Standard II(A)–Material Nonpublic Information. The mosaic theory states that an analyst may use material public information and nonmaterial nonpublic information in creating a larger picture than shown by any individual piece of information and the conclusions the analyst reaches become material only after the pieces are

assembled. Answers A and C are accurate statements relating to the Code and Standards but do not describe the mosaic theory.

13. The correct answer is C. This question involves Standard IV(B)–Additional Compensation Arrangements. The arrangement described in the question—whereby Jurgen would be compensated beyond the compensation provided by her firm, on the basis of an account's performance—is not a violation of the Standards as long as Jurgen discloses the arrangement in writing to her employer and obtains permission from her employer prior to entering into the arrangement. Answers A and B are incorrect; although the private compensation arrangement could conflict with the interests of other clients and lead to short-term performance pressures, members and candidates may enter into such agreements as long as they have disclosed the arrangements to their employer and obtained permission for the arrangement from their employer.

14. The correct answer is B. This question relates to Standard III(A)–Loyalty, Prudence, and Care—specifically, a member's or candidate's responsibility for voting proxies and the use of client brokerage. According to the facts stated in the question, Farnsworth did not violate Standard III(A). Although the company president asked Farnsworth to vote the shares of the Jones Corporation profit-sharing plan a certain way, Farnsworth investigated the issue and concluded, independently, the best way to vote. Therefore, even though his decision coincided with the wishes of the company president, Farnsworth is not in violation of his responsibility to be loyal and to provide care to his clients. In this case, the participants and the beneficiaries of the profit-sharing plan are the clients, not the company's management. Had Farnsworth not investigated the issue or had he yielded to the president's wishes and voted for a slate of directors that he had determined was not in the best interest of the company, Farnsworth would have violated his responsibilities to the beneficiaries of the plan. In addition, because the brokerage firm provides the lowest commissions and best execution for securities transactions, Farnsworth has met his obligations to the client in using this brokerage firm. It does not matter that the brokerage firm also provides research information that is not useful for the account generating the commission because Farnsworth is not paying extra money of the client's for that information.

15. The correct answer is A. In this question, Brown is providing investment recommendations before making inquiries about the client's financial situation, investment experience, or investment objectives. Brown is thus violating Standard III(C)–Suitability. Answers B and C provide examples of information members and candidates should discuss with their clients at the outset of the relationship, but these answers do not constitute a complete list of those factors. Answer A is the best answer.

16. The correct answer is C. This question involves Standard I(C)–Misrepresentation. Statement I is a factual statement that discloses to clients

and prospects accurate information about the terms of the investment instrument. Statement II, which guarantees a specific rate of return for a mutual fund, is an opinion stated as a fact and, therefore, violates Standard I(C). If statement II were rephrased to include a qualifying statement, such as "in my opinion, investors may earn . . . ," it would not be in violation of the Standards.

17. The correct answer is A. This question involves three of the Standards. Anderb, the portfolio manager, has been obtaining more favorable prices for her personal securities transactions than she gets for her clients, which is a breach of Standard III(A)–Loyalty, Prudence, and Care. In addition, she violated Standard I(D)–Misconduct by failing to adhere to company policy and by hiding her personal transactions from her firm. Anderb's supervisor, Bates, violated Standard IV(C)–Responsibilities of Supervisors; although the company had requirements for reporting personal trading, Bates failed to adequately enforce those requirements. Answer B does not represent a violation because Standard VI(B)–Priority of Transactions requires that personal trading in a security be conducted after the trading in that security of clients and the employer. The Code and Standards do not prohibit owning such investments, although firms may establish policies that limit the investment opportunities of members and candidates. Answer C does not represent a violation because the Code and Standards do not contain a prohibition against employees using the same broker for their personal accounts that they use for their client accounts. This arrangement should be disclosed to the employer so that the employer may determine whether a conflict of interest exists.

18. The correct answer is A because this question relates to Standard I(A)–Knowledge of the Law—specifically, global application of the Code and Standards. Members and candidates who practice in multiple jurisdictions may be subject to various securities laws and regulations. If applicable law is more strict than the requirements of the Code and Standards, members and candidates must adhere to applicable law; otherwise, members and candidates must adhere to the Code and Standards. Therefore, answer A is correct. Answer B is incorrect because members and candidates must adhere to the higher standard set by the Code and Standards if local applicable law is less strict. Answer C is incorrect because when no applicable law exists, members and candidates are required to adhere to the Code and Standards, and the Code and Standards prohibit the use of material nonpublic information.

19. The correct answer is B. The best course of action under Standard I(B)–Independence and Objectivity is to avoid a conflict of interest whenever possible. Therefore, for Ward to pay for all his expenses is the correct answer. Answer C details a course of action in which the conflict would be disclosed, but the solution is not as appropriate as avoiding the conflict of interest. Answer A would not be the best course because it would not remove the appearance of a conflict of interest; even though the report would not be affected by the reimbursement of expenses, it could appear to be.

20. The correct answer is B. Under Standard IV(A)–Loyalty, members and candidates may undertake independent practice that may result in compensation or other benefit in competition with their employer as long as they obtain consent from their employer. Answer C is not consistent with the Standards because the Standards allow members and candidates to make arrangements or preparations to go into competitive business as long as those arrangements do not interfere with their duty to their current employer. Answer A is not consistent with the Standards because the Standards do not include a complete prohibition against undertaking independent practice.

21. The correct answer is B. This question involves Standard VI(A)–Disclosure of Conflicts—specifically, the holdings of an analyst's employer in company stock. Answers A and C do not describe conflicts of interest that Smith would have to disclose. Answer A describes the use of a firm's products, which would not be a required disclosure. In answer C, the relationship between the analyst and the company through a relative is so tangential that it does not create a conflict of interest necessitating disclosure.

22. The correct answer is C. This question relates to Standard I(C)–Misrepresentation. Although Michelieu's statement about the total return of his clients' accounts on average may be technically true, it is misleading because the majority of the gain resulted from one client's large position taken against Michelieu's advice. Therefore, this statement misrepresents the investment performance the member is responsible for. He has not taken steps to present a fair, accurate, and complete presentation of performance. Answer B is thus incorrect. Answer A is incorrect because although Michelieu is not guaranteeing future results, his words are still a misrepresentation of his performance history.

23. The correct answer is B. The best policy to prevent violation of Standard II(A)–Material Nonpublic Information is the establishment of firewalls in a firm to prevent exchange of insider information. The physical and informational barrier of a firewall between the investment banking department and the brokerage operation prevents the investment banking department from providing information to analysts on the brokerage side who may be writing recommendations on a company stock. Prohibiting recommendations of the stock of companies that are clients of the investment banking department is an alternative, but answer A states that this prohibition would be permanent, which is not the best answer. Once an offering is complete and the material nonpublic information obtained by the investment banking department becomes public, resuming publishing recommendations on the stock is not a violation of the Code and Standards because the information of the investment banking department no longer gives the brokerage operation an advantage in writing the report. Answer C is incorrect because no exchange of information should be occurring between the investment banking department and the brokerage operation, so monitoring of such exchanges is not an effective compliance procedure for preventing the use of material nonpublic information.

24. The correct answer is B. Under Standard III(A)–Loyalty, Prudence, and Care, members and candidates who manage a company's pension fund owe these duties to the participants and beneficiaries of the pension plan, not the management of the company or the company's shareholders.

25. The correct answer is B. Answer B gives one of the two primary reasons listed in the *Handbook* for disclosing referral fees to clients under Standard VI(C)–Referral Fees. (The other is to allow clients and employers to evaluate the full cost of the services.) Answer A is incorrect because Standard VI(C) does not require members or candidates to discount their fees when they receive referral fees. Answer C is inconsistent with Standard VI(C) because disclosure of referral fees, to be effective, should be made to prospective clients before entering into a formal client relationship with them.

26. The correct answer is B. Standard VI(B)–Priority of Transactions does not limit transactions of company employees that differ from current recommendations as long as the sale does not disadvantage current clients. Thus, answer A is incorrect. Answer C is incorrect because the Standard does not require the matching of personal and client trades.

27. Answer C is correct. Standard IV(A)–Loyalty discusses activities permissible to members and candidates when they are leaving their current employer; soliciting clients is strictly prohibited. Thus, answer A is inconsistent with the Code and Standards even with the required disclosure. Answer B is incorrect because the offer does not directly violate the Code and Standards. There may be out-of-work members and candidates who can arrange the necessary commitments without violating the Code and Standards.

28. Answer A is correct. The question relates to Standard III(A)–Loyalty, Prudence, and Care. Carter believes the broker offers effective execution at a fee that is comparable with those of other brokers, so he is free to use the broker for all accounts. Answer B is incorrect because the accounts that prohibit soft dollar arrangements do not want to fund the purchase of research by Carter. The new trading scheme does not incur additional commissions from clients, so it would not go against the prohibitions. Answer C is incorrect because Carter should not incur unnecessary or excessive "churning" of the portfolios (excessive trading) for the purpose of meeting the brokerage commitments of soft dollar arrangements.

29. Answer B is correct according to Standard VII(B)–Reference to CFA Institute, the CFA Designation, and the CFA Program. CFA Program candidates do not receive their actual scores on the exam. Topic and subtopic results are grouped into three broad categories, and the exam is graded only as "pass" or "fail." Although a candidate may have achieved a topical score of "above 70%," she or he cannot factually state that she or he received the highest possible score because that information is not reported. Thus, answer C is incorrect. Answer A is incorrect as long as the member or candidate actually completed the exams

consecutively. Standard VII(B) does not prohibit the communication of factual information about completing the CFA Program in three consecutive years.

30. Answer C is correct. According to Standard III(A)–Loyalty, Prudence, and Care, the CFA Program would be considered a personal or firm expense and should not be paid for with the fund's brokerage commissions. Soft dollar accounts should be used only to purchase research services that directly assist the investment manager in the investment decision-making process, not to assist the management of the firm or to further education. Thus, answer A is incorrect. Answer B is incorrect because the reasonableness of how the money is used is not an issue; the issue is that educational expense is not research.

31. Answer A is correct. Standard I(B)–Independence and Objectivity emphasizes the need for members and candidates to maintain their independence and objectivity. Best practices dictate that firms adopt a strict policy not to accept compensation for travel arrangements. At times, however, accepting paid travel would not compromise one's independence and objectivity. Answers B and C are incorrect because the added benefits—free conference admission for additional staff members and an exclusive golf retreat for the speaker—could be viewed as inducements related to the firm's working arrangements and not solely related to the speaking engagement. Should Long wish to bring other team members or participate in the golf outing, he or his firm should be responsible for the associated fees.

32. Answer C is correct. The guidance to Standard II(A)–Material Nonpublic Information recommends adding securities to the firm's restricted list when the firm has or may have material nonpublic information. By adding these securities to this list, Andrews would uphold this standard. Because waiting until the next day will not ensure that news of the merger is made public, answer A is incorrect. Negotiations may take much longer between the two companies, and the merger may never happen. Andrews must wait until the information is disseminated to the market before he trades on that information. Answer B is incorrect because Andrews should not disclose the information to other managers; no trading is allowed on material nonpublic information.

33. Answer B is correct. Through placing a personal purchase order that is significantly greater than the average volume, Pietro is violating Standard IIB–Market Manipulation. He is attempting to manipulate an increase in the share price and thus bring a buyer to the negotiating table. The news of a possible merger and confirmation of the firm's earnings guidance may also have positive effects on the price of Local Bank, but Pietro's actions in instructing the release of the information does not represent a violation through market manipulation. Announcements of this nature are common and practical to keep investors informed. Thus, answers A and C are incorrect.

34. Answer C is correct. Cupp violated Standard III(D)–Performance Presentations when he deviated from the firm's stated policies solely to

capture the gain from the holding being acquired. Answer A is incorrect because the firm does not claim GIPS compliance and the GIPS standards require external cash flows to be treated in a consistent manner with the firm's documented policies. Answer B is incorrect because the firm does not state that it is updating its composite policies. If such a change were to occur, all cash flows for the month would have to be reviewed to ensure their consistent treatment under the new policy.

35. Answer A is correct. According to Standard V(C)–Record Retention, Cannan needed the permission of her employer to maintain the files at home after her employment ended. Without that permission, she should have deleted the files. All files created as part of a member's or candidate's professional activity are the property of the firm, even those created outside normal work hours. Thus, answer B is incorrect. Answer C is incorrect because the Code and Standards do not prohibit using one's personal computer to complete work for one's employer.

36. Answer B is correct. According to Standard VII(B)–Reference to CFA Institute, the CFA Designation, and the CFA Program, Quinn cannot claim to have finished the CFA Program or be eligible for the CFA charter until he officially learns that he has passed the Level III exam. Until the results for the most recent exam are released, those who sat for the exam should continue to refer to themselves as "candidates." Thus, answer C is incorrect. Answer A is incorrect because members and candidates may discuss areas of practice in which they believe the CFA Program improved their personal skills.

37. Answer A is correct. Hart's decision to invest in the retail fund appears directly correlated with Rodriguez's statement about the successful quarter of Mega Retail and thus violates Standard II(A)–Material Nonpublic Information. Rodriguez's information would be considered material because it would influence the share price of Mega Retail and probably influence the price of the entire exchange-traded retail fund. Thus, answer B is incorrect. Answer C is also incorrect because Rodriguez shared information that was both material and nonpublic. Company officers regularly have such knowledge about their firms, which is not a violation. The sharing of such information, however, even in a conversation between friends, does violate Standard II(A).

38. Answer C is correct. Standard VII(A)–Conduct as Members and Candidates in the CFA Program prohibits providing information to candidates or the public that is considered confidential to the CFA Program. In revealing that questions related to the analysis of inventories and analysis of taxes were on the exam, Park has violated this standard. Answer B is incorrect because the guidance for the standard explicitly acknowledges that members and candidates are allowed to offer their opinions about the CFA Program. Answer A is incorrect because candidates are not prohibited from using outside resources.

39. Answer B is correct. Paper has violated Standard III(D)–Performance Presentation by not disclosing that he was part of a team of managers that

achieved the results shown. If he had also included the return of the portion he directly managed, he would not have violated the standard. Thus, answer A is incorrect. Answer C is incorrect because Paper received written permission from his prior employer to include the results.

40. Answer A is correct. Townsend has not provided any information about her clients to the leaders or managers of the golf program; thus, she has not violated Standard III(E)–Preservation of Confidentiality. Providing contact information about her clients for a direct-mail solicitation would have been a violation. Answer B is incorrect because the notice in the newsletter does not violate Standard III(E). Answer C is incorrect because the golf program's fund-raising campaign had already begun, so discussing the opportunity to donate was appropriate.

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This the 13th day of June, 2023.

/ Katarina K. Wong /
Katarina K. Wong

Attorney for Applicant

EXHIBIT 287

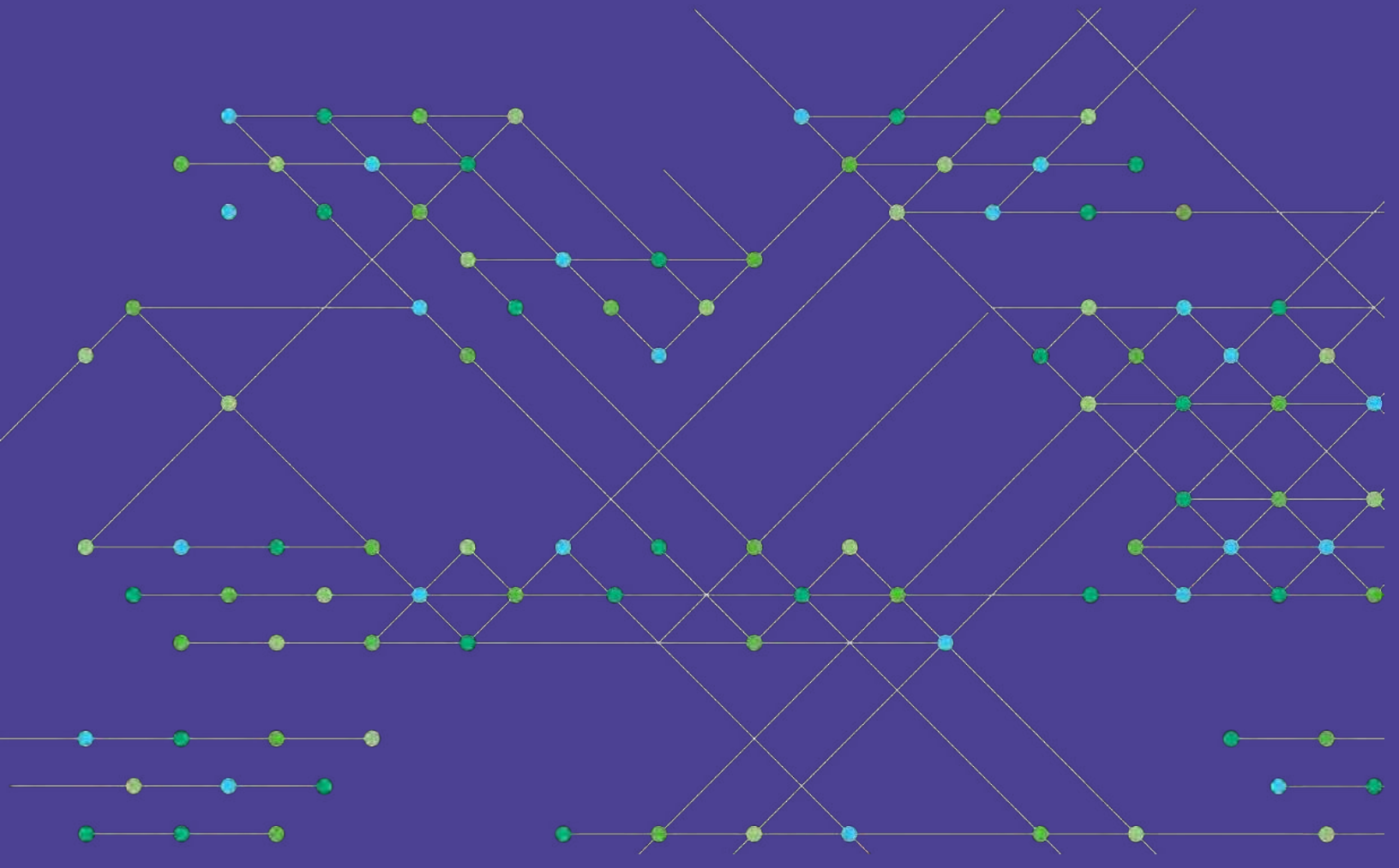
CFA Institute

RULES OF PROCEDURE:

FOR CONDUCT RELATED TO THE PROFESSION

As Amended and Restated

1 January 2022



CFA Institute

RULES OF PROCEDURE: FOR CONDUCT RELATED TO THE PROFESSION

TERMS OF REFERENCE

Answer: The Covered Person's written response to a Statement of Charges, in which they must specifically admit or deny each of the alleged findings of fact and conclusion as to violations and accept or reject the recommended sanction.

Appeal Panel: A panel comprised of current and/or former DRC members and a current or former CFA Institute Board member who evaluate, at the request of a Covered Person and pursuant to Rule 5, the findings of fact, conclusion as to violation(s), and sanction(s) imposed by a Hearing Panel.

Appeal Panel Chair: The individual selected by the DRC Chair to conduct and lead the Appeal Panel proceeding.

Bylaws: The CFA Institute Articles of Incorporation and Bylaws.

CFA Institute Board: The CFA Institute Board of Governors.

CFA Institute Exam Program: The CFA and/or CIPM exam programs.

Code and Standards: The CFA Institute Code of Ethics and Standards of Professional Conduct.

Conflict of Interest: Any business, financial, and/or personal interest, relationship, or other circumstance that could be reasonably expected to impair the ability to be objective or that creates the appearance of impropriety.

Covered Person: Any CFA Institute Charterholder, Regular, or Affiliate Member; Candidate or Postponed Candidate (as those terms are defined in the CFA Institute Bylaws); individual that has passed the Level III CFA exam but not been awarded the CFA charter (and appears to have been misusing the CFA designation); individual that has allowed their membership to lapse or has had their membership suspended through the disciplinary process (and appears to have been misusing the CFA designation); individual that seeks to reactivate a membership that has been lapsed; or individual who petitions for Reinstatement.

Disciplinary Proceeding: A Hearing Panel, Appeal Panel, Review Panel, Summary Suspension Panel, or Reinstatement Panel proceeding.

Disciplinary Review Committee (DRC): The volunteer committee of CFA Institute members established by the CFA Institute Board to enforce the Governing Documents and the CFA Institute Exam Rules and Policies as they pertain to Covered Persons.

DRC Chair: A member of the Disciplinary Review Committee approved by the CFA Institute Board to lead the DRC.

Enforcement: The CFA Institute Professional Conduct Program's Enforcement group, including their representatives and designees, whose duties include, but are not limited to, investigating professional conduct matters, recommending disciplinary sanctions, and participating in Disciplinary Proceedings.

Governing Documents: Documents that govern the conduct of Covered Persons, including the Bylaws, Code and Standards, and Rules of Procedure.

Hearing Panel: A panel composed of DRC members convened when the Statement of Charges has been rejected by either the Covered Person or a Review Panel.

Hearing Panel Administrator: The administrative and scheduling intermediary among Professional Conduct, the Covered Person, and any Panel and/or the DRC Chair.

Hearing Panel Chair: The Hearing Panelist selected by the DRC Chair to conduct and lead a Hearing Panel proceeding.

Professional Conduct: Any activity or conduct governed by the Code and Standards and other Governing Documents, except for conduct relating to participation in a CFA Institute Exam Program, as determined by Professional Conduct. (See Rules of Procedure: Exam-Related Conduct).

Reinstatement Panel: A panel of DRC members who conduct a hearing to evaluate and make a decision regarding a petition for reinstatement.

Review Panel: A panel of DRC members who evaluate the conclusion as to violation(s) and recommended sanction(s) when the Covered Person has accepted, or has failed to reject, a Statement of Charges, or who evaluate an agreed-upon Settlement Agreement as set forth in Rule 3.

Settlement Agreement: A document in which Professional Conduct and the Covered Person agree to resolve a disciplinary matter. The agreement must be in writing and include findings of facts, a conclusion as to the violation(s), and an agreed upon sanction.

Statement of Allegations: The document provided by Professional Conduct to the Covered Person that notifies the individual of the preliminary findings of the investigation and conclusion as to the apparent violation(s) of the Governing Documents. The Statement of Allegations provides the Covered Person an opportunity to submit additional documents, information, and explanations before Professional Conduct determines whether to issue a Statement of Charges.

Statement of Charges: The document that notifies the Covered Person of Professional Conduct's findings of fact, conclusion as to violation(s), and recommended sanction(s). The Statement of Charges must be accepted or rejected by the Covered Person in the time provided.

Summary Suspension Hearing Panel: A panel of DRC members who conduct a hearing to determine whether a summary suspension is reasonable when a Covered Person has submitted a request for review of a notice of summary suspension issued by Professional Conduct.

Contents

RULE 1: INTRODUCTION

The Bylaws of CFA Institute and these Rules of Procedure form the basic structure for enforcing compliance with the Governing Documents. CFA Institute believes that Covered Persons are presumed to be in compliance with the Governing Documents unless and until proved otherwise, and is committed to providing a fair, efficient, and effective disciplinary process. Throughout the disciplinary process, CFA Institute staff, Covered Persons and their representatives, and members of the Disciplinary Review Committee and Board of Governors must follow these Rules of Procedure.

Rule 1.1 Roles and Authority of the Disciplinary Review Committee

The DRC is a volunteer committee of CFA Institute members established by the CFA Institute Board through the Bylaws. The DRC enforces the Governing Documents through participation as panelists in Disciplinary Proceedings. Panelists will not participate in any proceeding in which they have a Conflict of Interest. If a conflict exists, the panelist will withdraw from any proceeding immediately. In the unlikely event that all members of the DRC are conflicted and unable to serve as panelists in a Disciplinary Proceeding, substitute panelists will be drawn from current or former members of the CFA Institute Board or former members of the DRC.

Subject to these rules, the DRC will conduct disciplinary proceedings in such a manner as it considers appropriate, provided that participants are treated fairly and that at an appropriate stage of the proceedings each party is given a reasonable opportunity to present its case. The DRC, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process.

Rule 1.2 Roles and Authority of Professional Conduct

Professional Conduct is authorized to investigate any matter involving, or appearing to involve, a violation of the Governing Documents by a Covered Person and is authorized to contact any person or entity that it believes may be able to provide relevant information, documents, testimony, or assistance in an investigation or Disciplinary Proceeding.

Professional Conduct investigates to determine whether it is more likely than not that the Covered Person has violated the Governing Documents and, if so, issues a Statement of Allegations and/or Statement of Charges. In addition, Professional Conduct presents its findings of fact, conclusion as to violations, and recommended sanction in Disciplinary Proceedings.

Professional Conduct may appoint individuals to act on its behalf and to assist in performing the functions related to investigations and any resulting Disciplinary Proceedings.

Staff members of Professional Conduct, and those individuals acting on its behalf, will withdraw from any investigation or Disciplinary Proceeding in which they have a Conflict of Interest. If the entire Professional Conduct staff has a Conflict of Interest, the Chair of the Risk Committee of the CFA Institute Board will appoint individuals to act on behalf of Professional Conduct and to assist in or perform the functions related to investigations and any resulting Disciplinary Proceedings.

Rule 1.3 Rights and Responsibilities of a Covered Person

A Covered Person who is the subject of a professional conduct investigation or Disciplinary Proceeding, or who may have relevant information regarding such an investigation or proceeding, has the responsibility to

a) adhere to the Rules of Procedure;
b) produce accurate and complete copies of all requested documents in their possession or control;
c) provide information orally and in writing, as requested by Professional Conduct;
d) prepare, execute, and deliver documents requesting and authorizing third parties (*e.g.*, former clients, previous employers) to provide requested documents, information, and testimony to Professional Conduct in connection with a pending investigation or proceeding;

e) respond in a timely manner and cooperate fully in the investigation or Disciplinary Proceeding; and
f) keep Professional Conduct apprised of current mailing and email addresses in a timely manner;

and the right to

a) retain and be represented by legal counsel;
b) retain and have present, if applicable, an interpreter to assist them;
c) present documentary evidence and oral and written testimony;
d) call and present oral testimony by witnesses; and
e) question any testifying witnesses presented by Professional Conduct.

The Covered Person assumes their own costs for producing documents and information, legal representation, translations, language interpreter, travel, witness expenses, and other expenses associated with an investigation and/or participation in a Disciplinary Proceeding.

Rule 1.4 Delivery and Receipt of Documents

Professional Conduct and the Hearing Panel Administrator may provide notices and documents relating to an investigation or Disciplinary Proceeding to the Covered Person's mailing address and/or email address as shown in CFA Institute records. Correspondence and/or documents are considered received by the Covered Person when sent to

a) the mailing and/or email address for the Covered Person shown in CFA Institute records; or
b) the business mailing and/or email address of the Covered Person's attorney or other representative who has been previously identified to Professional Conduct, in writing, by the Covered Person.

All references to the timing of delivery and receipt of documents within these Rules are calculated based on calendar days.

Rule 1.5 Grounds for Sanctions

Disciplinary sanctions may be imposed on a Covered Person for

a) any violation of the Governing Documents;
b) a conviction or guilty plea, as further described in Rule 6.1(a);
c) a permanent or indefinite bar or suspension, or a suspension of two or more years, as described in Rule 6.1(b);
d) failure to respond in a timely manner and/or cooperate fully in a Professional Conduct investigation or Disciplinary Proceeding or misusing the CFA designation while the Covered Person's membership is lapsed, as described in Rule 6.1(c).

The type of sanction imposed will consider the Covered Person's present status with CFA Institute so as to be meaningful and effective. So, for example, if a person commits a violation while they are a Candidate, but while an investigation or Disciplinary Proceeding is pending they become a CFA charterholder, the sanction imposed will be that applicable to their present status as a charterholder member (*e.g.*, a revocation or suspension of membership and of the right to use the CFA designation).

Rule 1.6 Sanctions

Possible disciplinary sanctions include the following:

a) **Private Reprimand.** An admonishment in writing that will not be published or disclosed to other persons or entities.
b) **Censure.** An admonishment in writing for which publication and disclosure will include the Covered Person's name and identifying information and will be disclosed to other persons or entities upon request.
c) **Suspension of Membership.** Termination of a Covered Person's memberships, or opportunity for memberships, in CFA Institute and any member societies for a specified period.

d) **Suspension of the Right to Use the CFA Designation.** Termination of a Covered Person's right to use the CFA designation for a specified period.
e) **Revocation of Membership.** Permanent or indefinite termination of a Covered Person's memberships, or opportunity for memberships, in CFA Institute and any member societies.
f) **Revocation of the Right to Use the CFA Designation.** Permanent or indefinite termination of a Covered Person's right to use the CFA designation.
g) **Summary Suspension.** Automatic termination of a Covered Person's memberships, or opportunity for memberships, in CFA Institute and any member societies, as well as the right to use the CFA designation or participate in a CFA Institute Exam Program.
h) **Suspension from Participation in CFA Institute Exam Program.** Termination of a Covered Person's participation in the CFA and/or CIPM exam programs for a specified period.
i) **Prohibition from Participation in CFA Institute Exam Program.** Permanent or indefinite termination of a Covered Person's participation in the CFA and/or CIPM exam programs.

As part of any public sanction identified above, Covered Persons may also be required by a Hearing Panel to meet other conditions for membership that may be proposed by Professional Conduct, such as: the successful completion of a specific ethics course and/or examination; and providing proof of payment of any related monetary awards, claims, fines, costs, disgorgement, or restitution ordered by a regulator, arbitration panel, government agency, or court of law. If the Covered Person fails to satisfy any such condition(s), they will not be allowed to reactivate or continue membership in CFA Institute or any member societies and/or participate in the CFA Institute Exam Program.

The effective date of a sanction is the date of the Review Panel or Hearing Panel's written decision imposing the sanction, or, in the event of an appeal, the date of the Appeal Panel's written decision or the date that the appeal is otherwise concluded.

Rule 1.7 Publication, Disclosure, and Confidentiality

CFA Institute understands that all investigations and Disciplinary Proceedings are sensitive in nature and, therefore, will exercise reasonable care to ensure that the pendency, subject matter, status, and records of investigations and Disciplinary Proceedings conducted according to these Rules remain confidential.

Exceptions to this general policy may be made by Professional Conduct

a) as required by law;
b) as necessary to conduct an investigation or Disciplinary Proceeding;
c) to disclose to the public the Covered Person's name, location, conduct, resignation, violations, and sanctions in CFA Institute publications, websites, and news releases; to persons or entities upon request; and/or to member societies;
d) if the Covered Person has agreed to a waiver of confidentiality;
e) to notify a regulatory organization, governmental entity, or court with jurisdiction over the Covered Person's conduct. In such a case, the regulator, agency, or court may make whatever use of that information it deems appropriate.

RULE 2: INVESTIGATIONS

Rule 2.1 Beginning an Investigation

Possible violations of the Governing Documents come to the attention of Professional Conduct through many sources, including self-disclosures, third-party tips and complaints, and publicly available information. Professional Conduct may open an investigation of any matter involving, or appearing to involve, a violation of the Governing Documents by a Covered Person, regardless of the source of the information.

Rule 2.2 Notice of Investigation

A Covered Person who becomes the subject of an investigation by Professional Conduct will be notified in writing. The notice of investigation will include information as to where the Rules of Procedure can be found.

Rule 2.3 Investigation

As part of an investigation into a Covered Person's conduct, Professional Conduct is authorized to contact any person or entity that it believes may be able to provide relevant information, documents, testimony, or assistance in an investigation. Professional Conduct may request and obtain information, documents, testimony, and assistance from the Covered Person, regulatory authorities, clients, employers, public records, and any other sources. In making a request to any person or entity, it may be necessary for Professional Conduct to identify the Covered Person and/or the conduct or allegations under investigation.

Rule 2.4 Continuing an Investigation or Proceeding

Professional Conduct may commence and/or continue an investigation or Disciplinary Proceeding for conduct that occurred while an individual was a Covered Person, even if the individual's membership has since lapsed. Similarly, if an individual whose membership has lapsed later seeks to reactivate their membership, Professional Conduct may commence and/or continue an investigation and bring a Disciplinary Proceeding for any conduct that occurred while the person's membership was lapsed, regardless of whether they were also misusing the CFA designation.

If a Covered Person permanently resigns their CFA membership and/or permanently withdraws from further participation in the CFA Institute Exam Program during an investigation or Disciplinary Proceeding under these Rules of Procedure, the resignation will be considered permanent. The individual will not be allowed to reinstate, reactivate, or resume their membership or candidacy in the future. In order for a resignation to be effective, the Covered Person must agree in writing that they will not use the CFA designation or claim to be a Chartered Financial Analyst, or otherwise represent to others that they are a charterholder or member of CFA Institute in good standing. A notice of the Covered Person's permanent resignation and/or withdrawal may be published as provided in Rule 1.7. The notice may include the Covered Person's name, location, a statement that the resignation or withdrawal occurred during a professional conduct investigation or Disciplinary Proceeding, and a brief description of the conduct that was the subject of the investigation or proceeding.

Rule 2.5 Closing an Investigation

If, at the end of an investigation, Professional Conduct determines there is no evidence or insufficient evidence of a violation, the Covered Person will be notified in writing that the investigation has been closed. Professional Conduct may re-open a closed investigation if it receives new or different information or allegations concerning the Covered Person's conduct.

Rule 2.6 Statement of Allegations

If Professional Conduct believes there is sufficient evidence of a violation of the Governing Documents, Professional Conduct may, at its discretion, provide the Covered Person with a Statement of Allegations.

The purpose of the Statement of Allegations is to inform the Covered Person of the preliminary findings of the investigation and to allow the Covered Person a final opportunity to respond and present their position before Professional Conduct determines whether to proceed with a Statement of Charges.

The Statement of Allegations provides the Covered Person with Professional Conduct's preliminary findings of fact and conclusion as to the apparent violation(s) of the Governing Documents. The Covered Person may, but is not required to, provide a written response that presents any additional facts, evidence, explanations, or mitigating facts or circumstances to Professional Conduct for further consideration. Responses to the Statement of Allegations must be received within the time provided by Professional Conduct to receive consideration.

If the Covered Person provides a response to the Statement of Allegations in the time provided, Professional Conduct will consider the submission and may continue the investigation, close the investigation, or proceed to issue a Statement of Charges. The written response of a Covered Person also may be presented and considered as evidence if the matter results in a Disciplinary Proceeding. If the Covered Person does not respond to the Statement of Allegations within the time provided, Professional Conduct may continue the investigation, close the investigation, or proceed with a Statement of Charges

Rule 2.7 Statement of Charges

If Professional Conduct determines, upon consideration of the evidence and, if applicable, the Covered Person's response to the Statement of Allegations, that it is more likely than not that the Covered Person committed a violation of the Governing Documents and a disciplinary sanction is warranted, Professional Conduct will provide the Covered Person with a Statement of Charges.

The Statement of Charges will notify the Covered Person of Professional Conduct's findings of fact, conclusion as to violation(s), and recommended sanction(s). Professional Conduct also will provide copies of all non-public documents it considered relevant to its findings of fact and conclusion as to violation(s) that were obtained from third-parties (*i.e.*, sources other than the Covered Person or their representatives), after removing any confidential information. Transcripts or other recordings of any investigative interviews conducted by Professional Conduct will be made available to the Covered Person upon written request.

Rule 2.8 Covered Person's Answer to the Statement of Charges

The Covered Person must submit a written Answer to the Statement of Charges and specifically admit or deny each of the alleged findings of fact and conclusions as to violations, and accept or reject the recommended sanction within 21 days.

If the Covered Person answers and admits to all of the alleged findings and violations, and accepts the recommended sanction (or fails to respond to the Statement of Charges within the time provided), Professional Conduct will refer the matter to a Review Panel, as provided under Rule 3.1. However, if the recommended sanction was a Private Reprimand, that sanction will be deemed accepted by the Covered Person and the matter will be considered final without the need of a Review Panel.

If the Covered Person answers and denies any of the alleged findings or violations and/or does not accept the recommended sanction(s) in the Statement of Charges, Professional Conduct may refer the matter to a Hearing Panel.

Rule 2.9 Settlement Agreements

Professional Conduct and the Covered Person may at any time resolve a disciplinary matter (investigation or proceeding) through a negotiated Settlement Agreement. The agreement must be in writing and include findings of facts, a conclusion as to the violation(s), and an agreed upon sanction.

Settlement Agreements in which the agreed upon sanction is a Censure, Suspension, Revocation, or Prohibition must be presented to a Review Panel for final consideration and acceptance, as provided under Rule 3.1. For the sole purpose of making its determination whether to accept or reject the proposed settlement, the Review Panel will consider the findings and conclusion in the agreement to be admitted. If the Settlement Agreement is accepted, the matter is final.

If the proposed Settlement Agreement is rejected by the Review Panel, the investigation or proceeding may resume or proceed and the findings, conclusion, and/or agreed upon sanction considered by the Review Panel are not binding and may be contested. Settlements in which the agreed upon outcome is a Private Reprimand are considered final and effective upon execution by the parties.

RULE 3: REVIEW PROCESS

Rule 3.1 Review Panel Procedures

If the Covered Person accepts the Statement of Charges, or fails to reject the Statement of Charges within the time provided, and the recommended sanction is a Censure, Suspension, Revocation, or Prohibition, the findings of fact, conclusion as to violation(s), and recommended sanction(s) will be deemed accepted by the Covered Person and Professional Conduct will refer the matter to a Review Panel. Settlement Agreements in which the agreed upon sanction is a Censure, Suspension, Revocation, or Prohibition also will be referred to a Review Panel.

The Review Panel will be selected and conducted in the same manner as a Hearing Panel (see Rule 4.2) but will meet outside the presence of the Covered Person and Professional Conduct. The Review Panel will be provided with a copy of the executed Settlement Agreement or the Statement of Charges and the Covered Person's Answer, if applicable.

Professional Conduct may submit additional documents and information to the Review Panel with the Covered Person's consent or waiver. Professional Conduct must submit all documents for consideration by the Review Panel to the Hearing Panel Administrator at least 14 days before the Review Panel.

Rule 3.2 Review Panel Standard of Review and Decision

For the sole purpose of making its determination whether to approve or reject a Settlement Agreement or accepted Statement of Charges, the Review Panel will consider the findings of fact and conclusion as to violation(s) to be admitted by the Covered Person. After considering the documents presented, the Review Panel will determine, based on the accepted findings of fact, whether the conclusion as to violation(s) and the recommended sanction(s) in the Statement of Charges or proposed Settlement Agreement are reasonable.

If the Review Panel finds the conclusion as to violation(s) and the recommended sanction(s) reasonable, they will be accepted, and the outcome will be final. The Review Panel may accept the conclusion as to violation(s) and impose a lesser sanction; however, they may not impose a more severe sanction.

If the Review Panel does not find the conclusion as to violation(s) and/or the recommended sanction(s) reasonable, the Review Panel must reject the proposed Settlement Agreement or accepted Statement of Charges. Professional Conduct may then continue the investigation and/or refer the matter to a Hearing Panel.

RULE 4: HEARING PROCESS

Rule 4.1 Scheduling a Hearing Panel

If a Covered Person (or Review Panel) rejects the Statement of Charges, Professional Conduct will refer the matter to a Hearing Panel. Hearings will be conducted by telephone conference call or video conference (if practical). If the Covered Person and Professional Conduct agree, the case may instead be considered and decided by the Hearing Panel on the basis of written submissions only. Hearings on written submissions only will be conducted outside the presence of the Covered Person and Professional Conduct and will not be transcribed or recorded.

If the recommended sanction is a Suspension, Revocation, or Prohibition, the Covered Person may request an in-person hearing. However, only those Covered Persons that have earned the CFA, FSIP, ASIP, and/or CIPM professional designation are eligible for an in-person hearing. Any requests for an in-person hearing must be received by the Hearing Panel Administrator, in writing, at the time of the Covered Person's rejection of the Statement of Charges (or within 7 days of notification of the Review Panel's rejection of the Statement of Charges). In-person Hearing Panels will be conducted at a CFA Institute office or such other location designated by CFA Institute.

A Hearing Panel will be scheduled for a date and time that are agreeable to both the Covered Person and Professional Conduct. If an agreement cannot be reached, the date and time for the Hearing Panel will be determined by the DRC Chair, or their designee. Once a hearing has been scheduled, any requests to reschedule must be submitted in writing to the Hearing Panel Administrator. The DRC Chair, or their designee, has the sole discretion to grant or deny any request to reschedule a hearing.

In related matters, Covered Persons and/or Professional Conduct may request to have more than one Covered Person's case determined in a single Disciplinary Proceeding. Such requests must be submitted in writing to the DRC Chair. If the Covered Persons and Professional Conduct do not agree on a single proceeding, the DRC Chair, or their designee from the DRC, will determine whether to proceed with single or multiple hearings.

If a Covered Person requests a hearing but subsequently fails to cooperate in the scheduling of that proceeding, the original request will be considered withdrawn or abandoned, the findings of fact and conclusion as to violation(s) will be deemed accepted, the recommended sanction(s) will be imposed without further review, and the Covered Person will have waived all rights to further review.

If a Covered Person requests a Hearing Panel, but subsequently fails to participate in that proceeding, the Hearing Panel will proceed with the hearing and make its determination without the Covered Person's participation. The Hearing Panel may, at its discretion, reschedule or resume a Disciplinary Proceeding if the Panelists determine by majority vote that the Covered Person's failure to participate was unanticipated and for reasons beyond their control. Otherwise, a Covered Person may not request an appeal in a proceeding in which they did not participate.

If a Covered Person requests a Hearing Panel but subsequently agrees to a written Settlement Agreement with Professional Conduct, the Hearing Panel will be converted into a Review Panel and will proceed under Rule 3.

Rule 4.2 Selection of Hearing Panelists

The DRC Chair, or their designee from the DRC, will appoint three to five voting members and one alternate from the DRC to a Hearing Panel, one of whom will be selected as the Hearing Panel Chair. Alternates appointed for in-person hearings will not travel to, or participate in, the proceeding unless it is determined at least 7 days prior to the hearing that a voting member is unable to participate or is disqualified. For Hearing Panels held by telephone conference call, video conference, or on written submissions, the alternate will attend the hearing as an observer, but will not participate in the Hearing Panel deliberations or vote unless a voting member is unable to participate or is disqualified.

Rule 4.3 Notice of Hearing and Challenge Procedures

The Hearing Panel Administrator will provide at least 40 days' notice of the hearing to the Covered Person and Professional Conduct. The notice of hearing will include the date and time (and location, if applicable) as well as the identities of the Hearing Panelists and an explanation of the process for challenging Hearing Panelists' participation on the Hearing Panel.

The Covered Person and Professional Conduct will each have 7 days from the date of the notice of hearing to disqualify one panelist's participation on the Hearing Panel without stating a reason.
The Covered Person and Professional Conduct may also challenge an unlimited number of Hearing Panelists but must state a reason for the challenge. Hearing Panelists who are challenged for a stated reason will be disqualified from the panel

a) by agreement between the Covered Person and Professional Conduct;
b) absent an agreement, by decision of the Hearing Panel Chair; or
c) by decision of the DRC Chair, or their designee, if necessary, because of a challenge to the Hearing Panel Chair.

A disqualified panelist may be replaced in the same manner as panelists were appointed.

Rule 4.4 Pre-Hearing Submissions

It is important to the disciplinary process for the Hearing Panel to receive written pre-hearing submissions from both Professional Conduct and the Covered Person. Pre-hearing submissions should state the relevant facts, explain each party's respective position, and include a list of proposed witnesses and a copy of all supporting documents referenced in the submission or to be presented and relied on at the hearing. Witness lists must include the names, contact information, and a brief description of each person's expected testimony.

All documents submitted in connection with a disciplinary proceeding must be legible, presented in an organized manner, and written in or translated into English.

Professional Conduct's pre-hearing submission will be provided to the Covered Person and Hearing Panel Administrator at least 30 days prior to the hearing. The Covered Person must then provide their pre-hearing submission to Professional Conduct and the Hearing Panel Administrator at least 21 days prior to the hearing. Professional Conduct may, at its discretion, supplement its pre-hearing submission so long as it is provided to Covered Person and Hearing Panel Administrator at least 14 days prior to the hearing.

The Hearing Panel Administrator will provide all pre-hearing submissions to the Hearing Panelists in advance of the hearing. Any submissions, witnesses, or documents not provided in accordance with this rule may be excluded from consideration by the Hearing Panel at its discretion.

Rule 4.5 Hearing Procedures

All Hearing Panels will be conducted in English. Each witness, including the Covered Person, will be asked to swear or affirm that their testimony will be truthful. Witnesses (other than the Covered Person) may not attend or participate in a hearing until called to testify.

The Covered Person and Professional Conduct will each have the opportunity to present evidence and testimony, question all witnesses, present arguments, and respond to the evidence, testimony, and arguments presented by the other. Panel members may also question witnesses during the proceeding.

An audio or stenographic recording or transcript will be made of every hearing conducted under Rule 4, the costs of which will be paid by CFA Institute. Hearing Panel deliberations will not be recorded. A copy of the recording or transcript will be made available to the Covered Person on request.

The Hearing Panel is not bound by any rules of evidence, such as those applicable in courts of law, and may upon request, or at its own discretion, exclude or disregard any documents, information, or testimony that it deems unreliable, repetitive, or irrelevant to the proceeding.

At the end of the hearing, the Hearing Panel will deliberate outside the presence of the Covered Person and Professional Conduct to make findings of fact and decide whether the Covered Person committed the alleged violation(s) and, if so, what the appropriate sanction(s) should be, if any.

Rule 4.6 Standard of Proof

The Hearing Panel must determine whether, by a preponderance of the evidence, the alleged violation(s) occurred. A preponderance of the evidence means that it is "more likely than not" that the Covered Person committed the alleged violation(s). Professional Conduct has the burden of proof.

Rule 4.7 Hearing Panel Decision

The decision of the Hearing Panel must be based solely on the evidence and testimony presented in the pre-hearing submissions and at the hearing and relate only to the allegations identified and communicated to the Covered Person in the Statement of Charges.

The Hearing Panel must be comprised of at least three members and their determinations will be made by a simple majority vote. The Hearing Panel will determine findings of fact, make a conclusion as to violation(s), and if appropriate, impose a sanction(s). The Hearing Panel may impose the sanction recommended by Professional Conduct, a lesser or greater sanction, or no sanction.

The Hearing Panel Chair, or their designee from the Hearing Panel, will issue a written decision setting forth the Hearing Panel's findings of fact, conclusion as to violation(s), and sanction(s), if any. The Hearing Panel decision will be sent to the Covered Person and Professional Conduct within 35 days following the conclusion of the hearing.

The decision of the Hearing Panel will be final unless the sanction imposed is a suspension of membership, suspension of the right to use the CFA designation, revocation of membership, revocation of the right to use the CFA designation, or a prohibition from participation in the CFA Institute Exam Program, in which case the Covered Person may request an appeal of the Hearing Panel decision as provided in Rule 5.

RULE 5: APPEAL PROCESS

Rule 5.1 Covered Person's Request for Appeal

If the Hearing Panel imposes a suspension of membership, suspension of the right to use the CFA designation, revocation of membership, revocation of the right to use the CFA designation, or a prohibition from participation in the CFA Institute Exam Program, the Covered Person may request an appeal of the Hearing Panel's decision. The request must be made in writing to the Hearing Panel Administrator and Professional Conduct within 28 days of the date of the Hearing Panel decision letter.

Along with the request for appeal, the Covered Person must simultaneously provide a written submission for the Appeal Panel's consideration stating the relevant facts and reasons why the Hearing Panel erred in its findings of fact or conclusion as to violation(s) and/or why the sanction(s) imposed is unfair.

Rule 5.2 Professional Conduct's Response to Appeal

Professional Conduct may, within 28 days of receipt of the Covered Person's request for an Appeal Panel, submit a written response. A copy of Professional Conduct's written submission will be provided to the Covered Person and the Hearing Panel Administrator.

Any requests by the parties for additional time to make their submissions on appeal will be decided by the DRC Chair, or their designee, unless the parties have agreed to an extension. In the absence of a request for extension before the deadline, any submissions to the Appeal Panel not provided in accordance with these Rules may be excluded from consideration by the Appeal Panel in their discretion.

Rule 5.3 Standard of Review

The Appeal Panel must determine whether there was a clear and material error in the findings of fact or conclusion as to violation(s) and/or whether the sanction(s) imposed was unfair. The Appeal Panel will affirm the Hearing Panel's decision unless the Covered Person's written submission identifies a clear and material error in the findings of fact or conclusion as to violation(s) made by the Hearing Panel or shows that the sanction(s) imposed by the Hearing Panel was unfair. In assessing sanctions, the decision of the Hearing Panel will be upheld unless it was so clearly unreasonable, given the entirety of the evidence, that it was unfair or unjust.

Rule 5.4 Selection of Appeal Panelists

An Appeal Panel will consist of five voting members. The DRC Chair, or their designee from the DRC, will appoint to the Appeal Panel four current or former members from the DRC, one of whom will be selected as the Appeal Panel Chair, and one member who is a current or former member of the CFA Institute Board.

Rule 5.5 Notice of Appeal Panel and Challenge Procedures

The Covered Person and Professional Conduct will be provided at least 21 days' notice of the Appeal Panel date. The notice of Appeal Panel will include the identities of the Appeal Panelists and explain the process for challenging Appeal Panelists' participation.

The Covered Person and Professional Conduct will each have 7 days from the date of the notice of Appeal Panel to challenge one panelist's participation without stating a reason.

The Covered Person and Professional Conduct may also challenge an unlimited number of Appeal Panelists but must state a reason for the challenge. Appeal Panelists who are challenged for a stated reason will be disqualified

a) by agreement between the Covered Person and Professional Conduct;
b) absent an agreement, by decision of the Appeal Panel Chair; or
c) by decision of the DRC Chair, or their designee, if necessary, because of a challenge to the Appeal Panel Chair.

A disqualified panelist may be replaced in the same manner as panelists were appointed.

Rule 5.6 Appeal Panel Procedures

The Appeal Panel will meet by telephone conference call outside the presence of the Covered Person and Professional Conduct. The Appeal Panel deliberations will not be transcribed or recorded.

The Appeal Panel will be sent a copy of the hearing transcript or recording (if applicable), the pre-hearing submissions from the Covered Person and Professional Conduct, the Hearing Panel decision, and the written submissions to the Appeal Panel by Professional Conduct and the Covered Person.

Rule 5.7 Appeal Panel Decision

The Appeal Panel must be comprised of at least three members, and their determinations will be made by a simple majority vote. The Appeal Panel Chair, or their designee from the Appeal Panel, will issue a written decision as to whether there was a clear and material error in the Hearing Panel's findings and/or whether the sanction imposed by the Hearing Panel is unfair. The Appeal Panel may at its discretion impose no sanction, the same sanction imposed by the Hearing Panel, a lesser sanction, or a greater sanction.

The Appeal Panel decision will be provided to the Covered Person and Professional Conduct by the Hearing Panel Administrator within 35 days after the hearing. The decision of the Appeal Panel is final.

RULE 6: SUMMARY SUSPENSIONS

Rule 6.1 Grounds for Summary Suspension

Professional Conduct may, in its discretion, impose a summary suspension if

a) a Covered Person is convicted of, pleads guilty to, or consents to the imposition of punishment for any crime that is "punishable" by more than one year in prison (regardless of the actual sentence imposed);
b) a Covered Person is barred or suspended permanently, for an indefinite period, or for a period of two or more years, from registration or participation under the securities laws or similar laws or rules relating to the investment decision-making process; or from participation, association, or affiliation by a regulator, court, or government agency; or by a public or private self-regulatory organization with legal authority over the investment decision-making process; or
c) a Covered Person fails to cooperate fully with Professional Conduct in any investigation of the Covered Person's conduct or misuses the CFA designation while their membership is lapsed.

Bars and suspensions that have been imposed “with a right to re-apply” at some future time are deemed to be “for an indefinite period” for purposes of this rule.

Rule 6.2 Notice of Summary Suspension

If a summary suspension is imposed, Professional Conduct will provide the Covered Person with a written notice of summary suspension, which will also advise the Covered Person of the right to request a review by a Summary Suspension Hearing Panel.

Rule 6.3 Request for Review of Summary Suspension

To obtain a review of the summary suspension, the Covered Person must provide a written request within 21 days of the date of the notice of summary suspension. Professional Conduct will refer the matter to a Summary Suspension Hearing Panel.

Rule 6.4 Failure to Request Review of Summary Suspension

If the Covered Person does not request a review of the summary suspension within 21 days of the date of the notice of summary suspension, the summary suspension automatically becomes a revocation and/or prohibition.

Rule 6.5 Summary Suspension Hearing Panel

A Summary Suspension Hearing Panel will be formed and conducted as provided in Rule 4, except that there will be no in-person hearings, no recording or transcription, and no right to an Appeal Panel. Professional Conduct must provide its pre-hearing submission to the Covered Person and the Hearing Panel Administrator at least 30 days before the Summary Suspension Hearing Panel. The Covered Person must provide their pre-hearing submission to Professional Conduct and the Hearing Panel Administrator at least 21 days before the Summary Suspension Hearing Panel.

The Covered Person has the burden to prove by a preponderance of the evidence that the summary suspension is not reasonable. Absent such a showing, the Summary Suspension will be affirmed by the Panel. If a Summary Suspension Hearing Panel affirms the summary suspension, the sanction automatically becomes a revocation and/or prohibition. If the Summary Suspension Hearing Panel finds the summary suspension was not reasonable and rejects the summary suspension, Professional Conduct may close the matter or continue its investigation into the Covered Person’s conduct.

Rule 6.6 Reversal of a Revocation and/or Prohibition Imposed Pursuant to Rule 6.1(a) or (b)

A revocation and/or prohibition imposed under Rule 6.1(a) or (b) may be rescinded by Professional Conduct if the Covered Person provides reliable evidence demonstrating that the underlying criminal conviction, bar, or suspension has been reversed and no longer meets the sanction criteria under Rule 6.1(a) or (b). Professional Conduct, however, may open, or reopen and continue, an investigation into the underlying conduct and pursue charges for any violations of the Governing Documents. A notice of the reversal of the revocation and/or prohibition may also be published.

Rule 6.7 Reversal of a Revocation and/or Prohibition Imposed Pursuant to Rule 6.1(c)

If the Covered Person agrees to cooperate with Professional Conduct’s investigation, or promptly ceases their misuse of the CFA designation, Professional Conduct may, at its discretion, rescind the notice of summary suspension and reverse the revocation and/or prohibition on such conditions as Professional Conduct may impose. A notice of the reversal may also be published.

RULE 7: REINSTATEMENT PROCESS

Rule 7.1 Reinstatement Following Timed Suspension

A Covered Person who has received a suspension of membership, suspension from participation in a CFA Institute Exam Program, or suspension of the right to use the CFA designation will be reinstated on the expiration of the period of suspension, provided the Covered Person completes and files a Professional Conduct Statement (or its equivalent) with CFA Institute confirming that they have not been the subject of any disciplinary action since the suspension became effective and provided the Covered Person pays all applicable membership dues.

Rule 7.2 Petition, Investigation, and Review for Reinstatement Following Prohibition or Revocation

A Covered Person who received a prohibition from participation in a CFA Institute Exam Program or a revocation of membership and/or the right to use the CFA designation for industry-related conduct may seek reinstatement by submitting a petition for reinstatement to Professional Conduct. To be eligible to seek reinstatement, the petitioner must wait at least five years after the effective date of the revocation or prohibition.

On receipt of a petition for reinstatement, Professional Conduct may conduct any necessary investigation.

On completion of the investigation, Professional Conduct will send a written recommendation to the Reinstatement Panel and the petitioner. The petitioner may then submit written information to the Reinstatement Panel on their behalf.

The Reinstatement Panel will be organized and conducted in accordance with Rule 4, except that there will be no in-person hearings. The Reinstatement Panel will be provided with a copy of the transcript(s), if available, and the decision(s) from any prior Disciplinary Proceeding(s). The reinstatement hearing itself will be recorded, but not transcribed.

The petitioner must demonstrate to the Reinstatement Panel's satisfaction their professional competence and fitness to practice, which will include sufficient evidence demonstrating rehabilitation and full compliance with all disciplinary orders, including those that required payments of fines, disgorgement, damages, remediation, and costs.

If the petition for reinstatement is denied, the Reinstatement Panel may mandate that Professional Conduct not accept any further petitions for reinstatement permanently, or for a period, or subject to the satisfaction of any condition(s) the Panel may impose.

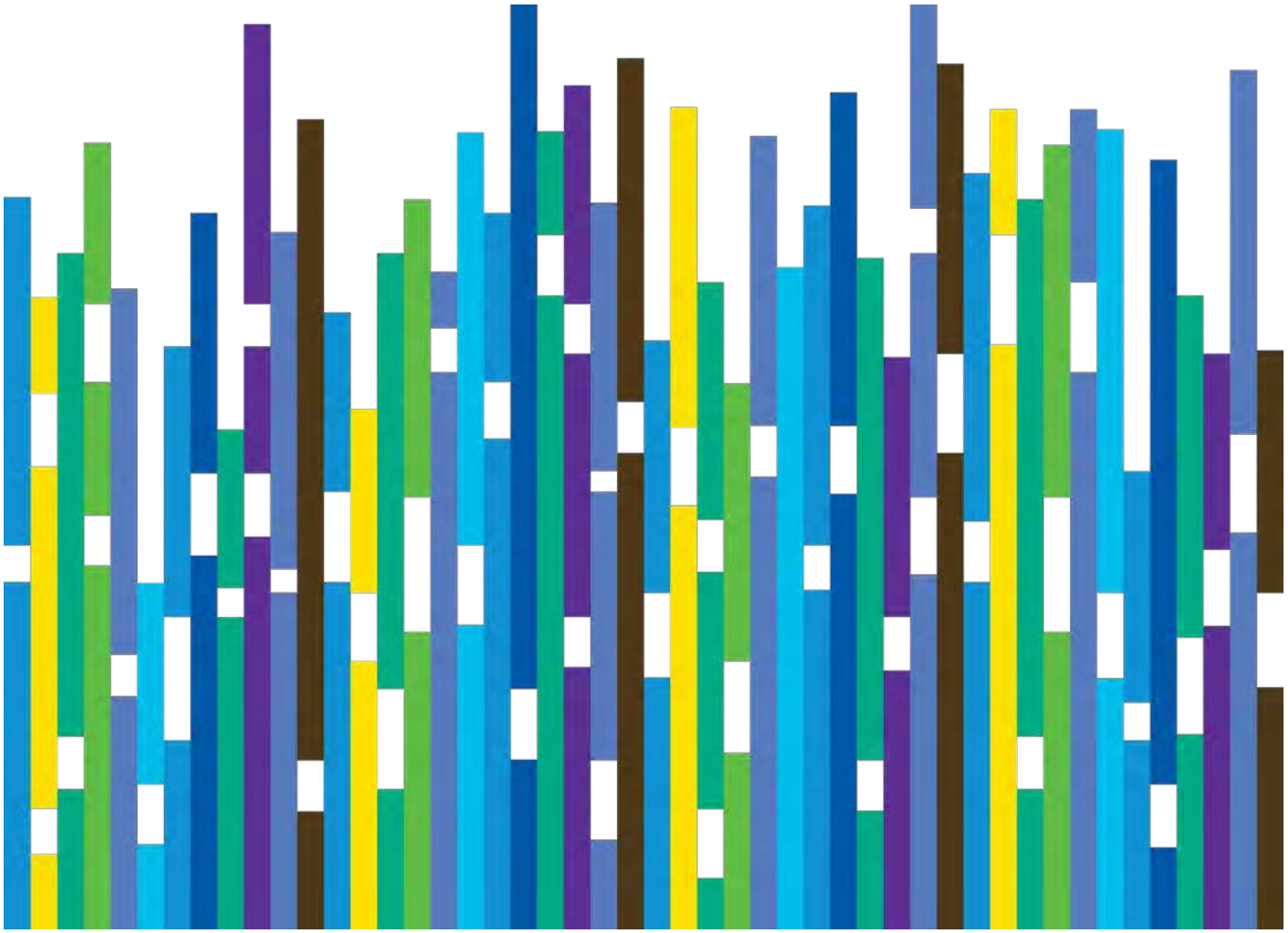
If a petition for reinstatement is granted, a notice of the reinstatement may be published.

EXHIBIT 288

CFA Institute

DISCIPLINARY SANCTION GUIDELINES

Matters Related to Professional Conduct



DISCIPLINARY SANCTION GUIDELINES

Matters Related to Professional Conduct

Introduction

CFA Institute has created these Sanction Guidelines to describe the guiding principles, key factors and considerations, conduct-specific factors, and types of aggravating/mitigating factors that Professional Conduct and Hearing Panels typically consider in determining disciplinary sanctions for violations of the CFA Institute Code of Ethics and Standards of Professional Conduct in industry-related cases. The goals are to ensure that sanction determinations continue to be fair, effective, transparent, and consistent, and to provide more information to Covered Persons and their attorneys regarding the approach that Professional Conduct and Disciplinary Panels will take when making sanction decisions.

Professional Conduct and Hearing Panels must always use their knowledge, experience, and best professional judgment in making sanction decisions. They should also consult these Guidelines to ensure that their sanction determinations are well-reasoned, fair, and consistent.

Guiding Principles

The goals of CFA Institute disciplinary sanctions are to protect the investing public, maintain market integrity, and promote and reinforce public confidence in the investment profession, as embodied by our members and candidates who have committed themselves to the highest standards of professional ethics. Disciplinary sanctions serve to deter Covered Persons and others from engaging in wrongdoing and to educate them about the risks, dangers, and consequences of engaging in different types of illegal and unethical conduct.

To achieve these important goals, Professional Conduct and Hearing Panels should seek to impose fair, consistent, and proportionate sanctions that are effective in holding Covered Persons accountable for the actual or potential damage that their wrongdoing posed to clients, the investing public, the financial markets, and/or the reputations of CFA Institute, its members and candidates, the CFA designation, and the investment profession generally.

Consequently, when determining the appropriate sanction in industry-related matters, Professional Conduct and Hearing Panels should assure themselves that the sanction:

- Advances the goal of protecting the investing public and enhances the public's confidence in the investment profession by ensuring that CFA Institute holds its members and candidates accountable for their professional misconduct and sanctions them appropriately,
- Upholds the integrity and value of CFA Institute membership and professional designations and protects the reputations and interests of the membership of CFA Institute as a whole,
- Serves to educate and deter others (including the Covered Person) from committing similar violations in the future,
- Promotes, enforces, and maintains high ethical standards in the investment profession,
- Ensures that misconduct that was directed at, or involved taking advantage of, an elderly, infirm, or otherwise vulnerable person is considered a significant aggravating factor in determining the appropriate sanction,
- Reflects the unique facts, circumstances, and evidence in each matter,

- Balances the need to protect the investing public and promote the ethical values of CFA Institute with the right of the individual Covered Person to a fair sanctioning process while ensuring that protecting investors remains paramount,
- Ensures that the sanction determination is well-reasoned and is proportional to the seriousness of the misconduct, after considering mitigating and aggravating factors:
    - Because the principal goal of CFA Institute sanctions is to protect the public (rather than merely to punish individuals for wrongdoing), factors that mitigate against punishment may carry less weight in Hearing Panel sanction decisions than they might in other forums where the goal of sanctioning is merely punitive.
    - Because the public is entitled to expect integrity and honesty from a member or candidate who has committed to abide by the Code and Standards, absent unusual circumstances, it is reasonable for a Hearing Panel to impose a lengthy Timed Suspension or a Revocation/Prohibition upon a member or candidate whose misconduct involves dishonesty or deceit.
    - In cases involving multiple violations of the Code and Standards, the sanction may be aggregated so that it appropriately reflects the gravity of the total underlying misconduct.
    - A Timed Suspension should be considered when: (a) the violations involve intentional or reckless misconduct, or gross or inexcusable negligence; (b) there has been a pattern of misconduct or deliberate acts of concealment; (c) the Covered Person has a prior, relevant disciplinary history; and/or (d) the misconduct caused some measure of tangible or intangible harm to investors, the marketplace, or the financial services industry.
    - A Revocation or Prohibition should be considered when: (a) any of the factors stated above is present; (b) the Covered Person's disciplinary history with CFA Institute, a securities regulator/self-regulatory organization, or criminal authority shows a fundamental disrespect for law; and/or (c) the violation caused *significant* tangible or intangible harm to investors, the marketplace, or the financial services industry.

Key Factors and Considerations

The table below provides guidance regarding the three Key Factors in determining the appropriate sanction to impose on a Covered Person: (1) the Covered Person's intent or state of mind when he or she engaged in the misconduct, (2) the nature and severity of the Covered Person's misconduct, and (3) the extent of the damage caused by the Covered Person's conduct. To make a determination as to each of those factors, a Hearing Panel should consult the questions listed under "Considerations" and review the "Guidance" associated with each Key Factor.

Key Factor	Considerations	Guidance
Covered Person's Intent Unintentional (accidental) Negligent (careless) Reckless (clearly should have known) Intentional (deliberate)	Did the Covered Person: • Make full, timely disclosure to, and then reasonably rely on, competent professional advice provided by a direct supervisor, compliance officer, or in-house or outside counsel? • correctly follow the supervisory or operational procedures of his or her employer in connection with the misconduct? • engage in the misconduct despite prior warning from a colleague, manager, compliance officer, counsel, or regulator? • engage in fraudulent, manipulative, or deceptive conduct? • engage in the misconduct alone, or with others, resulting in differing degrees of knowledge, participation, and responsibility? • organize and plan the conduct, or was it the result of a rash action or temporary lapse of judgment? • Conceal or attempt to conceal the misconduct or otherwise deceive or mislead a client, employer, or regulator from discovering the misconduct?	It may be difficult to discern a Covered Person's state of mind at the time of the misconduct. In many cases, however, a Covered Person's behavior before and after the misconduct can provide a reliable indication of whether they had deliberate intent to engage in wrongdoing. For example, a strong indicator of intent is pre-planning of the behavior and/or attempting to hide it after the fact. Reckless conduct ignores "red flags" and involves behavior that a professional or student of the investment industry should clearly have known violated regulatory, judicial, or ethical rules.

Key Factor	Considerations	Guidance
Nature of Misconduct Minor or Technical Substantive Severe	Did the Covered Person's Conduct: • Involve a minor misstep or honest mistake; is it the result of a lack of expertise or experience? • Involve a single act of misconduct, or did the conduct involve numerous acts and/or a pattern of misconduct? • Involve misconduct over an extended period? • Involve multiple violations, either related or un-related to each other? • Involve the Covered Person's directing, in either a supervisory or non-supervisory capacity, another individual to engage in misconduct? • Involve fraudulent, deceptive, or manipulative acts or statements?	There are varying levels of misconduct. What makes the nature of one's conduct minor, substantive, or severe often is dependent on an assessment of intent. It is the difference between misstating and misrepresentation; forgetting a disclosure or intentionally omitting information. Multiple incidents of misconduct or misconduct over an extended period often indicate a pattern of misconduct that may warrant a more severe sanction. There are some types of misconduct that are clearly objectionable and improper. Even a single incident of such misconduct may be so egregious as to be deemed "severe", such as market manipulation, theft, fraud, and/or trading on material nonpublic information.
Key Factor	**Considerations**	**Guidance**
Harm/Damage to a) Clients, b) Employer, c) Financial Markets, d) Market Participants, e) CFA Institute, and/or f) The Profession. None Minimal Moderate Significant	Did the Covered Person's conduct: • Financially harm a client? • Affect one client or several clients? • Result in actual harm or possible harm? • Impact business operations and productivity for the employer? • Result in a loss of clients, loss of trust, or otherwise negatively affect the employer's ability to conduct business? • Undermine confidence in the integrity of financial markets? • Reflect poorly on the gold standard of CFA Institute, its membership, candidates, products, and/or testing programs? • Reflect poorly on the investment profession, undercutting the public's trust in the profession through adverse publicity? • Affect negatively the markets by distorting prices, artificially affecting trading volume, or overall misleading market participants?	Actual harm can be tangible or intangible. Tangible harm is measurable and often financially related. In assessing the Covered Person's conduct, consideration should be given to the nature and extent of monetary harm, if any, to the client and/or employer. Monetary harm to a client is typically measured through losses sustained in an account or unnecessary fees paid. Monetary harm to an employer can occur through monetary damages for an investigation, regulatory proceeding and/or legal fees. Intangible harm to a client is more difficult to quantify but may include subjective factors that impact the client's life or loss of trust in the Covered Person or financial markets. For a Covered Person's employer, intangible harm may include reputational damage, unwanted publicity, or loss of trust in the firm. Exposing a client or employer to a risk that does not materialize or cause direct harm may be considered when evaluating this sanction factor. For example, if the Covered Person's misconduct exposes the firm or client to possible litigation, regardless of whether a lawsuit is ever filed, the firm or client were exposed to a potential risk and that potential harm may be considered.

Key Factor	Considerations	Guidance
		Involving a client or employer, either voluntarily or involuntarily, in misconduct causes indirect and possibly intangible harm, regardless of whether monetary losses were incurred by either. That a client or employer benefitted financially from the Covered Person's misconduct (or otherwise) does not justify or negate the harm caused by that misconduct, nor does it negate consideration of this sanction factor. The measure of damage to financial markets and market participants can be tangible or intangible. For example, in the instance of market manipulation, there may be tangible damages measured by the extent to which the market for a security was distorted. An intangible damage may be the extent to which investors' trust in a market is undermined by the conduct. Similarly, damage to CFA Institute may result in loss of members and/or candidates, or in undermining the reputation of the organization, its professional designations, exam programs, products, or membership as a whole. Given the nature of information technology, the mere dissemination of information regarding a Covered Person's misconduct may not be the best measure of the seriousness or impact of that individual's conduct on the markets, market participants, CFA Institute, or the profession.

Conduct-Specific Factors

The following tables contain principal considerations and sanction ranges for many of the most common types of misconduct:

1. Conversion or improper use of funds or securities
2. Duty to employer (independent practice)
3. Duty to Employer (leaving an employer)
4. Fiduciary duty
5. Forgery
6. Inadequate supervision
7. Insider trading
8. Manipulation
9. Plagiarism
10. Suitability/excessive trading

Conversion or Improper Use of Funds or Securities

Standard I(D) – Misconduct

Members and Candidates must not engage in any professional conduct involving dishonesty, fraud, or deceit or commit any act that reflects adversely on their professional reputation, integrity, or competence.

Conversion is a type of theft. In this context, the term "Conversion" typically means the intentional, unauthorized taking or use of funds, securities, or other property belonging to a client or employer, for one's own benefit or for some other unauthorized purpose. The term "Improper Use" refers to funds, securities, or other property being used in a manner unintended by its owner. In addition to funds and securities, conversions or improper uses can involve such things as client lists and account information; intellectual property or the work of others; and business opportunities.

Principal Considerations (in Addition to the General Principles)	Recommended Sanction
• Was the misappropriation done intentionally or negligently? • If the Covered Person (CP) engaged in an improper use of funds or securities, did he or she honestly and reasonably misunderstand his or her client's or employer's instructions or intentions? • Did the misappropriation cause any harm? • Did the CP personally benefit, and if so, to what extent? • Did the CP self-disclose his or her misconduct to those involved and voluntarily take appropriate remedial action before he or she was required to do so?	***Negligent Misconduct*** • If there was an honest and reasonable misunderstanding, consider a Censure or short Timed Suspension (up to 6 months). • If there was little or no harm, consider a Censure or a short Timed Suspension (up to 6 months). • If there was harm, consider a longer Timed Suspension (6 months to 3 years). • In cases involving inexcusable negligence and/or significant harm, consider a Revocation/Prohibition. ***Intentional or Reckless Misconduct*** • A Revocation/Prohibition is standard, regardless of the nature or amount of any harm.

Duty to Employer (Independent Practice)

Standard IV(A) – Duty of Loyalty

In matters related to their employment, Members and Candidates must act for the benefit of their employer and not deprive their employer of the advantage of their skills and abilities, divulge confidential information, or otherwise cause harm to their employer.

Independent Practice: Members and candidates must abstain from independent competitive activity that could conflict with that of their employer. While members and candidates may enter into an independent business while still employed, they must notify their employer and describe the type of service they intend to provide to independent clients, the duration of the services, and the compensation they expect to receive.

Principal Considerations (in Addition to the General Principles)	Recommended Sanction

Failure to Obtain Employer Permission to Engage in Independent Practice (IP)
• Did the Covered Person (CP) intentionally, recklessly, or negligently fail to obtain employer consent to IP?
  ○ Did the CP disclose the IP to the employer and obtain the required consent before the employer detected the IP?
  ○ Did the CP mislead the employer about the IP?
  ○ Did the CP engage in IP despite the employer's denial of the CP's request?
• What was the duration of the undisclosed IP?
• How much did the CP's IP harm the employer (*e.g.*, did the IP reduce the employer revenues? Did the CP use employer resources to conduct IP?) Did the IP involve the employer's clients?
• Were the employer's clients harmed by the CP's IP (*e.g.*, did the CP neglect the employer's clients in favor of the IP clients? Did the CP create the impression that IP was approved and that the employer was supervising it?
	Negligent Misconduct
	• If there was no harm to the employer or the employer's clients, and the CP received no benefit, the IP was of short duration, or was eventually disclosed to the employer prior to detection, consider a Private Reprimand or Censure.
	• If the employer or the employer's clients were minimally harmed and the CP received minimal benefit, the IP was of short duration, or was eventually disclosed to the employer prior to detection, consider a Timed Suspension (3 months to 12 months).
	• If the employer or the employer's clients were significantly harmed, the CP received significant benefit, the IP was of long duration or was detected by the employer, consider a longer Timed Suspension (6 months to 3 years).
	Intentional of Reckless Misconduct
	• If neither the employer nor the employer's clients were harmed, the IP was of short duration, or was eventually disclosed to the employer prior to detection, consider a Censure or a short Timed Suspension (up to 6 months).
	• If the employer or the employer's clients were minimally harmed, the IP was of long duration or was detected by the employer after the fact, consider a longer Timed Suspension (6 months to 3 years) or a Revocation/Prohibition.
	• In egregious cases, consider a Revocation/Prohibition.

Duty to Employer (Leaving an Employer)

Standard IV(A) – Duty of Loyalty

In matters related to their employment, Members and Candidates must act for the benefit of their employer and not deprive their employer of the advantage of their skills and abilities, divulge confidential information, or otherwise cause harm to their employer.

Leaving an Employer: When members and candidates are planning to leave their current employer, they must continue to act in the employer's best interest. They must not engage in any activities that would conflict with this duty until their resignation becomes effective.

Principal Considerations (in Addition to the General Principles)	Recommended Sanction

Leaving an Employer
• Did the Covered Person (CP) intentionally, recklessly, or negligently:
  ○ Misappropriate trade secrets?
  ○ Misuse confidential information?
  ○ Misappropriate employer records, including models and reports, including those developed by the CP?
  ○ Solicit the employer's clients prior to the cessation of employment?
  ○ Disparage the employer?
  ○ Violate the terms of a non-compete or non-solicitation agreement?
  ○ Engage in self-dealing (appropriating for the CP's use the employer's property, business opportunity, or information belonging to the employer)? or
  ○ Misappropriate clients or client lists?
• To what extent was the employer harmed by the CP's misconduct?
	Negligent Misconduct
	• If the CP engaged in only one of the behaviors described at left, and the employer was not harmed, consider a Private Reprimand or Censure.
	• If the CP engaged in more than one of the behaviors describe at left, and the employer was harmed, consider a Censure or a Timed Suspension (up to 18 months).
	• In egregious cases, consider a lengthy Timed Suspension (6 months to three years) or a Revocation/ Prohibition.
	Intentional or Reckless Misconduct
	• If the CP engaged in only one of the behaviors described at left, and the employer was not harmed, consider a Censure or a short Timed Suspension (up to 12 months).
	• If the CP engaged in more than one of the behaviors described at left, and the employer was harmed, consider a longer Timed Suspension (6 months to 3 years) or a Revocation/Prohibition.
	• In egregious cases, consider a lengthy Timed Suspension or a Revocation/Prohibition.

Fiduciary Duty/Loyalty Prudence and Care

Standard III(A) – Loyalty, Prudence, and Care

Members and Candidates have a duty of loyalty to their clients and must act with reasonable care and exercise prudent judgment. Members and Candidates must act for the benefit of their clients and place their clients' interests before their employer's or their own interests.

Under this Standard, the client's interests are paramount. Investment actions must be carried out for the sole benefit of the client and in a manner that the member or candidate believes, given the known facts and circumstances, to be in the best interest of the client. Members and candidates must exercise the same level of prudence, judgment, and care that they would apply in the management of their own interests in similar circumstances. This Standard clarifies that all members and candidates, regardless of job title, local laws, or cultural differences, are required to comply with these fundamental obligations.

Principal Considerations (in Addition to the General Principles)	Recommended Sanction
• Did the Covered Person (CP) breach the duty of loyalty, prudence, and care intentionally, recklessly, or negligently? • Was the breach of the duty of loyalty, prudence and care an isolated incident or did the CP engage in numerous breaches and/or a pattern of misconduct? • Did the CP breach the duty of loyalty, prudence, and care over an extended period? • To what extent were the CP's clients harmed by the CP's failure to exercise the duty of loyalty, prudence, and care? • Did the CP self-identify the breach of the duty of loyalty, prudence, and care and address it responsibly? • Did the member or candidate benefit in any way from the breach of the duty of loyalty, prudence, and care?	***Negligent Misconduct*** • If there was no reliance or harm to others, consider a Censure. • If there was harm to clients, consider a Timed Suspension (3 to 12 months). • In egregious cases, consider a longer Timed Suspension (6 months to 3 years) or a Revocation/Prohibition. ***Intentional or Reckless Misconduct*** • If there was no reliance or harm to others, consider a Timed Suspension (6 to 18 months). • If there was reliance and/or harm to others, consider a longer Timed Suspension (6 months to 3 years) or a Revocation/Prohibition. • In egregious cases, consider a Revocation/Prohibition.

Forgery

Standard I(C) – Misrepresentation

Members and Candidates must not knowingly make any misrepresentations relating to investment analysis, recommendations, actions, or other professional activities.

Forgery: the unauthorized use of signatures or falsification of records.

Principal Considerations (in Addition to the General Principles)	Recommended Sanction
• Was the forgery done intentionally, recklessly, or negligently? ○ Did the Covered Person (CP) have a good-faith, but mistaken, belief that the CP had express or implied authority to sign documents on the client's behalf? • What was the nature of the forged document? If the document pertained to a transaction was the transaction agreed to by the client? Did the client re-sign the forged/falsified document or ratify the signature? • How extensive/significant was the forgery? • Did anyone rely on the forged materials, and if so, were they harmed? • Was the forgery later identified and addressed responsibly? • Did the member or candidate benefit in any way from the forgery?	***Negligent Misconduct*** • If there was no reliance or harm to others, consider a Private Reprimand or Censure. • If there was reliance and/or harm to others, consider a Censure or Timed Suspension (6 months to 3 years). • In egregious cases, consider a longer Timed Suspension (12 months to 3 years) or a Revocation/Prohibition. ***Intentional or Reckless Misconduct*** • If there was no reliance or harm to others, consider a Censure. • If there was reliance and/or harm to others, consider a Timed Suspension (12 months to 3 years). • In egregious cases, consider a Revocation/Prohibition.

Inadequate Supervision

Standard IV(C) – Responsibilities of Supervisors

Members and Candidates must make reasonable efforts to ensure that anyone subject to their supervision or authority complies with applicable laws, rules, regulations, and the Code and Standards.

A Member or Candidate has supervisory responsibilities for all employees who are subject to his or her authority or influence, regardless of whether they are CFA Institute members or candidates in the CFA Program. What constitutes "reasonable efforts" to supervise depends on the specific circumstances of each case, including the number of employees involved and the nature of the work.

Principal Considerations (in Addition to the General Principles)	Recommended Sanction
• Did the Covered Person (CP) ignore "red flag" warnings of possible misconduct by those he or she supervised, or otherwise allow the misconduct to occur or escape detection? • How bad was the underlying misconduct that resulted from the CP's failure to adequately supervise? • Did the CP diligently implement and follow his or her firm's supervisory policies and procedures? • Were the supervisory policies and procedures reasonable designed to prevent and detect violations, or were they somehow defective through no fault of the CP? • Did the CP take prompt corrective action once violations were detected? • Did the CP's failure to supervise contribute to any harm caused by the violations, and if so, to what extent?	***Negligent Misconduct*** • If there was little or no harm, consider a Censure or a short Timed Suspension (3 to 6 months). • If there was harm, consider a longer Timed Suspension (6 months to 3 years). • In cases involving gross negligence, willful blindness, personal participation in the underlying misconduct, and/or significant harm, consider a Revocation/Prohibition. ***Intentional or Reckless Misconduct*** • Regardless of whether the conduct caused any harm, if the CP behaved recklessly by ignoring "red flag" warnings of possible misconduct or engaged in willful blindness, consider a Timed Suspension (6 months to 3 years). • If the CP's failure to supervise was intentional, involved their participation in the underlying misconduct, and/or caused significant harm, consider a Revocation/Prohibition.

Insider Trading

Standard II(A) – Material Nonpublic Information

Members and Candidates who possess material nonpublic information that could affect the value of an investment must not act or cause others to act on the information.

Information is "material" if its disclosure would probably have an impact on the price of security or if reasonable investors would want to know the information before making an investment decision. Information is "nonpublic" until it has been made known or is available to the marketplace in general (as opposed to a select group of investors).

Principal Considerations (in Addition to the General Principles)	Recommended Sanction

• Did the Covered Person (CP) intentionally, recklessly, or negligently trade on information that was material and nonpublic?
  ○ Determining intent can be difficult, but efforts to conceal: (1) a relationship between the CP and the source/recipient of the material nonpublic information (MNPI) or (2) the trading (*e.g.* by trading in a friend's or family member's account or failing to report or pre-clear the trade (if required)) may indicate knowledge that the information was material and nonpublic.
  ○ Efforts to capitalize on MNPI (e.g., using OTM options, liquidation of other assets to purchase shares, or uncharacteristically large transactions) often suggests the CP knew s/he was trading while in possession of the MNPI.
  ○ Credible, contemporaneous evidence of reasonable reliance on counsel or compliance suggests a lack of intent to misuse material nonpublic information. In such cases, CP must provide accurate information regarding the source/ circumstances surrounding the acquisition of the MNPI.
• Did the CP obtain a benefit (either tangible or intangible) from the use of the material nonpublic information? In insider trading cases, a tangible benefit may be a monetary gain from the purchase of shares or the avoidance of a loss from the sale of shares. Intangible benefits may include an enhanced reputation for investing acumen or strengthened relationships between the provider of material nonpublic information and its recipient.
• Did the CP's use of MNPI cause harm to clients, the securities markets, the investing public, or the reputation CFA designation?
  ○ The guidance for Standard II(A) creates a strong presumption that the use of MNPI causes significant harm. "Trading or inducing others to trade on material nonpublic information erodes confidence in the capital markets, institutions, and investment professionals by supporting the idea that those with inside information and special access can take unfair advantage of the general investing public."
	Negligent Misconduct
	• If there was no benefit to the CP and no harm to others, consider a Censure.
	• If there was benefit to the CP or harm to others, consider a Timed Suspension (6 months to 3 years)
	• In more egregious cases (benefit to CP and/or harm to others) consider a lengthy Timed Suspension (6 months to 3 years) or a Revocation/Prohibition.
	Intentional or Reckless Misconduct
	• If there was no benefit to the CP and no harm to others, consider a Timed Suspension (12 months to 3 years).
	• If there was benefit to the CP or harm to others, consider a lengthy Timed Suspension (12 months to 3 years) or a Revocation/Prohibition.
	• In egregious cases, a Revocation/Prohibition is standard.

Manipulation

Standard II(B) – Market Manipulation

Members and Candidates must not engage in practices that distort prices or artificially inflate trading volume with the intent to mislead market participants.

Market manipulation includes: the dissemination of false or misleading information; and transactions that deceive or would be likely to mislead others by distorting prices. The intent of the action is critical to determining whether there has been a violation.

Principal Considerations (in Addition to the General Principles)	Recommended Sanction
• Was the Covered Person's (CP) conduct intentional or reckless? • Did the violation involve planning or concealment? • Did the CP involve or work with others in the manipulation? • Did the CP or his or her colleagues benefit from the manipulation and, if so, to what extent? • Were investors or other market participants harmed and, if so, what was the nature and extent of that harm?	***Negligent Misconduct*** • If there was little or no harm to the market and/or the CP received only minimal benefit, consider a Timed Suspension (3 months to 12 months). • If there was harm to the market and/or the CP received significant benefit, consider a longer Timed Suspension (6 months to 3 years). ***Intentional of Reckless Misconduct*** • If there was little or no harm to the market or the CP received only minimal benefit, consider a Timed Suspension (12 months to 3 years). • If the CP's conduct harmed the market and/or the CP received significant benefit, a Revocation/Prohibition is the standard sanction.

Plagiarism

Standard I(C) – Misrepresentation

Members and Candidates must not knowingly make any misrepresentations relating to investment analysis, recommendations, actions, or other professional activities.

Plagiarism: Plagiarism is defined as copying or using in substantially the same form materials prepared by others without acknowledging the source of the material or identifying the author and publisher of such material.

Principal Considerations (in Addition to the General Principles)	Recommended Sanction
• Was the plagiarism done intentionally, recklessly, or negligently? • What was the nature of the plagiarized document? • How extensive was the plagiarism? • Did anyone rely on the plagiarized material, and if so, were they harmed? • Was the plagiarism later identified and addressed responsibly? • Did the Covered Person benefit in any way from the plagiarism?	***Negligent Misconduct*** • If there was no reliance or harm to others, consider a Private Reprimand or Censure. • If there was reliance and/or harm to others, consider a Timed Suspension (3 months to 12 months). • In egregious cases, consider a Timed Suspension (6 months to 3 years). ***Intentional or Reckless Misconduct*** • If there was no reliance or harm to others, consider a Timed Suspension (3 months to 12 months). • If there was reliance and/or harm to others, consider a longer Timed Suspension (6 months to 3 years) or a Revocation/Prohibition. • In egregious cases, consider a longer Timed Suspension (12 months to 3 years) or a Revocation/Prohibition.

Suitability

Standard III(C)(1) – Suitability

When Members and Candidates are in an advisory relationship with a client, they must:

- **Make a reasonable inquiry into a client's or prospective client's investment experience, risk and return objectives, and financial constraints prior to making any investment recommendations or taking investment action and must reassess and update this information regularly.**
- **Determine that an investment is suitable to the client's financial situation and consistent with the client's written objectives, mandates, and constraints before making an investment recommendation or taking investment action.**
- **Judge the suitability of investments in the context of the client's total portfolio.**

Principal Considerations (in Addition to the General Principles)	Recommended Sanction
• Was the Covered Person's (CP) conduct intentional, reckless, or negligent? • Did the CP gather client information at the inception of the relationship and use it to develop a written investment policy statement that addresses the client's risk tolerance, return objectives, and investment constraints? • Did the CP regularly review and periodically update the client's investment policy statement to address any important changes? • Were clients harmed and, if so, what was the nature and extent of that harm?	***Negligent Misconduct*** • If there was no actual or potential harm, consider a short Timed Suspension (3 months to 12 months). • If there was limited or only potential harm, consider a longer Timed Suspension (6 months to 3 years). • If there was significant actual or potential harm, consider a longer Timed Suspension (12 months to 3 years) or a Revocation/Prohibition. ***Intentional or Reckless Misconduct*** • If there was no actual or potential harm, consider a Timed Suspension (6 months to 3 years). • If there was limited harm, consider a longer Timed Suspension (12 months to 3 years) or a Revocation/Prohibition. • If there was significant actual or potential harm, consider a Revocation/Prohibition.

Aggravating/Mitigating and Factors

Once the Hearing Panel has made an initial sanction determination, it should consider whether the facts of the case include aggravating or mitigating factors. The following aggravating and mitigating factors should be considered to more closely calibrate the severity of the sanction to the conduct at issue. Because the goal of all CFA sanctions is primarily to protect the public interest, the presence of mitigating circumstances should not cause a significant shift or change in the Hearing Panel's initial sanction determination.

Aggravating & Mitigating Factors	Considerations	Guidance
Personal Benefit • None • Minimal • Moderate • Significant	Did the Covered Person's conduct • result in a personal benefit, either monetary or otherwise, for the Covered Person, his or her colleagues, family, friends, current employer, or future employer? • permit the Covered Person, colleagues, family, friends, current employer, or future employer to avoid a loss?	Personal benefit should be broadly understood to include direct and indirect, tangible and intangible enrichment that the Covered Person, colleagues, family, friends, current employer, or future employer received as a result of the misconduct. Avoidance of loss is also a factor for purposes of this sanction factor. Benefit can often be received in a manner that is readily measurable monetarily such as commissions, gifts, bonuses, promotions, and salary increases. A benefit can also include less easily measurable, intangible enrichment such as enhanced reputation, client admiration, reciprocity of favors, public recognition, and client referrals. Also consider potential benefit, whether realized or not. For example, a Covered Person may have engaged in a transaction in order to realize a tangible or intangible gain or avoid a loss. Intervening circumstances may have prevented that gain from being realized or the loss being avoided. In such cases, consider the magnitude of the potential gain or loss avoided.

Aggravating & Mitigating Factors	Considerations	Guidance
Prior Findings of a Violation • None • One, not similar conduct • One, similar conduct • Multiple, not similar conduct • Multiple, similar conduct	Does the Covered Person have a disciplinary history • with Professional Conduct that resulted in a finding of a violation? • with a regulatory body, former employer, current employer, or professional association that resulted in a finding of a violation? • that relates to the current conduct at issue?	In evaluating a Covered Person's disciplinary history, consideration should be given to the number, age, and nature of any previous violations, as well the corresponding outcome(s). A history of similar violations that shows a general disregard for the Code and Standards should be considered adversely. Some violations are of such a serious nature that even if there are no previous violations, a significant sanction will be appropriate.
Reporting of a Matter to CFA Institute • Timely disclosure • Non-Disclosure	Did the Covered Person timely and accurately report the matter to Professional Conduct?	All members and candidates are obligated to disclose in a timely and accurate manner whether they are the subject of an investigation or proceeding with a regulatory or judicial body, their employer, or a professional organization. Failing to disclose a matter on the annual professional conduct statement should be considered adversely.
Reporting of a Matter to employer and/or regulator	Did the Covered Person self-report the matter and accept responsibility for the misconduct *prior to* its detection by his or her employer and/or regulator?	Proactive self-reporting and acceptance of responsibility is a mitigating factor. Merely admitting to conduct that has already been discovered by an employer or a regulator is not.

Aggravating & Mitigating Factors	Considerations	Guidance
Cooperation with Investigators • Assisted in investigation (produced requested documents and information in timely manner) • Minimal assistance during investigation • Active concealment of information	Did the Covered Person conceal information, provide inaccurate or misleading information, or otherwise unnecessarily delay Professional Conduct's investigation?	All members and candidates are obligated to produce accurate and complete copies of all requested documents in their possession or control, provide information and cooperate fully in the investigation and disciplinary proceeding by Professional Conduct. Failing to cooperate fully with an investigation or proceeding should be considered adversely. Because Covered Persons are required to cooperate with Professional Conduct investigations, only assistance provided by the Covered Person that is proactive and exceptional should be considered a mitigating factor in imposing sanctions.
Time Elapsed Between Conduct and the Statement of Charges **Delay between resolution of the matter and completion of investigation**	Did the investigation involve • protracted regulatory or judicial proceedings which delayed Professional Conduct's investigation? • conduct by the Covered Person that was either ongoing or compounded by new disclosures or discovery of additional misconduct? • a lapse resulting in a disadvantage to the Covered Person's ability to present a defense?	Significant delays between conclusion of the underlying action and resolution of a Professional Conduct investigation can occur for a variety of reasons. However, to the extent that responsibility for the delay rests with Professional Conduct, this may be considered a mitigating factor in evaluating the appropriate sanction.
Significant Remediation and Genuine Remorse	Has the Covered Person • acted proactively and responsibly to remedy the misconduct? • exhibited genuine remorse and accepted responsibility for their actions?	Significant remediation and genuine remorse is a mitigating factor. Lack of remediation and/or genuine remorse should be considered an aggravating factor.

EXHIBIT 289

CFA INSTITUTE BYLAWS

(A Virginia Nonstock Corporation)

AMENDED
14 JULY 2022

ARTICLE 1 – NAME, LOCATION, PURPOSES, AND CORPORATE SEAL

1.1 **Name.** The name of the corporation is "CFA Institute."
1.2 **Location.** The principal office of CFA Institute shall be located at such place as the Board of Governors (the "Board") may determine.
1.3 **Corporate Seal.** The corporate seal shall consist of a circular die bearing the CFA Institute name and year of incorporation.The form of the seal may be changed by the Board.
1.4 **Purposes.** The purposes of CFA Institute are to promote and advance the "Investment Decision Making Process," consisting of financial analysis, investment management, securities analysis, stewardship, and other similar professional endeavors, through education, instruction and training; examinations and professional credentialing; research and advocacy; publications and communications; technical standards for professional practice; ethical and behavior codes; and other policies, programs, activities, and operations that promote and advance the Investment Decision Making Process.

ARTICLE 2 – DEFINITIONS

For purposes of the Articles of Incorporation and Bylaws, the following are defined terms which may be used, as appropriate,in singular or plural form:

2.1 **"Acceptable Professional Work Experience"** shall be defined by the Board and shall include those activities related to the professional practices of financial analysis, investment management, securities analysis or other similar activities.
2.2 **"Articles"** refers to the Articles of Incorporation of CFA Institute as they may be amended.
2.3 **"Board"** is the Board of Governors of CFA Institute.
2.4 **"Bylaws"** refers to these Bylaws of CFA Institute as they may be amended.
2.5 **"Candidate"** is an individual:
- **a.** whose application for registration in the CFA® Program has been accepted by CFA Institute, as evidenced by the issuance of a notice of acceptance, and who is enrolled to sit for a specified examination level ("Exam") in the CFA Program; and
- **b.** who has not:
  - **i** received Exam results;
  - **ii** voluntarily removed himself or herself from the CFA Program;
  - **iii** failed to sit for an Exam; or
  - **iv** otherwise been removed from the CFA Program.

2.6 **"CFA Program"** is the Chartered Financial Analyst® (CFA®) study and examination program developed and administered by CFA Institute.
2.7 **"Chair"** is the presiding officer of the Board as more particularly described in Section 6.2 of the Bylaws.
2.8 **"Code and Standards"** is the CFA Institute Code of Ethics and Standards of Professional Conduct, as they be amended.
2.9 **"Covered Person"** is any individual who is: a CFA Institute Charterholder, a Regular, Affiliate, or other class of Member, a Candidate, a Postponed Candidate, an individual that has passed the CFA® Level III Exam but not been awarded the CFA charter (and who appears to be misusing the CFA designation), an individual that has allowed membership to lapse or has had membership suspended through the disciplinary process (and who appears to be misusing the CFA designation), or an individual that seeks to reactivate a disciplinary process (and who appears to be misusing the CFA designation), or an individual that seeks to reactivate a membership that has been lapsed.
2.10 **"Governor"** is an individual serving on the Board in accordance with the Articles and Article 5 of the Bylaws.
2.11 **"Individual Member"** refers to persons who are Regular Members, Affiliate Members, Charterholder Members, or Members in another class of membership.
2.12 **"Investment Decision-Making Process"** is the professional practice of financial analysis, investment management, securities analysis, or other similar professions.
2.13 **"Member's Agreement"** is a document prepared by CFA Institute setting forth member obligations and responsibilities that must be signed by every Individual Member.
2.14 **"Postponed Candidate"** is an individual who has registered for the CFA Program, but is not a Candidate as defined in the Bylaws.
2.15 **"Professional Conduct Statement"** is a form prepared by CFA Institute that must be signed annually and submitted by all Individual Members and Candidates.
2.16 **"Rules of Procedure"** are the Rules of Procedure as amended, which govern the procedures to which both CFA Institute and Covered Persons must adhere.

ARTICLE 3 – MEMBERS AND CANDIDATES

3.1 Classes of Members. The classes of membership in CFA Institute are Regular Members, Affiliate Members, Charterholder Members, Member Societies, and other classes of non-voting membership for individuals, as determined by the Board.

3.2 Regular Members. Each applicant seeking to become Regular Member of CFA Institute or of any Member Society shall:

- **a** hold a bachelor's degree from an accredited academic institution or have equivalent education or work experience as determined by CFA Institute;
- **b** have attained one (1) or more of the following:
  - **i** 4,000 hours of Acceptable Professional Work Experience completed during a period of not less than 36 months and passage of Level I of the CFA Program, or such other appropriate examination approved by the Board;
  - **ii** 4,000 hours of Acceptable Professional Work Experience completed during a period of not less than 36 months and passage of a standards of professional conduct examination approved by the Board;
  - **iii** be a Charterholder Member; or
  - **iv** 4,000 hours of Acceptable Professional Work Experience completed during a period of not less than 36 months and bea voting member in good standing of an organization with which CFA Institute or its Member Societies have combined through merger, acquisition or otherwise, provided that the Board of Governors has approved Regular Membership bya 2/3 affirmative vote;
- **c** sign and submit to CFA Institute a Member's Agreement and a Professional Conduct Statement; and
- **d** complete any additional application procedures or requirements established by CFA Institute.

3.3 Affiliate Members

- **a** Each applicant seeking to become an Affiliate Member of CFA Institute shall:
  - **i** be an affiliate member of at least one (1) Member Society;
  - **ii** sign and submit to CFA Institute a Member's Agreement and a Professional Conduct Statement; and
  - **iii** complete any additional application procedures or requirements established by CFA Institute and, when applicable, theappropriate Member Society.
- **b** For purposes of Section 3.3(a)(i), in the event that a Member Society ceases to exist by reason of dissolution or otherwise,such Member Society may designate CFA Institute to serve in the capacity of a Member Society in order that the affiliate members of such Member Society can maintain their status as Affiliate Members.

3.4 Charterholder Members.

- **a** Each applicant seeking to become a Charterholder Member of CFA Institute shall:
  - **i** be an individual who has satisfied (1) the requirements to become a Regular Member and (2) the requirements of the CFA Program as established by CFA Institute and achieved the minimum passing score; and
  - **ii** complete and submit any additional application procedures or requirements established by CFA Institute.
- **b** Upon satisfaction of the requirements in Section 3.4(a) and acceptance by CFA Institute, an applicant shall become a Charterholder Member and be granted the right to use the Chartered Financial Analyst® (CFA®) designation.

3.5 Responsibilities of Covered Persons.

- **a** Each Covered Person shall:
  - **i** adhere to all applicable rules and regulations, including the Articles and Bylaws, the Code and Standards, and other rules relating to professional conduct and membership, all of which may be amended;
  - **ii** be subject to the disciplinary jurisdiction and sanctions of CFA Institute;
  - **iii** submit information requested relating to professional conduct and activities;
  - **iv** produce documents, testify, and otherwise cooperate in disciplinary proceedings of CFA Institute including adhering to the Rules of Procedure; and
  - **v** adhere to such other requirements as set forth by CFA Institute.
- **b** In addition to the responsibilities set forth above, Individual Members must also:
  - **i** annually file a Professional Conduct Statement; and
  - **ii** annually pay membership dues.

3.6 Voting Rights. Regular Members and Charterholder Members have voting rights in CFA Institute and each shall be entitled to one (1) vote on each matter submitted to the Regular Members. Affiliate Members, Member Societies, and other classes of membership for individuals as determined by the Board, do not have voting rights in CFA Institute. Candidates and Postponed Candidates are not members of CFA Institute unless otherwise associated with CFA Institute as Regular Members, Affiliate Members or other classes of membership for individuals as determined by the Board.

3.7 Resignation. Any Individual Member may resign from CFA Institute or a Member Society by submitting notice to CFA Institute.CFA Institute shall notify each applicable Member Society of the resignation.

3.8 Suspension or Revocation of Membership.

- **a** Individual Members.
  - **i** An Individual Member's membership in CFA Institute and in any Member Society may be suspended or revoked at anytime by CFA Institute for any violation of Section 3.5.
  - **ii** An individual Member whose membership is revoked or suspended shall not be entitled to any rights or privileges of membership, including, when applicable, the right to use the Charter Financial Analyst ® (CFA®) designation and the right to vote.
- **b** Candidates and Postponed Candidates. Any Candidate or Postponed Candidate may be suspended or removed from the CFA Program for any violation of Section 3.5(a).

3.9 Membership List and Member Records. CFA Institute shall keep a list of the names, business addresses, business affiliations, membership classifications, and other information relating to all CFA Institute members.

3.10 Member Societies.

- **a** Requirements for Membership. To organize or admit a Member Society of CFA Institute an application and other requested information must be submitted to CFA Institute and approved by the Board.
- **b** Adoption of the Code and Standards.
  - **i** Each Member Society shall adopt the Code and Standards and shall provide in its bylaws that its regular members and affiliate members shall be subject to and comply with the Code and Standards.
  - **ii** The bylaws of each Member Society shall provide that all authority and responsibility for enforcement of the Code and Standards with respect to regular members and affiliate members of the Member Society are delegated to CFA Institute.
- **c** Membership in a Member Society.
  - **i** The bylaws of each Member Society shall provide that it may not admit or retain an individual as a regular member who is not a Regular Member of CFA Institute.
  - **ii** The bylaws of each Member Society shall provide that all affiliate members of a Member Society shall become Affiliate Members of CFA Institute.
  - **iii** Any individual whose membership as a Regular Member or Affiliate Member has been revoked or suspended by CFA Institute may not retain membership in a Member Society while such revocation or suspension is in effect.
  - **iv** Except for a uniform sponsorship requirement set forth by CFA Institute, a Member Society shall not impose anyrequirements on its regular members other than those listed in Section 3.2 of these Bylaws or as required by the Member Society's local laws.
  - **v** Each Member Society shall have the right to review all applications for regular membership in the society, as applicable.
  - **vi** The Board, or a committee designated by the Board, shall have the authority to make final determinations on the application of membership provisions listed in Section 3.2 of the Bylaws.
- **d** Member Society Local Law Exception. If a Member Society's local laws prohibit its bylaws from complying with the requirements of Section 3.10(b) and (c) of these Bylaws, the Member Society shall enter into a legally binding agreement with CFA Institute to satisfy the requirements of this Section.

3.11 Termination of Membership. The membership of any Member Society in CFA Institute may be terminated or suspended by a vote of two-thirds (2/3) of the Governors then serving.

ARTICLE 4 – MEETINGS OF THE MEMBERS

4.1 Meetings.

- **a** All meetings of the members shall be held at suitable times and, if the meeting is to be held at a place, places within or without the Commonwealth of Virginia, as determined by the Board. The Board may determine that any meeting of members shall not be held at any place and shall instead be held solely by means of remote communication in accordance with applicable law.
- **b** There shall be an annual meeting of the members.
- **c** Special meetings of the members shall be called:
  - **i** by the Board or the Chair; or
  - **ii** by the Secretary, upon receipt of a written petition signed by at least two percent (2%) of the Regular Members.
- **d** Only business within the purpose or purposes described in the meeting notice shall be conducted at a special meeting.

4.2 Notice.

- **a** Written notice of meetings shall:
  - **i** state the date, time, and place (if any) of the meeting and, in the case of a special meeting, the purpose or purposes for which the meeting is called; and
  - **ii** be delivered, mailed, expressed, or sent by facsimile, electronic mail, or other reliable printed or printable communication to each Regular Member to the address, as it appears on the CFA Institute membership records, not less than ten (10) nor more than sixty (60) days before the meeting date unless a different notice period is required by law.

b Notice of any meeting may be waived in writing signed by the member entitled to notice before or after the date of the meeting. A Regular Member who attends a meeting in person or by proxy:
   i waives objection to lack of notice or defective notice of the meeting unless the Regular Member at the beginning of the meeting objects to holding the meeting or transacting business at the meeting; and
   ii waives objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice unless that Regular Member objects to considering the matter when it is presented.

4.3 Quorum. At any meeting of the members, ten percent (10%) of all Regular Members represented in person or by proxy at such meeting shall constitute a quorum for the transaction of business. If less than a quorum is present in person or by proxy, the Chair may adjourn the meeting to a fixed time and place (if any) determined by the Chair or Secretary.

4.4 Voting.

a Each Regular Member shall be entitled to one (1) vote.

b A majority of the votes cast in person or by proxy, in hard or, when permitted by law, electronic form, at a meeting at which a quorum is present shall be required for adoption of any matter voted upon, except as otherwise required by the Bylaws, the Articles, or applicable law.

ARTICLE 5 – BOARD OF GOVERNORS

5.1 Authority and Responsibility. All corporate powers shall be exercised by or under the authority of, and the business of CFA Institute managed under the direction of, the Board subject to the Bylaws, the Articles, and applicable law.

5.2 Composition and Qualification.

a The number of Governors (including ex officio Governors as defined in the Articles) shall be not less than ten (10) normore than fifteen (15) and shall be determined by the Board. The President, Chair, and Vice Chair shall serve as ex officio Governors in accordance with the Articles.

b The Board may have up to two (2) Governors who are not Regular Members. All other Governors shall be Regular Members.

5.3 Terms and Elections.

a Governors, excluding those serving in an ex officio capacity, shall be elected by the Regular Members at the annual meeting of members for a term of three (3) years, staggered so that, as nearly as possible, the terms of one-third (1/3) of such Governors shall expire at the end of CFA Institute fiscal year end and until the election and qualification of their successors.

b When the number of nominees for Governor exceeds the number of individuals to be elected, the nominees receiving the highest number of votes shall be elected.

5.4 Vacancies. A Governor's vacancy for any reason may be filled by the Board by the appointment of a successor for the unexpired term of the Governor whose place is vacant.

5.5 Meetings.

a Meetings of the Board shall be called by:
   i the Board;
   ii the Chair; or
   iii the Secretary, upon the written request of a majority of the Governors.

b The date, time, and place (if any) of the Board meetings shall be designated by the Board, Chair or Secretary. The Board, Chair or Secretary may determine that any Board meeting shall not be held at any place and shall instead be held solely by means ofremote communication in accordance with applicable law.

c The Chair of the Presidents Council and the Presidents Council Representatives shall be invited to attend non-executive sessions of Board meetings.

5.6 Notice.

a Regular meetings of the Board shall be held with notice at such dates, times, and places (if any) as the Board may determine by vote.

b Written notice shall be sent by the Secretary and shall:
   i state the date, time, and place (if any) of the meeting; and
   ii be delivered, mailed, or expressed to each Governor at least fifteen (15) days before the meeting date or be given by telephone, electronic transmission, or other reliable means at least twenty-four (24) hours before the meeting date.

c The business to be transacted or the purpose of any Board meeting is not required to be specified in the notice or a waiver of notice of any Board meeting.

d Notice of any meeting may be waived in writing signed by the individual entitled to notice before or after the date ofthe meeting.

e A Governor who attends a meeting in person or through the use of any means of communication by which all Governors may simultaneously hear each other during the meeting shall be deemed to have had timely and proper notice of the meeting.

5.7 Quorum. Except as otherwise provided in the Bylaws or by law, at any meeting of the Board, a majority of the Governorsthen serving who are present in person or through the use of any means of communication by which all Governors may simultaneously hear each other during the meeting shall constitute a quorum.

5.8 Voting.

- **a** Each Governor, including ex officio Governors, shall be entitled to one (1) vote, which shall not be voted by proxy.
- **b** The act of a majority of the Governors voting at a meeting at which a quorum is present shall be the act of the Board, except as otherwise provided in the Bylaws, the Articles or by law.

ARTICLE 6 – OFFICERS

6.1 Number, Designation, and Qualifications.

- **a** The officers of CFA Institute shall be a Chair, a Vice Chair, a President, a Chief Financial Officer, a Secretary, and such other officers as the Board, Executive Committee, or President may determine.
- **b** Only Regular Members may serve as the Chair, Vice Chair, or President of CFA Institute.
- **c** Any Chair elected to serve a term commencing on or after 1 September 2021 shall not have served as a Governor during the CFA Institute fiscal year beginning 1 September 2020.

6.2 Chair.

- **a** The Chair shall:
  - **i** preside at all Board and member meetings;
  - **ii** be the representative of the Board and the Executive Committee; and
  - **iii** have such other duties and powers as prescribed in the Bylaws, the Articles, by the Board, and by law.

6.3 Vice Chair

- **a** The Vice Chair shall:
  - **i** perform the duties of the Chair in his or her absence;
  - **ii** automatically become the Chair of CFA Institute in the event of the Chair's incapacity, resignation, removal, or death; and
  - **iii** have such other duties and powers as prescribed in the Bylaws, the Articles, by the Board, and by law.

6.4 President.

- **a** The President shall:
  - **i** be appointed by the Board to serve at its pleasure;
  - **ii** be entitled to compensation as approved by the Compensation Committee;
  - **iii** be the chief executive officer of CFA Institute;
  - **iv** have the power and authority to appoint and remove officers other than the Chair, Vice Chair, Secretary, and Chief Financial Officer;
  - **v** have management, supervision and control of, and responsibility for the business of CFA Institute, subject to the direction of the Board; and
  - **vi** have such other duties and powers as prescribed in the Bylaws, the Articles, by the Board, and by law.
- **b** It shall be the President's duty, and the President and CFA Institute officers shall have the power, to effectuate all orders and resolutions of the Board.

6.5 Secretary and Chief Financial Officer

- **a** The Secretary shall:
  - **i** act as secretary at all Board and member meetings, including maintaining minutes of such meetings;
  - **ii** maintain the corporate seal and certify the authenticity of Board actions and officer signatures; and
  - **iii** have such other duties and powers as prescribed in the Bylaws, the Articles, by the Board, and by law.

  The Chief Financial Officer shall:
  - **iv** oversee the receipt and disbursement of all funds;
  - **v** maintain CFA Institute financial records and statements;
  - **vi** submit an annual financial statement and budget to the Board and such other statements as the Chair may require; and
  - **vii** have such other duties and powers as prescribed in the Bylaws, the Articles, by the Board, and by law.

6.6 Election and Term.

- **a** Elected Officers.
  - **i** The Chair and Vice Chair shall be elected by the Regular Members at each annual meeting of members.
  - **ii** The Secretary and Chief Financial Officer and such other officers as the Board may determine shall be elected by the Board annually.
  - **iii** Each elected officer shall serve for a term of one (1) year, commencing on the first day of CFA Institute fiscal year following his or her election and continuing until the election and qualification of his or her successor. Effective 1 September 2021, the Chair and the Vice Chair may serve consecutive terms, up to a maximum of six (6) terms as Chair and two (2) terms as Vice Chair, in each case subject to the election and qualification of his or her successor.

b Appointed Officers.
  i Except for the President who shall be appointed by the Board, all other officers shall be appointed by the Executive Committee or the President.
  ii Each appointed officer shall serve at the pleasure of the person or group that appointed him or her.

6.7 Vacancies. A vacancy in any office, except as otherwise provided in the Bylaws, may be filled by the Board for all elected officers and the President and by the Executive Committee or President for appointed officers (other than the President) by the appointment of a successor for the unexpired term of the officer whose place is vacant.

ARTICLE 7 – COMMITTEES

7.1 Creation and Requirements.

a The Board may establish one (1) or more committees to perform such duties as prescribed by the Board, the Articles or the Bylaws, provided that such duties are not prohibited by applicable law.

b Except as otherwise provided in the Bylaws or required by applicable law, each committee shall act under the supervision and control of the Board or as designated by the Board, to (i) an Oversight Committee or (ii) member(s) of Management for a committee that does not (A) have specific responsibilities pursuant to the Bylaws and/or (B) exercise the authority of the Board.

c Except as permitted by law and specified in the Bylaws or a resolution of the Board, no committee shall perform any function of corporate power, policy-making, or management.

d Each committee and subcommittee shall adhere to the same procedural requirements as applicable to the Board for notice ofmeeting, quorum and voting.

7.2 Executive Committee.

a Authority and Responsibility. CFA Institute shall have an Executive Committee that shall:
  i act for the Board act between Board meetings on all matters to the extent permitted by law and in accordance with the authority delegated to the Executive Committee by the Board; and
  ii monitor and assess the activities of any Oversight Committee established by the Board to ensure that their objectives and milestones are appropriate.

b Composition.
  i The Executive Committee shall consist of the CFA Institute Chair, Vice Chair, and such other members as specified by the Board.
  ii The CFA Institute Chair shall be the chair of the Executive Committee.

7.3 Oversight Committees.

a Authority and Responsibility. The Board may establish one (1) or more Oversight Committees that, to the extent specified by the Board and as permitted by law, may exercise the authority of the Board, including the exercise of corporate powers, policy-making, and management.

b Composition. Each Oversight Committee shall consist of two (2) or more Governors.

c Purpose. Any Oversight Committee established by the Board shall have the duties and responsibilities as assigned by the Board or the Executive Committee.

7.4 Committee Chair and Members. Except as otherwise provided in the Bylaws:

a the chair of each committee shall be a Regular Member;

b the chair of each committee shall be appointed and approved by the Board, Oversight Committee or member(s) of Management having responsibility for such committee, to serve for a term of one (1) year or such longer period as the Board, Oversight Committee or member(s) of Management may determine and shall serve until his or her successor is selected and qualified, provided, however, that no individual shall serve as a committee chair for more than three (3) consecutive years except to the extent his or her successor has not been selected and qualified;

c each member of a committee shall be a Regular Member except to the extent that the Board, Oversight Committee or member(s) of Management having responsibility for such committee shall determine otherwise;

d the Board, Oversight Committee or member(s) of Management having responsibility for such committee, shall appoint and approve the members of the committee to serve for a term of one (1) year or such longer period as the Board, Oversight Committee or member(s) of Management may determine and shall serve until his or her successor is selected and qualified, provided, however, that no individual shall serve as a member of a committee (including anytime as committee chair) for more than six (6) consecutive years except to the extent his or her successor has not been selected or qualified. For the avoidance of doubt, each member of (i) a committee of the Board shall be a Governor, and (ii) any other committee shall be comprised of such members as provided in the Bylaws or by resolution of the Board; and

e the Board, Oversight Committee or member(s) of Management having responsibility for a committee shall have the authority to remove any chair or member of such committee.

7.5 Subcommittees. Except as otherwise set forth in the Bylaws, a committee may create one (1) or more subcommittees and shall determine the subcommittee chairs, members, and terms of members. All actions taken by the subcommittees shall be subject to review and approval by the appointing committee, or as otherwise set forth in the Bylaws.

7.6 **Reports of Committees**. Each of the committees shall submit a written report to the Board, Oversight Committee or member(s) of Management having responsibility for such committee to assist in providing oversight of such committee at least once each fiscal year covering the committee activities since the previous report. Each committee shall report to the Board, Oversight Committee or member(s) of Management having responsibility for such committee at any time upon request.

ARTICLE 8 – PRESIDENTS COUNCIL

8.1 **Authority and Responsibilities.** A volunteer committee of CFA Institute known as the "Presidents Council" shall be established that:
- **a** provides a forum for discussion among the presidents of the Member Societies;
- **b** facilitates communication of information among Member Societies;
- **c** makes recommendations regarding Member Society activities;
- **d** provides advice and consultation to Presidents Council Representatives, CFA Institute officers, and the Board;
- **e** elects Presidents Council Representatives.

8.2 **Composition and Chair.** The Presidents Council shall be composed of the president of each Member Society, the Presidents Council Representatives, and the Presidents Council chair. The chair of the Presidents Council shall be elected by a majority of the members of the Presidents Council, and the chair is authorized to attend non-executive sessions of Board meetings.

8.3 **Meetings.** The Presidents Council shall meet at least once per year.

8.4 **Votes.** Each member of the Presidents Council shall have one (1) vote. Each Member Society president may designate an alternate representative, if such president is unable to attend any meeting.

8.5 **Presidents Council Representatives.**
- **a** Authority and Responsibilities. The Presidents Council shall select Presidents Council Representatives that shall facilitatecommunication of information between the Board and the members of the Presidents Council, and the Presidents CouncilRepresentatives are authorized to attend non-executive sessions of Board meetings.
- **b** Composition. Presidents Council Representatives shall be Regular Members selected by the Presidents Council pursuant to procedures established by the Presidents Council. The number of Presidents Council Representatives shall be set by the Board and not be less than eight (8) nor more than thirteen (13) and, in the absence of Board action, shall be eight (8).

ARTICLE 9 – NOMINATING PROCESS AND ELECTION

9.1 **Nominating Committee.**
- **a** Authority and Responsibility. Nominations for Governor and for the offices of Chair, Vice Chair, and, in the absence of action by the Executive Committee, Chief Financial Officer, and Secretary, shall be made by the Nominating Committee, subject to approval of the Board.
- **b** Composition. The Nominating Committee shall be composed of:
  - **i** The Chair shall serve as an *ex officio* member;
  - **ii** two (2) Regular Members elected by the Board who are serving as a Governor or are in their first year after serving as a Governor;
  - **iii** one (1) Regular Member that is a Charterholder Member elected by the members of the Education Advisory Committee or elected by the members of the Council of Examiners, each in alternate terms; and
  - **iv** two (2) Regular Members elected by the Presidents Council Representatives.
- **c** On an annual fiscal year basis and commencing no later than 1 September, the Board shall select one of the two (2) members serving on the Nominating Committee pursuant to Article 9.1(b)(ii) to serve as chair of the committee.
- **d** Each member of the Nominating Committee other than the Chair shall serve a two (2) year term. The terms of the representatives from each constituency in Article 9.1(b)(ii) and (iv) will be staggered as determined by the Board so that the terms of one representative referred to in Article 9.1(b)(ii) and one representative referred to in Article 9.1(b)(iv) shall expire at the end of the CFA Institute fiscal year beginning 1 September 2020 and at the end of every second CFA Institute fiscal year thereafter, and
- **e** the terms of the remaining representatives referred to in Article 9.1(b)(ii) and 9.1(b)(iv) shall expire at the end of the CFA Institute fiscal year beginning 1 September 2021 and at the end of every second CFA Institute fiscal year thereafter. No person shall serve two consecutive terms on the Nominating Committee.

9.2 **Nominations.** Nominees shall be selected by the Nominating Committee and approved by the Board. In carrying out is duties, the Nominating Committee shall seek to:
- **a** nominate individuals to the Board who, in the committee's judgment, will cause the Board to be composed of a wide and balanced range of individuals professionally engaged in the Investment Decision-Making Process;
- **b** select the very best candidates in terms of leadership qualities and skill sets while striving to ensure that the diversity of characteristics of the CFA Institute membership is adequately represented on the Board;

c consider nominees that have shown strong and active commitment and participation to CFA Institute and Member Society activities;
d be mindful of the diversity of job functions, industry sectors, and geographical locations and the many other differences in member perspectives that the Nominating Committee judges to be significant in seeking to achieve a Board that can act effectively in the best interest of members; and
e at the Executive Committee's direction, nominate an individual(s) that is not a Regular Member, who in the Nominating Committee's judgment, will cause the Board to have the very best candidate(s) to assist CFA Institute in fulfilling its purposes.

9.3 Solicitations of Nominations. The Nominating Committee shall solicit candidates for each position that the committee is seeking to fill. Solicitation of candidates shall commence promptly after the Nominating Committee has been duly appointed. The names of nominees will be published no later than seventy (70) days prior to the annual meeting of members.

9.4 Nominations of Nominating Committee Members. No member of the Nominating Committee other than the Chair, while serving on the committee, may be nominated for a Board or officer position.

9.5 Nominations by Members. Any Regular Member may submit additional written nominations for Governors and for the offices of Chair and Vice Chair if:
a sponsored in writing by at least two percent (2%) of the Regular Members;
b written consent from the nominee has been obtained; and
c documents supporting both (a) and (b) are submitted to the Secretary no later than sixty (60) days before the annual meeting.

ARTICLE 10 – LIMIT ON LIABILTY AND INDEMNIFICATION

10.1 Non-Liability. To the fullest extent permitted by law, a Governor or officer of CFA Institute shall not be liable for monetary damages.

10.2 Indemnification. To the fullest extent permitted by law, CFA Institute shall indemnify and advance reasonable expenses to, any individual who was, is, or is threatened to be made a party in any proceeding because he or she Is or was a Governor, officer, employee, or agent (including committee members and other volunteers) of CFA Institute, or is or was serving at the request of CFA Institute as a director, officer, partner, trustee, employee, or agent of another corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise.

ARTICLE 11 – FINANCES

11.1 Fiscal Year. The fiscal year of CFA Institute shall begin on 1 September of each year unless otherwise determined by the Board.

11.2 Dues. CFA Institute shall have the right to establish and collect dues for Members of CFA Institute.

11.3 Audit Review. Financial statements of CFA Institute shall be audited not less than once per year by an independent certified public accountant approved by the Board.

ARTICLE 12 – STANDARDS AND DISCIPLINARY PROCESS

12.1 Standards and Disciplinary Process. The Standards and Disciplinary Process shall consist of the Professional Conduct Program, the Disciplinary Review Committee, the Standards of Practice Council, and such other programs and committees as established by CFA Institute or the Board.

12.2 Professional Conduct Program. CFA Institute shall have a Professional Conduct Program that may investigate and conduct disciplinary proceedings in connection with the professional conduct of Covered Persons as set forth in the Rules of Procedure.

12.3 Disciplinary Sanctions and Grounds of Discipline. The Professional Conduct Program and the Disciplinary Review Committee shall have the authority to impose disciplinary sanctions upon Covered Persons as set forth in the Rules of Procedure. The disciplinary sanctions that may be imposed upon Covered Persons, up to and including revocation of membership, revocation of the right to use the CFA designation and prohibition from participation in the CFA Program, and the grounds for imposing disciplinary sanctions upon Covered Persons shall be set forth in the Rules of Procedure.

12.4 Standards and Disciplinary Process Committees.
a The Board shall establish such committees, including a Disciplinary Review Committee and a Standards of Practice Council, as it deems reasonably necessary.
b Except as otherwise specified, each committee created under this section shall function in accordance with Article 7 of the Bylaws.
c The chair and members of each committee shall be selected in accordance with Section 7.4 of the Bylaws.

ARTICLE 13 – AMENDMENT OF THE BYLAWS

13.1 Amendments by the Board. The following articles and sections of the Bylaws may be amended by the Board upon two-thirds (2/3) affirmative vote of the Governors then serving: Section 2.8, 2.9, 2.16, 2.17 and Articles 5, 6, 7, 10 and 11.

13.2 Amendments by the Members. In addition to amendments by the Board under Section 12.1:

- **a** any amendment of any article or section of the Bylaws may be approved by the Board for submission to the Regular Members at any meeting of the members or a proposed amendment of any article or section of the Bylaws sponsored by at least two percent (2%) of the Regular Members shall be submitted to the Regular Members at the next duly called meeting of members if such amendment is submitted in writing by the sponsors to the Secretary at least forty-five (45) days prior to such meeting; and
- **b** an amendment to the Bylaws shall be adopted when approved by the affirmative vote of a majority of the votes entitled to becast by the Regular Members present or represented by proxy at a duly held meeting at which a quorum is present, unless a greater majority is required in the Articles, Bylaws, or otherwise by applicable law.

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$467.88 + 1,384.75 ….

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The Marketplace

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Markets

Geography	Market Size	Adult Population	% of Adults
US	35,117,635	250,840,250	14%
EU	47,543,199	339,594,280	“
UK	7,149,995	51,071,392	“
Canada	4,043,757	28,883,981	“
Mexico	13,688,314	97,773,669	“
Rest of World	180,752,841	4,338,647,562	3%
Total Market	288,295,741	5,106,811,134	6%

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Equity Opportunity

Members	% of Market	Revenue - $360	20% Margin	20x PE
3,511,763	1.22%	$1,264,234,858	$252,846,972	$5,056,939,432
10,535,290	3.65%	$3,792,704,574	$758,540,915	$15,170,818,296
35,117,635	12.18%	$12,642,348,580	$2,528,469,716	$50,569,394,319
52,676,452	18.27%	$18,963,522,870	$3,792,704,574	$75,854,091,479
71,113,211	24.67%	$25,600,755,874	$5,120,151,175	$102,403,023,497
92,447,174	32.07%	$33,280,982,636	$6,656,196,527	$133,123,930,546
115,558,967	40.08%	$41,601,228,296	$8,320,245,659	$166,404,913,182
144,448,709	50.10%	$52,001,535,369	$10,400,307,074	$208,006,141,478

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Comparable: AlphaSense

Capital Raised: $490 million

Valuation: $1.7 billion - 17x sales

Total Market: 10 million subscribers

Provides equity research to corporate professionals from Bank of America, Morgan Stanley, and others.

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by stoxdox | Oct 8, 2022 | 0 comments

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"Excellent article. The argument is based on solid and original research. The presentation of pertinent data is clear and logical and carried in a dispassionate manner – rarity. Thank you for publishing."

"You have written an excellent article. When I was only 1/3 of the way through it, I was impressed beyond belief. One of the best I have ever read, sincerely..."

"Tremendous work. Applause. I have been interested in this company and it is now a screaming buy. Cheers."

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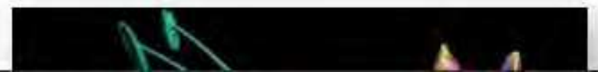

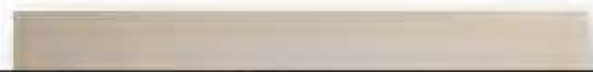

Brian Kapp, CFA

Co-Founder and CEO

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Brian is the co-founder and CEO of stoxdox, Inc., a universal platform for investment research and perspective. He started in the investment industry in 1996 and spent the first half of his career as a portfolio manager at Merrill Lynch then UBS Financial Services. Later, he founded and served as the portfolio manager at both Kapp/Scanlon Financial Group and Oasis Capital.

Being an experienced investment strategist with 26 years of wisdom across the broad market is a key differentiator. The analyst side enables the creation of the highest quality, unbiased, and insightful analysis. The portfolio manager enables the design and delivery of timely and actionable information.

Brian is a CFA® charterholder and earned a BS in Industrial Management and a BS in Economics at Carnegie Mellon University. His experience combined with a strong foundation in strategic management and economics offers a uniquely full-spectrum, full-cycle, and global perspective.

Brian Kapp, CFA

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Emma is the co-founder and COO of stoxdox, Inc. She has held management and leadership positions in publishing and finance throughout her career. Emma serves in a management and editorial capacity, ensuring that the highest quality products and services are delivered. As chief operating officer, Emma oversees and manages all aspects of the stoxdox platform.

She began her career at Technology Publishing Company (publisher of *PCE*, PaintSquare, *JAC*, *JPCL* and Paint BidTracker) in Pittsburgh. There Emma managed Protective Coatings Europe (*PCE*), a print publication circulated to members of 26 technical coatings organizations throughout Europe. In addition, she served as product manager in the development and launch of a b2b coatings portal and then went on to manage the company sales team.

Later, Emma served as publisher for a national audited b2b print publication, *Journal of Architectural Coatings* (*JAC*). More recently she created and implemented PRISM Sustainability in the Built Environment, a website and online b2b niche publication for sustainable building materials. Finally, Emma was chief operating officer for Oasis Capital and Kapp/Scanlon Financial Group.

Emma earned a BA in French at the University of Pittsburgh, and an MBA with a focus on international business at Point Park University in Pittsburgh.

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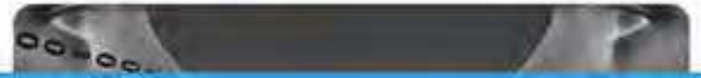

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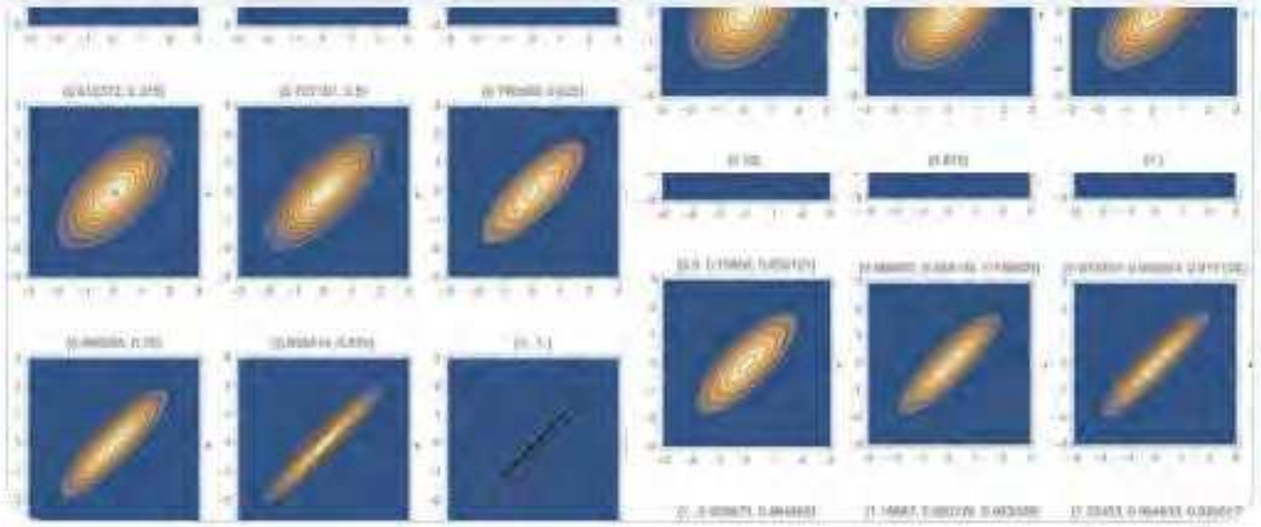

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Shake Shack is changing its colors

by Brian Kapp, CFA | May 22, 2023 | 0 comments

> The butterfly offers a robust mental model for viewing the present and the future as it unfolds. Applying the butterfly model to investment opportunities is especially powerful. After all, an investor's job is to clearly see the present (a caterpillar) while keeping sight of the vast possibilities (a butterfly).

The above quote from the report "Of investment models and butterflies" sets the stage for viewing growth stock opportunities. When it comes to growth stocks, one must take a step back from the current news flow to reflect upon future possibilities. Shake Shack is a great example of these opportunities.

Shake Shack

The most interesting feature of the Shake Shack (NYSE:SHAK) investment opportunity is that its extraordinary brand potential was self-evident at the time of its IPO in January of 2015. That said, the company's business model at the time, and until quite recently, prohibited the full realization of Shake Shack's brand equity opportunity.

Due to the conflict between the extraordinary potential of the Shake Shack brand and its limited business model, I have monitored it casually over the years. Today, the business model limitations are a thing of the past as the company now has a credible blueprint for penetrating the restaurant mass market.

Business Model

The prior business model limitations revolved around the company's restaurant format. Essentially, Shake Shack was developing larger restaurants which were similar to the full-service, casual dining concepts which pervade society. Such full-service, casual dining concepts have proven to be of limited potential in terms of ultimate equity value realization.

Darden Restaurants is an excellent example of the brand equity limitations that are innate to the full-service, casual dining industry. The company has long been a leader in the space, with an equity value of just under $20 billion dollars today. This valuation equates to 1.9x sales estimates for the current year.

Darden has reached maturity and is valued at just under $20 billion. While Darden is not strictly a direct comparable, Shake Shack's original

business model was quite Darden-like and faced a similar hard ceiling in regard to potential equity value.

Changing Its Colors

The core challenge for Shake Shack living up to its full brand potential primarily has revolved around its restaurant format. The following series of slides are from the company's January 2023 investor presentation with the first depicting the original, Darden-like business model.

Source: Shake Shack ICR Conference January 10, 2023

The above image is an example of the original restaurant format which one would find alongside similar concepts in shopping centers. The following two slides depict the essence of the strategy change which has significantly expanded the brand equity opportunity and thus valuation potential for Shake Shack.

Source: Shake Shack ICR Conference January 10, 2023

Source: Shake Shack ICR Conference January 10, 2023

Smaller store formats and drive-thru restaurants open the door to densification and thus maximum market penetration. This dynamic is on display in the next image which offers a case study that speaks to the full potential of Shake Shack's brand under the new strategy.

Source: Shake Shack ICR Conference January 10, 2023

The Orlando example in the above image gets to the crux of the matter; two restaurants operating successfully within one mile of each other. Prior to the strategy change, the company estimated that it could open 450 US restaurants. Shake Shack's business model change opens the door to a much larger footprint, thus maximizing the company's equity potential.

In addition to enabling densification in urban and suburban areas, the new format strategy enables Shake Shack to target all available markets. For example, captive audiences are now in play for the brand. Recent examples of captive audience targeting include new restaurants located in airports and resorts. Travel market demand is quite large and lucrative in its own right.

Brand Equity Potential

Smaller formats and drive-thru restaurants fundamentally change Shake Shack's competitive positioning and remove Darden as a comparable company. Shake Shack's change of color places its brand potential in league with the industry leaders: Chipotle Mexican Grill, Wingstop, Starbucks, and McDonalds.

The importance of the strategy shift and the change in comparable companies is evident in the equity valuations of the four industry

leaders. The following table displays the equity valuation of these four companies, as well as that of Darden and Shake Shack.

Created by Brian Kapp, stoxdox

Note that the % to Comp column depicts the upside return potential if Shake Shack were to reach the level of success and valuation achieved by each comparable company. Given Shake Shack's strategy shift, I view Chipotle's valuation as a realistic long-term target, if the company can successfully execute its business plan.

The Starbucks and McDonalds targets, while not impossible, remain highly unlikely. Nonetheless, the upside potential remains substantial using the first three comparable companies in the table.

Consensus Estimates

Given Shake Shack's corporate youth and related earnings power immaturity, viewing consensus sales expectations and the price-to-sales valuation ratios into mid decade is the most informative approach. The following table displays consensus estimates for Shake Shack and the four industry leaders. I have highlighted in yellow the price-to-sales ratio using next year's estimates for ease of comparison.

Source: Seeking Alpha. Created by Brian Kapp, stoxdox

Notice that Shake Shack trades at a steep discount to the four comparable companies. Additionally, take note of the wide dispersion in the valuation of each company. Wingstop trades at an incredible 14x 2024 sales estimates on the high end, while Shake Shack trades at 2x 2024 estimates on the low end.

All things equal, higher growth rates should translate into higher valuations. As a result, what immediately jumps out from the above comparison is that Shake Shack is the youngest of the group while trading at the lowest valuation. This is unusual as Shake Shack offers

the greatest growth potential of the comparable companies, as can be seen in the next table.

The table below displays the number of restaurants in operation for each company as of the most recent quarter and the percentage of the locations which are licensed (franchised). The % of Stores column displays Shake Shack's total restaurant count as a percentage of each comparable company's store count.

Created by Brian Kapp, stoxdox

It is self-evident that Shake Shack's growth runway is quite long in relation to its top peers. As the company's strategy shift opens the door to deep market penetration worldwide, success is largely a function of execution. In other words, Shake Shack should control its own destiny.

Returning to the prior table and the wide valuation dispersion from 2x sales (Shake Shack) to 14x sales (Wingstop), the % Licensed column in the store count table holds the answer to the dispersion question. McDonalds and Wingstop are primarily licensing business models and trade at large premiums to the group at 8x and 14x sales, respectively.

The bottom line, licensing or franchise business models receive much higher valuations than do company-operated restaurant models. From this perspective, and a potential valuation premium, Shake Shack's future could be quite bright. The following slide from the January 2023 investor presentation displays the number and locations of licensed restaurants globally.

Source: Shake Shack ICR Conference January 10, 2023

What is clear from the above image is that Shake Shack has only scratched the surface of its global licensing potential. The company has developed a foothold in the top Asian and Middle Eastern markets and can expand from there. The remainder of the world outside of the US remains untouched to date.

While it is unclear how many Shake Shack restaurants are ultimately possible, with the new strategy it is safe to say that the number is many multiples of its current restaurant base of 449. For reference, Chipotle's 3,224 are almost entirely in the US market, while McDonalds has just under 13,500 in the US. Internationally, McDonalds has just under 27,000 restaurants and Starbucks has nearly 18,000 store fronts.

A small fraction of McDonalds' global footprint would translate into a Chipotle-sized brand equity opportunity for Shake Shack investors.

Technicals

Turning to the price action, Shake Shack's share price has been largely unchanged since the company's January 2015 IPO. That said, the shares have established an uptrend over the past year which is likely

due to the company's evolving business model. The following 1-year daily chart captures the recent uptrend.

Shake Shack 1-year daily chart. Created by Brian Kapp using a chart from Barchart.com

On all of the charts, the green line represents the key support zone and the orange lines depict the primary resistance levels. Additionally, the gold line represents the 50-period moving average while the grey line is the 200-period moving average.

Notice that the 50-day moving average crossed above the 200-day moving average on January 23, 2023. This golden cross carries a bullish technical interpretation and confirms the short-term uptrend. The recent price spike followed the company's May 4, 2023 earnings report and reaffirms the bullish price trend.

Following the May earnings report, the shares were rejected at the first resistance level (the orange line), which was to be expected. Keep in mind that resistance levels are technical price targets. Return potential to the upper two resistance levels is 21% and 69%, respectively. The following 5-year weekly chart provides a longer term view.

Shake Shack 5-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

Shake Shack put in a double bottom near $40 per share in June and December of 2022, while forming what should be a strong support base near $56 per share (the green line). A retest near this support level would represent an ideal accumulation opportunity.

Summary

Shake Shack represents a rare growth stock opportunity in the restaurant industry. As evidenced by the store count data, the company has just scratched the surface of the global market. When combined with the strategy change to include smaller format and drive-thru restaurants, the ultimate brand equity opportunity is quite large.

The upside opportunity is illuminated by Chipotle's success at the high end, which would equate to 1,989% over the long term. Wingstop highlights the low end of the upside return spectrum at 121% over the intermediate term. With the shares trading within 16% of the primary support level, and bullish trends in place, Shake Shack represents an asymmetric risk/reward opportunity for secular growth stock investors. While it remains a caterpillar, Shake Shack may yet become a butterfly.

Price as of this report: $66.67

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The market is on a long and winding road

by Brian Kapp, CFA | Apr 29, 2023 | 0 comments

This is a brief market update as the market's long and winding road back to the head and shoulders top is largely complete. With the return trip complete and Q1 earnings reports in full swing, it is an ideal time to take a step back and examine each side of the road.

The Road

The 5-year weekly chart below is of the S&P 500 index (NYSE:SPY), which captures both sides of the winding road. The orange lines represent the breakdown zone during the peaking process which spanned the final two quarters of 2021 and first two quarters of 2022. This resistance zone can be thought of as the decaying side of the image above.

The green line represents the primary support level which coincides with the October 2022 bottom. It was also the primary resistance level prior to the market topping process in Q3 and Q4 of 2021. Note that the upward sloping green line depicts the short-term price trend.

SPY 5-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

The proximity of the S&P 500 to the primary resistance zone combined with a lack of upward momentum suggests an attempted breakout is more likely to fail than not, technically speaking. In fact, for all intents and purposes, the lack of momentum in either direction has now persisted for an entire year. The following 1-year daily chart provides a closer look.

SPY 1-year daily chart. Created by Brian Kapp using a chart from Barchart.com

Note that the 50-day moving average (the gold line) is above the 200-day moving average (the grey line). This confirms the short-term uptrend which remains within a primary bear market. What we can say with certainty is that there is little momentum in either direction.

As such, given the primary downtrend in place, the proximity to the primary resistance zone at the head and shoulders neckline remains the dominant technical force. In the February 15, 2023 report entitled "New bull market or a bear market bounce?", I summarized the situation as follows:

> The fundamental and technical signs point to the broad US stock market nearing a short-term peak. Technically, the head and shoulders neckline from the topping process looms large. From a fundamental perspective, valuations remain extended in relation to the historical evidence and near-term earnings growth.

At the time of that report, the SPY was trading near $414, which is where it is trading today. As a result, the question is: does the above summary of the market backdrop still hold?

The Recession

Technically speaking, the above summary remains the case today. On the fundamental side, as first discussed in the September 15, 2022 report "The recession is here, filter the noise," the economy remains in what is best described as an inflationary contraction. This is a recession by any other name.

The official declaration of such, whether or not it occurs, is largely irrelevant from an investment perspective. Official recessions are back dated, after all. The following passage from the report captures the essence:

> Given the lags and flaws inherent in economic statistics and data collection, an extra filter is required. As a result, it is helpful to go directly to the source for confirmation of where we are in the economic cycle. The source is the corporations themselves.

The following passage exemplifies the investment irrelevancy of trailing economic data:

> Eastman Chemical's Q3 warning points to recessionary conditions being in effect with a likely start date of Q2 2022 into Q3 2022. Eastman is confirming what we have already heard from RH and other cyclical industries, such as semiconductors.

From an investment perspective, one usually captures the most asymmetric risk/reward opportunities in cyclical stocks by buying during the early stages of a recession. Interestingly, a week prior to Eastman's Q3 warning, I wrote positively about the company as its valuation was on the cusp of pricing in a recession.

The Eastman Summary below is the summary from the September 6, 2022 report titled "Eastman Chemical is entering a bull market." I include it here as a reminder of the old saying: "it is a market of stocks, not a stock market."

The saying is worth remembering as sectors, industries, and individual stocks react to different economic factors at different times of the economic cycle. Another cyclical example can be found in the October 3, 2022 report titled "A top sector choice for the coming cycle." It was published within eight days of the October 2022 S&P 500 bottom.

Eastman Summary

After eight years of sideways consolidation, Eastman Chemical looks to be on the cusp of a new bull market. The high likelihood of Eastman surpassing consensus growth estimates through mid-decade combined with its deeply discounted valuation creates an excellent multiple expansion opportunity.

Eastman's leveraging of secular growth opportunities combined with its organic growth and increasingly premium product mix set the stage for above-average growth rates well into the future. With the consensus expecting stagnant sales into mid-decade, the upside surprises could become substantial. This dynamic could introduce the high end of the fundamental upside targets discussed above.

The above-average dividend yield of 3.4% is likely to grow at well-above-average rates into the foreseeable future. The capital return program is supplemented by a substantial share buyback program. Eastman's capital return program should provide material support alongside the strong technical foundation nearby.

Finally, the high quality of Eastman's business is likely being undervalued by the market. This opens the door to further multiple expansion opportunity as Eastman is rerated to the higher-quality end of the materials sector. Eastman offers a truly asymmetric risk/reward opportunity.

Summary

Eastman, like the market, has remained largely unchanged since the September 2022 report. The primary difference between the two is that Eastman is well-defined by its cyclical nature, whereas the market indices are not. The market cap-weighted indices are dominated by

technology-related mega-cap corporations. These companies were the secular growth beneficiaries of the last economic cycle.

The last economic cycle ended as 2022 began, with the market indices peaking six months in advance of the onset of recessionary conditions for Eastman. From a historical perspective, this is par for the course in terms of broad stock indices leading the onset of recessions.

While Eastman is trading within its most asymmetric risk/reward window, a recession, it is unclear that the same applies to the broad market indices. The peculiarities inherent in the large technology overweight in the indices is a function of them being the beneficiaries of the just ended cycle.

Complicating matters for the market-cap indices is the explosion of technology budgets since 2019, which points toward the possibility that technology spending could be entering a mean reversion period. This was discussed in more detail in the December 20, 2022 report "Technology outlook for 2023."

In summary, the market indices continue on the winding road and are likely to struggle with gaining upside momentum given the peculiarities of the moment. That said, there are many opportunities under the market cap-weighted surface. These opportunities are discussed in more detail in the sector series reports previously published on stoxdox.com.

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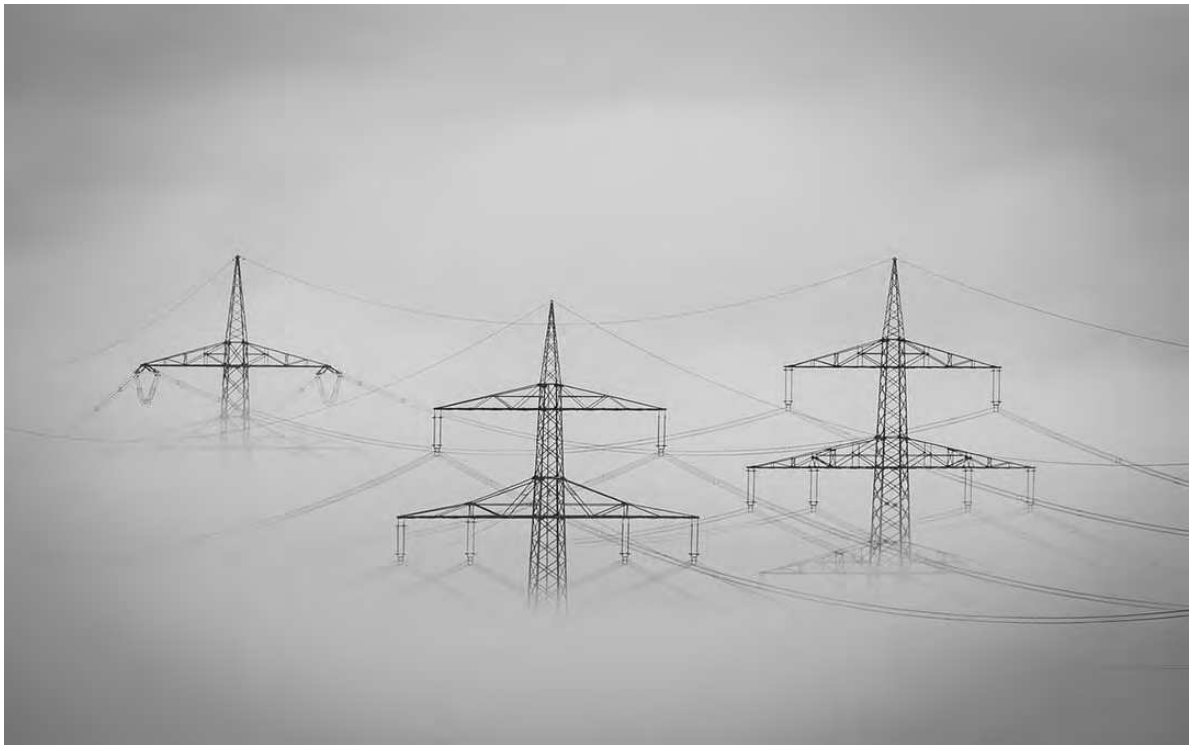
Generac is a distributed energy leader

by Brian Kapp, CFA | Apr 12, 2023 | 0 comments



Generac's (NYSE:GNRC) corporate purpose, as stated in its February 2023 investor presentation, is to lead the evolution to more resilient, efficient, and sustainable energy solutions. As the energy transition is the largest secular growth opportunity of our time, pure plays like Generac stand out as uniquely asymmetric risk/reward opportunities.

Residential Opportunity

Generac's business can be divided into two distinct end-market segments, residential and commercial/industrial. Beginning with residential, the following slides from the February 2023 investor presentation capture the essence of the opportunity. Please note that the blue and the orange lines represent central air conditioning and HSB (home standby power) penetration in North America, respectively.

Source: Generac February 2023 Investor Presentation

Source: Generac February 2023 Investor Presentation

As someone with experience in single and multi-family residential real estate, it is easy to envision home standby power systems (the orange line in the first image) following the path of central air conditioning (the blue line in the same image). In order to sell a mid- to high-end residential property today, central air conditioning is nearly a universal requirement. This of course was not always the case, as market expectations have evolved over time.

Notice that Generac estimates that a 1% increase in penetration in the HSB market translates into $3 billion of sales potential. For reference, Generac generated $4.6 billion of total sales in 2022, with $2.9 billion coming from the residential segment. If the HSB market tracks central air conditioning, going from 6% to 88% penetration equates to a $245 billion residential revenue opportunity in North America alone.

Home standby power, or distributed energy, is a secular growth opportunity. If 88% market penetration occurs, it is likely to take many decades as was the case with central air conditioning. Looking out over the coming decade, the portable generator penetration rate is likely to be a realistic target (the grey line in the first image). If 20% penetration is achieved, the revenue opportunity for Generac is around $42 billion.

Growth Estimates

I view 20% penetration as a realistic possibility over the coming decade. Reviewing market expectations in the context of the North American residential HSB opportunity provides a foundation on which to move forward. The following table displays consensus sales growth estimates through 2027.

Source: Seeking Alpha. Created by Brian Kapp, stoxdox

In light of the home standby power market, which is just one sliver of Generac's opportunity set, annual sales in the range of $4 to $5 billion per year into mid-decade should be achievable. Keep in mind that the end market is inherently cyclical, and thus prone to volatility. This can be seen in the 2023 decline estimate of -10% following sales growth of 22% in 2022. The following image summarizes Generac's larger residential product footprint.

Source: Generac February 2023 Investor Presentation

Generac's full residential product suite opens the door to competitive differentiation. It is positioned as a one-stop shop for home electrification. The breadth and depth of its products create packaging and pricing optionality, which in turn enables greater market segmentation, and thus penetration.

In the following slides, Generac compares itself to several residential competitors in the home battery and solar inverter product categories. The importance of the comparison is in the comparable companies themselves, which are three energy transition highflyers in today's stock market: Tesla (NASDAQ:TSLA), Enphase Energy (NASDAQ:ENPH), and SolarEdge Technologies (NASDAQ:SEDG).

Source: Generac February 2023 Investor Presentation

Source: Generac February 2023 Investor Presentation

It is clear that the integration of batteries, solar systems, standby power, and whole house electricity is a growth market. While Generac may or may not offer performance superiority, as shown in the battery comparison, it does in fact have a full home electrification product suite. As a result, Generac has a positioning advantage over its competitors in the broad residential market.

Valuation

The importance of the above comparison becomes clear when reviewing Generac's valuation to that of Tesla, Enphase Energy, and SolarEdge Technologies. Keep in mind that the four companies are not directly comparable in a strict sense. Rather, the companies represent equally viable options in the universe of energy transition investment alternatives. As such, from a portfolio perspective, they are directly comparable.

In the upper portion of the following table, I compare the valuation of the four companies based on consensus earnings estimates. In the lower section, I compare consensus sales growth estimates. Estimates for 2026 are highlighted in yellow for ease of comparison.

Source: Seeking Alpha. Created by Brian Kapp, stoxdox

By 2026, the sales growth rates for all four companies begin to converge, while the valuation dispersion between Generac and the group remains quite large in comparison. If today were April 2025, Generac would be relatively attractive compared to the group.

Furthermore, the expected sales growth rates for Generac's three energy transition comparables through 2025 are unusually high. This is especially the case for Tesla given its current size in comparison to

its likely market share limitations, which are innate in the auto industry.

Given the heightened expectations, the probability of missing consensus estimates in 2024 and 2025 is elevated for the three comparable companies. As a result, trading at 13x 2024 estimates, Generac offers a relatively attractive opportunity for exposure to the residential energy transition.

The asymmetry of the opportunity is supported by Generac trading at a steep discount to its 5-year average valuation multiples, as can be seen in the following table. Note that Generac is trading in line with the median valuations across the broad industrial sector while offering above-average secular growth potential.

Source: Seeking Alpha. Created by Brian Kapp, stoxdox

Commercial and Industrial

In addition to residential, Generac has material exposure to the energy transition in the commercial and industrial sector, as can be seen in the following images. The non-residential market accounted for 36% of Generac's sales in 2022. The forecast for 2023 is for the commercial and industrial segment to grow sales at a mid-to-high single-digit rate compared to a high-teens percentage decline in the residential segment.

Source: Generac February 2023 Investor Presentation

Source: Generac February 2023 Investor Presentation

In the second image, notice that acquisitions are a core component of Generac's growth strategy. This is especially true in the commercial and industrial segment. The acquisitions have expanded Generac's served and addressable market from $14 billion in 2018 to $72 billion looking out to 2025. This estimate includes both the residential and commercial segments.

While acquisitions are a viable and proven growth strategy, the approach comes with heightened risks. The primary risks pertain to

successful integration of the acquired companies and the potential for capital misallocation given investor pressure to meet growth targets. An added risk is that most of the acquisitions occurred during a time period of rather extreme valuations, generally speaking.

While there will be the inevitable write-offs related to past acquisitions that do not pan out, Generac has assembled a full product suite for both the residential and commercial segments. The company is well positioned for customer retention and growth in both the residential and commercial markets.

Furthermore, Generac has built a broad and deep distribution network which provides the needed market reach and service capabilities to successfully execute its growth strategy. Importantly, no single distribution partner accounted for more than 4% of total sales. From the 2022 annual report:

> We believe our global distribution network is a competitive advantage… Our network is well balanced with no single customer providing more than 4% of our sales in 2022… We have the industry's largest network of factory direct independent generator dealers in North America.

Of note, Generac works with a financial institution to finance select dealer floor plans for which it provides an inventory repurchase guarantee to the financing institution. One such dealer filed for bankruptcy recently, which required Generac to fulfill its inventory repurchase obligation. Distributors utilizing this financing method accounted for 15% of sales in 2022.

All told, Generac is operating in well-defined secular growth markets in both the residential and commercial segments, with a full suite of products and distribution partners. It has all the ingredients required for success, thus leaving execution as the primary fulcrum on which the future will be determined.

Technicals

Turning to Generac's share price action, the 5-year weekly chart below captures the essence of the technical setup. The shares experienced an explosive 400% rally during COVID, which has now been fully reversed. Note that the orange lines represent key resistance levels, and the green lines bracket the primary support zone between $70 and $100.

Generac 5-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

The shares are now testing the upper end of the support zone while attempting to form a double bottom. The downside to the upper and lower support levels is -1% to -29%, respectively. In contrast, the upside potential to each of the three resistance levels is 106%, 182%, and 300%, respectively. The following 1-year daily chart provides a closer look at the technical setup.

Generac 1-year daily chart. Created by Brian Kapp using a chart from Barchart.com

The key feature of the 1-year chart is the bottoming process over the past six months. As the market has rallied strongly since October 2022, Generac's underperformance is notable. The underperformance highlights what I view as the most likely near-term scenario, disappointment. Said differently, the market looks to be pricing in such a disappointment in regard to consensus estimates in the coming quarters. This dynamic introduces upside surprise potential.

Summary

As Generac is inherently a cyclical growth company, and recessionary conditions are in effect, the question is primarily tactical in nature. With the shares testing the upper end of the primary support area, at minimum, Generac is on the cusp of an ideal accumulation zone.

Given the recessionary macroeconomic backdrop, it would not be surprising if the shares test the lower end of the support zone toward the $70's in the coming months. Looking out to mid-decade and beyond, regardless of the near-term price action, the risk/reward asymmetry is decidedly skewed to the upside. Generac should be on the accumulation radar of growth-stock investors.

Price as of this report: $100.32

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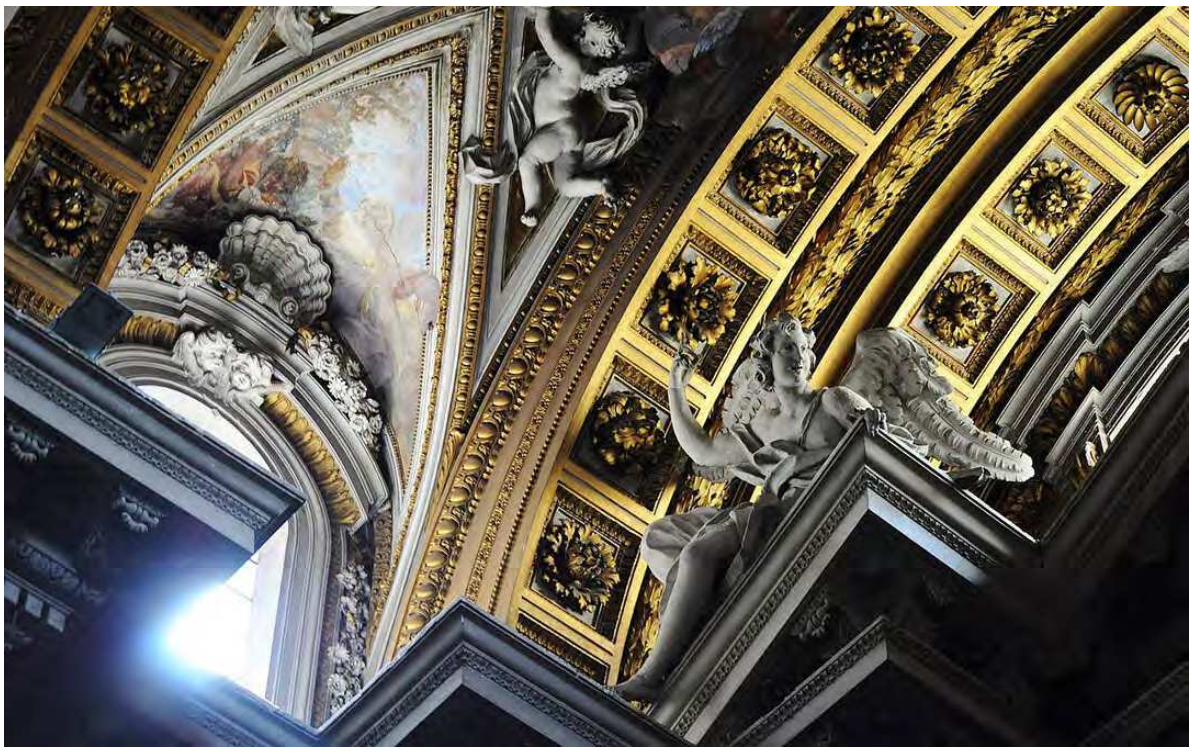
A new copper bull market takes shape

by Brian Kapp, CFA | Jan 30, 2023 | 0 comments



When it comes to commodities, the technical setup is especially informative. Price and volume are the main factors, which react to physical supply and demand conditions in the market. In the October 19, 2021 report, "Barrick Gold is on the efficient frontier," I

summarized the technical setup for copper as follows (emphasis added):

> While the $4 level is extended to the upside compared to the next two lower support levels, it should offer fairly firm support given the bullish fundamentals. Next **lower support near $3.27 should offer strong support if it is retested. It looks to be the floor for the foreseeable future**.

Copper Technicals

At the time of the Barrick (NYSE:GOLD) report, copper was trading at $4.73 and attempting a breakout to new all-time highs. The following 2-year daily chart displays the price action of copper following the October 2021 report. Notice that copper formed a double bottom near $3.27 between July and September 2022.

Copper 2-year daily chart. Created by Brian Kapp using a chart from Barchart.com

While unusual, sometimes technical targets work to the pennies. As a result, copper remains well-defined by its key technical levels. The range bounded by the green lines, between $3.27 and $3.71, represents what should be an exceptionally strong support zone for

copper. I view the upper end of that range as the likely intermediate-term floor.

Following the October 2021 report, copper failed at the $4 support level in June 2022. Copper is now testing resistance at this prior support zone in the low $4 range from underneath (the orange horizontal line on the charts). Zooming out to the 5-year weekly chart below displays the nature of copper's primary resistance level and places it in a longer-term perspective.

Copper 5-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

Copper is likely to face resistance in the $4.30 area which is denoted by the orange line. This was support prior to the breakdown in Q3 2022. That said, the time spent trading sideways in 2022 was minimal, which suggests that the resistance should be marginal in the bigger picture. The following 20-year monthly chart places the support and resistance levels in a long-term context.

Copper 20-year monthly chart. Created by Brian Kapp using a chart from Barchart.com

Technically speaking, using the longer-term perspective on display in the weekly and monthly charts, copper is in a well-defined bull market within a 17-year sideways consolidation. While further testing of the $3.71 support level is likely from a weekly perspective, it is also just as likely that $4 holds as support this time around. Either way, an eventual breakout to new all-time highs appears highly likely over the intermediate term. A new bull market is also well supported by the fundamental backdrop.

Fundamentals

The following summary of the fundamental backdrop for copper is from "Top commodities for the energy transition." It continues to capture the essence of the bull market case for copper.

> Copper is likely to have a secular tailwind into the 2030s. The thesis is quite simple, electrification requires copper. If society is broadly transitioning to electrification and away from hydrocarbons, copper is the "new oil" as they say.

With respect to the above quote and the outlook for copper, China ultimately determines the demand side of the equation as it accounts

for 50% of global consumption. The primary demand-side fear that led to a test of lower support at $3.27 emanates from China's real estate correction, which has been material and is ongoing.

Interestingly, real estate is projected to account for only 5-10% of China's copper demand over the coming decades. A forecast of Chinese copper demand by economic sector is displayed below with real estate shaded in grey. The chart, from a study published by Wiley in the Journal of Industrial Ecology, was featured in "Freeport McMoRan, Doctor Copper makes a house call."

Source: Wiley's Journal of Industrial Ecology

Infrastructure is by far the largest source of forecasted copper demand, followed by transportation and consumer durables. Per capita copper demand is forecasted to roughly triple through 2050. This represents an annual growth rate of only 4% for Chinese copper demand and appears to be a reasonable estimation.

While China is the largest consumer, copper demand is forecasted to grow above trend globally into 2040 as a result of decarbonization efforts. The following Wood Mackenzie chart from a Kitco article is also featured in the Freeport McMoRan (NYSE:FCX) report and displays

the projected copper shortfall under the preferred global decarbonization plans in place. The red line represents base demand, and the upper blue line includes the forecasted demand spike due to decarbonization.

Source: Wood Mackenzie

With supply shortfalls forecasted for mid-decade onward as the energy transition progresses, copper prices should remain well supported at generally higher price levels than has been the case in recent times. When the difficulty of bringing new copper mines online is combined with the forecasted step change in demand, the door is open to potential supply shortfalls as the current decade unfolds.

Recent market forecasts place expected copper prices in the $4 to $5 range over the coming decade, with the high end estimated to be above $6. Importantly, the upper end of the price forecast does not require a shortfall in copper supply. Rather, the $6 area requires a tight supply and demand balance, which introduces the risk of supply shortfalls as mines can be knocked offline by events such as natural disasters and labor strikes. The $4 to $6 price forecasts are well supported fundamentally and technically.

Summary

The fundamentals and technicals are in alignment and support a new bull market for copper. While new all-time highs are highly likely, a pullback to the $3.70 to $4 range is to be expected in the short term. Nonetheless, given the precarious nature of supply and the visible increase in future demand, the asymmetry in copper is to the upside.

I will review and update three copper opportunities that are positively rated in the next report with a focus on tactical portfolio considerations given recent share price action. They include:

- Freeport McMoRan: Reviewed positively in “Freeport McMoRan, Doctor Copper makes a house call” on July 7, 2022, within a week of the $3.27 copper bottom. The stock is now up 64% and trading at $44.82 compared to $27.38 at the time of the report.
- Rio Tinto (NYSE: RIO): Reviewed positively in “The dogs of stoxdox: Top 5 income stocks” on November 17, 2022. The stock is up 22% at $79.44 compared to $65.28 at the time of the report.
- Barrick Gold: Reviewed positively in “Gold is on the efficient frontier” on October 14, 2022. The stock is up 38% and trading at $19.58 compared to $14.16 at the time of the report.

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Schlumberger is an asymmetric opportunity with supercycle potential

by Brian Kapp, CFA | Apr 14, 2022 | 0 comments

I am reaffirming a positive risk/reward rating for Schlumberger (NYSE: SLB) based on the early stages of a new growth cycle, an exceptional multiyear earnings growth trajectory, material upside surprise potential, the company's global leadership position, and its asymmetric potential return profile.

Risk/Reward Rating: Positive

Schlumberger reported its third consecutive quarter of year-over-year revenue growth on January 21, 2022. The Q4 2021 and full-year financial results confirmed that the energy services sector has officially exited a 6-year bear market while signaling that the first new growth cycle since 2009 is now in force. Given the early stage of the nascent energy services growth cycle, Schlumberger continues to represent an intriguing cyclical growth opportunity as the global leader in the space.

The Growth Cycle

The scale and duration of the new upturn remains highly uncertain due to the global focus on decarbonization and the resulting negative sentiment surrounding the traditional oil and gas sector. As a result, there remains heightened investor uncertainty and industry cautiousness compared to prior cyclical upturns. In my last Schlumberger report published on December 21, 2021, I made the following observation:

> Ironically, the generally negative investor sentiment and cautious industry behavior sets the stage for an unusually strong upcycle for the group.

Olivier Le Peuch, Schlumberger's CEO, hints at this possibility in Schlumberger's recent Q4 2021 8-K filed with the SEC (emphasis added):

> Looking ahead into 2022, the **industry macro fundamentals are very favorable**, due to the combination of projected steady demand recovery, an increasingly tight supply market... We believe this will result in a material step up in industry capital spending... These favorable **market conditions are strikingly similar to those experienced during the last industry supercycle, suggesting** that resurgent global demand-led capital spending will result in **an exceptional multiyear growth cycle**.

From my perspective, the last industry supercycle was the period from roughly 2003 through 2014. During this period, with a brief interruption during the Great Financial Crisis in 2008, Schlumberger's share price appreciated 556%, rising from $18 to $118. Interestingly, the majority of this appreciation occurred by mid-2008, with a sideways trading pattern thereafter into the 2014 peak. In other words, nearly all of the gains from the 11-year supercycle were pulled forward into the first 5 years.

Performance: Can it Continue?

Since my last report on December 21, 2021, Schlumberger has produced a total return of roughly 45% compared to -4.3% for the S&P 500 index. Schlumberger's current share price is $42.39 compared to $29.41 at the time of the last report. This is incredible outperformance over such a short period of time and raises the natural question: can it continue?

The statement above from Le Peuch, was made on January 21, 2021. Since this time and the time of my last report, industry conditions have become materially more bullish. Unfortunately, Russia's invasion of Ukraine is a large contributor to the increasingly bullish industry backdrop for oil and gas.

Nonetheless, oil and gas prices were trending higher prior to the invasion and have now entered a powerful, if volatile, bull-market phase. The recent breakout of Brent crude oil above the orange line on the following 5-year weekly chart confirms the phase transition in the traditional energy markets. The orange line served as upside resistance in October 2018 and again in October 2021 before being overtaken in January 2022.

Brent crude oil 5-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

The orange line near $85 now represents key support. At the time of my last report, the green line near $72 represented the primary support level. This level now looks to be a nearer-term floor as things stand, with $85 replacing it as the primary support level.

With increasing geopolitical risks and runaway inflation in many parts of the world, oil and gas markets are beginning to price in the potential for supply disruptions and the increasing possibility that there may be regional imbalances between supply and demand. This is occurring against a macroeconomic backdrop that features a once-in-a-generation attempt at an energy transition.

I say attempt because the thrust of global policy initiatives is generally not well aligned with the most efficient and sustainable long-term pathway to zero-carbon energy production and utilization. For example, from the perspective of utility-scale electrical grid applications, nuclear energy is by far the single most efficient, sustainable, and resilient pathway forward. As a result, nuclear energy provides the greatest leverage if one is trying to electrify the world's

energy usage and replace hydrocarbons. Interestingly, global policy initiatives are not well aligned with this reality.

In fact, many nuclear power plants are in various stages of being decommissioned in the Western world as the installed nuclear fleet nears its end of life and requires substantial capital investment to upgrade and modernize. The aging of the nuclear fleet alone could offset much of the impact from policy initiatives which favor more intermittent energy supplies such as solar and wind. For those interested in more detail regarding burgeoning nuclear technologies, please see my recent BWX Technologies report (NYSE: BWXT).

The nuclear example above combined with policies designed to disincentivize oil and gas production are important in understanding the oil and gas demand backdrop and the likely trajectory of the new upcycle. For example, the policy initiatives being employed may prove to be ineffective or, at minimum, insufficient in supporting sustained global energy demand growth over the coming cycle and beyond.

If this is indeed the case, global demand for oil and gas will continue to set new records for the foreseeable future. In turn, this would place unexpected pressure on the oil and gas producers to increase output. Skyrocketing oil and gas prices are a possible signal that this scenario is already unfolding. In fact, global oil and gas demand is projected to reach pre-pandemic highs in 2022 and ascend to new all-time highs going into 2023. Given the supply tightness in the energy services sector following 6 years of downsizing, these dynamics would confer substantial pricing power to Schlumberger.

The cautious stance of the oil and gas industry toward investment in new capacity is a rational choice given the just completed 6-year bear market and depression-like conditions in 2020 and into 2021. When combined with global policy initiatives which disincentivize new oil and gas investment, supply and demand conditions look to remain exceptionally strong for the industry over the coming years.

In summary, as suggested by Schlumberger's CEO, supply and demand conditions in the oil and gas sector may indeed rival the bullish setup at the beginning of the last industry supercycle. As a result, the short answer to the question of whether the outperformance can continue, is yes.

Consensus Growth Estimates

With positive industry trends firmly in place and a transitioning to a more bullish phase since my last report, one would expect to see consensus growth estimates moving materially higher for Schlumberger. Interestingly, consensus growth estimates remain largely unchanged since the end of 2021. The following table was compiled from consensus earnings and sales estimates provided by Seeking Alpha.

The top section of the table displays consensus earnings estimates and the lower section displays consensus sales estimates. On the left side of the table you will find the current consensus estimates, the middle displays consensus estimates as of my last report date, and the right-hand side displays how much consensus estimates have changed in absolute and percentage terms since my last report on December 21, 2021.

Source: Seeking Alpha. Created by Brian Kapp, stoxdox

I have highlighted in yellow the percentage change in consensus estimates through 2025 since my last report. For all intents and purposes, there has been no change to consensus estimates for sales

and earnings since the end of 2021. Of note, there was actually a reduction to sales estimates for 2024 and 2025. Given the upward-trending industry conditions discussed above, this is quite surprising and remarkably interesting.

This is especially the case in light of the materially higher baseline for energy prices since the last report. Over the same time horizon as the above tables (December 21, 2021 to April 11, 2022), Brent crude oil has risen by 35%, and was higher by 73% at one point.

It should be noted that Brent crude oil is not unique as most energy prices are in similar price trends, if to differing degrees. For example, the spot NYMEX natural gas price is up 77% over this period. The price trends are an exceptionally bullish signal for demand from Schlumberger's customers as these are the commodities that they produce.

Upside Surprise Potential

There are a few possibilities as to why estimates have not changed in response to increasingly bullish industry trends. These are important to consider in checking the investment thesis. The marketplace may view the energy price spike as an aberration tied to transitory geopolitical events. While the Brent oil price spike to $128 was certainly caused by a shock, the Russian invasion of Ukraine, prices were trending solidly higher throughout the period since my last report.

The fundamental uptrend was and is being driven by conservative capital allocation policies at most major oil and gas producers. Keep in mind that they had just survived negative prices and depression-like conditions in 2020.

This leads to another potential reason for estimates not responding to bullish industry trends. The marketplace may not see a meaningful supply response from oil and gas producers no matter how high the price of oil and gas in the short term. Scott Sheffield, the CEO of Pioneer Natural Resources (NYSE: PXD), made comments in this

regard during recent interviews. In February, Sheffield stated in a Bloomberg article:

> Several other producers are having trouble getting frack crews, they're having trouble getting labor and they're having trouble getting sand... I just don't think the industry can grow anyway.

One thing is certain about commodity cycles, at the right price companies will expand production capacity. The quote above from Sheffield was in speaking to the situation facing US oil and gas producers. He also discussed which regions of the world could invest and expand production. As stated in my prior report, this actually bodes well for Schlumberger:

> Schlumberger is at its core a technology company, which is an excellent fit for the current state of the North American marketplace.

While North America may be labor constrained near term, Schlumberger's competitive advantage is in engineering and technology. Maximizing the output and productivity of existing assets, in response to higher prices, is an incredibly low-risk and high-reward investment decision compared to investing in new wells. In addition, over 80% of Schlumberger's sales are outside of North America.

This is important because North America was one of the first markets to recover in 2021. Most other geographies have yet to reach a meaningful growth inflection point, as discussed in my prior report:

> These trends are important because 80% of Schlumberger's markets had not inflected toward growth as of the end of Q2 2021, while only 39% had reached the growth inflection point by the end of Q3. 61% of Schlumberger's markets have yet to join the new growth cycle as of the end of Q3.

This is excellent news for near-term growth at Schlumberger as the vast majority of its markets are still in the process of bouncing off the very deep bottom reached in 2020 and 2021 following a brutal 6-year bear market.

A final reason estimates have not reacted to the bullish trends may be the previously discussed policy incentives. The marketplace may view oil and gas as a mature to declining industry as a result. A related factor is the length of time that has passed since the last new upcycle in oil and gas. In essence, the market may have developed an embedded recency bias toward a negative view of the growth prospects for the industry.

Cyclical Context

To place the above possibilities in context, it is helpful to view current growth estimates with Schlumberger's actual results following the last cycle bottom in 2009, following the Great Financial Crisis. Keep in mind that the 2009 bottom was a rapid downcycle within the middle of the last supercycle. Whereas the 2021 bottom was the culmination of a 6-year bear market for the oil and gas industry that ended in depression-like conditions.

The following table is from my prior Schlumberger report in which I compared consensus estimates at the time (they remain largely unchanged today) to the actual growth rates achieved by Schlumberger coming off the prior industry bottom in 2009.

Created by Brian Kapp, stoxdox

I have highlighted the important differences. Growth in 2022 is estimated to be only two-thirds of the growth achieved in the first full year after the 2009 bottom (2010). The growth estimates for 2023 look to be exceptionally conservative at roughly one-quarter of that achieved in year two of the prior upcycle. While I do not expect 44% growth to be repeated in 2023, there appears to be considerable room to surpass the current consensus growth estimate of 12%.

Additionally, this cycle is beginning with oil and gas producers adhering to disciplined and conservative capital allocation policies that have been ingrained by a long downcycle and policy disincentives. As a result, the current shape of consensus growth estimates looks to be correct with higher growth estimated for 2024 compared to 2012. In other words, this upcycle does indeed look to be more stable and persistent than the prior cycle.

In summary, consensus growth estimates look to be materially too low for 2023 and too low generally through 2025. If this is in fact the case, current consensus earnings estimates are likely to be quite low given Schlumberger's commitment to expand and sustain higher profit margins. The 6-year bear market culminating in depression-like conditions for the industry in 2020 has likely left a durable mark on the entire industry.

Earnings and Upside Potential

Speaking to the commitment to expand and sustain higher profit margins, in the Schlumberger Fourth-Quarter and Full-Year 2021 Results Prepared Remarks, Le Peuch had the following to say (emphasis added):

> Finally, the macro environment is increasingly supportive of a **potential supercycle**. As these favorable market conditions extend both onshore and offshore, **well beyond 2022**, we have **increased confidence** in reaching our midcycle **EBITDA margin ambition of 25% in the second half of 2023**.

The following table was compiled from my prior report and the current consensus earnings estimates provided by Seeking Alpha. To begin construction of Schlumberger's potential return spectrum, I reviewed its historical valuation multiple during the prior upcycle. The average PE multiple during the last upcycle (2009 to 2014) was 24. Each year's high PE is displayed in the upper portion of the table below.

Source: Seeking Alpha. Created by Brian Kapp, stoxdox

For ease of contrast, I have highlighted Schlumberger's consensus growth estimates in blue and the current PE based on those estimates in yellow. A cursory glance points to upside return potential given the discrepancy between the expected growth rates and the associated valuations. For example, if earnings estimates are hit in 2023, Schlumberger would be producing 38% earnings growth while trading at only 16 times earnings with several years of cyclical growth remaining. This is well below the historical PE of 24, and well beneath the current market averages in the 20x range.

In addition to the upside return potential using consensus earnings estimates, Schlumberger also offers an excellent opportunity to materially surpass consensus sales growth estimates through 2025. As a result, it is worthwhile to examine Schlumberger's potential return based on consensus earnings estimates as well as scenarios in which Schlumberger surpasses consensus estimates.

Potential Return Spectrum

To anchor the potential return spectrum, I use Schlumberger's average historical PE multiple during the last upcycle (2009 through 2014). This has the benefit of eliminating extremely high PE ratios that occur near cyclical bottoms. For example, Schlumberger's average PE multiple over the past 5 years is near 35x.

In the following table, I apply a 24x valuation multiple to various earnings estimates through 2025 and calculate the associated return potential ignoring dividends. I use consensus earnings estimates in the upper portion of the table. In the middle and lower portion, I estimate potential upside earnings surprises assuming various operating profit margins (Op margin), stable interest expense, and a 20% tax rate.

Please note that no sales surprises are incorporated into the upside scenarios below, only margin expansion. The scenarios below capture the essence of the upside surprise potential. That said, if the upside surprises occur, they will most likely result from a combination of upside sales surprises in addition to margin expansion.

The middle section assumes Schlumberger achieves an 18% and 20% operating margin on consensus sales estimates for 2022 and 2023. In the lower portion of the table, I assume a 25% operating profit margin on consensus sales estimates for 2023 and 2024. While the last scenario is aggressive, it is not out of the realm of possibilities given the increased EBITDA margin confidence of 25% by 2023 and the potential for upside sales surprises outlined above.

Created by Brian Kapp, stoxdox

I have highlighted in yellow what I view as being a high probability upside return spectrum over the coming 1-3 years. The blue highlighted cells reflect what I view to be realistic, if less probable, higher-end possibilities through 2024. While I have only used margin expansion on consensus sales estimates for the upside scenarios, if they play out, sales growth surprises are likely to play a large role. Given the bullish industry trends, the technical backdrop offers the most relevant context within which to estimate the downside potential.

Technicals

The technical backdrop for Schlumberger is a tale of three time frames: daily, weekly, and monthly. The common feature of each is strong support at $35 and then $30. Beginning with the 2-year daily chart below, it is clear that Schlumberger is in a well-defined primary uptrend. The key support levels are highlighted by the horizontal lines.

Notice the green line near $35 and the blue line near $30. These are extraordinarily strong long-term support levels as we will see.

Schlumberger 2-year daily chart. Created by Brian Kapp using a chart from Barchart.com

Please note that the upper green line near $41 was prior resistance and is now being tested as support. I would consider the zone between $35 and $41 to be exceptionally strong support given the bullish industry backdrop. The $30 level appears to be a worst-case scenario as things stand.

The downside potential to $35 and $30 is 17% and 29%, respectively. I view 17% as the most likely downside potential given the early stage of the new growth cycle. The following 5-year weekly chart places the key levels in greater context and introduces technical resistance levels which are denoted by the orange lines. The resistance levels can be thought of as technical upside price targets.

Schlumberger 5-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

Notice that the area outlined by the green lines should be extraordinarily strong support given that the breach of this level occurred during the COVID crash and the extraordinary spectacle of negative oil prices. The orange resistance levels are at $61, $70, and $82.

The first resistance level coincides nicely with the first fundamental upside return target near $63 displayed in the potential return spectrum table above. This represents 48% upside potential. The return potential to the first target level compares quite favorably to the likely downside potential of 17%.

The upper technical target near $80 is not far removed from the upper end of the high-probability potential return spectrum near $91 per share, which represents upside potential of 114%. This return potential is exceptional compared to the technical downside potential. The following monthly-price chart places the upper price levels in the appropriate context.

Schlumberger monthly chart. Created by Brian Kapp using a chart from Barchart.com

Notice that during the 2008 and 2014 tops, Schlumberger peaked near $120 per share. If the current cycle were to follow the same pattern, the higher-end return potential near $115 per share from the potential return spectrum would be in play (highlighted in blue in the table above). This represents 173% upside return potential and completes the asymmetric risk/reward profile for Schlumberger.

2025 and Beyond

The above analysis and the prior research report did not speak to Schlumberger's growth plans, only its cyclical growth potential. The oil and gas industry has a long and prosperous future in front of it, the energy transition notwithstanding. While the return potential from the oil and gas business is exceptional in its own right, Schlumberger is methodically expanding in the alternative energy space. As stated in my last report: "Schlumberger is at its core a technology company."

Schlumberger is planting the seeds of future growth. While these new business ventures remain immaterial today, they have meaningful potential for Schlumberger looking past 2025. My intent here is to provide a flavor for Schlumberger's growth ambitions. Remember,

these ventures offer pure upside potential to what has been covered here. The following is a list of Schlumberger's most visible venture investments with a link to more details for those interested.

- NeoLith: Novel Lithium mining technology with transformative potential and a pilot project underway.
- EnerVenue: Nickel-hydrogen battery technology with proven potential that is now being deployed.
- Genvia: Electrolyzer technology used to produce hydrogen with zero emissions, pilot projects underway.
- Celsius Energy: Proven building-scale geothermal energy technology that is being deployed.

Summary

Schlumberger is an asymmetric growth opportunity in the early stages of a new upcycle. The cyclical growth opportunity could be quite large given the exceedingly favorable industry conditions, which were described by Schlumberger's CEO as being "strikingly similar to those experienced during the last industry supercycle." All things considered, Schlumberger remains a top choice for growth over the coming years.

Price as of this report: $42.39

Schlumberger Investor Relations Website: Schlumberger Investor Relations Website

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Rio Tinto is going up

by Brian Kapp, CFA | Feb 10, 2023 | 0 comments

Following up on the bullish copper and Freeport reports, "A new copper bull market takes shape" and "The miners are looking up," Rio Tinto (NYSE:RIO) stands out as an asymmetric risk/reward opportunity.

Rio Tinto

In terms of copper, Rio Tinto offers one of the most robust profiles with over 100% production potential visible into 2030. The company is

unique in the mining sector in that it operates world-class assets across three commodities: copper, aluminum, and iron ore. Rio's portfolio is covered in the following reports:

- "Rio Tinto is a perfect portfolio diversifier"
- "Rio Tinto is an asymmetric global growth opportunity"

As the previous reports reviewed Rio in detail, and the fundamentals remain unchanged, I will focus on the tactical considerations here. The following table from "Rio Tinto is a perfect portfolio diversifier" provides a recent breakdown of Rio's business mix by commodity for reference.

Created by Brian Kapp, stoxdox

Iron ore is and will remain the primary driver of Rio's results, with 2021 EBITDA near $28 billion. The company's total EBITDA near $40 billion is quite impressive. Rio's leadership position in iron ore is similar to Newmont Corporation's (NYSE:NEM) leadership in gold. As a result, using Newmont as a valuation comparable quantifies the size of the relative opportunity.

Source: Seeking Alpha. Created by Brian Kapp, stoxdox

As Rio offers peer-leading copper growth potential, an industry leading aluminum portfolio, and arguably the top iron ore assets in the world, a valuation in line with Newmont is a reasonable expectation. Based on this, the upside using 2025 consensus estimates is 160% or $192 per share. That would place Rio at the top of the potential return spectrum that was estimated in “Rio Tinto is a perfect portfolio diversifier.” The potential return spectrum from the report is below.

Created by Brian Kapp, stoxdox

The blue highlighted cells remain valid upside targets for Rio, especially in light of Newmont's valuation. As we will see in the technicals, the $60 downside potential now looks to be a floor.

Technicals

Looking at the 20-year monthly chart below, the $60 support level is highlighted by the green line. This support level dates back nearly 20 years and served as resistance during the decade-long commodity bear market.

Rio Tinto 20-year monthly chart. Created by Brian Kapp using a chart from Barchart.com

The only visible resistance level is highlighted by the orange line. Importantly, Rio has rarely traded above $60 since 2008. In essence, there is nearly zero technical resistance and incredibly strong support to the downside. The strength of the downside technical support is reflected in the deeply discounted valuation. The 5-year weekly chart below zooms in on the strong support and to a potential breakout towards new all-time highs.

Rio Tinto 5-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

Notice the 50-week moving average (the gold line) remains above the 200-week moving average (the grey line). Rio is in a bull market, if muted at the moment.

Supporting the upside trend, the 1-year daily chart below displays the golden cross that occurred in early January. The current correction should find strong support near $70, which is between the 50-day and 200-day moving averages, near $73 and $65 respectively.

Rio Tinto 1-year daily chart. Created by Brian Kapp using a chart from Barchart.com

Summary

Using the 200-day moving average at $65 as the likely low end of the price range, and $190 as the maximum upside potential, the potential return spectrum is -11% to 160% looking into 2025. A dividend of between 5% to 10% per year on the current price appears highly likely if results near the consensus estimates are achieved. The dividend further reinforces the $60 floor, leaving the risk/reward asymmetry skewed decidedly to the upside.

Price as of report: $73

Rio Tinto Investor Relations Website: Rio Tinto Investor Relations

EXHIBIT 294

stoxdox

Sector strategies for navigating 2023

by Brian Kapp, CFA | Feb 20, 2023 | 0 comments

As the outlook for the broad capitalization-weighted indices in the US is clouded by higher interest rates and extended valuations, it is a suitable time to look for opportunities under the market surface. The following section from "New bull market or a bear market bounce?" summarizes the situation facing investors.

New Bull Market or Bear Market Bounce?

The fundamental and technical signs point to the broad US stock market nearing a short-term peak. Technically, the head and shoulders neckline from the topping process looms large. From a fundamental perspective, valuations remain extended in relation to the historical evidence and near-term earnings growth.

In terms of opportunities in the broad stock market, valuation compression remains the primary risk. This is supported by the outlook for higher long-term rates and the current earnings contraction in the Nasdaq 100.

As a result, the relative opportunities in the stock market reside in those segments and sectors which are trading at discounted valuations. These opportunities are prevalent in the small to mid-cap value segments of the US market and stretch into the large-cap segment.

Sector Opportunities

As the primary risk today is multiple compression, and valuations are more elevated in large-cap stocks, viewing sectors in greater granularity helps illuminate the opportunity set. The broadest manner in which to view sector opportunities is using the 11 GICS sectors, as was done in my report "Technology outlook for 2023." The following image is from the report:

Sector Performance YTD	% YTD	PE fwd	Yield	Wgt.
Energy Select Sector SPDR® - XLE	52%	8.01	3.26%	4.96%
Utilities Select Sector SPDR® - XLU	-2%	19.83	2.82%	3.14%
Consumer Staples Select Sector SPDR® - XLP	-3%	21.45	2.40%	7.16%
Health Care Select Sector SPDR® - XLV	-4%	16.72	1.44%	15.73%
Industrial Select Sector SPDR® - XLI	-7%	18.88	1.51%	8.57%
Materials Select Sector SPDR® - XLB	-13%	14.64	1.90%	2.71%
Financial Select Sector SPDR® - XLF	-14%	13.42	1.93%	11.39%
Technology Select Sector SPDR® - XLK	-27%	21.40	0.96%	26.23%
Real Estate Select Sector SPDR® - XLRE	-28%	28.78	3.15%	2.71%
Consumer Discretionary Select Sector SPDR® - XLY	-34%	18.98	0.87%	10.11%
Communication Services Select Sector SPDR® - XLC	-38%	14.45	1.17%	7.29%
SPDR® S&P 500® ETF Trust - SPY	-19%	16.93	1.53%	100.00%

Source: State Street Corporation. Created by Brian Kapp, stoxdox

The drawback of the above approach, which uses the S&P 500 index as the stock market opportunity set, is that the largest companies dominate the indices. Additionally, many sectors are quite diverse, thereby limiting exposure to the total opportunity set.

Expanding the View

The S&P 1500 Total Market Index (NYSE:SPTM) triples the opportunity set to 1,500 companies. By viewing the opportunity set by industry rather than sector, the number of opportunities doubles to 21 from 11. The industries and representative ETFs are displayed below. I have highlighted in yellow key summary metrics for the industry groups. The ETF data was compiled from State Street and the Index data from S&P Global.

S&P Select Industry Indices	Ticker	PE FY 1	3-5 yr %	# of Co.s	Mkt Cap ($B)*
S&P Transportation Select Industry	XTN	10.83	15.16	49	$17.05
S&P Metals & Mining Select Industry	XME	9.98	(4.05)	34	$11.19
S&P Oil & Gas Equip & Services Select	XES	13.75	57.59	33	$8.96
S&P Oil & Gas Explrtn & Prodctn Select	XOP	5.64	20.96	59	$33.79
S&P Pharmaceuticals Select Industry	XPH	10.93	(78.02)	41	$59.82
S&P Telecom Select Industry	XTL	12.24	11.65	41	$30.00
S&P Health Care Services Select Industry	XHS	16.67	10.70	66	$18.98
S&P BioTech Select Industry	XBI	12.88	4.92	156	$10.16
S&P Aero & Defense Select Industry	XAR	25.30	12.15	33	$27.78
S&P Insurance Select Industry	KIE	11.32	16.97	49	$20.87
S&P Banks Select Industry	KBE	9.43	7.61	98	$24.60
S&P Retail Select Industry Index	XRT	11.80	6.92	94	$27.93
S&P Regional Banks Select Industry	KRE	10.07	8.65	144	$9.78
S&P Homebuilders Select Industry	XHB	11.70	7.11	35	$29.82
S&P Capital Markets Select Industry	KCE	14.80	(0.14)	68	$24.32
S&P Semiconductor Select Industry	XSD	22.00	12.46	39	$53.00
S&P Software & Services Select Industry	XSW	25.20	19.42	197	$28.22
S&P Health Care Equip Select Industry	XHE	27.14	18.83	77	$16.03
S&P Internet Select Industry Index	XWEB	27.93	38.40	46	$71.06
S&P Tech Hardware Select Industry	Index	18.66	-	42	$62.93
S&P Food & Beverage Select Industry	Index	20.42	-	69	$28.43
Average	-	15.65	9.86	70	$29.27
Median	-	12.88	11.65	49	$27.78

Source: State Street Corporation and S&P Global. Created by Brian Kapp, stoxdox

I have highlighted in grey the cells that are heavily influenced by outliers and thus should be taken with a grain of salt. State Street

describes the weighting methodology within the industry ETFs and the benefits of this approach as follows (emphasis added):

> ...a modified equal weighted index which provides the potential for **unconcentrated industry exposure** across **large, mid and small cap stocks**... Allows investors to take **strategic or tactical positions at a more targeted level** than traditional sector based investing.

Industry Opportunities

The Nasdaq 100 and S&P 500 are trading at 25x and 19x forward earnings, respectively. With a 13x median PE multiple on the above industry groups, it is evident that there are opportunities under the market-cap-weighted surface. 12 of the industries offer a decidedly positive risk/reward setup, albeit to varying degrees. They are displayed below. I have highlighted in yellow the key summary metrics for the group.

S&P Select Industry Indices	Ticker	PE FY 1	3-5 yr %	# of Co.s	Mkt Cap ($B)*
S&P Transportation Select Industry	XTN	10.83	15.16	49	$17.05
S&P Metals & Mining Select Industry	XME	9.98	(4.05)	34	$11.19
S&P Oil & Gas Equip & Services Select	XES	13.75	57.59	33	$8.96
S&P Oil & Gas Explrtn & Prodctn Select	XOP	5.64	20.96	59	$33.79
S&P Pharmaceuticals Select Industry	XPH	10.93	(78.02)	41	$59.82
S&P Telecom Select Industry	XTL	12.24	11.65	41	$30.00
S&P Health Care Services Select Industry	XHS	16.67	10.70	66	$18.98
S&P BioTech Select Industry	XBI	12.88	4.92	156	$10.16
S&P Aero & Defense Select Industry	XAR	25.30	12.15	33	$27.78
S&P Insurance Select Industry	KIE	11.32	16.97	49	$20.87
S&P Banks Select Industry	KBE	9.43	7.61	98	$24.60
S&P Retail Select Industry Index	XRT	11.80	6.92	94	$27.93
Average	-	12.56	6.88	63	$24.26
Median	-	11.56	11.18	49	$22.74

Source: State Street Corporation. Created by Brian Kapp, stoxdox

Using the median, a portfolio constructed of the above industries would offer an 8.65% earnings yield at an 11.56 PE. This is quite favorable compared to the market yields reviewed in “New bull market or a bear market bounce?” The market-cap-weighted indices have an

earnings yield of 4% to 5.5%, while the bond market offers yields in the 5% to 8% range.

While the bond market is more competitive, the income stream does not grow. Using the median, the above group offers an expected annual earnings growth rate of 11.18%. If consensus estimates are in the ballpark, the above group offers a decidedly asymmetric risk/reward opportunity. In other words, there is much room for error and a margin of safety is embedded in the current prices.

The industries which were excluded from the positive risk/reward list above are displayed below. Notice the yellow-highlighted summary data. As the primary risk today is valuation compression and the median PE of the group is 20.42, the primary short-term market risk is substantially mitigated. This is accomplished with a marginal reduction in the expected growth rate over three to five years.

S&P Select Industry Indices	Ticker	PE FY 1	3-5 yr %	# of Co.s	Mkt Cap ($B)*
S&P Regional Banks Select Industry	KRE	10.07	8.65	144	$9.78
S&P Homebuilders Select Industry	XHB	11.70	7.11	35	$29.82
S&P Capital Markets Select Industry	KCE	14.80	(0.14)	68	$24.32
S&P Semiconductor Select Industry	XSD	22.00	12.46	39	$53.00
S&P Software & Services Select Industry	XSW	25.20	19.42	197	$28.22
S&P Health Care Equip Select Industry	XHE	27.14	18.83	77	$16.03
S&P Internet Select Industry Index	XWEB	27.93	38.40	46	$71.06
S&P Tech Hardware Select Industry	Index	18.66	-	42	$62.93
S&P Food & Beverage Select Industry	Index	20.42	-	69	$28.43
Average	-	19.77	14.96	80	$35.95
Median	-	20.42	12.46	68	$28.43

Source: State Street Corporation and S&P Global. Created by Brian Kapp, stoxdox

The three lower-multiple industries at the top of the list were removed due to short-term cycle dynamics. Real estate markets remain in limbo due to higher rates, which should pressure the builders. Stress in commercial real estate markets is likely to reverberate throughout the regional banks. Both create headwinds for capital markets, while opening the door to fat-tail events.

Top Industries for 2023

Winnowing through the 12 positively-rated risk/reward opportunities results in the top eight for 2023, which are displayed below. The valuation of the top eight increases the median PE by 4% in comparison to all 12. This is a marginal increase in valuation compression risk. On the other hand, the expected growth rate increases by a material amount and represents a 20% higher growth rate.

S&P Select Industry Indices	Ticker	PE FY 1	3-5 yr %	# of Co.s	Mkt Cap ($B)*
S&P Transportation Select Industry	XTN	10.83	15.16	49	$17.05
S&P Oil & Gas Equip & Services Select	XES	13.75	57.59	33	$8.96
S&P Oil & Gas Explrtn & Prodctn Select	XOP	5.64	20.96	59	$33.79
S&P Telecom Select Industry	XTL	12.24	11.65	41	$30.00
S&P Health Care Services Select Industry	XHS	16.67	10.70	66	$18.98
S&P BioTech Select Industry	XBI	12.88	4.92	156	$10.16
S&P Insurance Select Industry	KIE	11.32	16.97	49	$20.87
S&P Retail Select Industry Index	XRT	11.80	6.92	94	$27.93
Average	-	11.89	18.11	68	$20.97
Median	-	12.02	13.41	54	$19.93

Source: State Street Corporation. Created by Brian Kapp, stoxdox

Biotech Industry

The positive risk/reward rating for the S&P BioTech Select Industry (NYSE:XBI) is both strategic and tactical in nature. Strategically, the ongoing valuation compression across markets is centered on sectors that growth investors traditionally favor. Technology-related industries have been the top choice traditionally and are especially vulnerable in today's market environment.

The biotech industry is a natural opportunity set for growth investors. In terms of timeliness, the industry has little exposure to macroeconomic conditions. Additionally, today's more acute macroeconomic risk factors do not directly affect the biotech industry. As a result, the industry is likely to become an increasingly attractive option relative to traditional growth-investor favorites.

The near-term relative opportunity is both a tactical and strategic consideration. Thinking longer term, and with the hindsight of a global pandemic, it is hard to imagine an industry that offers more upside

asymmetry than biotech. Strategically speaking, given the asymmetric upside potential in the industry, it is an ideal investment option for diversified growth portfolios.

Technicals

Turning to tactical considerations, the technical backdrop for biotech points to a positive risk/reward asymmetry. The following 1-year daily chart depicts the year-long bottoming process and the more recent consolidation phase.

S&P BioTech SPDR (XBI) 1-year daily chart. Created by Brian Kapp using a chart from Barchart.com

Notice that the 50-day moving average (the gold line) recently crossed above the 200-day moving average (the grey line). This is a bullish price signal following a long bottoming and consolidation process. The green line represents a primary support level, from which the shares recently bounced. Stepping back, the 2-year daily chart below provides a look at the key resistance levels. They are represented by the orange lines.

S&P BioTech SPDR (XBI) 2-year daily chart. Created by Brian Kapp using a chart from Barchart.com

The upside potential to the two resistance levels is 27% to 45%, respectively. Technically speaking, these targets are easily achievable over the short term. The following 5-year weekly chart provides a larger perspective within which to view the upside targets.

S&P BioTech SPDR (XBI) 5-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

The monthly chart below adds important context to the key support

level highlighted by the green line.

S&P BioTech SPDR (XBI) monthly chart. Created by Brian Kapp using a chart from Barchart.com

The primary support level dates back to the 2015 top and the long sideways consolidation that occurred between 2017 and 2020. Technically speaking, the biotech industry is sitting on top of what should be an incredibly strong support level.

Summary

The biotech industry represents a tactical overweight opportunity while operating within secular growth undercurrents. Growth investors are likely to gravitate toward the sector as it is structurally skewed toward extreme upside asymmetry, as was evidenced by the pandemic. As the technical backdrop mirrors the fundamental asymmetry, the risk/reward is decidedly skewed to the upside.

I will cover the remaining top seven sector opportunities for 2023 in subsequent reports.

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Top 5 industries for earnings growth

by Brian Kapp, CFA | Feb 23, 2023 | 0 comments

This piece is an extension of the "Sector strategies for navigating 2023" report, which concluded with the top eight sectors for the remainder of 2023 and a review of the biotech opportunity in particular. Here, I will review five of the eight industries with the highest expected earnings growth rates over the next three to five years. The following table, compiled from State Street, displays these industries and their summary data.

S&P Industry Indices: Growth Top 5 Growth	Ticker	PE FY 1	3-5 yr %	# of Co.s	Mkt Cap ($B)*
S&P Oil & Gas Equip & Srvcs Select	XES	13.75	57.59	33	$8.96
S&P Oil & Gas Explrtn & Prodctn Select	XOP	5.64	20.96	59	$33.79
S&P Insurance Select Industry	KIE	11.32	16.97	49	$20.87
S&P Transportation Select Industry	XTN	10.83	15.16	49	$17.05
S&P Telecom Select Industry	XTL	12.24	11.65	41	$30.00
Average	-	10.76	24.47	231	$22.13
Median	-	11.32	16.97	231	$20.87

Source: State Street Corporation. Created by Brian Kapp, stoxdox

The PE FY 1 column is the PE based on forward earnings estimates, the 3-5 yr % column is the expected annual earnings growth rate, and the market cap column is the weighted average for each industry in billions of US dollars.

Top 5 Industries for Earnings Growth

I have covered many individual companies in the above industries. As a result, I can attest to the relative attractiveness of the groups. The constituents in each index fund offer broad industry exposure via the number of companies (231) and the modified equal-weighted approach (46 companies per industry on average).

These factors, especially the weighting methodology, outweigh the relatively small negative effects expected from the less than desirable companies in each index. One could complement the industry exposure above with a more targeted portfolio of individual stocks and ETFs.

A great example of a missed opportunity in the top five industry list is the metals and mining industry.It did not make the top eight list due to its exposure to near-term downside cyclicality. The degree of which is difficult to quantify as the industry was on the receiving end of material price inflation.

On the other hand, there are many individual metals and mining opportunities for which the outlook is clearer and quite favorable. The following reports cover opportunities that would complement the top five list with exposure to the metals and mining industry:

- "Rio Tinto is going up"
- "The miners are looking up"
- "Gold is on the efficient frontier"

Opportunities in the energy sector that would complement the two oil and gas industries in the top five include:

- "A top sector choice for the coming cycle"
- "Schlumberger is an asymmetric opportunity with supercycle potential"

The two energy industries in the top five list lack international exposure, which offers greater growth potential than the US. Adding OIH adds the international diversification quite nicely while adding a material overweight position in Schlumberger.

Oil and Gas

I covered the bullish intermediate-term outlook for the oil and gas industries in several recent reports. As the fundamentals and technicals are in alignment in supporting a continuation of the energy bull market, tactical considerations are front and center. The following reports cover the bullish backdrop:

- "Relative opportunities in energy for 2023"
- "Is the sun setting on energy stocks?"
- "A top sector choice for the coming cycle"
- "CNX Resources: The Saudi Arabia of natural gas"

Energy Equipment and Services

Given the uptrend, the technical backdrop offers a sufficient overview for tactical considerations. I will start with the energy services and equipment industry as it is the top sector choice for the current cycle. The following 1-year daily chart of the SPDR® S&P® Oil & Gas Equipment & Services ETF (NYSEARCA: XES) captures the recent

breakout attempt and current retest of what was once a key resistance level. It is now support and is represented by the green line.

SPDR® S&P® Oil & Gas Equipment & Services ETF XES 1-year daily chart. Created by Brian Kapp using a chart from Barchart.com

Notice that the 50-day moving average (the gold line) crossed above the 200-day moving average (the grey line) on November 15, 2022. This is a bullish signal in the context of the year-long consolidation process and breakout attempt. The following 5-year weekly chart captures the uptrend within which the recent consolidation occurred.

SPDR® S&P® Oil & Gas Equipment & Services ETF XES 5-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

The sideways consolidation began in March 2021 and lasted nearly two years. Notice that the 50-week moving average crossed above the 200-week moving average on October 10, 2022. Given the long bottoming process, the weekly golden cross is signaling a long-term trend reversal.

In summary, the energy equipment and services industry is in a bull market and on the doorstep of breaking out from a major 5-year resistance level (the green line). It is an ideal technical setup, although there is potential for a short-term price correction back to the 50-week moving average near $72.

Looking over the intermediate term in the next chart, the two orange lines represent the primary resistance levels. From a fundamental perspective, the two upside targets are well within the realm of possibilities. The following monthly chart places the key resistance levels in context.

SPDR® S&P® Oil & Gas Equipment & Services ETF XES max monthly chart. Created by Brian Kapp using a chart from Barchart.com

The upside potential to the two technical targets is 80% and 213%, respectively. In the nearer term, the first target is achievable and is

well supported by the fundamentals. The second target is achievable over the intermediate term. Each of the technical targets date back to the 2007 to 2009 period, pointing to marginal upside resistance once a successful breakout above the green line is confirmed.

The energy equipment and services industry remains a top choice for the current cycle.

Oil and Gas Exploration and Production

While the oil and gas producers offer less upside potential than the energy equipment and services industry, the deeply discounted valuations in the group offer an added margin of safety. The SPDR® S&P® Oil & Gas Exploration & Production ETF (NYSEARCA: XOP) trades at 5.64x forward earnings estimates compared to the XES at 13.75x estimates. The following 2-year daily chart sets the stage.

SPDR® S&P® Oil & Gas Exploration & Production ETF XOP 2-year daily chart. Created by Brian Kapp using a chart from Barchart.com

The XOP is in a well-defined uptrend, which includes the recent year-long sideways consolidation. Notice that the 50-day moving average (the gold line) crossed beneath the 200-day moving average (the grey line) in early February 2023.

Given the established uptrend, discounted valuations, and positive industry conditions, the death cross is likely a reflection of the duration of the consolidation rather than a signal of an impending trend reversal. The following 5-year weekly chart places the recent consolidation in context of the current bull market.

SPDR® S&P® Oil & Gas Exploration & Production ETF XOP 5-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

Notice that the 50-week moving average crossed above the 200-week moving average in March 2022. This is a bullish long-term trend change signal in the context of a long bear market in energy and the aforementioned positive fundamentals. The weekly golden cross in March 2022 also marked the beginning of the year-long consolidation process. The following monthly chart provides further context.

SPDR® S&P® Oil & Gas Exploration & Production ETF XOP max monthly chart. Created by Brian Kapp using a chart from Barchart.com

The green line represents the primary support level near $110, which represents 15% downside potential. The key resistance levels are identified by the orange lines and represent upside potential of 24% and 55%, respectively. Given the lack of trading above the first resistance level since 2015, technical resistance is likely to be mild until the second target near $200.

Strong technical underpinnings combine with favorable fundamentals and discounted valuations to create an asymmetric risk/reward opportunity in the oil and gas exploration and production industry.

Insurance

The bullish case for the insurance industry is two-fold. The extreme asset price inflation in recent years combined with well-above average inflationary trends has created favorable industry conditions. Insurance is a direct beneficiary of inflation on the revenue side, while being more insulated than most from inflationary cost pressures. Secondly, the industry is less exposed to interest rate and credit risk. The following table summarizes the segmentation of the insurance industry SPDR® S&P® Insurance ETF (NYSEARCA: KIE) by line of business.

Sector	Weight
Property & Casualty Insurance	46.37%
Life & Health Insurance	26.93%
Insurance Brokers	12.50%
Reinsurance	7.86%
Multi-line Insurance	6.35%

Source: State Street Corporation. Created by Brian Kapp, stoxdox

Looking over the intermediate to longer term, the insurance industry is in a secular uptrend as can be seen in the following monthly chart.

SPDR® S&P® Insurance ETF KIE max monthly chart. Created by Brian Kapp using a chart from Barchart.com

One would be hard pressed to find an industry in a more stable uptrend than insurance. Keep in mind that the 2008 decline was an unusual panic period for financial companies and was quickly reversed by the insurance industry, unlike the banking sector. Similar dynamics are at play today.

Given the stage of the current cycle, and the exposure of banks and capital market firms to credit and interest rate risks, insurance is relatively attractive compared to the broader financial sector. The 5-

year weekly chart below displays the more subdued uptrend in recent times.

SPDR® S&P® Insurance ETF KIE 5-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

The green lines represent key support levels. As the price is at an all-time high, there is no technical resistance visible. The downside to the two support levels is -5% to -18%, respectively. Like the energy industries, insurance has been in a one-to-two-year sideways consolidation, The following 2-year daily chart zooms in on the consolidation and recent breakout to new all-time highs.

SPDR® S&P® Insurance ETF KIE 2-year daily chart. Created by Brian Kapp using a chart from Barchart.com

The insurance industry is sitting on what should be strong support, which has formed over the past two years. While a retest of the upper support zone is to be expected, the discounted valuation of 11x earnings estimates combined with the expected 17% earnings growth rate over the intermediate term points to a continuation of the long-term bull market.

Transportation

Similar to the insurance industry, transportation is in a well-established uptrend. The long-term uptrend is complemented in the short term by the transports being in a cyclical bottoming process. I covered the cyclical downturn and fundamentals in the following reports:

- "Shipping and recession: To be or not to be?"
- "FedEx and the recession"

The following monthly chart captures the long-term uptrend of the SPDR® S&P® Transportation ETF (NYSEARCA: XTN). This is followed by the 1-year daily chart which captures the recent bottoming process. Note that the green lines represent key support levels, and the orange line depicts the only visible resistance zone. In all of the charts, the gold line is the 50-period moving average and the grey line is the 200-period moving average.

SPDR® S&P® Transportation ETF XTN max monthly chart. Created by Brian Kapp using a chart from Barchart.com

Notice that the shares recently bounced off lower support, which dates back to 2018 and coincides with the 50-month moving average. The 1-year daily chart below captures the recent bottoming process.

SPDR® S&P® Transportation ETF XTN 1-year daily chart. Created by Brian Kapp using a chart from Barchart.com

Notice that the 50-day moving average crossed above the 200-day moving average in February 2023. This is a bullish signal given the duration of the bottoming process combined with the stage of the

economic cycle, discounted valuations, and above-average earnings growth over the intermediate term.

Telecom

The telecom industry rounds out the top five industries. Several bullish factors are at play. First, telecom networks globally are being upgraded to expand capacity, which was touched on in the report, "Comcast is riding the information wave." Second, the high degree of macroeconomic uncertainty renders the stability of the industry relatively attractive. Finally, the discounted valuations and generally robust earnings growth outlook, at 12x expected earnings and a 12% growth rate, open the door to multiple expansion.

The following monthly chart of the SPDR® S&P® Telecom ETF (NYSEARCA: XTL) captures the long-term uptrend. The subsequent 5-year weekly chart displays the 5-year consolidation and strong nearby support. Note that the green line represents the primary support level and the orange line denotes the only visible resistance.

SPDR® S&P® Telecom ETF XTL max monthly chart. Created by Brian Kapp using a chart from Barchart.com

SPDR® S&P® Telecom ETF XTL 5-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

Notice on the above chart that the 50-week moving average remains above the 200-week moving average, signaling that the long-term uptrend remains intact. As the telecom industry is sitting just above primary support and the 200-week moving average, it is in an ideal accumulation zone within in a long-term uptrend.

Summary

With an average PE of 11x forward earnings estimates, the top five industries for earnings growth minimize the primary risk in today's market: multiple compression. On the upside, the average earnings growth estimate of 24% over the coming three to five years opens the door to significant multiple expansion potential. The top five industries for earnings growth are decidedly asymmetric risk/reward opportunities.

I will cover the final two of the top eight industries, healthcare services and retail, in a subsequent report.

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The retail industry offers timely diversification

by Brian Kapp, CFA | Mar 1, 2023 | 0 comments

Retail is one of the final two among the top eight industries covered in the report, "Sector strategies for navigating 2023." Before diving in, the following is a summary of current market conditions from the prior sector report:

> ...valuation compression remains the primary risk... As a result, the relative opportunities in the stock market reside in those segments and sectors which are trading at discounted valuations. These opportunities are prevalent in the small to mid-cap value segments of the US market and stretch into the large-cap segment.

Retail

As discussed in "Sector strategies for navigating 2023," the drawback to using the 11 primary sectors of the S&P 500 as the opportunity set is that they are dominated by a few large companies. As a result, they can materially reduce diversification in market-cap-weighted portfolios.

For example, the consumer discretionary sector in the S&P 500, as defined by the Consumer Discretionary Select Sector SPDR® Fund (NYSEARCA:XLY), includes the retail industry. The following table displays the top five companies and their weightings.

Consumer Discretionary - XLY	Ticker	% Weight	PE FY 1	Industry
Amazon.com Inc.	AMZN	23	65	Internet
Tesla Inc.	TSLA	15	52	Automobiles
Home Depot Inc.	HD	9	19	Specialty Retail
NIKE Inc. Class B	NKE	4	38	Apparel
McDonald's Corporation	MCD	4	25	Restaurants
Total/Average	-	56	40	-

Source: State Street Corporation. Created by Brian Kapp, stoxdox

I have highlighted in blue the percentage weight of the top five companies in the consumer discretionary sector. At 56% of the index, it is fair to say that it is a concentrated portfolio within the sector and its various industries. The average PE multiple of 40x forward earnings estimates (the yellow cell) highlights the exposure of this group to today's primary risk, multiple compression.

Expanding the view using the SPDR® Portfolio S&P 1500® Composite Stock Market ETF (NYSEARCA:SPTM) triples the total opportunity set.

Viewing by industry rather than sector doubles the number of opportunity vectors.

The retail industry within the S&P 1500 Total Market Index is represented by the SPDR® S&P® Retail ETF (NYSEARCA:XRT). Retail is the most directly comparable industry to the consumer discretionary sector in the S&P 500, as represented by the XLY. The following table displays the weightings of the top five companies in the XLY within the XRT.

Top 5 XLY - % of XRT	Ticker	Weight
Amazon.com Inc.	AMZN	1.16
Tesla Inc.	TSLA	0
Home Depot Inc.	HD	0
NIKE Inc. Class B	NKE	0
McDonald's Corporation	MCD	0

Source: State Street Corporation. Created by Brian Kapp, stoxdox

What was a 56% weighting of the top five companies in the XLY becomes a 1.16% weighting in the XRT. Concentration risk is eliminated when using the XRT as opposed to the XLY, thereby greatly expanding diversification. The following table compares the XLY and XRT across key variables. For ease of comparison, I have highlighted in blue the PE ratio on forward earnings estimates and in yellow the weighted average market cap for each fund.

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I do hereby certify that on date indicated below, I filed via electronic means (ESTTA) the foregoing document with the:

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This the 13th day of June, 2023.

/ Katarina K. Wong /
Katarina K. Wong

Attorney for Applicant

Summary Data - XLY	XLY
Est. 3-5 Year EPS Growth	18.03%
Number of Holdings	56
Price/Book Ratio	5.91
Price/Earnings Ratio FY1	25
Weighted Average Market Cap	$385B
30 Day SEC Yield	0.85%
Summary Data - XRT	**XRT**
Est. 3-5 Year EPS Growth	6.92%
Number of Holdings	94
Price/Book Ratio	2.55
Price/Earnings Ratio FY1	11.8
Weighted Average Market Cap	$28B
30 Day SEC Yield	1.74%

Source: State Street Corporation. Created by Brian Kapp, stoxdox

The XRT offers a material reduction in multiple compression risk with a PE of 12x compared to 25x for the XLY. This reduction in risk is accomplished with material exposure to the small and mid-cap value universe, as evidenced by the weighted average market cap of $28 billion compared to $385 billion for the XLY.

To provide greater color for the retail industry, the following table displays the sub-industry allocation within the XRT and includes a representative company for each. Given the modified equal weighting in the XRT, the company weightings are representative of the weightings of the other 93 firms in the portfolio.

Industries - XRT	Weight	Sample Company	Ticker	Weight
Automotive Retail	20.93	Advance Auto Parts	AAP	1.08
Apparel Retail	20.19	Urban Outfitters	URBN	1.07
Specialty Stores	17.76	Dick's Sporting Goods	DKS	1.14
Internet & Direct Retail	14.83	Amazon	AMZN	1.16
OTHER	6.77	Dollar General	DG	0.99
Food Retail	6.18	Kroger	KR	0.99
Department Stores	4.91	Macy's	M	1.06
Hypermarkets & Super Centers	3.87	Walmart	WMT	1.04
Computer & Electronics Retail	3.38	Best Buy	BBY	1.13
Drug Retail	0.94	Walgreens Boots	WBA	0.94
Diversified Support Services	0.19	Liquidity Services	LQDT	0.19
Total	100	-	-	10.78

Source: State Street Corporation. Created by Brian Kapp, stoxdox

I have highlighted in blue the total portfolio weight of the sample companies. Eleven companies comprise 11% of the XRT portfolio. In comparison, five companies make up 56% of the XLY portfolio.

The retail industry offers broad consumer diversification at a discounted price while adding material diversification compared to the market-cap-weighted consumer discretionary sector. Company details for each sub-industry and their weightings are covered next.

Automotive

Automotive is the largest sub-industry in the retail industry at 21% of the XRT portfolio (highlighted in yellow below). This is similar to the 24% automotive weighting in the XLY. The key difference lies in the composition of the industry in each fund. Tesla accounts for 64% of the automotive weighting in the XLY and 15% of the total portfolio.

The largest holding in the XRT automotive industry accounts for only 10% of the sub-industry and 2% of the total portfolio, as can be seen below. Note that exposure to less than desirable holdings, such as Carvana, are systemically minimized via quarterly rebalancing.

Automotive Retail - XRT	Ticker	Weight
Carvana Co. Class A	CVNA	2.27
Asbury Automotive Group Inc.	ABG	1.35
Group 1 Automotive Inc.	GPI	1.28
AutoNation Inc.	AN	1.27
Lithia Motors Inc.	LAD	1.26
Penske Automotive Group Inc.	PAG	1.24
EVgo Inc. Class A	EVGO	1.22
Sonic Automotive Inc. Class A	SAH	1.20
Monro Inc	MNRO	1.19
CarMax Inc.	KMX	1.19
Camping World Holdings Inc. Class A	CWH	1.13
AutoZone Inc.	AZO	1.10
O'Reilly Automotive Inc.	ORLY	1.09
TravelCenters of America Inc.	TA	1.09
Advance Auto Parts Inc.	AAP	1.08
Murphy USA Inc.	MUSA	0.99
America's Car-Mart Inc.	CRMT	0.53
ARKO Corp	ARKO	0.24
OneWater Marine Inc Class A	ONEW	0.20
Automotive: % of XRT	-	**20.93**

Source: State Street Corporation. Created by Brian Kapp, stoxdox

As can be seen above, each automotive company in the XRT accounts for roughly 5% of the sub-industry weighting and 1% of the total portfolio. The weighting and rebalancing remove the concentration and undesirable stock risks that are prevalent today in market-cap-weighted portfolios.

Apparel

The apparel sub-industry is the second largest weighting at 20% of the XRT, which compares to apparel's 5% weighting in the XLY. This is a material divergence in sub-industry exposure. Furthermore, Nike accounts for 50% of the apparel industry exposure in the XLY. The top three apparel companies account for 92% of the apparel exposure in the XLY.

In contrast, each of the 19 companies in the XRT apparel sub-industry account for roughly 5% of the apparel exposure and 1% of the total portfolio, as can be seen below.

Apparel Retail - XRT	Ticker	Weight
Children's Place Inc.	PLCE	1.39
Boot Barn Holdings Inc.	BOOT	1.37
Abercrombie & Fitch Co. Class A	ANF	1.34
Caleres Inc.	CAL	1.24
Foot Locker Inc.	FL	1.23
Burlington Stores Inc.	BURL	1.22
Guess? Inc.	GES	1.11
TJX Companies Inc	TJX	1.07
Urban Outfitters Inc.	URBN	1.07
Designer Brands Inc. Class A	DBI	1.06
Ross Stores Inc.	ROST	1.05
Gap Inc.	GPS	1.04
American Eagle Outfitters Inc.	AEO	1.01
Buckle Inc.	BKE	1.00
Victoria's Secret & Company	VSCO	0.97
Chico's FAS Inc.	CHS	0.96
Shoe Carnival Inc.	SCVL	0.76
Zumiez Inc.	ZUMZ	0.71
Genesco Inc.	GCO	0.60
Apparel: % of XRT	**-**	**20.19**

Source: State Street Corporation. Created by Brian Kapp, stoxdox

While Nike is a superior company, this fact is priced into Nike's shares which are trading at 38x forward earnings estimates. Given today's market environment, the XRT apparel portfolio offers an attractive alternative to the market-cap-weighted indices. Diversification increases by orders of magnitude in the XRT and is complemented by deeply discounted valuations.

Specialty Stores

The differences are pronounced when turning to the third largest sub-industry in the XRT, specialty stores. Home Depot accounts for 60% of

the specialty store weighting in the XLY, while home improvement stores account for 91% of the total specialty exposure.

Home improvement stores account for an immaterial amount of the XRT specialty store exposure, as can be seen in the following table.

Specialty Stores - XRT	Ticker	Weight
Sally Beauty Holdings Inc.	SBH	1.59
Five Below Inc.	FIVE	1.23
Leslie's Inc.	LESL	1.20
Signet Jewelers Limited	SIG	1.19
Ulta Beauty Inc.	ULTA	1.18
Academy Sports and Outdoors	ASO	1.17
ODP Corporation	ODP	1.16
Dick's Sporting Goods Inc.	DKS	1.14
Tractor Supply Company	TSCO	1.14
National Vision Holdings Inc.	EYE	1.12
Petco Health & Wellness	WOOF	1.09
Hibbett Inc	HIBB	1.09
Bath & Body Works Inc.	BBWI	1.06
MarineMax Inc.	HZO	0.90
Warby Parker Inc. Class A	WRBY	0.86
Sportsman's Warehouse Holdings	SPWH	0.32
Winmark Corporation	WINA	0.30
Specialty Stores: % of XRT		**17.76**

Source: State Street Corporation. Created by Brian Kapp, stoxdox

Given the stage of the economic cycle, and the downturn in real estate, minimal exposure to home improvement is a positive attribute of the XRT compared to the XLY over the short to intermediate term.

Internet

The internet sub-industry of the XRT is decidedly different than that of the XLY. Amazon is the primary difference between the two funds. It accounts for 95% of the internet exposure in the XLY and 23% of the total fund. In contrast, Amazon represents 7% of the internet sub-

industry and 1% of the total XRT portfolio. The following table displays the internet holdings in the XRT and the weights of each company.

Internet Retail - XRT	Ticker	Weight
ContextLogic Inc. Class A	WISH	1.43
Wayfair Inc. Class A	W	1.42
Stitch Fix Inc. Class A	SFIX	1.31
DoorDash Inc. Class A	DASH	1.27
Qurate Retail Inc. Class A	QRTEA	1.25
eBay Inc.	EBAY	1.17
Amazon.com Inc.	AMZN	1.16
Chewy Inc. Class A	CHWY	1.13
Etsy Inc.	ETSY	1.08
Revolve Group Inc Class A	RVLV	1.05
Overstock.com Inc.	OSTK	1.00
Xometry Inc. Class A	XMTR	0.94
PetMed Express Inc.	PETS	0.62
Internet: % of XRT	**-**	**14.83**

Source: State Street Corporation. Created by Brian Kapp, stoxdox

Of note, the internet industry within the XRT is not terribly attractive. As a result, the diversification benefits of the XRT compared to the market-cap-weighted XLY are diluted.

For those that take a more customized portfolio approach, swapping Amazon for the above companies is a viable alternative to the XRT's 15% internet exposure. While Amazon faces a uniquely high-risk environment, it is better positioned than the above companies while trading at a similar to lower valuation.

Other

The differences between the XRT and XLY in the other sub-industry category are minimal as the group represents 7% and 5% of each fund, respectively. The following table displays the companies in the other category within the XRT.

Other - XRT	Ticker	Weight
Franchise Group Inc. Class A	FRG	1.22
Ollie's Bargain Outlet Holdings Inc	OLLI	1.21
Target Corporation	TGT	1.20
Dollar Tree Inc.	DLTR	1.08
Big Lots Inc.	BIG	1.07
Dollar General Corporation	DG	0.99
Other: % of XRT		**6.77**

Source: State Street Corporation. Created by Brian Kapp, stoxdox

Food

On the other hand, divergence in exposure to the food industry between the XRT and XLY is quite pronounced. Hotels, restaurants, and leisure comprise 19% of the XLY, with McDonalds and Starbucks accounting for 40% of the total sub-industry exposure. In contrast, the XRT offers 6% exposure to the food retail industry and zero exposure to the hotels and leisure companies, as can be seen in the following table.

Food Retail - XRT	Ticker	Weight
Grocery Outlet Holding Corp.	GO	1.11
Albertsons Companies Inc. Class A	ACI	1.04
Sprouts Farmers Market Inc.	SFM	1.02
Kroger Co.	KR	0.99
Casey's General Stores Inc.	CASY	0.95
Ingles Markets Incorporated Class A	IMKTA	0.60
Weis Markets Inc.	WMK	0.47
Food Retail: % of XRT		**6.18**

Source: State Street Corporation. Created by Brian Kapp, stoxdox

With McDonalds trading at 34x forward earnings estimates and Starbucks trading at 30x, the XRT is relatively attractive in terms of minimizing the risk of valuation compression. Furthermore, grocery stores are likely to benefit from continued industry consolidation. As a

result, the XRT's food retail exposure is attractive compared to the XLY's large overweight in two high multiple restaurant stocks.

Department Stores

Minimal exposure to the department store sub-industry is a bonus for the XRT. For reference, the XLY has zero exposure to department stores. The following table displays the four members of the XRT.

Department Stores - XRT	Ticker	Weight
Nordstrom Inc.	JWN	1.32
Kohl's Corporation	KSS	1.29
Dillard's Inc. Class A	DDS	1.24
Macy's Inc.	M	1.06
Department Stores: % of XRT	-	**4.91**

Source: State Street Corporation. Created by Brian Kapp, stoxdox

Each of the above companies look to be a survivor, and, given the discounted valuations offer meaningful upside potential.

Super Centers

The XRT offers a small 4% exposure to super centers compared to zero for the XLY. While largely immaterial, the diversification benefits are a net positive.

Super Centers - XRT	Ticker	Weight
BJ's Wholesale Club Holdings Inc.	BJ	1.13
Costco Wholesale Corporation	COST	1.09
Walmart Inc.	WMT	1.04
PriceSmart Inc.	PSMT	0.61
Super Centers: % of XRT	-	**3.87**

Source: State Street Corporation. Created by Brian Kapp, stoxdox

Electronics

While the exposure to electronics is marginal for the XRT at 3.38% of the portfolio, it is three times that provided by the XLY at just under

1% of the portfolio.

Electronics - XRT	Ticker	Weight
GameStop Corp. Class A	GME	1.00
Best Buy Co. Inc.	BBY	1.13
Rent-A-Center Inc	RCII	1.25
Electronics: % of XRT		**3.38**

Source: State Street Corporation. Created by Brian Kapp, stoxdox

Miscellaneous

The final two companies in the XRT fall under miscellaneous and are provided in the table below.

Miscellaneous - XRT	Ticker	Weight	Sub-Industry
Liquidity Services Inc.	LQDT	0.19	Diversified Support Services
Walgreens Boots Alliance Inc.	WBA	0.94	Drug Retail

Source: State Street Corporation. Created by Brian Kapp, stoxdox

Technicals

The technical backdrop for the XRT is defined by long-term support which has been carved out over the past decade. In the following monthly chart, the lower green line represents the long-term support level which dates back to early 2015. The support zone is defined by both green lines for which the upper end is currently being tested.

SPDR® S&P® Retail ETF XRT monthly chart. Created by Brian Kapp using a chart from Barchart.com

Note that the current test of the upper support level also coincides with the 50-month moving average (the gold line). On the upside, the orange lines represent the primary resistance levels. The following 5-year weekly chart places the long-term price action in the context of recent cycles.

SPDR® S&P® Retail ETF XRT 5-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

Notice that the 50-week moving average (the gold line) is above the 200-week moving average (the grey line), signaling that the long-term uptrend remains intact. The moving averages are now converging following the extreme upside overextension of the shorter-term moving average during the pandemic.

As a result, the retail industry is now sitting atop what should be a strong support zone after having worked off an overbought technical condition that developed in 2020 and 2021. The following 1-year daily chart zooms in on the recent bottoming process.

SPDR® S&P® Retail ETF XRT 1-year daily chart. Created by Brian Kapp using a chart from Barchart.com

Notice that the 50-day moving average (the gold line) crossed above the 200-day moving average (the grey line) in early February 2023. Given the year-long bottoming process and the recessionary stage of the economic cycle, this golden cross is a bullish signal for the industry.

The return potential to the upper resistance level is 38%. This represents a realistic target over the nearer term given the discounted valuation, at 12x forward earnings estimates. As the next economic

upcycle comes into view, upward earnings revisions could amplify the multiple expansion potential.

Summary

Compared to the 56% weighting of the top five companies in the XLY, the 1% weighting of the same companies in the XRT eliminates the extreme concentration risk. Furthermore, the modified equal weighted portfolio strategy of the XRT provides broad diversification across the consumer sector and its various industries. Finally, the deeply discounted valuation of 12x earnings estimates in comparison to 25x for the XLY minimizes the primary risk in today's market, multiple contraction.

In summary, from a short-term tactical perspective and an intermediate-term strategic viewpoint, the SPDR® S&P® Retail ETF offers an asymmetric risk/reward opportunity in the consumer sector.

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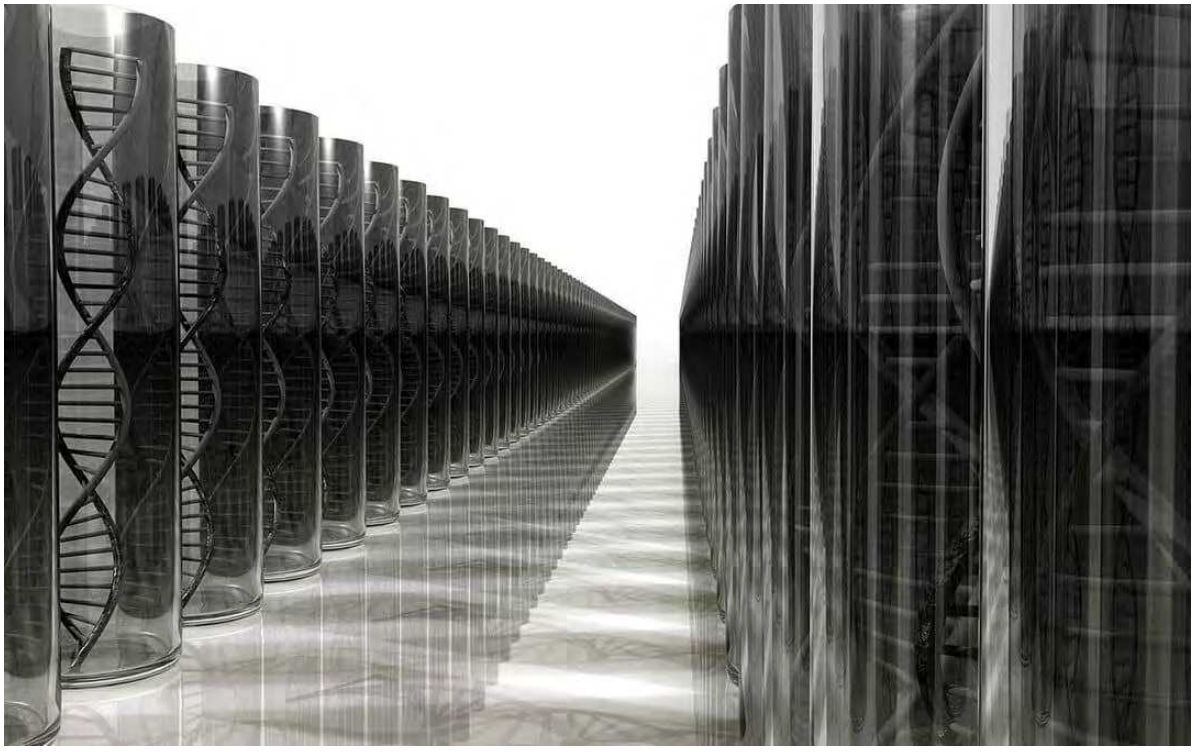
All sorts of possibilities in health care services

by Brian Kapp, CFA | Mar 5, 2023 | 0 comments



Health care services is the final industry of the top eight, as covered in "Sector strategies for navigating 2023." The underlying theme of the opportunities discussed throughout the top sector choices is the relative attractiveness of the small to mid-cap stock universe in the US. There are two factors underlying this reality.

First, the sheer number of opportunities in the small to mid-cap segment far exceeds what is available in the large to mega caps. There are simply more opportunities from which to choose. For example, expanding the opportunity set to the S&P 1500 Total Market Index triples the number of opportunities compared to the S&P 500 Index. Viewing the companies by industry rather sector doubles the number of opportunity vectors from 11 to 21.

The second factor at play is the large number of small to mid-cap companies which trade at discounted valuations, while offering attractive growth potential. For example, the forward PE multiple of the top eight industry choices for 2023 is 12x and the estimated earnings growth rate is 13.5%.

An 8.3% earnings yield projected to grow in the mid-teens annually over the next three to five years is relatively attractive today. The relative attractiveness is clear when viewed against the following market backdrop. I have highlighted in blue the top eight industries and in yellow the nearest stock market index.

Valuations	PE FY1	Eyld % FY1	Growth %
US 10-year Treasury	25	3.97	0.0
NASDAQ 100 Index	24	4.16	2.3
Russell 2000 Index	21	4.76	na
S&P 500 Index	18	5.58	-1.2
Top 8 industries for 2023	12	8.33	13.4
US 2-year Treasury	21	4.86	0.0
Double-A-rated (AA)	20	5.05	0.0
Triple-B-rated (Baa)	17	5.88	0.0
High Yield 100	12	8.07	0.0

Source: The Wall Street Journal and State Street Corporation. Created by Brian Kapp, stoxdox

Please note that the industry growth rate (highlighted in blue) is an annual estimate over a three-to-five-year time frame, while that of the

S&P 500 and Nasdaq 100 are the year ahead earnings growth estimates.

Health Care Services Industry

The health care services industry, as represented by the SPDR® S&P® Health Care Services ETF (NYSEARCA:XHS), is unique in comparison to the top eight. The valuation multiple is the highest of the top industries at 17x forward estimates. Summary data for the industry is displayed below alongside the same data for the Health Care Select Sector SPDR® Fund (NYSEARCA:XLV). The XLV tracks the market-cap-weighted health care sector within the S&P 500 index.

Summary Data - XLV	Amount
Est. 3-5 Year EPS Growth	7.91%
Number of Holdings	64
Price/Earnings Ratio FY1	16.88
30 Day SEC Yield	1.59%
Weighted Average Market Cap	$193B
Summary Data - XHS	**Amount**
Est. 3-5 Year EPS Growth	10.70%
Number of Holdings	66
Price/Earnings Ratio FY1	16.67
30 Day SEC Yield	0.14%
Weighted Average Market Cap	$19B

Source: State Street Corporation. Created by Brian Kapp, stoxdox

I have highlighted in blue the estimated earnings growth rate for each and in yellow the weighted average market cap. Notice that the weighted average market cap is $19 billion for the XHS portfolio compared to $193 billion for the XLV. While each portfolio carries a forward PE of 17x, the expected growth rates are materially different at 11% for the XHS and 8% for the XLV.

The small to mid-cap exposure in the XHS opens the door to significantly higher growth at a slightly lower valuation multiple

compared to the market-cap-weighted health care sector.

Sub-Industries

The health care services sub-industry is the largest weighting within the XHS at 54%. A comparison of the sub-industry breakdown within the XHS and the XLV highlights the differences between the two in terms of health care industry exposure.

Industries - XLV	% Weight
Pharmaceuticals	29.72
Health Care Providers & Services	22.85
Health Care Equipment & Supplies	19.06
Biotechnology	15.54
Life Sciences Tools & Services	12.64
Sub-Industries - XHS	**% Weight**
Health Care Services	53.88
Health Care Facilities	21.99
Managed Health Care	13.29
Health Care Distributors	10.80

Source: State Street Corporation. Created by Brian Kapp, stoxdox

I have highlighted in blue those sub-industries which are not represented in the XHS and in yellow those with a marginal weighting in the XHS. Taking an industry approach offers materially different health care exposure compared to the market-cap-weighted sector approach. The following table displays the health care services sub-industry within the XHS.

Services - XHS	Ticker	Weight	Sector
Oak Street Health	OSH	2.58	Health Care Services
R1 RCM	RCM	2.19	Health Care Services
agilon health	AGL	2.11	Health Care Services
Apollo Medical Holdings	AMEH	1.88	Health Care Services
Privia Health Group	PRVA	1.87	Health Care Services
Hims & Hers Health	HIMS	1.83	Health Care Services
Amedisys	AMED	1.79	Health Care Services
DocGo	DCGO	1.77	Health Care Services
DaVita	DVA	1.74	Health Care Services
Laboratory Corporation of America	LH	1.70	Health Care Services
Addus HomeCare	ADUS	1.60	Health Care Services
LHC Group	LHCG	1.58	Health Care Services
Enhabit	EHAB	1.57	Health Care Services
CorVel	CRVL	1.57	Health Care Services
Chemed	CHE	1.54	Health Care Services
Signify Health	SGFY	1.54	Health Care Services
Option Care Health	OPCH	1.52	Health Care Services
Quest Diagnostics	DGX	1.52	Health Care Services
Premier	PINC	1.52	Health Care Services
Fulgent Genetics	FLGT	1.50	Health Care Services
Accolade	ACCD	1.48	Health Care Services
Invitae	NVTA	1.45	Health Care Services
Pediatrix Medical Group	MD	1.43	Health Care Services
1Life Healthcare	ONEM	1.42	Health Care Services
Cigna	CI	1.40	Health Care Services
23andMe Holding Co.	ME	1.39	Health Care Services
Cross Country Healthcare	CCRN	1.39	Health Care Services
CVS Health	CVS	1.34	Health Care Services
AMN Healthcare Services	AMN	1.31	Health Care Services
ModivCare	MODV	1.26	Health Care Services
Castle Biosciences	CSTL	1.01	Health Care Services
Guardant Health	GH	0.96	Health Care Services
RadNet	RDNT	0.80	Health Care Services
Lifestance Health Group	LFST	0.78	Health Care Services
OPKO Health	OPK	0.61	Health Care Services
Agiliti	AGTI	0.57	Health Care Services
National Research Corporation	NRC	0.34	Health Care Services
Total services % - XHS		**53.88**	

Source: State Street Corporation. Created by Brian Kapp, stoxdox

I have highlighted in blue those companies that are also in the XLV. They account for roughly 5% of the XHS and 10% of the health care

services sub-industry exposure in the XHS. Approximately 80% of the above companies could be considered growth companies.

In fact, three of the above companies, or 8%, are in the process of being acquired (the orange highlighted cells). Amazon is acquiring 1Life Healthcare for $3.9 billion, CVS is acquiring Signify Health for $8 billion, and UnitedHealth Group is acquiring LHC Group for $5.4 billion. The M&A activity highlights the attractive growth profile of the industry.

Health Care Facilities

The second largest sub-industry within the XHS is health care facilities at 22% of the portfolio. In comparison, the XLV facilities weighting is just over 1%, highlighting a distinct difference between the two approaches. The following table displays the holdings in the XHS.

Facilities - XHS	Ticker	Weight	Sector
Tenet Healthcare	THC	2.17	Health Care Facilities
Community Health Systems	CYH	2.17	Health Care Facilities
Surgery Partners	SGRY	2.14	Health Care Facilities
Select Medical Holdings	SEM	1.96	Health Care Facilities
Universal Health Services	UHS	1.82	Health Care Facilities
Cano Health	CANO	1.81	Health Care Facilities
Encompass Health	EHC	1.72	Health Care Facilities
HCA Healthcare	HCA	1.71	Health Care Facilities
Brookdale Senior Living	BKD	1.65	Health Care Facilities
Ensign Group	ENSG	1.58	Health Care Facilities
Acadia Healthcare	ACHC	1.54	Health Care Facilities
U.S. Physical Therapy	USPH	1.25	Health Care Facilities
National HealthCare	NHC	0.48	Health Care Facilities
Total facilities - XHS		**21.99**	

Source: State Street Corporation. Created by Brian Kapp, stoxdox

I have highlighted in blue the one overlapping company with the XLV. An important risk factor for the facilities sub-industry is elevated debt levels. As a result, I have highlighted in orange those companies in the

group that are especially at risk. They account for 5.6% of the total XHS portfolio.

For those that take a more customized portfolio approach, the three at risk companies could be swapped for better alternatives. Nonetheless, the facilities sub-industry offers generally attractive valuations and related growth profiles.

Managed Care

The managed care sub-industry comes in third within the XHS at 13% of the portfolio. There are many overlapping companies with the XLV, which are highlighted in blue below. The five companies comprise 14% of the XLV, with UnitedHealth Group comprising 9% of the total XLV compared to 1.4% of the XHS.

Managed Care - XHS	Ticker	Weight	Sector
Progyny	PGNY	1.65	Managed Health Care
HealthEquity	HQY	1.64	Managed Health Care
Clover Health Investments	CLOV	1.60	Managed Health Care
Humana	HUM	1.47	Managed Health Care
Alignment Healthcare	ALHC	1.46	Managed Health Care
Elevance Health	ELV	1.44	Managed Health Care
UnitedHealth Group	UNH	1.40	Managed Health Care
Molina Healthcare	MOH	1.33	Managed Health Care
Centene	CNC	1.31	Managed Health Care
Total managed care % - XHS		**13.29**	

Source: State Street Corporation. Created by Brian Kapp, stoxdox

I have highlighted in orange the company in the XHS that is questionable and would be a swap candidate for more customized portfolios. Clover aside, the more diversified exposure within the XHS is a distinct positive compared to the heavy overweight in UnitedHealth Group in the market-cap-weighted XLV. Valuations in UnitedHealth's peer group are materially lower while their growth potential is comparable.

Distributors

The final sub-industry is distributors, which represent 11% of XHS. While four of the seven companies overlap with the XLV (highlighted in blue below), the total weight of the four in the XLV is only 2%

Distributors - XHS	Ticker	Weight	Sector
Henry Schein Inc.	HSIC	1.58	Health Care Distributors
Cardinal Health Inc.	CAH	1.57	Health Care Distributors
AdaptHealth Corp.	AHCO	1.57	Health Care Distributors
Owens & Minor Inc.	OMI	1.54	Health Care Distributors
Patterson Companies	PDCO	1.53	Health Care Distributors
McKesson Corporation	MCK	1.52	Health Care Distributors
AmerisourceBergen	ABC	1.50	Health Care Distributors
Total distributors % - XHS		**10.80**	

Source: State Street Corporation. Created by Brian Kapp, stoxdox

The added 11% weighting for the distributors in the XHS compared to the XLV is a net positive given the heightened risk of valuation compression underlying today's market environment. Distributors generally trade at deeply discounted valuations compared to the sector and market averages.

Technicals

Turning to the technical setup, the health care services industry is in a long-term uptrend. The price action since 2015 is best described as a long consolidation pattern within a secular bull market. On the following monthly chart, the lower green line represents the 2015 top and the gold line is the 50-month moving average. The moving average has served as support during the long uptrend.

SPDR® S&P® Health Care Services ETF XHS monthly chart. Created by Brian Kapp using a chart from Barchart.com

The following 5-year weekly chart zooms in on the post-Covid attempt to resume the long-term uptrend following the long consolidation trend which began in 2015.

SPDR® S&P® Health Care Services ETF XHS 5-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

The gold line depicts the 50-week moving average and the grey line is the 200-week moving average. Technically speaking, the health care services industry is in a bull market and testing support (the green

line). The following 1-year daily chart zooms in on the recent year-long bottoming process and nearby support.

SPDR® S&P® Health Care Services ETF XHS 1-year daily chart. Created by Brian Kapp using a chart from Barchart.com

The industry is bouncing off of what should be a strong support level, though the 50-day moving average remains beneath the 200-day moving average. Within the context of the bull market trend displayed in the weekly and monthly charts, a reversal to the upside is well supported.

Summary

The health care services industry offers timely diversification given the uncertain macroeconomic environment. Though the industry trades at the highest valuation multiple of the top eight industries for 2023, there is a wide dispersion between growth and value stocks within the group.

The growth companies are relatively attractive given the aforementioned macroeconomic uncertainty and the non-cyclical nature of health care. This is especially the case when combined with the ongoing valuation correction, which should continue to be a drag on traditional growth favorites.

The value stocks within the industry tend to be discounted rather deeply compared to other sectors and market averages. This opens the door to material multiple expansion potential. The recent M&A within the industry by Amazon, CVS, and UnitedHealth Group sends a strong signal.

When combined with the top industries for 2023, the health care services industry offers a uniquely diversified, asymmetric risk/reward opportunity.

CERTIFICATE OF FILING/SERVICE

I do hereby certify that on date indicated below, I filed via electronic means (ESTTA) the foregoing document with the:

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This the 13th day of June, 2023.

/ Katarina K. Wong /
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Is the sun setting on energy stocks?

by Brian Kapp, CFA | Dec 12, 2022 | 0 comments

As we approach year end and look forward to 2023, a top question on the minds of investors is whether the price of crude oil is signaling the end of the energy stock bull market.

Of primary concern within the investment community is the outperformance of energy stocks in relation to the price of oil. The Energy Select Sector SPDR® Fund (NYSE:XLE) has returned greater

than 50% over the past twelve months compared to just 5% for the price of Brent crude oil and 0% for WTI oil.

Risk/Reward Rating: Positive

As Brent crude is a global price, I will use it as the benchmark for oil. The following 5-year weekly charts provide initial context for examining the outperformance of energy stocks in relation to crude oil. In the following oil chart, notice that the higher green line marks the current price and is the upper bound of what should be a strong technical support zone. The zone is bracketed by the green horizontal lines.

Crude Oil Brent 5-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

The $70 to $80 range served as resistance in a sideways consolidation during 2018 and 2019. Following the COVID crash, oil first reached the current price of $76 in June 2021. Using June 2021 as a reference point, the following 5-year weekly chart of the Energy Select Sector SPDR® Fund illuminates the divergence between the price of oil and energy stocks. The June 2021 XLE price is highlighted by the green horizontal line.

Energy Select Sector SPDR® Fund XLE 5-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

With energy stocks 50% above the level of June 2021 and oil having completed a round trip, investors are right to ask the question: is the sun setting on energy stocks?

The Energy Select Sector SPDR® Fund

In order to answer this question, further context is needed. The XLE is designed to track the energy sector components within the S&P 500 index. They account for 4.9% of the total value of the stock market, using the S&P 500 as the market index. A full list of the energy stocks and their weighting in the sector is displayed below. The table was compiled from State Street Corporation.

Name	Ticker	Weight	Industry
Exxon Mobil Corporation	XOM	23.06	Oil, Gas & Consumable Fuels
Chevron Corporation	CVX	19.99	Oil, Gas & Consumable Fuels
Schlumberger NV	SLB	5.14	Energy Equipment & Services
EOG Resources Inc.	EOG	4.21	Oil, Gas & Consumable Fuels
ConocoPhillips	COP	4.19	Oil, Gas & Consumable Fuels
Marathon Petroleum Corporation	MPC	3.95	Oil, Gas & Consumable Fuels
Pioneer Natural Resources Company	PXD	3.84	Oil, Gas & Consumable Fuels
Phillips 66	PSX	3.53	Oil, Gas & Consumable Fuels
Occidental Petroleum Corporation	OXY	3.45	Oil, Gas & Consumable Fuels
Valero Energy Corporation	VLO	3.35	Oil, Gas & Consumable Fuels
Devon Energy Corporation	DVN	3.03	Oil, Gas & Consumable Fuels
Williams Companies Inc.	WMB	2.92	Oil, Gas & Consumable Fuels
Hess Corporation	HES	2.71	Oil, Gas & Consumable Fuels
Kinder Morgan Inc Class P	KMI	2.56	Oil, Gas & Consumable Fuels
Halliburton Company	HAL	2.30	Energy Equipment & Services
ONEOK Inc.	OKE	2.09	Oil, Gas & Consumable Fuels
Baker Hughes Company Class A	BKR	2.07	Energy Equipment & Services
Diamondback Energy Inc.	FANG	1.72	Oil, Gas & Consumable Fuels
Coterra Energy Inc.	CTRA	1.44	Oil, Gas & Consumable Fuels
Marathon Oil Corporation	MRO	1.32	Oil, Gas & Consumable Fuels
APA Corp.	APA	1.02	Oil, Gas & Consumable Fuels
Targa Resources Corp.	TRGP	0.94	Oil, Gas & Consumable Fuels
EQT Corporation	EQT	0.81	Oil, Gas & Consumable Fuels

Source: State Street Corporation

I have highlighted in yellow the energy equipment and services companies within the XLE. They account for just 9.5% of the sector and 0.4% of the S&P 500. As covered in the October 3 report, "A top sector choice for the coming cycle," the industry is timely given the early stage of the oil and gas capex upcycle.

Additionally, the cyclical upturn is occurring alongside secular growth opportunities due to the energy transition. The future looks decidedly bright for the energy equipment and services industry. That being said, 75% of the value in the energy sector is comprised of the oil and gas producers, with 15% exposure to pipelines and processors. As a result, energy prices are a primary driver of sector returns.

The Big Picture

With energy prices driving returns, the round trip in the price of crude oil is front and center. Of utmost importance for investors is the equilibrium price of crude oil looking out over the intermediate term. The recent reversal lower in the price of oil requires further context. The following 20-year monthly chart of Brent crude oil offers a bird's eye view.

Crude Oil Brent 20-year monthly chart. Created by Brian Kapp using a chart from Barchart.com

The key technical support zone highlighted by the green horizontal lines remains unchanged from the prior 5-year weekly chart. Notice that the lower end of the support zone was first reached in 2005 and the upper end in 2006. The price of oil has been in a trading range between $40 and $120 for much of the past 18 years.

What is most interesting in the above chart is how little time oil has spent trading between $75 and $100, or between the upper green line and the lower orange line. Over the past 18 months, oil has traded in this range much more frequently, hinting at a possible equilibrium price zone.

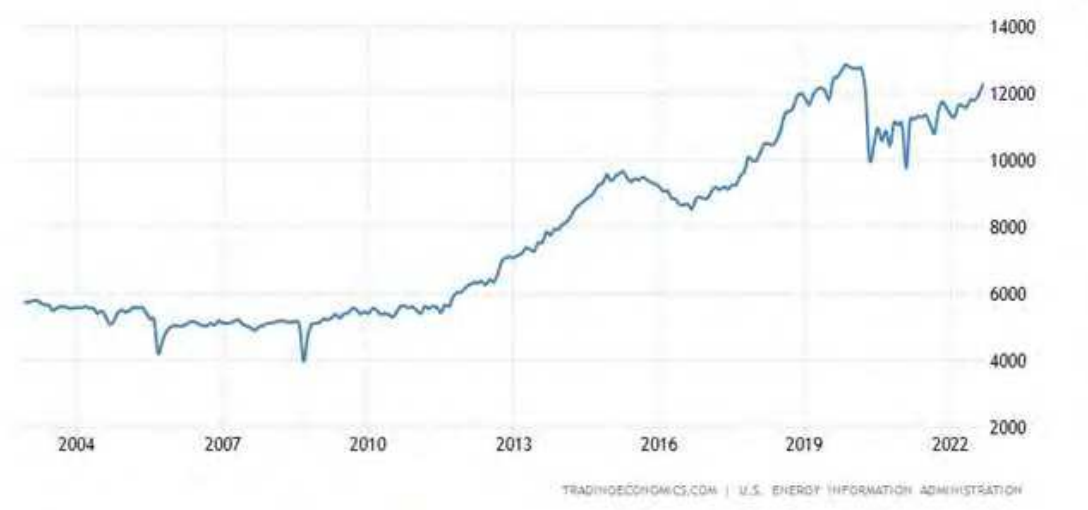
Prior to the late 2014 price collapse, oil traded in a tight range between $100 and $120 for over three years. This range was the last stable equilibrium price before shifting to a volatile trading range

between $40 and $75 from 2015 to 2021. The central tendency between 2015 and 2021 was roughly $60 per barrel.

Returning to the key question, what is the most likely equilibrium price of crude oil over the intermediate term?

What Happened in 2014?

To reach an estimate we must review what happened in the second half of 2014 which caused the price of oil to collapse from its stable trading range of $100 to $120. The following chart from Trading Economics captures the primary cause of the shift lower in oil prices following 2014. It displays US oil production over the past 20 years.



Source: Trading Economics

Beginning in 2012, US oil production began to soar and more than doubled by 2019. The energy markets absorbed one of the largest and most rapid additions to global supply in modern times. Between 2012 and 2021, global oil demand increased by roughly the same amount as US oil production. With little room for supply growth in the rest of the world, the price of oil adjusted lower beginning in the second half of 2014.

It is worth noting that Chinese GDP growth also ratcheted lower from over 10% per year prior to 2012 to the mid 7% range through 2015. From 2016 to 2019 GDP growth slowed to around 6%.
The OECD forecasts China's GDP growth to be about 4% through 2024.

In summary, a substantial growth deceleration in China coincided with the historic supply increase from US energy producers. In this context, the oil price collapse during the second half of 2014 and the lower trading range through 2021 makes sense.

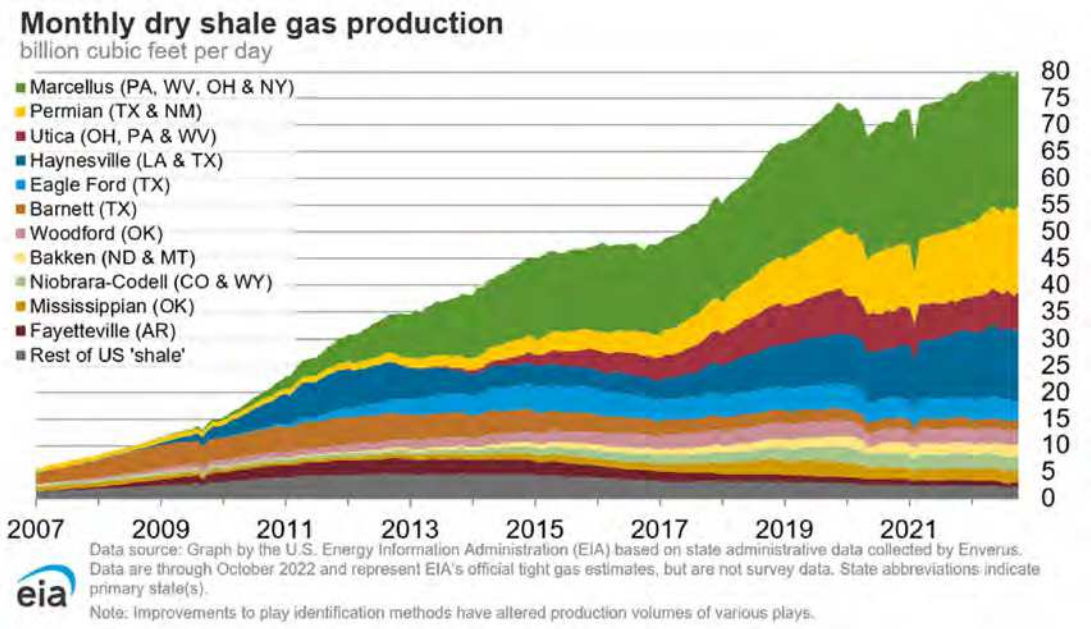
Today, US producers are squarely focused on shareholder returns and are unlikely to expand production materially. This is evidenced by the draw down in DUCs (drilled but uncompleted wells) as discussed in "A top sector choice for the coming cycle." From the report:

> Oil and gas producers in the US are restricting available well inventory to the lowest levels in a decade, and beneath the level reached in 2013.

Natural Gas

A feature of most US shale oil wells is that they also produce a significant amount of natural gas. On average, roughly half of the production volume is oil and half natural gas. In fact, three of the top five natural gas producing states are also among the largest oil producing states. Texas is the largest producer of each.

As a result, natural gas is equally important for the energy sector. The above oil supply chart is mirrored in US natural gas production, as can be seen in the following image from the EIA.



Source: EIA

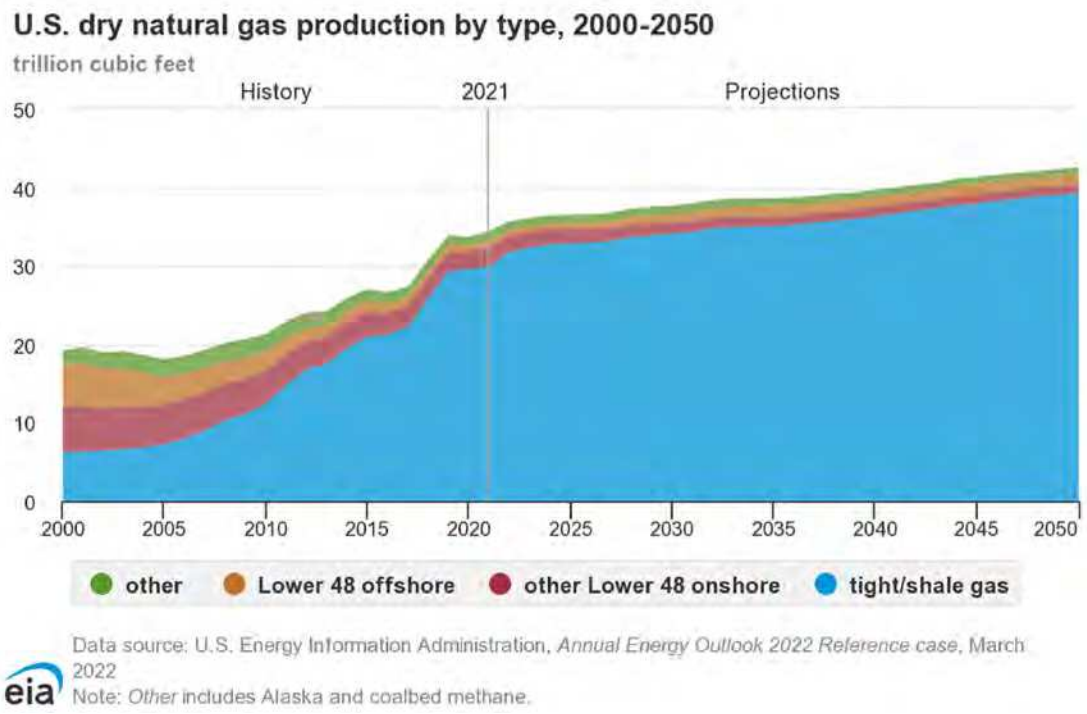
The explosion of US production had a similar effect on the price of natural gas as is it did for oil, as can be seen in the following 20-year monthly chart. Please note that the orange lines represent a resistance zone dating back to 2010. The zone served to cap the price during the doubling of US oil production. Importantly, since August 2021, natural gas has found support at this prior resistance zone which spans the mid-$4 to $6 range.

Natural Gas 20-year monthly chart. Created by Brian Kapp using a chart from Barchart.com

For comparison to the prior oil and XLE charts, the green line marks the June 2021 price level. Unlike oil, natural gas remains well above the level reached in June 2021, at double the price. In this light, energy stocks remaining 50% above the level reached in June 2021 receives support and largely offsets oil's round trip.

The dominant market force for US natural gas prices over the last decade was the explosion of gas supply associated with oil production growth. Importantly, future US oil production growth looks likely to be mild at best and is largely in the rearview mirror.

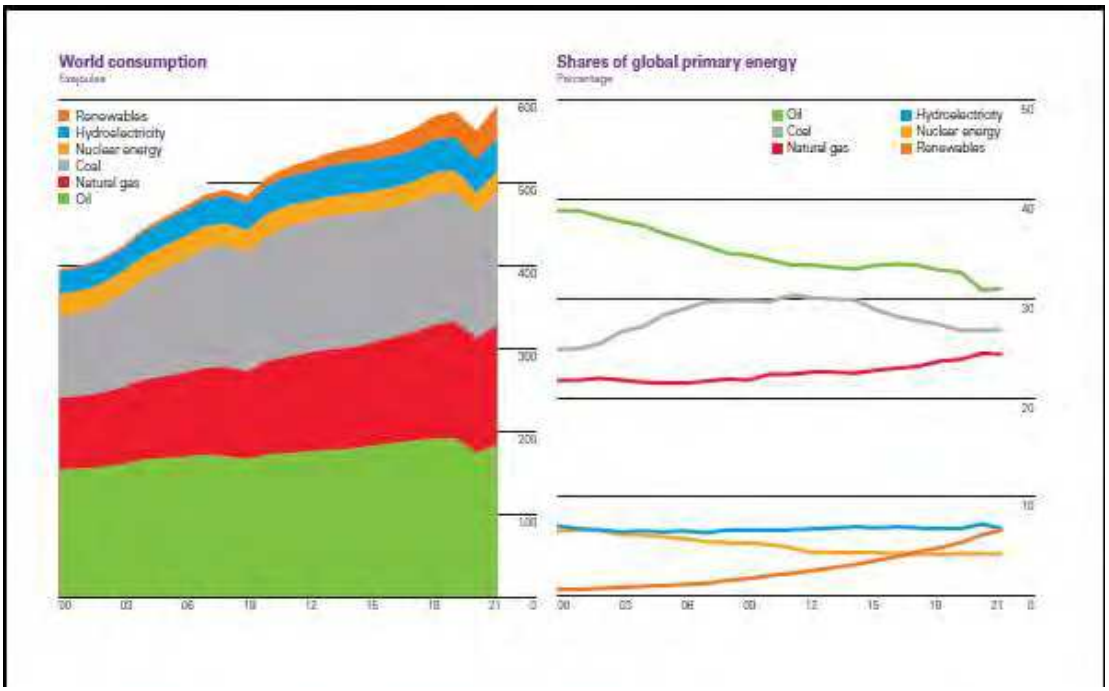
As a result, a major headwind for natural gas prices, US oil production growth, has been removed. Projections for US natural gas supply growth through 2050 suggest a much more supportive pricing environment than was the case over the past decade. The following image displays the EIA's forecast.



Source: EIA

There is no doubt that natural gas is a primary energy source for the coming decades. It is a replacement for coal which still accounts for a greater share of primary energy generation globally. As can be seen in the following image from the bp Statistical Review of World Energy

2022 | 71st edition, natural gas is growing while oil and coal are declining as a percentage of primary energy demand.



Source: bp Statistical Review of World Energy 2022 | 71st edition

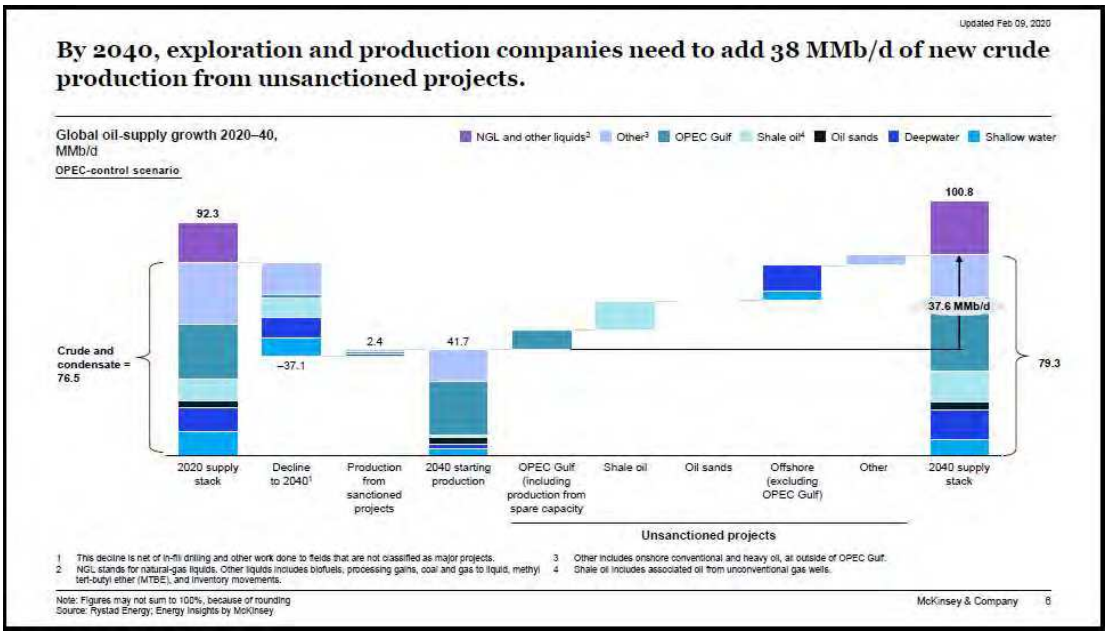
Oil Equilibrium Price

With a positive outlook for natural gas prices relative to the past decade, the question turns back to the likely equilibrium price for oil over the intermediate term. The EIA offers the following forecast which I view as being well supported.

> Despite the recent drop in crude oil prices, we still expect that falling global inventories of oil in early 2023 will push Brent prices back above $90/b by the beginning of the second quarter of 2023 (2Q23)... We forecast the Brent crude oil spot price will average $92/b for all of 2023.

A recent OPEC report estimates global oil demand to grow by 13% through 2045 to 110 million barrels per day from 97 million in 2021. While the annual growth rate for oil demand is expected to be minimal, there is a natural production decline from existing wells with which to contend.

In the following image, McKinsey estimates that exploration and production companies will need to find and develop an additional 38 million barrels of daily crude oil production through 2040. This will be needed to fill the gap left by production declines.



Source: McKinsey Global oil outlook to 2040 summary report

OPEC's estimate of $12.7 trillion in required capex for oil alone supports an inflationary cost backdrop. The energy services and equipment industry is a relative winner in an environment of muted oil demand growth and heavy capital expenditure requirements.

In contrast to the near-term EIA estimate of $92 for Brent crude in 2023, McKinsey estimates that the equilibrium price through 2040 will be $50 to $60 per barrel. From the report:

> Long-term equilibrium oil prices have decreased by $10 to $15/bbl compared with pre-COVID-19 outlooks, as driven by a flattening cost curve and lower demand. Under an OPEC-control scenario, in which OPEC maintains its market share, we see a $50 to $60/bbl equilibrium price range in the long term.

The McKinsey report was published in February 2021. I view the timing of the report to be an excellent window into the downside scenario for

oil. The pandemic was still raging and thus negatively influenced the outlook in the extreme. For example, McKinsey estimated that oil would remain in the $50 to $55 area through 2025. This forecast has since proven to be far too conservative.

The McKinsey estimate pre-COVID was for an equilibrium price of $60 to $75 per barrel though 2040. This is an excellent lower-end equilibrium estimate as McKinsey's projection of a flattening cost curve has run into inflationary realities.

As discussed in "A top sector choice for the coming cycle," the energy equipment and services industry is supply constrained and has increasing pricing power. Cost push inflation is likely to remain elevated going forward thus putting further upward pressure on the price of oil. OPEC's estimate of $12.7 trillion of required capex for oil alone supports an inflationary cost backdrop.

In summary, an equilibrium oil price of $60 to $75 is an excellent low-end estimate. This price range is technically well-supported by the long-term support zone between $70 and $80 that was discussed in the opening. In this light, the $92 estimate by the EIA over the nearer term appears quite reasonable. This is especially the case with oil spending an increasing amount of time trading in the $75 to $100 range over the past year.

Finally, there is historical evidence for an equilibrium price in the $100 to $120 range as it prevailed prior to the 2014 US supply-induced collapse. As this major headwind is now in the rearview mirror, a return to the $100 to $120 equilibrium range serves as an excellent upside price scenario.

With a likely equilibrium price for oil in the $60 to $120 range over the intermediate term and a $90 central tendency, energy companies should continue to perform quite well. This is especially the case with the improved pricing outlook for natural gas.

Consensus Estimates

Given the generally favorable energy price outlook, the question turns to consensus growth estimates and valuations. State Street reports the PE of The Energy Select Sector SPDR® Fund to be 8x the consensus earnings estimate for the current year, with a dividend yield near 3.4%.

A cursory glance at consensus estimates for the top two companies, Exxon Mobil (NYSE:XOM) and Chevron (NYSE:CVX), confirms State Street's numbers. Exxon and Chevron alone account for 43% of the energy sector. The following consensus estimate tables were compiled from Seeking Alpha.

XOM	EPS	Growth	PE	Low	High	Analysts
Dec-22	$13.92	158.76%	7.44	$13.31	$14.81	23
Dec-23	$11.30	-18.85%	9.17	$6.24	$13.99	26
Dec-24	$9.37	-17.02%	11.04	$5.21	$13.86	16
CVX	**EPS**	**Growth**	**PE**	**Low**	**High**	**Analysts**
Dec-22	$19.19	136.00%	8.76	$17.65	$20.53	24
Dec-23	$16.87	-12.07%	9.96	$12.04	$20.94	27
Dec-24	$13.85	-17.92%	12.13	$7.85	$16.00	17

Source: Seeking Alpha. Created by Brian Kapp, stoxdox

Notice that consensus estimates are for a material earnings decline through 2024. Consensus projections likely reflect the more bearish McKinsey price scenario. With bearish to mild pricing assumptions through 2024, there is upside surprise potential. Regardless, valuations remain quite low at 8x to 12x earnings through 2024. For reference, the S&P 500 is trading at 18x 2023 consensus estimates.

Energy Opportunities

With much of the sector value dominated by just two companies, there may be more interesting opportunities beneath the surface. I covered several leading oil and gas producers in the following reports:

- "Pioneer Natural Resources strikes cash flow gusher" – July 2, 2021

- "EOG Resources has pent up energy" – August 23, 2021
- "What Buffett sees In Occidental" – August 24, 2022

The following table displays consensus estimates for Occidental Petroleum (NYSE:OXY), EOG Resources (NYSE:EOG), and Pioneer Natural Resources (PXD).

OXY	EPS	Growth	PE	Low	High	Analysts
Dec-22	$10.01	292.55%	6.25	$9.55	$10.70	24
Dec-23	$7.87	-21.40%	7.96	$6.02	$10.59	25
Dec-24	$6.09	-22.63%	10.28	$4.57	$11.88	14
EOG	**EPS**	**Growth**	**PE**	**Low**	**High**	**Analysts**
Dec-22	$14.61	69.64%	8.33	$13.41	$17.95	26
Dec-23	$15.62	6.92%	7.79	$12.48	$19.98	25
Dec-24	$13.85	-11.33%	8.79	$9.30	$18.61	15
PXD	**EPS**	**Growth**	**PE**	**Low**	**High**	**Analysts**
Dec-22	$31.45	137.19%	6.8	$30.40	$33.90	26
Dec-23	$27.32	-13.14%	7.83	$20.76	$33.67	30
Dec-24	$24.21	-11.38%	8.84	$18.76	$33.11	19

Source: Seeking Alpha. Created by Brian Kapp, stoxdox

I have highlighted in blue the valuation on 2024 consensus estimates. Each of the above companies trades at a material discount to Exxon and Chevron through 2024. For commodity producers, relative valuations are especially relevant. As a result, a market capitalization-weighted energy portfolio is likely to underperform a more opportunistic approach.

In the energy equipment and services industry, I first reviewed Schlumberger (NYSE:SLB) on December 21, 2021 in "Schlumberger is a top choice for cyclical growth through 2023." Consensus estimates for Schlumberger continue to paint a growth stock picture with significant valuation expansion potential over the intermediate term.

SLB	EPS	Growth	PE	Low	High	Analysts
Dec-22	$2.16	68.42%	21.79	$2.04	$2.37	26
Dec-23	$2.98	38.16%	15.77	$2.63	$3.19	29
Dec-24	$3.66	22.85%	12.84	$3.26	$3.92	19

Source: Seeking Alpha. Created by Brian Kapp, stoxdox

I have highlighted in blue Schlumberger's expected earnings growth rate and valuation for 2023 and 2024. Schlumberger offers one of the most attractive growth profiles in the energy space and across the broad large-cap stock universe. Investors would be hard pressed to find a similar growth profile for a large cap stock, including technology companies.

Outside of the capitalization-weighted sector fund, there are many asymmetric risk/reward opportunities in the energy space. I covered two small cap gas producers in the following reports:

- "Chesapeake Energy looking up after bankruptcy" – June 24, 2021
- "CNX Resources: The Saudi Arabia of natural gas" – September 7, 2022

Consensus earnings estimates for Chesapeake Energy (NASDAQ:CHK) and CNX Resources (NYSE:CNX), are displayed below. I have highlighted the valuation of each on 2024 consensus earnings estimates. The relative valuations are a fraction of Exxon and Chevron, and roughly half that of Occidental, Pioneer, and EOG.

CHK	EPS	Growth	PE	Low	High	Analysts
Dec-22	$16.84	84.63%	5.63	$15.99	$18.46	13
Dec-23	$20.77	23.35%	4.56	$15.40	$28.69	13
Dec-24	$19.45	-6.34%	4.87	$12.68	$29.56	9
CNX	EPS	Growth	PE	Low	High	Analysts
Dec-22	$1.79	11.08%	8.84	$1.44	$2.85	9
Dec-23	$2.93	63.68%	5.4	$2.03	$3.57	9
Dec-24	$2.74	-6.58%	5.78	$1.97	$3.67	4

stoxdox

Gold is on the efficient frontier

by Brian Kapp, CFA | Oct 14, 2022 | 0 comments

The above image of Tutankhamun's 24-pound solid gold burial mask is on display in Egypt today. King Tut was an Egyptian pharaoh who ruled between 1332 – 1323 BC, roughly 3,350 years ago. Gold has clearly been a valuable asset throughout human existence. The key question is why?

I will answer the question in the context of portfolio management; however, the properties of gold are truly extraordinary, which imbue elemental value. For example, Nasa's recently launched James Webb Space Telescope features gold-plated beryllium mirrors. They enable it to view objects too old, distant, or faint for the Hubble Space Telescope. For the first time, humanity will be able to observe the first stars and galaxies in addition to detailed atmospheric conditions on exoplanets. This is quite valuable.

A key property of gold for space exploration is that gold is chemically unreactive. In other words, gold doesn't change easily and remains incredibly stable. This makes gold the most effective element for many important purposes, in addition to being the most reflective element for infrared light applications.

Stability is a key feature for those looking to preserve wealth, as is on display in the picture of King Tut's burial mask. It remains unchanged after 3,350 years with a current gold value of approximately $650,000 in a 24-pound package. History has proven that currencies and financial instruments can become unstable over longer time periods while many will lose all of their value. Gold is unique in that it is guaranteed to remain unchanged forever, on an elemental level.

The Efficient Frontier

In portfolio management, the return distribution of each asset class is a key and defining feature. Essentially, what is the most likely risk/reward potential for each asset through time? Another key factor is how closely the returns of each asset class are correlated.

The less correlated the better in achieving the lowest portfolio risk for a given return objective. Diversification is at the core of portfolio management.

Correlation

Historically, precious metals have proven to be one of the least correlated asset classes in relation to all others. The following table displays the historical correlations between asset classes as of 2019. It

is from an optimization analysis I conducted at the time using long-term historical data. As a result, if updated, the historical correlations would be little changed today. A value of 1 means the assets are perfectly and positively correlated. A value of 0 means the assets are perfectly uncorrelated.

Covariance Matrix	US Lg Cap	Corp Bds	Tsy Bds	Gold	Real Estate
US Large Cap Stock	1.00	0.18	(0.21)	(0.10)	0.12
US Corp Bonds	0.18	1.00	0.73	0.10	(0.14)
US Treasury Bonds	(0.21)	0.73	1.00	0.06	(0.07)
Gold	(0.10)	0.10	0.06	1.00	0.02
Real Estate	0.12	(0.14)	(0.07)	0.02	1.00

Created by Brian Kapp, stoxdox

I removed many asset classes from the above matrix to focus on those that have been uncorrelated historically, or those that normally diversify a portfolio. Historically, bonds and real estate have been uncorrelated with stocks and provided portfolios with valuable diversification benefits.

Estimating base correlation assumptions using very long-term datasets is a necessary first step for portfolio optimization. The key question is always whether today is an average environment? Do we need to adjust forward-looking assumptions for current extremes? Where are we in the cycle?

When I ran this portfolio optimization in late 2019, there were many extremes for which adjustments were required. I have highlighted in yellow the historical correlations that were at risk of not repeating in the intermediate-term future.

Each of these historical correlations, or lack thereof to be precise, have since broken down and all have become highly correlated. This was due to each asset classes' returns becoming increasingly dependent on the same factors, extremely low interest rates and high liquidity. As a result, most importantly, bonds are not serving their usual

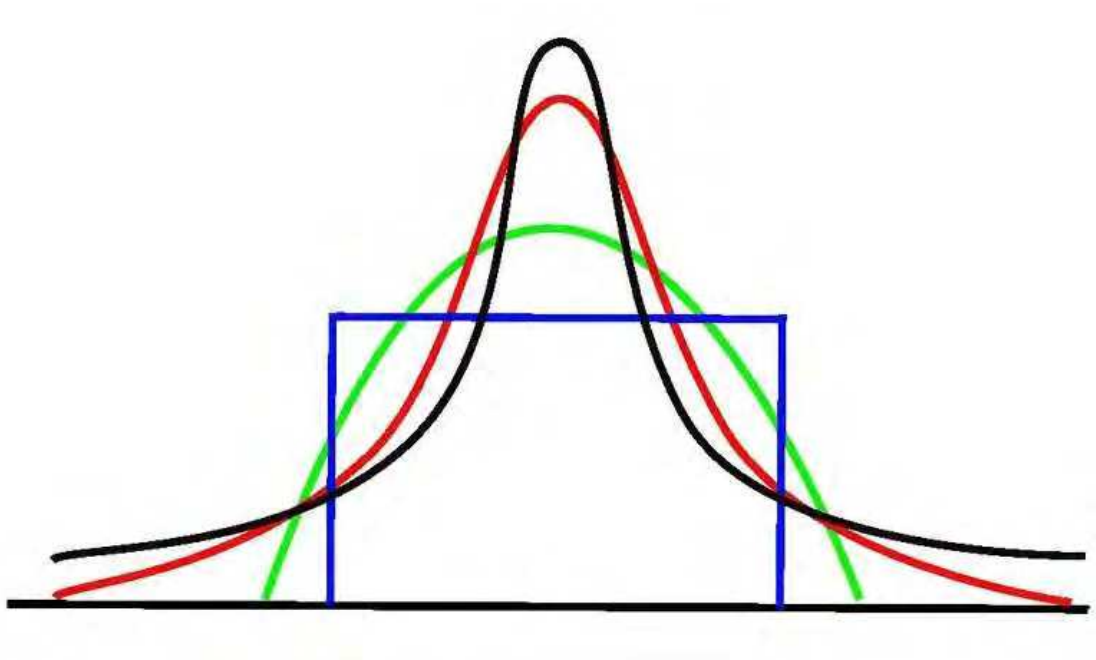
diversification role during the current bear market. Real estate too has become highly correlated with stocks and bonds.

Notice that gold is uncorrelated with each asset class. This has remained true since 2019. For example, when the bear market began during the first months of 2022, gold advanced by roughly 10% while Barrick Gold (NYSE:GOLD) rallied 46%. Gold miners, under certain conditions, can offer a uniquely asymmetric risk/reward opportunity. They offer high beta exposure to an uncorrelated asset which can be a powerful combination from a portfolio management perspective. It should be noted that the conditions and outlook for the miners today are generally favorable.

Return Distribution: Kurtosis

Gold's historical return distribution further amplifies the portfolio attractiveness of its uncorrelated return profile. For return distributions, the tails are a defining feature. Long or fat tails point to extreme return potential, up or down.

In statistical terms, such fat-tailed distributions are referred to as Leptokurtic distributions. The following image from Corporate Finance Institute captures the three primary return distribution shapes, with returns on the x-axis and the frequency of returns on the y-axis. The black line represents a Leptokurtic or fat tail return distribution. Notice that there is greater area under the black line at both extremes in this example, up and down (right and left).



Source: Corporate Finance Institute

Gold's historical return distribution is Leptokurtic. The degree of fat tail potential is statistically measured and is called excess kurtosis. Gold's historical excess kurtosis was near 10 at the time of the 2019 optimization, the highest of all asset classes. For reference, US large cap stocks had an excess kurtosis score of 1.75 at the time.

Return Distribution: Skewness

With extreme return potential, or high excess kurtosis, the question is in which direction? For this, we turn to the skewness of the return distribution. Are returns above and below the average by an equal amount and frequency? Are returns more extreme in one direction, up or down? The following image from ResearchGate displays the three general shapes of skewness in return distributions. Returns are on the x-axis with their frequency is on the y-axis.

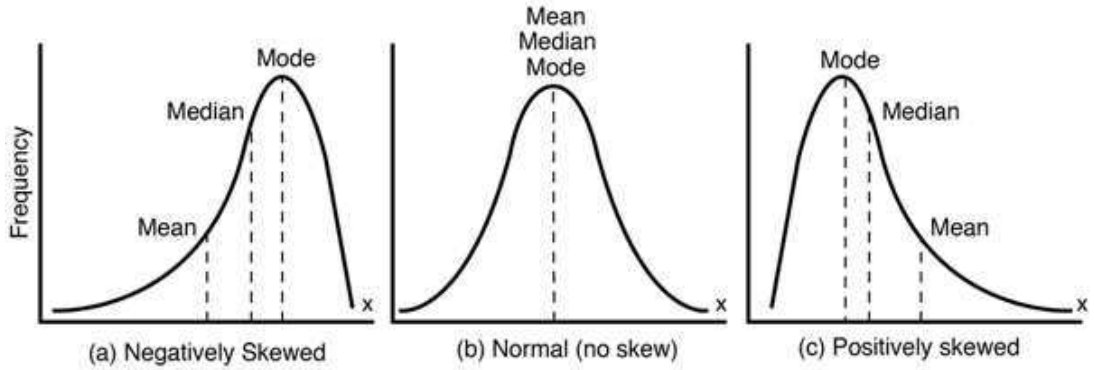


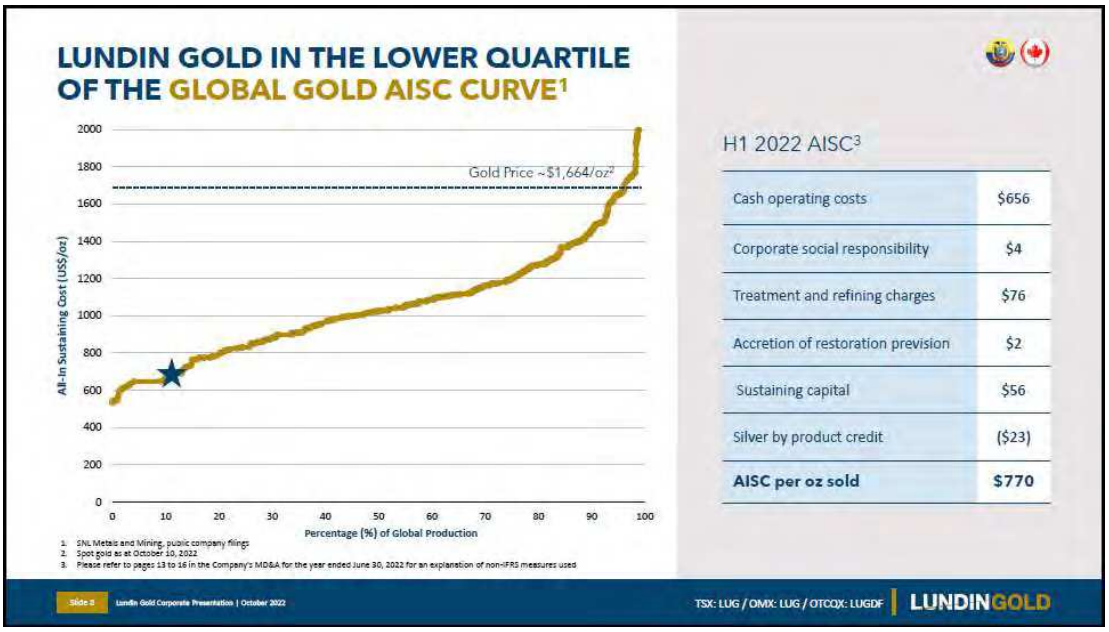
Figure 1. a) Negative skewness; b) Normal curve; c) Positive skewness (Durkhure and Lodwal, 2014). Source: ResearchGate

In terms of skew, positive skewness points toward the potential for extreme positive returns being more likely. Gold's skewness score was just over 2 as of the 2019 optimization, double the nearest asset class.

Looking at the positively skewed chart on the right, notice that the majority of returns cluster below the average return or mean. Under most conditions, gold performs below average or relatively poorly. This is a feature of assets that exhibit extreme positive returns or positive skewness and must be accounted for when adjusting portfolio weights in real time.

Combining the excess kurtosis (or fat tail potential) with the positive skewness points toward gold's extreme return potential being more likely to occur to the upside if history is a guide. There is fundamental support for this to remain true into the future.

The fundamental price support for gold relates to its cost of production. The following chart from Lundin Gold's (OTCQX:LUGDF) October 11, 2022 investor presentation displays the industry's cost curve on a per ounce produced basis.



Source: Lundin Gold's October 11, 2022 investor presentation

The x-axis represents the percentage of global production accounted for while travelling from low-cost per ounce gold producers to high-cost producers. Roughly 15% of global gold production costs $1,400 per ounce or more to produce.

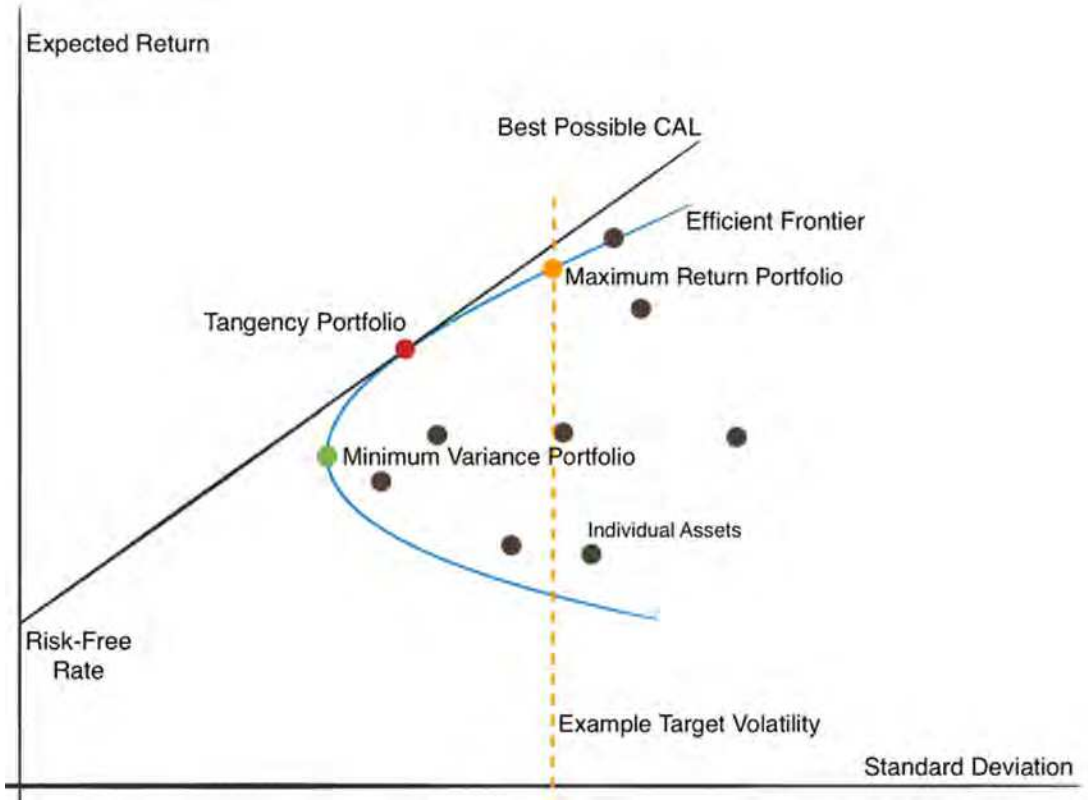
Importantly, these cost estimates are likely to err on the side of understating true costs, as many are excluded from industry calculations of all-in sustaining costs. Furthermore, high-quality low-cost gold deposits are mined and depleted first, leaving lower-quality higher-cost ounces for the future. As a result, the cost to produce each marginal ounce of gold is likely to continue higher as has been the case historically. This is especially true given normal cost inflation through time.

The cost of production for a commodity represents a fundamental price support level over the intermediate term.

The Markowitz Model

Returning to portfolio optimization, the return distribution for each asset class is combined with each asset class's correlation with all others to produce a risk/reward framework for portfolio construction.

The efficient frontier is best approached as a mental model, pioneered by Harry Markowitz, for thinking about and constructing portfolios. In essence, underlying the model is the idea that investors should always prefer less risk (defined as portfolio volatility) for the same expected return (the average expected return). Conversely, investors should always prefer higher expected returns for a given level of risk. The following image from Quantpedia displays the typical shape of an efficient frontier in portfolio optimization.



Source: Quantpedia

In the above image, the dots represent portfolio options with various asset class allocations. The expected portfolio volatility is plotted on the x-axis and the expected return on the y-axis. Using a target volatility or risk level as the primary portfolio constraint, the orange vertical line serves as an example. Given a risk constraint, or target level for portfolio volatility, investors should always prefer the portfolio represented by the orange dot to any other beneath it.

The red dot represents the most efficient portfolio. It offers significant risk reduction (distance to the left of the orange dot) with little loss of expected return (distance vertically from the orange dot). It is also the portfolio that is tangent to the CAL or capital allocation line, which plots all possible combinations of risk-free and risky assets. The green dot represents the minimum risk portfolio option.

Gold's historic role is in limiting portfolio volatility, as is evidenced by its lack of correlation and its fat-tailed, positively-skewed return distribution. The average historical return for precious metals (primarily gold) was 8.33% per year at the time of the 2019 portfolio optimization. This is below historical US stock returns but remains

competitive. As a result, gold would be featured more heavily in the portfolios represented by the green and red dots as compared to the orange, all things being equal.

Historical returns aside, in late 2019, I adjusted the expected stock market return to 4.5% annually over the intermediate to longer term. This was based on the elevated valuations in place at the time and the more recent sequence of extremely high rates of return for stocks. This highlights a key feature of statistical portfolio optimization using the efficient frontier as a model, it is garbage in, garbage out.

Meaning, using historical returns as expected returns when conditions are extreme is likely to produce large forecast errors. Modulating one's gold allocation in tune with prevailing extremes is a powerful portfolio management strategy.

Gold: Portfolio Weight

I have run many Monte Carlo simulations over my career in order to view optimal portfolio allocations under various assumptions. What I can say with certainty is that the most efficient portfolio allocation to gold is almost always vastly higher than what is implemented in practice.

Today, I see studies showing that institutions have a 0.5% weighting to gold in their portfolios, on average. Portfolio optimization points toward something many multiples of this. To me, the relative underinvestment represents a source of demand should traditional asset returns continue to revert to the mean. Additionally, we have entered a higher volatility regime than has been the case in some time, which further supports fund flows toward greater diversification for which gold is a top choice.

Technicals

Gold is an element, a commodity, and thus lends itself quite well to technical analysis. Meaning, the only thing that can change is price and volume. Gold is what it is and doesn't change. The technical backdrop

for gold is one of the more bullish long-term setups in the market today. The following 20-year monthly chart presents a bird's eye view of the technical setup for gold. Note that the orange lines represent resistance levels and the green lines depict key support areas.

Gold 20-year monthly chart. Created by Brian Kapp using a chart from Barchart.com

The defining feature of gold's technical backdrop is a massive 10-year cup and handle formation. In essence, gold has been moving sideways or consolidating for over a decade. This followed an incredible bull market run in the first decade of the 2000s. The bull market created extreme upside returns as the first decade of the century came to an end. Those excesses have now been reversed through a decade long reversion to the mean.

Today, gold is sitting on top of a major support area between $1,515 and $1,620 (the two upper green lines). This zone should offer incredibly strong support given its proximity to the marginal cost of gold production across the mining industry. A sustained move to the lower support level near $1,340 (the lower green line) looks unlikely in light of production costs. The following 5-year weekly chart provides a closer look.

Gold 5-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

As can be seen above, gold has been in a bull market since the bottom near $1,200 in late 2018. The move from $1,200 to just over $2,000 was a perfect example of gold's upside return asymmetry — a 67% gain over two years. With a peak in August of 2020, gold has once again been in a consolidation phase which is now into a third year.

The grey line on the above chart is the 200-week moving average, which is at the current price. Gold is clearly not extended to the upside as was the case in August 2020. Additionally, from the 20-year monthly chart, gold is not extended to the upside on a longer time frame as it has been moving sideways for over a decade.

The current technical backdrop for gold suggests no adjustments are required and that we can use historical return data with added confidence. Gold remains a top allocation choice for reducing portfolio volatility while introducing upside return asymmetry.

Gold Miners

With gold displaying a strong technical backdrop, being near long-term support levels, the outlook is favorable. This is especially true given the aforementioned cost of production realities. The question then is

how best to gain gold exposure today within a diversified portfolio, buy gold or gold miners?

For those with the discretion to choose, gold miners look relatively attractive in relation to gold itself. The following monthly chart of the VanEck Gold Miners ETF (NYSE:GDX) is in stark comparison to the 20-year gold chart above. The miners have been decimated since the early 2000s logging some of the poorest returns of any industry over the period. The VanEck fund began trading in May of 2006 and has lost roughly 50% of its value through today.

VanEck Gold Miners ETF long term monthly chart. Created by Brian Kapp using a chart from Barchart.com

The green line is a major support level which the miners are now testing. This area should offer incredibly strong technical support. The orange lines represent the primary resistance levels. The upside to each is 24% and 77%, respectively.

The higher resistance level was tested into the August 2020 gold peak and looks to be a reasonable intermediate-term target. Keep in mind that the gold miners tend to move very quickly once momentum is ignited, up and down. The following 5-year weekly chart provides a closer look at the current technical setup for the miners.

VanEck Gold Miners ETF 5-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

Sitting on top of a major support zone, the miners are at an ideal accumulation level, technically speaking. Note that the grey line is the 200-week moving average and the gold line is the 50-week moving average. The miners are extended to the downside and are well below the long-term moving average, thus they are technically oversold.

Additionally, the 50-week moving average has come down and is now touching the 200-week moving average. If a new bull market in gold began in late 2018, which appears to be the case, the 50-week moving average is highly likely to remain above the 200-week for the miners over the intermediate term. This further supports the timely accumulation case for the gold miners.

Fundamentals and Summary

The top miners are generally trading in the mid-teens PE range with some trading in the high single-digit PE range. Given the dispersion, a separate review of top mining ideas requires its own write-up. I have reviewed many of the top miners in the past year and continue to view them positively. They are some of the top companies in the VanEck Gold Miners ETF above, which is weighted by market capitalization.

While a mid-teen PE ratio does not stand out as a bargain price, importantly, earnings estimates for commodity producers must be taken with a grain of salt. The reason lies in their operating leverage to commodity prices.

Consensus gold price forecasts are for generally flat prices from today into the intermediate future. If gold resumes its upward trend, earnings for the gold producers will expand rapidly as price increases flow straight to the bottom line, rendering consensus estimates far too conservative.

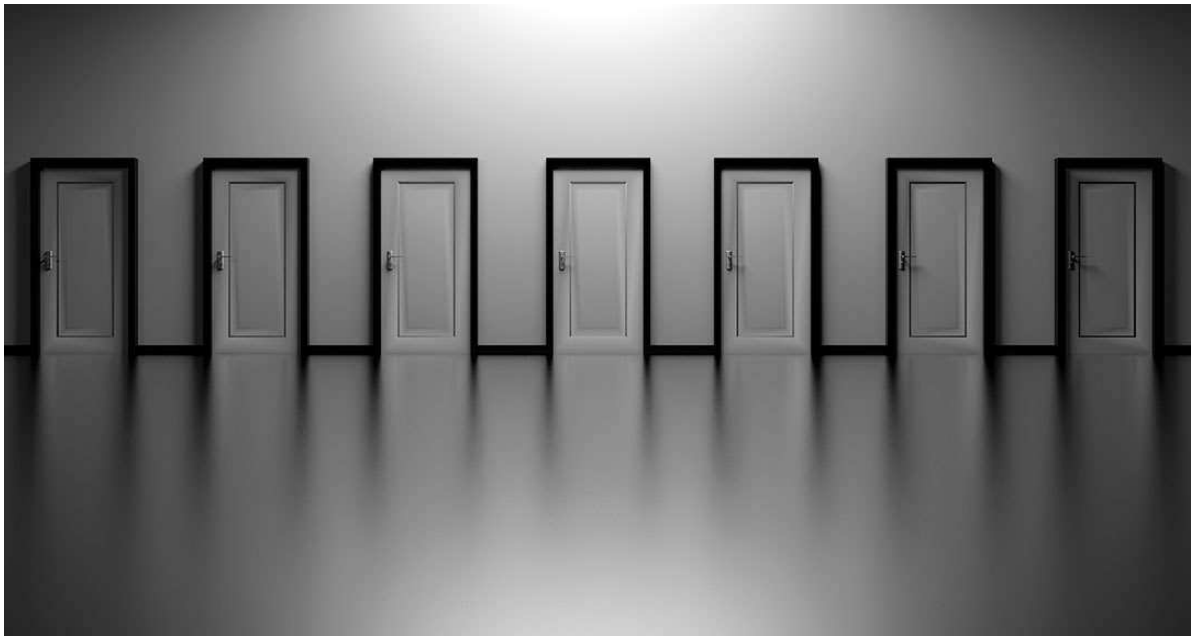
With gold likely to be in a moderate uptrend over the intermediate term, extreme upside returns from the price itself look to be unlikely outside of a crisis, whether financial or geopolitical. Additionally, the positive skewness of gold's historical return distribution points to below-average returns being much more common than above-average returns.

My base case for gold is a moderate bull market trend over the intermediate term following the recent consolidation, leaving the upside return asymmetry in the gold miners rather than in gold itself. Gold miners can offer a uniquely asymmetric risk/reward opportunity. They offer high beta exposure to an uncorrelated asset class. That is a powerful combination in portfolio optimization. Gold is on the efficient frontier.

stoxdox

A top sector choice for the coming cycle

by Brian Kapp, CFA | Oct 3, 2022 | 0 comments



Filter the Noise: Where Are We in the Cycle?

It may be surprising that the psychological stock market peak occurred in March 2021, while the bond market peaked in August 2020. These peaks occurred 18 and 24 months ago, respectively. During this historic topping process, information providers were overflowing with

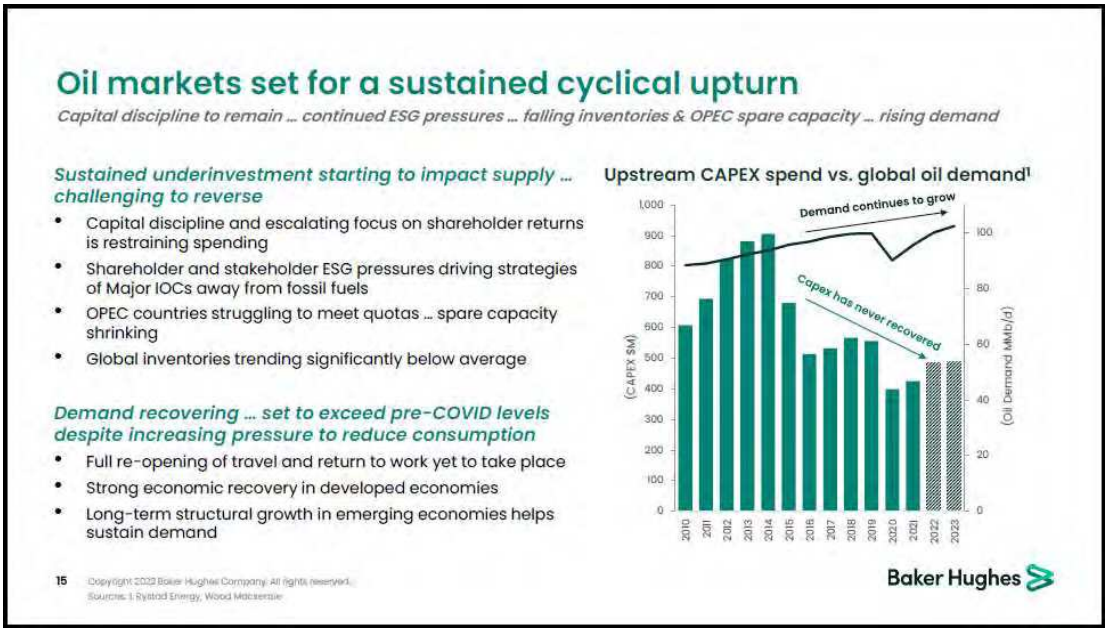
outlandish stories of the future and untethered optimism. This was the time of maximum risk.

Today, the investment information pendulum is beginning to move toward maximum fear, as the extreme risks of 18 to 24 months ago fully materialize. During such times of market stress, the purveyors of fear and doom will be elevated to the front page and given prime media placement.

The optimal time for risk mitigation ended long ago. Now is the time to search for signals amongst the noise as the greatest opportunities of the next cycle are born.

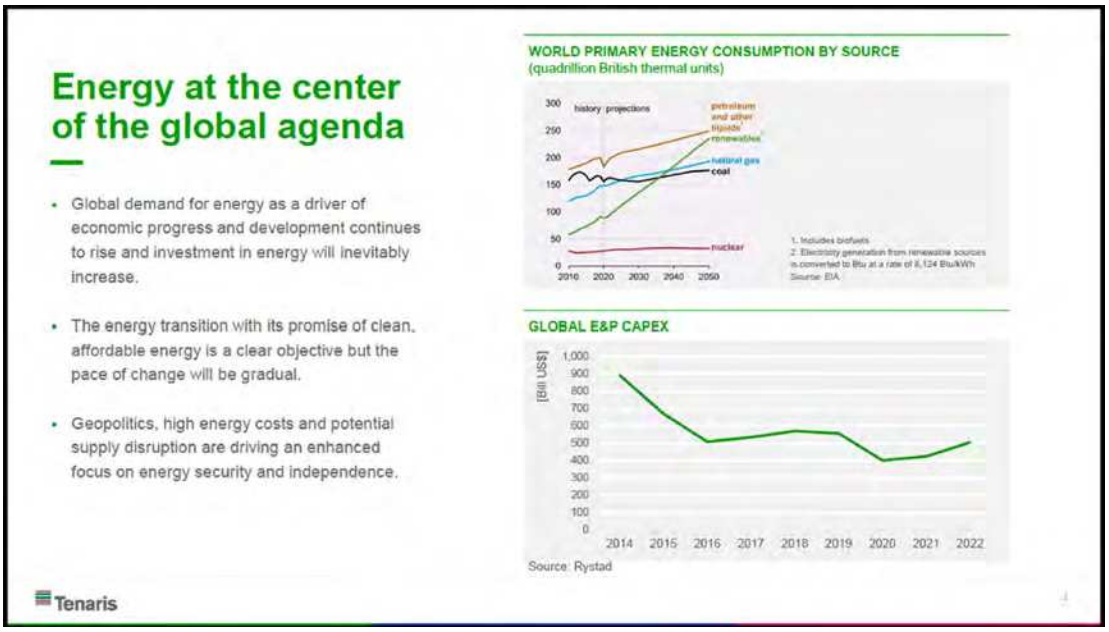
A Top Sector Opportunity for the Next Cycle

The energy services and equipment sector stands out as a top choice for the coming cycle. Technically, it is the "oil and gas equipment and services industry" in today's parlance. I refer to the group as energy services and equipment because it better describes the evolving nature of the industry as the energy transition is creating secular growth opportunities. The following slide from the Baker Hughes (NASDAQ:BKR) May 2022 investor presentation captures the essence of the bullish fundamental backdrop for the industry.



Source: Baker Hughes May 2022 investor presentation

On the right-hand side of the slide, notice that global oil and gas capex fell from $900 billion in 2014 to $500 billion in 2016. It stayed there until crashing to $400 billion during the 2020 to 2021 pandemic period. At roughly $500 billion currently, oil and gas capex remains below the level of 2010 and near half of the 2014 peak. Importantly, global oil and gas demand is expected to grow through 2050, as can be seen in the upper-right side of the following slide from the Tenaris (NYSE:TS) September 2022 presentation.



Source: Tenaris September 2022 presentation.

In essence, the oil and gas sector is in maintenance mode. The long bear market that began in 2014 and ended with negative oil prices in 2020 has created a risk averse environment. When combined with the global energy transition, there is little incentive for oil and gas companies to invest for growth. The lack of investment is on display in the table below which summarizes the drilled but uncompleted wells data for the US, or DUCs. The data was compiled from the US EIA (U.S. Energy Information Administration).

Month	DUCs
Dec-13	4,429
Dec-14	5,083
Dec-15	6,201
Dec-16	5,187
Dec-17	6,028
Dec-18	7,236
Dec-19	8,432
Dec-20	7,680
Dec-21	4,721
Apr-22	4,223
Aug-22	4,283

Source: US EIA. Created by Brian Kapp, stoxdox

I have highlighted the most recent DUC count in yellow and the peak in blue. Oil and gas producers in the US are restricting available well inventory to the lowest levels in a decade, and beneath the level reached in 2013. The following quote from Baker Hughes' Chairman and CEO, Lorenzo Simonelli, in the company's Q2 2022 earnings transcript, perfectly summarizes the fundamental industry backdrop (emphasis added):

> On one hand, the demand outlook for the next 12 to 18 months is deteriorating, as inflation erodes consumer purchasing power and central banks aggressively raise interest rates to combat inflation. On the other hand, due to **years of underinvestment globally** and the potential need to replace Russian barrels, broader **supply constraints** can realistically **keep commodity prices at elevated levels,** even in a scenario of moderate demand destruction… higher spending is required to re-order the global energy map and likely offsets moderate demand destruction **in most recessionary scenarios**.

Simonelli is describing the objectively bullish supply and demand conditions in the energy services and equipment industry. A recession

is almost immaterial to the sector given the long recessionary period and prolonged underinvestment in oil and gas. Olivier Le Peuch, Schlumberger's (NYSE:SLB) CEO, hints at this possibility in Schlumberger's Q4 2021 8-K filed with the SEC (emphasis added):

> Looking ahead into 2022, the **industry macro fundamentals are very favorable**, due to the combination of projected steady demand recovery, an increasingly tight supply market... These favorable market conditions are **strikingly similar to those experienced during the last industry supercycle,** suggesting that resurgent global demand-led capital spending will result in an **exceptional multiyear growth cycle**.

For a sense of the investment requirements, unconventional wells exhibit a hyperbolic decline curve during the first five years of production as discussed in this Journal of Petroleum Technology article, "Life After 5: How Tight-Oil Wells Grow Old," by Trent Jacobs. US gas wells are estimated to decline by 28% in year one while oil well production is expected to decline by 34% in the first year. 75% of US oil production is estimated to be produced from wells brought online over the previous two years.

At the time the journal article was published, January 31, 2021, there were 93,000 oil wells drilled between 2010 and 2017 that accounted for the remaining 25% of US oil production. The following quote from the article sums up the situation facing the oil and gas producers:

> "Base decline is the volume that oil and gas producers need to add from new wells just to stay where they are—it is the speed of the treadmill," said Raoul LeBlanc, vice president of the unconventional oil and gas unit at IHS.

With US DUCs down 50%, the US oil and gas industry is likely to rebuild available well inventory, as the treadmill requires. All signs point to the early innings of a material upcycle for oil and gas capex.

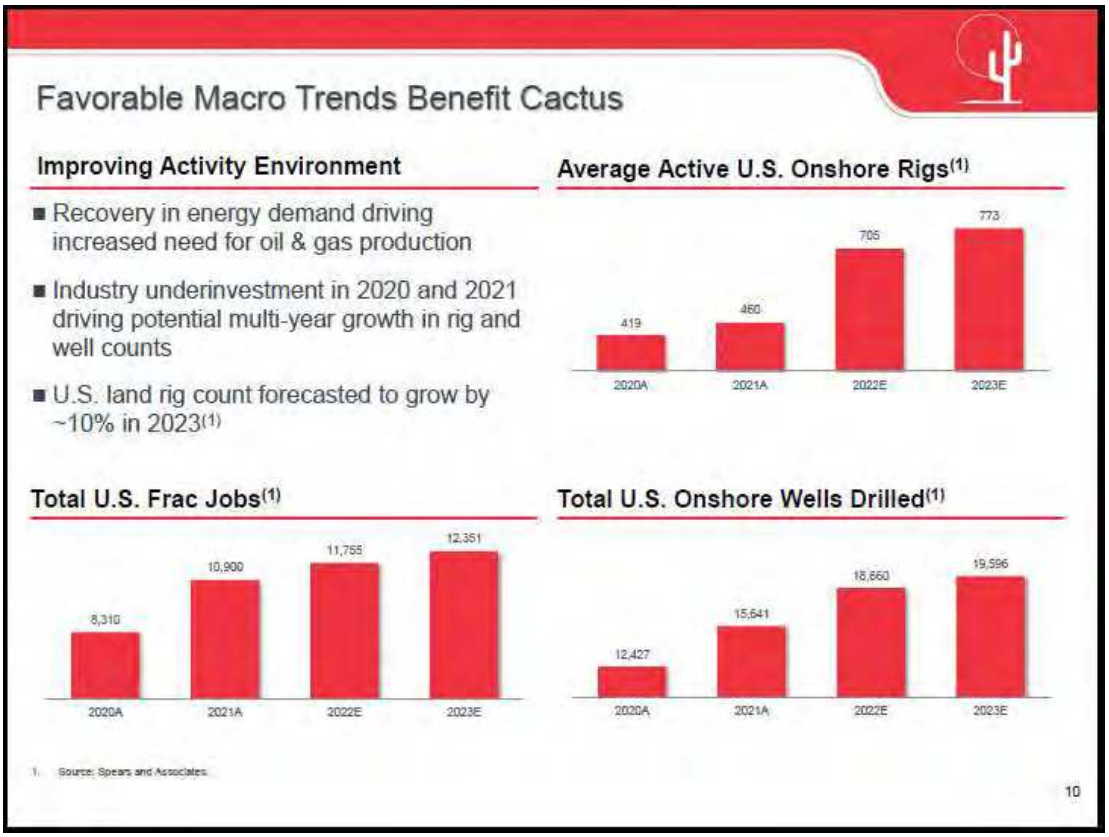
The energy services and equipment industry is the prime beneficiary as commodity price gains dissipate for the energy producers.

Cyclical Growth and Margin Expansion

The cyclical upswing is unfolding while the industry is operating conservatively given the long bear market. Clay Williams, the Chairman and CEO of NOV (NYSE:NOV), described it well in the company's Q2 2022 earnings release:

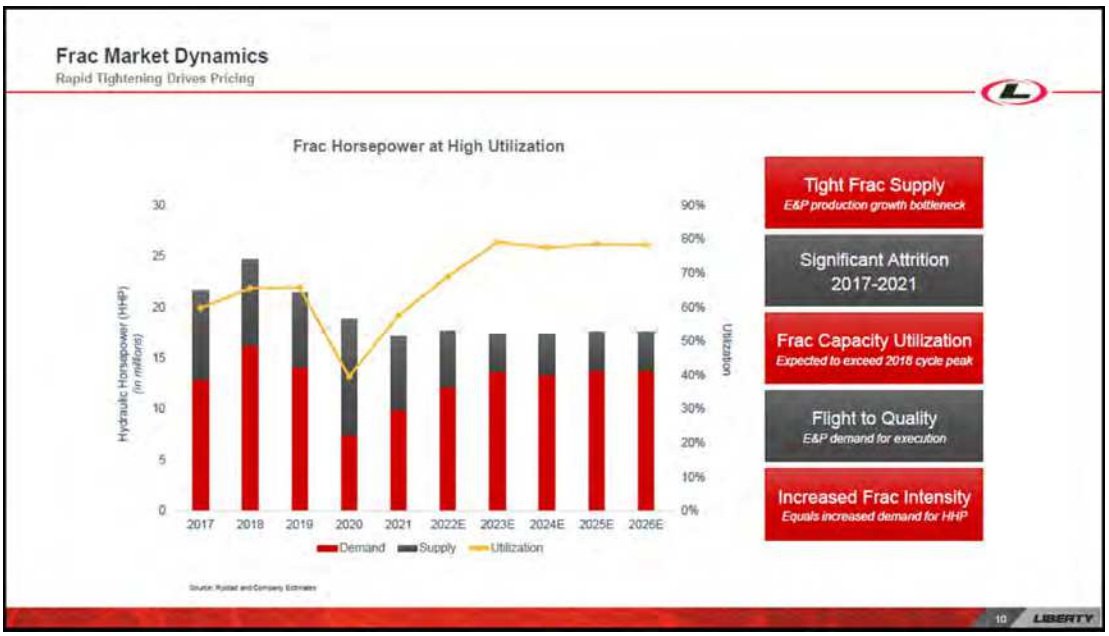
> Diminished global oil and gas inventories and productive capacity; rising energy security risks; and higher commodity prices are spurring increased oilfield activity. However, **the industry is struggling to ramp up following years of downsizing and underinvestment**... As the **early phase of this up-cycle** advances...

The early stage nature of the upcycle is supported in the following slide from the Cactus (NYSE:WHD) September 2022 investor presentation. 2022 marked the first year of growth for the US drilling upcycle with moderate growth projected thereafter.



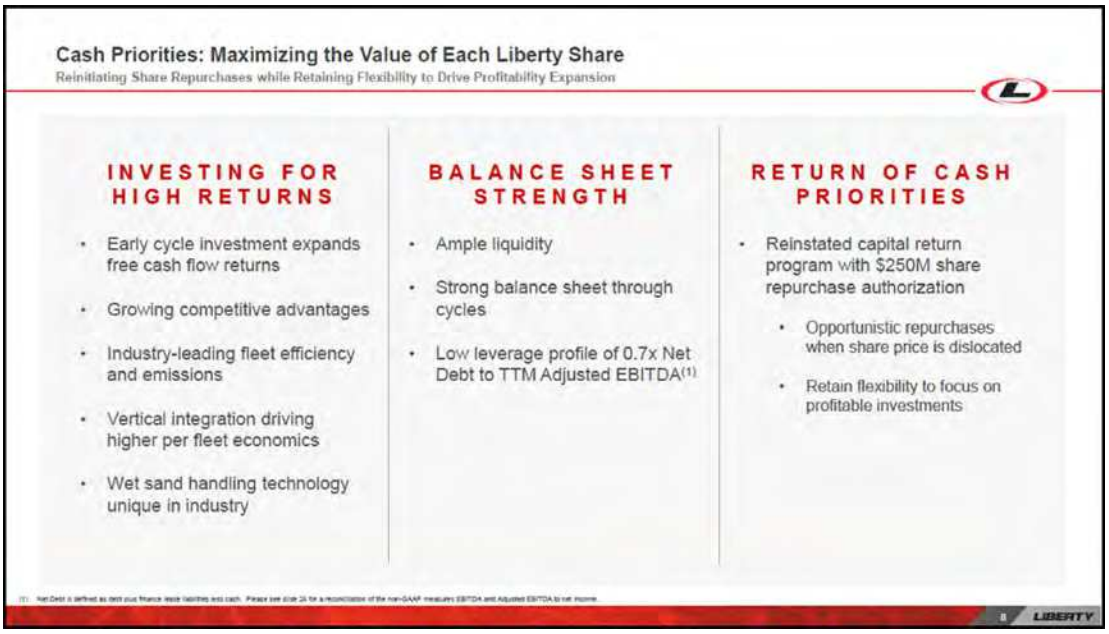
Source: Cactus September 2022 investor presentation

The limited ability to bring on additional capacity near term is supported in the following slide from the Liberty (NYSE:LBRT) September 2022 investor presentation. Conditions are rapidly tightening on the services and equipment side, which should continue to support pricing power for the foreseeable future.



Source: Liberty September 2022 investor presentation

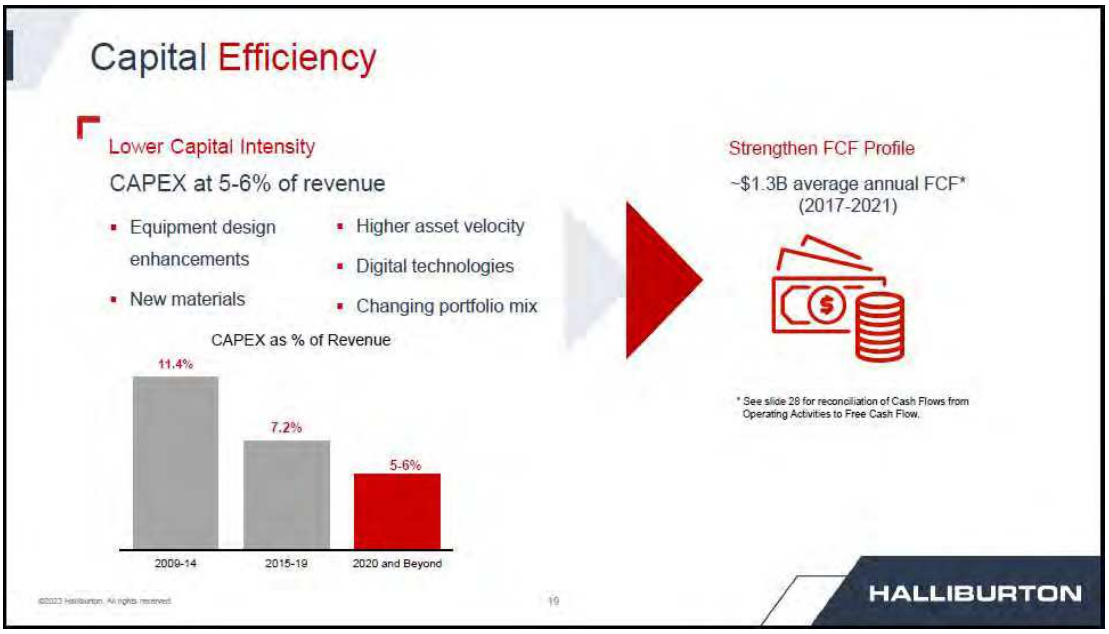
Notice on the following slide from the same presentation, that Liberty has authorized a substantial share buyback program at 10% of its current market capitalization. The industry is squarely focused on improving shareholder returns as the new upcycle unfolds.



Source: Liberty September 2022 investor presentation

Though conditions are tightening and leading to enhanced pricing power, the long bear market has created a more conservative industry. Demand could begin to stress supply creating an exceptional operating environment for the energy service and equipment industry.

Haliburton (NYSE:HAL) is materially reducing its capital expenditure plans compared to the prior upcycle between 2009 and 2014, as can be seen in the following slides from its Q2 2022 investor presentation . The sole focus remains on improving free cash flow and shareholder returns.



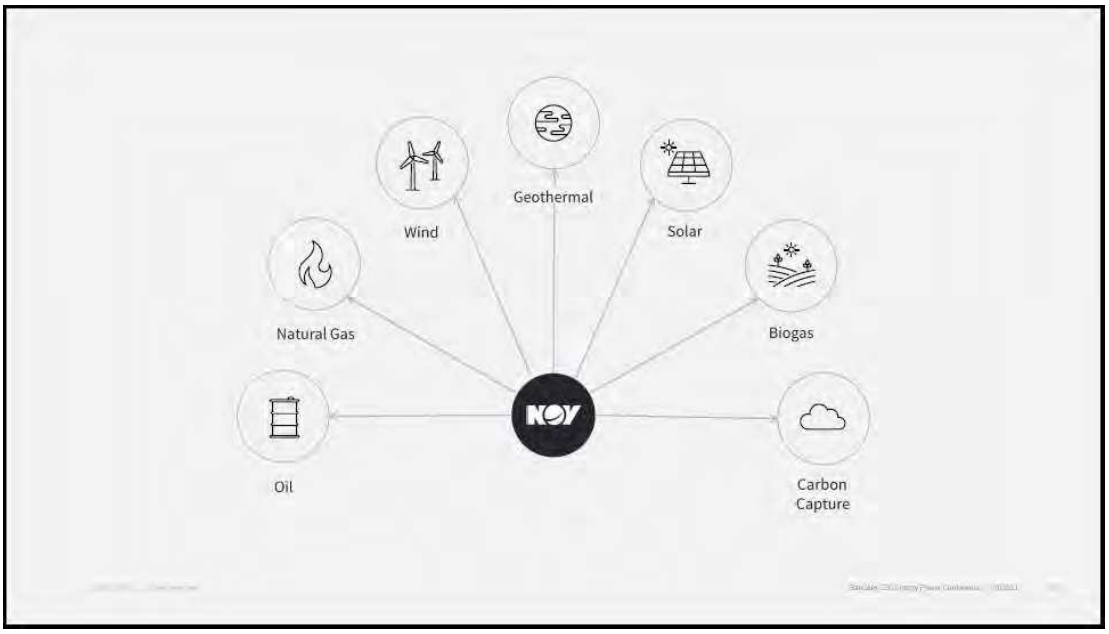
Source: Halliburton Second Quarter 2022 Update

Source: Halliburton Second Quarter 2022 Update

The Energy Transition: Secular Growth

As exemplified by Liberty and Halliburton above, the energy services and equipment industry is focused on returns rather than growth in the oil and gas sector. This is decidedly not the case outside of oil and gas. In fact, the energy transition is creating secular growth opportunities for the industry. The following sequence of slides from NOV's September 2021 investor presentation tell the secular growth story quite well. In the first slide, notice that oil and gas represent a

minority of the opportunity set for NOV and the energy services and equipment industry broadly.



Source: NOV's September 2021 investor presentation

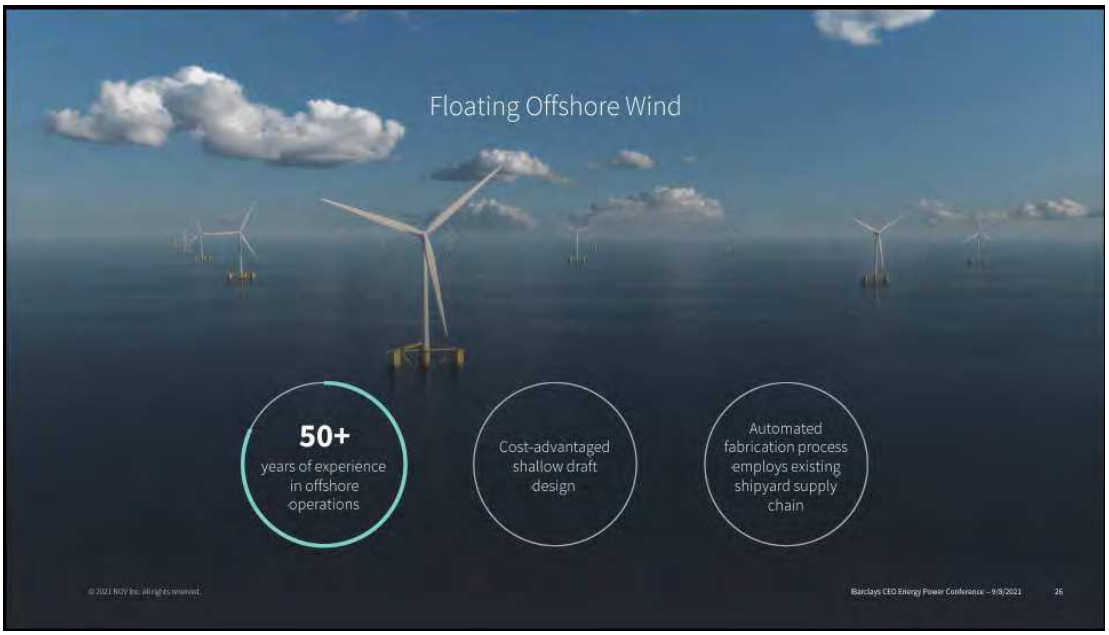
NOV's deep experience in offshore oil and gas makes it particularly well suited for the offshore wind energy market. Offshore wind installations are expected to explode through 2030 as can be seen on the next slide.

Source: NOV's September 2021 investor presentation

On the next slide, notice that NOV is expecting 100% growth from the offshore wind market, while 70% of vessels used by the industry to date were designed by NOV.

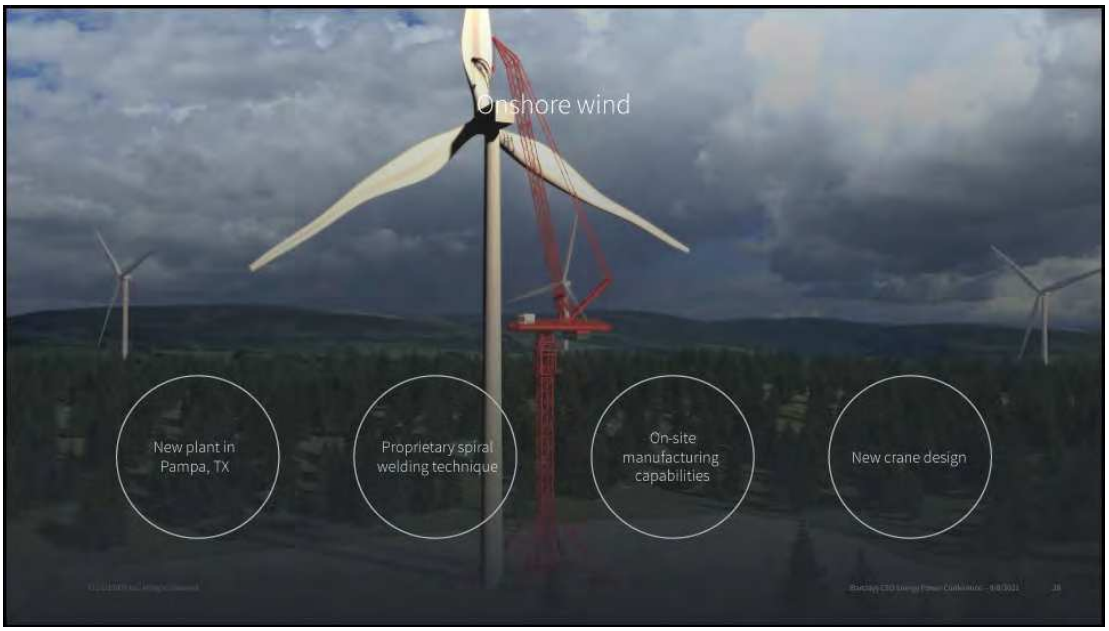
Source: NOV's September 2021 investor presentation

NOV has a competitive advantage in fixed and floating offshore wind as can be seen on the next slide.



Source: NOV's September 2021 investor presentation

The company is also targeting the onshore wind market with a new plant in Texas.



Source: NOV's September 2021 investor presentation

Keep in mind that wind is just one secular growth opportunity for NOV and the industry overall. The energy services and equipment industry is perfectly positioned for many energy transition growth opportunities including geothermal, solar, biogas, hydrogen, and carbon capture.

Simonelli, Baker Hughes' CEO, confirmed the industry's focus on secular growth opportunities while maximizing returns in the oil and gas sector. The following quote is from the Q2 2022 earnings transcript (emphasis added):

> From an operational and strategic perspective, we were active over the first half of the year, executing on a number of **exciting tuck-in acquisitions** and **new energy investments** such as Mosaic, Net Power, and HIF Global, which position us in **key technologies for the future**... to capitalize on opportunities in the **energy transition** and industrial areas... Overall, Baker Hughes is successfully executing on its vision as an **energy technology company**.

Viewing Baker Hughes and the industry as energy technology investments, broadly speaking, is the correct perspective for investors.

In the case of Baker Hughes, the complexity of its products and services is on display in the following slide.

Source: Baker Hughes May 2022 investor presentation

In my December 2021 Schlumberger (NYSE:SLB) report, "Schlumberger is a top choice for cyclical growth through 2023," I stated "Schlumberger is at its core a technology company." The company is a great example of the breadth of energy transition growth opportunities. The following is a list of Schlumberger's most visible venture investments from my April report: "Schlumberger is an asymmetric opportunity with supercycle potential."

- NeoLith: Novel Lithium mining technology with transformative potential and a pilot project underway.
- EnerVenue: Nickel-hydrogen battery technology with proven potential that is now being deployed.
- Genvia: Electrolyzer technology used to produce hydrogen with zero emissions, pilot projects underway.
- Celsius Energy: Proven building-scale geothermal energy technology that is being deployed.

In summary, the early-stage cyclical upturn in the oil and gas sector will be amplified by a diverse set of secular growth opportunities

resulting from the global energy transition.

Consensus Growth Estimates

Growth estimates for the energy services and equipment industry are in line with the bullish fundamental backdrop discussed above and could prove conservative. The combination of cyclical and secular growth opportunities is likely to introduce upside surprise potential into mid-decade. The table below, compiled from Seeking Alpha, displays consensus growth estimates for four of the top companies in the industry: Schlumberger, Halliburton, Baker Hughes, and NOV.

SLB	EPS	EPS %	PE	Sales %
Dec-22	$2.01	57.32%	17.83	18.87%
Dec-23	$2.81	39.54%	12.78	14.48%
Dec-24	$3.31	17.80%	10.85	8.99%
Dec-25	$3.71	12.08%	9.68	7.12%
HAL	**EPS**	**EPS %**	**PE**	**Sales %**
Dec-22	$2.01	85.75%	12.27	32.47%
Dec-23	$2.79	38.86%	8.84	14.91%
Dec-24	$3.21	15.29%	7.67	7.37%
Dec-25	$3.36	4.62%	7.33	5.71%
BKR	**EPS**	**EPS %**	**PE**	**Sales %**
Dec-22	$0.94	48.68%	22.38	5.26%
Dec-23	$1.64	74.83%	12.8	12.92%
Dec-24	$2.09	27.36%	10.05	6.36%
Dec-25	$2.27	8.84%	9.23	7.80%
NOV	**EPS**	**EPS %**	**PE**	**Sales %**
Dec-22	$0.54	-	29.85	26.95%
Dec-23	$1.00	84.12%	16.21	14.05%
Dec-24	$1.40	40.46%	11.54	7.37%
Dec-25	$1.54	9.49%	10.54	9.16%

Source: Seeking Alpha. Created by Brian Kapp, stoxdox

I have highlighted in blue the 2023 consensus earnings and sales growth estimates and in yellow the associated PE multiples. The estimated earnings growth rates across the industry are impressive while the valuation multiples are a fraction of the broad market. Additionally, earnings estimates are being reduced broadly across the economy which greatly enhances the relative attractiveness of the energy services and equipment industry.

Sector Detail: OIH

An interesting feature of the industry is the lack of investable options for larger institutions. The following table displays the components of the VanEck Oil Services ETF (NYSE:OIH), weighted by market capitalization. I have highlighted in yellow the companies that are large enough to absorb sizeable investment flows.

Capital Structure	Market Cap	Market Cap Weighted
SLB	$50.88B	33%
HAL	$22.35B	15%
BKR	$21.52B	14%
TS	$15.35B	10%
NOV	$6.18B	4%
VAL	$3.71B	2%
FTI	$3.81B	2%
CHX	$3.91B	3%
HP	$3.95B	3%
WHD	$3.04B	2%
PTEN	$2.57B	2%
LBRT	$2.37B	2%
RIG	$1.75B	1%
NEX	$1.80B	1%
XPRO	$1.41B	1%
NBR	$966.52M	1%
RES	$1.48B	1%
SLCA	$834.13M	1%
WTTR	$791.20M	1%
OII	$812.10M	1%
PUMP	$834.75M	1%
DRQ	$689.20M	0%
HLX	$596.30M	0%
CLB	$657.35M	0%
OIS	$247.96M	0%

Source: Seeking Alpha. Created by Brian Kapp, stoxdox

The industry is primarily composed of small and mid-cap stocks that are traditionally found in value funds, though they qualify as a top choice for most growth funds today. The total market cap of the above companies is $150 billion, less than many individual companies today.

For example, Exxon Mobil (NYSE:XOM) is valued at $364 billion. The entire energy sector, of which the services and equipment companies are a small fraction, comprises only 4.5% of the S&P 500. The relative

outperformance potential of the energy services and equipment industry is extraordinary. If significant investor flows enter the sector, as fundamentals suggest is likely, the tiny market cap of the industry creates the potential for explosive upside asymmetry.

Technicals

The technical backdrop speaks to the upside potential. The following 20-year monthly chart of the VanEck Oil Services ETF captures the carnage in the sector. One would be hard pressed to find a worse performing industry over the past two decades.

VanEck Oil Services ETF 20-year monthly chart. Created by Brian Kapp using a chart from Barchart.com

Please note that the green lines represent a major support zone while the orange lines represent the primary resistance levels. The following 5-year weekly chart provides a closer look at the technical setup.

VanEck Oil Services ETF 5-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

The industry is testing the upper end of what should be an incredibly strong support zone. It was primary resistance following the COVID crash and negative oil prices, then quickly became strong support into 2021. The upper end of this zone is highly likely to offer exceptionally strong support as the strong fundamentals render the lower end of the range as unlikely to be tested.

Summary

From a technical and fundamental perspective, the energy service and equipment industry has reached an ideal accumulation zone. The unique nature of the current cycle has created historically bullish operating conditions for the industry with volume growth and pricing power likely to persist for the foreseeable future. With the global energy transition entering a new phase, the early-stage cyclical upturn in the oil and gas sector will be amplified by a diverse set of secular growth opportunities. The energy services and equipment industry is a top choice for the coming cycle.

CERTIFICATE OF FILING/SERVICE

I do hereby certify that on date indicated below, I filed via electronic means (ESTTA) the foregoing document with the:

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This the 13th day of June, 2023.

/ Katarina K. Wong /
Katarina K. Wong

Attorney for Applicant

stoxdox

S&P 500: The path forward

by Brian Kapp, CFA | Jun 9, 2022 | 0 comments

What is the message of the markets?

The Primary Stock Market Trend

In my last market update report in March, "SPY: The death cross and what you need to know," I laid out the case for a primary downtrend being in force for the S&P 500 and the broader US stock market. Since this time, market prices have confirmed the primary downtrend by

falling for seven consecutive weeks. The question now is where do we go from here?

Technical Backdrop: S&P 500

The S&P 500 is unique amongst the major US stock market averages in that it has carved out a head and shoulders top pattern in addition to forming a death cross. Please keep in mind that there is nothing magical about a death cross, as discussed in the prior report, or a head and shoulders formation for that matter. That said, when used in conjunction with the macro environment, corporate fundamentals, and economic trends, technical analysis provides essential context for understanding price trends.

For example, when buying a house, everyone studies historical pricing trends, volumes, and price comps (technicals). While the fundamentals of location, neighborhood, school district, crime, local government, climate, etc. are the primary considerations underlying a home purchase, the price trends provide indispensable context for the ultimate decision. This is the essence of technical analysis.

The following quote and 5-year weekly chart from my March market update set the stage for understanding the path that we are on.

> Notice that the short, upward-sloping orange line, which represents the neckline of a potential weekly head and shoulders top, is more easily visible and aligns quite well with the monthly closing prices. This level is currently being tested from underneath...

SPY 5-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

In late March, as can be seen in the above chart, the S&P 500 index (NYSE:SPY) was testing its two primary resistance levels denoted by the orange lines. The diagonal orange line is the head and shoulders neckline, and the horizontal line is broken support from the topping pattern in late 2021.

The next chart carries over the same resistance and support levels (the green and blue lines) and updates the price action since. I have used a 3-year weekly chart instead of a 5-year chart for a closer look at the action.

SPY 3-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

Notice that the S&P 500 was rejected precisely at the upper orange line. This occurred the week following the March market update with the peak occurring two days after the report. The market then went on a seven-week losing streak, the first such streak since 2002. Please notice that I have added a third orange resistance line (the lowest orange line) as the 7-week decline took out a prior support level which has now become additional resistance.

In summary, the market has provided confirmation that we are in a primary downtrend of unknown length and depth. I will turn to the key fundamentals shortly to explore the question of the most likely length and depth of the downtrend. The following 2-year daily chart provides a closer look at the current setup.

SPY 2-year daily chart. Created by Brian Kapp using a chart from Barchart.com

Notice that the current price of $412 is only 2% beneath the new resistance level at $420. Additionally, the gold line represents the 50-day moving average which is also in this zone at $421. This area should be a challenging resistance level against the fundamental backdrop of declining economic growth, earnings disappointments, elevated inflation, and rising interest rates. As we will see, this is especially the case as the S&P 500 is materially underweight sectors that benefit from these fundamental trends.

The nearest primary support zone is designated by the two green lines which represent a price range of $338 to $351 compared to the current price of $412. The downside potential to this support zone is -15% to -18%. With the market currently down only -14% from the all-time high in January, a test of this primary support zone remains highly probable within the context of a typical bear market correction. If this occurs, the decline from the peak would be in the range of -27% to -30%.

The lower blue lines represent a primary resistance zone dating from 2018 to 2020 which should prove to be an exceptionally strong support level. If this lower zone is tested, the downside from current levels would be -27% to -30%. The downside from the peak would be -37% to -40%. A potential decline of this magnitude from the peak

cannot be ruled out as evidenced by the two prior bear markets which saw declines in the -50% range. The fundamental backdrop will shed light on the most likely path forward.

Fundamentals

To understand the fundamentals underlying the S&P 500 index, one must first understand the sector weightings in the index. Doing so places into context my comment that the S&P 500 is likely to struggle at key resistance levels given fundamental trends. The following table breaks down the sector weightings in the S&P 500. It is from my Rio Tinto (NYSE:RIO) report last week, "Rio Tinto is a perfect portfolio diversifier," in which I covered the diversification weakness within the S&P 500.

S&P 500 Sector Weights	% of S&P 500
Information Technology	27.11
Health Care	14.49
Financials	11.20
Consumer Discretionary	10.74
Communication Services	8.72
Industrials	7.77
Consumer Staples	6.50
Energy	4.84
Utilities	3.00
Materials	2.82
Real Estate	2.79

Source: State Street. Created by Brian Kapp, stoxdox

I have highlighted in yellow those sectors that benefit the most from existing economic trends. These two sectors account for just 8% of the S&P 500, which is a largely immaterial weighting. As a result, the S&P 500 has marginal exposure to the sectors that are best positioned for the current market climate.

The current economic trend features slower growth, elevated inflation, higher interest rates, and the removal of massive quantities of fiscal and monetary stimulus. These factors represent a distinct challenge for the following sectors: information technology, consumer discretionary, and consumer services. These sectors account for 47% of the S&P 500, or nearly half.

Turning to the other sectors, real estate should be pressured by higher rates on the valuation front and by the economically sensitive subsectors. Utilities are trading in the range of 30x earnings, which appears extreme. This is especially true in light of the rising rate environment. Consumer staples are being hurt by cost inflation, though sales are likely to be more stable than most. Healthcare should hold up well.

Finally, financials and industrials could be challenged in this environment as they often have been historically. There are competing forces that are unique to the current cycle that add support to the two sectors. Large US financials are financially strong and higher rates could increase margins. Industrials should be supported by policy trends such as the energy transition, onshoring, and the expansion of regional supply chains in addition to the positive trends in the energy and materials sectors.

All told, the trends in place are distinctly negative for 52% of the index while being historically negative for 19% more, though there are some offsetting effects for this group. Those industries that are experiencing neutral trends account for 21%, while those experiencing positive trends account for just 8% of the S&P 500. At minimum, with only 8% of the portfolio experiencing positive trends, the path forward is likely to remain volatile. For more color on the likely path for the other 92%, we need to discern what is priced into the market.

Equity Valuations

With economic trends skewing negative for roughly 70% of the S&P 500, the question turns to valuations. As mentioned above, the utility sector is trading at over 30x earnings as can be seen in the following

table compiled from The Wall Street Journal. I have highlighted in yellow those stock market indices that are trading at historically elevated valuations. The S&P 500 index is highlighted in blue.

Equity Market Valuations	Trailing PE	Year Ago PE	Yield (%)	Forward PE
Russell 2000 Index	50.57	n.a.	1.45	20.12
NASDAQ 100 Index	26.47	36.1	0.86	22.75
S&P 500 Index	21.72	36.97	1.55	18.05
Dow Jones Transportation Average	15.17	n.a.	1.3	12.56
Dow Jones Utility Average Index	30.47	22.91	4.14	26.05

Source: The Wall Street Journal. Created by Brian Kapp, stoxdox

With a trailing PE of 22x, the S&P 500 is certainly not extremely valued compared to the other market indices. That said, the S&P 500 shares many of its largest holdings with the Nasdaq 100 index. As a result, further valuation corrections within the Nasdaq would weigh heavily on the S&P 500.

Additionally, a mid to high teen valuation is more in line with historical norms for the broad stock market. If earnings growth comes under further pressure, valuation compression is highly likely. Furthermore, if we are past peak earnings and profit margins for the current cycle, the valuation multiple compression will coincide with declining earnings, which is the worst-case scenario for stocks.

I covered the Nasdaq 100 (NYSE:QQQ) and the Russell 2000 (NYSE:IWM) in the March update. They too have progressed similarly to the S&P 500. Given that all stock indices are positively correlated, a quick review of these two major indices is relevant to the S&P 500 and will shed more light on the situation.

Nasdaq 100

For this task, a picture is worth a thousand words. In the charts below, I compare the 1-year chart from March with the current 1-year chart for both the Nasdaq 100 and Russell 2000 indices. The progression of the Nasdaq 100 technical backdrop is identical to that of the S&P 500. Please note that the rally attempt at the time of the last report (the

first chart below) was rejected just above the orange resistance line at the 200-day moving average (the grey line). Additionally, note that the recent bounce in the Nasdaq 100 (the second chart) occurred at the second primary support level (the lower green line).

March 24, 2022: Rally attempt off a potential double bottom

QQQ 1-year daily chart. Created by Brian Kapp using a chart from Barchart.com

June 8, 2022: Failed rally and a test of next support level

QQQ 1-year daily chart. Created by Brian Kapp using a chart from Barchart.com

While a further rally attempt back toward the upper green line is possible in the short term, the index remains in a solid downtrend. The downtrend is occurring against a backdrop of elevated valuations and negative economic trends which are pressuring both the price and the earnings side of valuations (P/E).

Russell 2000

The Russell 2000 is in a similar technical boat. It too was rejected at the nearest resistance level following the rally attempt at the time of the March report. Interestingly, like the Nasdaq 100, the recent bounce in the Russell 2000 (the second chart) occurred at the first major support level (the green line). Notably, the S&P 500 has yet to test its first major support level.

March 24, 2022: Rally attempt off a potential triple bottom

IWM 1-year daily chart. Created by Brian Kapp using a chart from Barchart.com

June 8, 2022: Failed rally and a test of next support level

IWM 1-year daily chart. Created by Brian Kapp using a chart from Barchart.com

In summary, the S&P 500 and the broader US stock market are unequivocally in a primary downtrend. The technical behavior of each index is precisely what one would expect in a bear market. The remaining question is what is the most likely pathway forward?

Interest Rates: How We Got Here

To know where we're going, we have to know where we've been. The following chart of the 10-year treasury bond yield courtesy of the St. Louis Federal Reserve is the single best picture for capturing where we've been.

Source: St. Louis Federal Reserve.

A 40-year trip through ever lower interest rates. Notice the final plunge in the lower right-hand corner, coincident with the onset of the COVID pandemic. This took the 10-year treasury yield to a bottom of roughly 0.5% from a peak near 16% in September 1981.

With bonds and interest rates at the heart of the financial system and fundamental to all valuations, declining interest rates have been a driving force behind asset price inflation in recent years and since the early 1980s. Whether or not the secular trend in interest rates has reversed is therefore of central importance in determining the most likely path forward.

The Yield Curve

To answer the question of whether or not the recent rate spike represents a secular trend change, we must first start with the current upcycle. Is the current upcycle behaving unusually or is it in character with the behavior of rates during past spike episodes during the 40-year downtrend?

The bond market speaks through the yield curve. In other words, the market speaks to economic conditions and expectations by its differential pricing of short-term versus long-term rates. As a result, to answer the above questions, I will explore the behavior of the yield curve in the current cycle compared to historical cycles.

In the following chart from the St. Louis Federal Reserve, I have displayed the treasury yield curve since 1976. I have chosen to use the difference between the 2-year yield and the 10-year yield to define the yield curve through time as it is a widely accepted curve benchmark.

Source: St. Louis Federal Reserve.

At first glance, it is clear that the bond market, or yield curve, has experienced several well-defined epochs since 1976. Given recent concerns about a possible yield curve inversion and it signaling a possible recession, this study takes on added importance. Notice in the lower right-hand corner of the chart that the yield curve briefly inverted in April 2022. Note that going beneath the black horizontal line indicates an inverted yield curve (2-year yield > 10-year yield).

Unusual behavior in the bond market is immediately evident. The recent spike higher (steepening of the curve) from January 2020 into April 2021, was extraordinarily short lived. Additionally, the spread peaked out well below prior epochs. The unusual behavior in the current cycle hints at a change of character in the bond market when viewed through the lens of history.

Yield Curve Epochs

Reviewing each bond market epoch since 1976 will shed light on what is different this time. The following tables were compiled from the underlying data depicted in the St. Louis Federal Reserve chart above. I defined the time frame of each epoch to be the onset of yield curve inversion until the curve reestablished 25 basis points of positive slope (the 10-year minus the 2-year gets back to +0.25%).

This is the typical increment by which the Federal Reserve moves short-term interest rates and serves as a logical demarcation of an inverted/flat curve regaining upward slope. Please note that I have color coded the key data points in each epoch for ease of comparison

across cycles. Furthermore, I have grouped the epochs into three subsets in order to illuminate the trend.

Epoch: 1978 to 1982	Time	10-Year Yield
Inversion of 2-10 year yield curve	8/18/1978	8.39%
25 bps spread regained	Oct-82	10.71%
Duration (inversion to 25 bps spread)	42 months	-
Epoch: 1988 to 1990	**Time**	**10-Year Yield**
Inversion of 2-10 year yield curve	12/13/1988	9.14%
25 bps spread regained	Jul-90	8.20%
Duration (inversion to 25 bps spread)	21 months	-

Created by Brian Kapp, stoxdox

The two epochs in the above table represent the longest duration inversion cycles. Of note, they are also the first two epochs during the secular rate downtrend. They each had similar beginning and ending long-term interest rates, with the 1978-1982 period featuring extraordinary yield curve volatility. This volatility is clearly visible in the yield curve chart above.

Please note that I consider 1978 to 1982 to be one epoch even though there were brief moments in which the yield curve was not inverted during the period. 25 basis points of upward slope was not sustainably reestablished until 1982, following back-to-back recessions. The 1978-1982 period was exceptionally long at 42 months as the federal reserve was reversing the structural inflationary trend of the 1970s.

This epoch marked the last secular interest rate transition, from rising rates to falling rates. That period featured both an unusual inversion duration and unusual yield curve volatility, which would be likely signals of major regime changes in the bond market. In the case of the last secular shift, the inversion duration was unusually long, and yield curve volatility was unusually high.

A trend that will become visible as we go through time is the shortening of the inversion cycle (the yellow highlighted cells) as the

40-year bond bull market progressed.

Epoch: 1997 to 2000	Time	10-Year Yield
Inversion of 2-10 year yield curve	5/26/1998	5.56%
25 bps spread regained	Oct-98	4.64%
Duration (inversion to 25 bps spread)	6 months	-
-	-	-
Inversion of 2-10 year yield curve	2/2/2000	6.42%
25 bps spread regained	Jan-01	5.19%
Duration (inversion to 25 bps spread)	12 months	-
Epoch: 2005 to 2007	**Time**	**10-Year Yield**
Inversion of 2-10 year yield curve	12/27/2005	4.39%
25 bps spread regained	Aug-07	4.54%
Duration (inversion to 25 bps spread)	19 months	-

Created by Brian Kapp, stoxdox

The 1997 to 2000 epoch featured two inversion cycles with the second coinciding with a recession. Of note, four of the seven inversion epochs since 1976 coincided with recessions. Yield curve inversions are not necessarily a predictor of recessions, but they are a red flag for the heightened risk of one. The 2018 to 2020 and 2022 epochs were exceptionally swift and extreme outliers as can be seen in the following table.

Epoch: 2018 to 2020	Time	10-Year Yield
Inversion of 2-10 year yield curve	8/27/2019	1.50%
25 bps spread regained	Nov-19	1.78%
Duration (inversion to 25 bps spread)	3 months	-
2022	**Time**	**10-Year Yield**
Inversion of 2-10 year yield curve	4/1/2022	2.89%
25 bps spread regained	Apr-22	2.89%
Duration (inversion to 25 bps spread)	0.5 months	-
Current 2-10 year spread (6-7-22)	0.29	2.99%

Created by Brian Kapp, stoxdox

The duration of the two most recent epochs is clearly out of character compared to the preceding five cycles. If you blinked, you might have missed the 2022 epoch in its entirety as the yield curve inverted for only two days and regained upward slope within a mere two weeks. Time will tell if the 2022 epoch is an initial tremor or merely a blip on the screen. The following quote from the last market update captures the essence of the current situation.

> While risk-free rates may become periodically kinked at points along the yield curve, global central banks appear to have the ability and resources to maintain upward sloping yields. This is especially the case given the extreme inflationary backdrop.

In addition to the unusually short duration of recent inversions, interest rate volatility has been extreme. Long-term rates bottomed during the 2018 to 2020 epoch at an extraordinarily low yield near 0.5% (50 basis points); currently they are near 3% (300 basis points). This speaks to the other signal of a regime shift, volatility.

A 250-basis point increase in rates from a starting level of 50 basis points represents an exceptional level of rate volatility. Meaning, a 250-basis point change from a starting rate level of 450 to 1100 basis points is much different than starting at 50. For perspective, the percentage change from 50 to 300 is 500% compared to 55% and 14% from a starting point of 450 and 1100 basis points, respectively.

Yield Curve: A Summary

The current epoch displays all the signs of a major inflection point and trend change for rates. It features unusual inversion duration and unusual volatility.

On the volatility side, the difference in the current epoch compared to the 1978 to 1982 inflection point lies in what is unusual and what is

volatile. During the 1978 to 1982 period, the volatility expressed itself through yield curve volatility.

In the current epoch, volatility is expressing itself through relative yield changes. For example, the 2-year yield was under 25 basis points as recently as September 2021. The move higher to 280 basis points occurred with historic speed and thus, volatility. To date, the yield curve in the current cycle has experienced unusually low volatility.

For greater color on the current cycle, the table below compares the average slope of the yield curve in basis points since 1976 to the slope since 2020 (the most recent epoch). I have highlighted in yellow the difference in the median yield curve slope in the current period (2020 onward) compared to the entire 40-year period.

2-10 Year Curve Since: 6/1/1976	2-10yr (bps)
Average	93
Median	88
2-10 Year Curve Since: 1/2/2020	**2-10yr (bps)**
Average	76
Median	69
2-10 Year Curve: 1976 vs 2020	**Basis Points**
Difference: average	17
Difference: median	19

Created by Brian Kapp, stoxdox

Notice that the slope of the yield curve in the current epoch, in basis points, is nearly identical to the average since 1976. As a result, the slope of the yield curve in the current cycle is quite normal. This is especially the case considering the extraordinarily low level of long-term interest rates in the current cycle; the 10-year yield reached an incredibly low 0.5% in 2020.

Given that long-term interest rates remain quite low from a historical perspective, as well as in relation to inflation trends, there is ample room for the current yield curve to rise and steepen from here.

Interest Rates: Current Trends

Since the bottom in 2020, interest rates have exploded with all signs pointing to a major trend reversal to the upside. The current rate trend across the broad bond market remains solidly upward. In the following table, compiled from The Wall Street Journal and my March report, I compare current government-linked yields to the same yields as of the March update. The yield changes in basis points are in the right-hand column. The bond data providers include Bloomberg, J.P. Morgan, and ICE Data Services.

Bond Yields: High Quality Indices	6-5-22 (% Yld)	% Off High	Since 3-21-22 (bps)
U.S. Government/Credit	3.44	-3%	60
U.S. Aggregate	3.47	-4%	60
U.S. Agency	2.99	-2%	61
10-20 years	2.92	-2%	61
20-plus years	3.73	-3%	70
Mortgage-Backed	3.49	-7%	56
Global Government	2.18	0%	59
Canada	3.00	0%	66
EMU	2.06	0%	99
France	1.83	0%	90
Germany	1.25	0%	87
Japan	0.57	-5%	6
Netherlands	1.55	0%	94
U.K.	2.25	0%	53
Emerging Markets	6.89	-4%	52

Created by Brian Kapp, stoxdox

I have highlighted in yellow what I view to be the best gauge of the risk-free interest rate trend since the March report. Rates on the intermediate to long-end of the curve have increased by 60 basis points (0.6%). This provides a foundation for gauging the message of the bond market when it comes to the state of the economy.

Corporate Bonds: The Economic Signal

While risk-free government bonds provide pure interest rate trend information, the corporate bond market provides economic trend information.

Knowing that risk-free rates have expanded by 60 basis points since the last market update, we can place the change in corporate bond rates into an economic context. The following table was compiled from The Wall Street Journal and my prior report. I compare current corporate yields to the same yields as of the March update. The yield changes in basis points are in the right-hand column. I have highlighted the cells that capture the economic signals from the bond market since March.

Corporate Bond Yields	6-5-22 (% Yld)	% From High	Since 3-21-22 (bps)
U.S. Corporate	4.31	-3%	68
Intermediate	4.04	-3%	71
Long-term	4.79	-5%	65
Double-A-rated (AA)	3.76	-4%	62
Triple-B-rated (Baa)	4.62	-3%	72
1-10 Year Maturities	4.08	-2%	67
10+ Year Maturities	4.89	-4%	69
Corporate Master	4.35	-2%	67
Junk Bond Yields	**6-5-22 (% Yld)**	**% From High**	**Since 3-21-22 (bps)**
High Yield	7.09	-8%	107
High Yield Constrained*	7.25	-7%	112
Triple-C-rated (CCC)	12.77	-6%	266
High Yield 100	6.74	-9%	111
Europe High Yield Constrained	5.59	-5%	120
Global High Yield Constrained	7.32	-6%	89

Created by Brian Kapp, stoxdox

I have highlighted in yellow the investment grade bond market signal. Notice that the yield increase is roughly 60 basis points as was the case for the risk-free bond market in the previous table. The bond

market is not signaling material economic trouble for quality corporations.

The signal from the lower-quality end of the corporate bond market is decidedly negative. Notice that rates on triple-C rated bonds exploded to the upside by 266 basis points. This is roughly 200 basis points of yield spread widening compared to risk-free interest rates (highlighted in blue). These bonds represent a canary in the economic coal mine given their sensitivity to changes in economic conditions.

The broader junk bond market (the lower section of the table) is behaving much better than the triple-C rated index. Here, using the European high yield market as a benchmark, rates expanded by 120 basis points. This is a spread widening over risk-free rates of roughly 60 basis points. The spread widening of 60 basis points compared to risk-free rates is likely signaling a normalization of absolute junk bond yields as well as increasing economic risks.

The junk bond market is certainly not signaling impending economic doom, rather, it is signaling an economic slowdown and a renormalization of rates. Additionally, current junk bond yields are in the 5.5% to 7.5% range which, historically speaking, is moderate. Similar to the risk-free and high-quality segments of the bond market, there is ample room for rates to continue higher.

The Current Yield Curve

The global risk-free yield curves are summarized in the table below compiled from Bloomberg. Notice that all five yield curves are upward sloping and that the spread between the 2-year and 10-year yields are within the margin of error, historically speaking.

Risk Free Yield Curves	Monetary	2 Year	5 Year	10 Year	30 Year	2-10yr (bps)
Australia*	0.85%	2.76%	3.32%	3.55%	3.73%	79
US	1.00%	2.70%	2.99%	2.99%	3.15%	29
UK	1.00%	1.74%	1.85%	2.23%	2.45%	49
Germany	-0.50%	0.64%	1.02%	1.29%	1.54%	65
Japan	-0.10%	-0.08%	-0.01%	0.24%	1.05%	32

Source: Bloomberg. Created by Brian Kapp, stoxdox

Risk-free yield curves are not signaling an impending recession. That being said, economic volatility is highly likely and could feature a technical recession. The supply chain chaos created by the COVID shutdowns in concert with excess demand amplified by fiscal and monetary policies is being unwound.

Summary

As these forces continue to reverberate through the global economy, both risk and opportunity will remain elevated. The Chinese call it yin and yang. While the structural shifts afoot will produce headwinds for the broad market over the near term, the process is advanced. This has created an opportunity-rich environment for those that are selective, as the path forward will be a reflection of where we have been.

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QQQ: Curb your enthusiasm

by Brian Kapp, CFA | Apr 21, 2022 | 0 comments

I am assigning the Invesco QQQ ETF (NASDAQ: QQQ) a negative risk/reward rating based on its single stock and sector concentration risk, a heightened risk of valuation multiple contraction across much of the portfolio, and its decidedly bearish technical backdrop.

Risk/Reward Rating: Negative

On the doorstep of Q1 2022 earnings reports, I downloaded consensus earnings and sales estimates for each

company in the Invesco QQQ ETF (a proxy for the Nasdaq 100 index) to construct a baseline for reviewing each company as the year unfolds. The consensus estimates for each company were obtained from Seeking Alpha. My intent was not to analyze and write up the QQQ, but to find attractive risk/reward opportunities amongst the top Nasdaq stocks.

Like most investors I knew that the fund was concentrated, however, it was nevertheless shocking to breakdown and look at the degree of concentration in the portfolio. As an investment professional of 26 years, I have found that we can often get caught up in the day-to-day details and noise of the market and thus risk missing the forest for the trees. This risk can become especially acute following major bull market moves, the length of which can foster complacency and recency bias amongst even the most experienced investors.

Risks

The following table displays the sector weightings of the QQQ and compares them to that of the broad stock market represented by the SPDR S&P 500 Trust ETF (NYSE: SPY). I have highlighted in blue those sectors for which the QQQ has an extreme overweighting compared to the broad market. Of note, the three sectors that are overweighted in the QQQ account for 83% of the total portfolio value.

Sector Weights	QQQ	SPY	Diff.	% Diff.
Information Technology	48.89%	26.62%	22.27%	83.65%
Communication Services	17.15%	9.19%	7.96%	86.63%
Consumer Discretionary	17.00%	11.91%	5.09%	42.68%
Health Care	6.29%	14.21%	-7.92%	-55.75%
Consumer Staples	6.02%	6.53%	-0.51%	-7.75%
Industrials	3.18%	7.87%	-4.69%	-59.58%
Utilities	1.24%	2.88%	-1.64%	-56.97%
Financials	0.00%	11.02%	-11.02%	-100.00%
Energy	0.00%	4.17%	-4.17%	-100.00%
Real Estate	0.00%	2.87%	-2.87%	-100.00%
Materials	0.00%	2.73%	-2.73%	-100.00%

Source: State Street. Created by Brian Kapp, stoxdox

I have highlighted in yellow those sectors for which the QQQ has an extreme underweighting compared to the broad market averages. While the Nasdaq composite is well known as a technology-heavy index, it is incredible that the Nasdaq 100 index offers zero exposure to four of the eleven primary economic sectors and marginal exposure to three of the eleven primary economic sectors.

As an innovation-centric index, it is equally incredible that the QQQs have 56% less exposure to the healthcare sector compared to the S&P 500 index. This fact alone hints at the possibility that the Nasdaq 100 index may no longer serve as an efficient vehicle for exposure to the leading growth and new innovation opportunities.

In addition, looking out over the coming decade there is likely to be incredible innovation across the materials, energy, and industrial sectors. The fact that the QQQs have zero or marginal exposure to these future innovation sectors supports the thesis that the Nasdaq 100 may no longer offer the growth exposure that many investors have historically sought when investing in the QQQs.

Risk: Single Stock Concentration

The postulation that the QQQs may no longer represent an efficient vehicle for investment in new innovation or exceptional growth opportunities is further supported when looking at the top holdings of the fund. The following table displays the top seven holdings of the QQQs and compares their weighting to that within the SPY or S&P 500 index. I have highlighted the total weighting in both index funds for ease of comparison.

Name	Ticker	% Weight QQQ	% Weight SPY	Diff.	% Diff.
Apple Inc.	AAPL	12.62%	6.90%	-5.72%	-45.32%
Microsoft Corporation	MSFT	9.81%	5.65%	-4.16%	-42.41%
Alphabet Inc. Class C & A	GOOG	7.33%	3.96%	-3.37%	-45.98%
Amazon.com Inc.	AMZN	7.22%	3.58%	-3.64%	-50.42%
Tesla Inc	TSLA	4.76%	2.22%	-2.54%	-53.36%
NVIDIA Corporation	NVDA	3.50%	1.43%	-2.07%	-59.14%
Meta Platforms Inc. Class A	FB	3.40%	1.31%	-2.09%	-61.47%
Total	-	48.64%	25.04%	-23.60%	-

Created by Brian Kapp, stoxdox

Incredibly, the top seven holdings represent roughly half of the QQQ portfolio. It should be noted that the 25% weighting of the seven companies in the S&P 500 index is historically extreme in its own right. These are seven of the world's largest market cap companies, with five in the trillion dollar plus market cap club and some in the $2 to $3 trillion neighborhood. To expect these companies to continue to grow at rates commensurate with the expectations of growth investors, let alone innovation investors, is a tall order.

Risk: Valuation Multiple Compression

To evaluate the risk/reward potential of these top holdings, I reviewed the valuation of each relative to consensus earnings estimates for the current year, which is displayed in the 22' PE column in the table below. Please note that this column could reflect fiscal year 2022 or 2023 depending on the company. The Wgt. PE and Wgt. EPS % columns display the QQQ portfolio weighting for each company across each metric or the contribution of each company to the portfolio-wide PE and portfolio-wide EPS growth.

QQQ Top 7	Ticker	Weight	22' PE	23' EPS %	Wgt. PE	Wgt. EPS %
Apple Inc	AAPL	12.62%	27	6.36%	3.37	0.80%
Microsoft Corp	MSFT	9.81%	30	13.52%	2.91	1.33%
Alphabet Inc Class C & A	GOOG	7.33%	22	16.99%	1.61	1.25%
Amazon.com Inc	AMZN	7.22%	63	52.28%	4.52	3.77%
Tesla Inc	TSLA	4.76%	94	29.87%	4.46	1.42%
NVIDIA Corp	NVDA	3.50%	38	20.04%	1.33	0.70%
Meta Platforms Inc Class A	FB	3.40%	17	19.72%	0.58	0.67%
QQQ Top 7 vs Total Portfolio	**Ticker**	**Weight**	**22' PE**	**23' EPS %**	**Wgt. PE**	**Wgt. EPS %**
Top 7: Average (Wgt. = total)	-	49%	41	22.68%	18.78	9.94%
QQQ: Median (Wgt. = total)	QQQ	100%	25	15.10%	38.11	16.23%

Created by Brian Kapp, stoxdox

The critical summary data is highlighted in blue. The weight of the seven largest holdings is 49% with an average PE multiple of 41. The weighted PE of the full QQQ portfolio (all 101 stocks) is 38x current year earnings estimates. Please note that the yellow highlighted cells represent peculiarities of Amazon (NASDAQ: AMZN) in respect to 2023 growth estimates.

Essentially, Amazon's earnings are expected to plunge in 2022 and thus the unusual 52% growth expected for 2023. I adjust the expected QQQ portfolio earnings growth for 2023 by removing this distortion and using Amazon's expected 2-year annualized earnings growth rate from 2021 to 2023, which is projected to be 6.58% per year. This adjustment has the effect of reducing the QQQ portfolio expected earnings growth in 2023 from 19.52% to 16.23%, which is highlighted in the lower right-hand corner of the above table.

Heightened Risk: Top 5

From a pure valuation perspective, five of the top seven holdings carry a heightened risk of valuation multiple compression. This is the case when viewed through the lens of absolute valuation multiples and in relation to expected growth rates into 2023. The following table contains the summary data for these five companies. The Amazon 23' EPS % and Wgt. EPS % columns reflect the adjustments mentioned above.

QQQ Top 5: Heightened Risk	Ticker	Weight	22' PE	23' EPS %	Wgt. PE	Wgt. EPS %
Apple Inc	AAPL	12.62%	27	6.36%	3.37	0.80%
Microsoft Corp	MSFT	9.81%	30	13.52%	2.91	1.33%
Amazon.com Inc	AMZN	7.22%	63	6.58%	4.52	0.48%
Tesla Inc	TSLA	4.76%	94	29.87%	4.46	1.42%
NVIDIA Corp	NVDA	3.50%	38	20.04%	1.33	0.70%
QQQ Top 5 vs Total Portfolio	**Ticker**	**Weight**	**22' PE**	**23' EPS %**	**Wgt. PE**	**Wgt. EPS %**
Top 5: Average (Wgt. = total)	-	38%	50	15.27%	16.59	4.73%
QQQ: Median (Wgt. = total)	-	-	25	15.10%	38.11	16.23%

Created by Brian Kapp, stoxdox

I have highlighted in blue the key summary data points. The top five companies that represent heightened risk have an average PE of 50 and an average expected earnings growth rate of 15% for 2023, while comprising 38% of the total QQQ portfolio. Please keep in mind that these are all great companies and that I am speaking only to the heightened risks to their valuations.

In the upper section of the table, I have highlighted in yellow the dominant risk factor for each. Apple (NASDAQ: AAPL) and Microsoft (NASDAQ: MSFT) have heightened growth risks in relation to their valuations. Amazon, Tesla (NASDAQ: TSLA), and Nvidia (NASDAQ: NVDA) have more extreme absolute valuation risk in addition to relative growth risks in light of the valuations. Because these top stocks are widely held and have been the most successful companies of the recent bull market, providing a brief overview of the heightened risk for two provides color that can be extrapolated more broadly to the QQQ portfolio.

Heightened Risk Example: Amazon

I assigned a negative risk/reward rating to Amazon in my last report which was published on 10-14-21. The primary factors for this rating were its elevated valuation, the risk that analyst estimates were too high, and the possibility of Amazon entering a historically low return investment cycle.

The following two tables were compiled from consensus earnings and sales estimates for Amazon provided by Seeking Alpha. Consensus

estimates for earnings and sales as of 4-18-22 are displayed in the upper section of each table and those as of 10-12-21 are displayed in the middle section of each table. The lower section of each table summarizes the change in consensus estimates since my last report.

AMZN: 4-18-22	EPS	Growth	PE	Low	High	Analysts
Dec-22	$48.32	-25.45%	63.24	$23.46	$68.00	43
Dec-23	$73.58	52.28%	41.53	$54.23	$96.06	43
Dec-24	$112.75	53.24%	27.1	$82.34	$139.88	15
Dec-25	$149.87	32.93%	20.39	$106.36	$190.66	6
AMZN: 10-12-21	EPS	Growth	PE	Low	High	Analysts
Dec-22	$66.78	26.79%	49.25	$42.96	$89.43	43
Dec-23	$92.67	38.77%	35.49	$75.40	$127.06	22
Dec-24	$132.34	42.81%	24.85	$105.10	$173.53	6
Dec-25	$165.71	25.21%	19.85	$120.42	$213.61	6
% Change	EPS	Growth	PE	Low	High	Analysts
Dec-22	-27.64%	-195.00%	28.41%	-45.39%	-23.96%	0.00%
Dec-23	-20.60%	34.85%	17.02%	-28.08%	-24.40%	95.45%
Dec-24	-14.80%	24.36%	9.05%	-21.66%	-19.39%	150.00%
Dec-25	-9.56%	30.62%	2.72%	-11.68%	-10.74%	0.00%

Source: Seeking Alpha. Created by Brian Kapp, stoxdox

In the consensus earnings table above, I have highlighted in yellow the key earnings estimate data. Notice that the consensus EPS estimates for 2022 and 2023 as of 4-18-22 are now in line with the lowest analyst estimates as of 10-12-21. The consensus earnings estimates for 2022 and 2023 have fallen 28% and 21%, respectively. Interestingly, the low analyst estimate has collapsed by 45% for 2022 and 28% for 2023. Given the recent trend toward the low end of estimates, there is a distinct possibility that estimates for Amazon have not reached a bottom.

I have highlighted in blue the valuation data and expected growth rate for 2022 during both time periods. The swing from 27% growth expected on 10-12-21 to -25% contraction on 4-18-22 for the 2022 EPS estimate is incredible for a company the size of Amazon. Interestingly, Amazon's stock price is down only 6% since my last report in the face of these massive downward revisions. The reason for the lack of

response from Amazon's stock price is due to the valuation multiple expanding from 49x 2022 earnings estimates to 63x.

The lack of sustainable downside reaction from Amazon's share price can also be explained by sales estimates holding up very well compared to earnings estimates. Amazon has a history of heavy cyclical investments driving earnings lower temporarily, followed by a return to earnings growth. The following table displays consensus sales estimates with a similar highlighting scheme as was used above for earnings.

AMZN: 4-18-22	Sales (Billions USD)	Growth	P/S	Low	High	Analysts
Dec-22	$540.80	15.11%	2.87	$512.19	$560.27	47
Dec-23	$633.68	17.17%	2.45	$590.97	$662.14	45
Dec-24	$728.96	15.04%	2.13	$675.55	$766.00	21
Dec-25	$825.72	13.27%	1.88	$750.65	$915.80	10
AMZN: 10-12-21	Sales	Growth	P/S	Low	High	Analysts
Dec-22	$561.99	18.16%	2.96	$541.56	$587.77	45
Dec-23	$655.76	16.69%	2.54	$613.93	$690.93	27
Dec-24	$738.67	12.64%	2.25	$682.07	$797.16	9
Dec-25	$837.67	13.40%	1.99	$755.56	$942.57	8
AMZN: % Change	Sales	Growth	P/S	Low	High	Analysts
Dec-22	-3.77%	-16.80%	-3.04%	-5.42%	-4.68%	4.44%
Dec-23	-3.37%	2.88%	-3.54%	-3.74%	-4.17%	66.67%
Dec-24	-1.31%	18.99%	-5.33%	-0.96%	-3.91%	133.33%
Dec-25	-1.43%	-0.97%	-5.53%	-0.65%	-2.84%	25.00%

Source: Seeking Alpha. Created by Brian Kapp, stoxdox

I have highlighted in blue the change in sales growth estimates since 10-12-21. The consensus sales growth estimate has been marginally reduced from 18% to 15% for 2022. In my last report, I highlighted unseasonably soft sales growth as pointing toward the potential for a material reversion to the mean for Amazon's sales following the massive COVID boost. From the above estimates, we can say that the market remains highly confident in Amazon's sales growth potential in 2022 and that no material reversion to the mean is expected.

This is important as evidenced by Netflix's (NASDAQ: NFLX) disappointing results on 4-19-22 and subsequent 36% price drop.

Netflix is now expecting its user base to contract in the near term, which shocked the market. As some may be aware, Netflix is a large customer of Amazon and runs its services using Amazon's AWS. The Netflix earnings report is a negative read through for sales at Amazon's AWS division which accounts for 59% of Amazon's operating income.

Interestingly, when I last reported on Netflix in July 2021, I assigned a negative risk/reward rating largely based on the coming COVID hangover or reversion to the mean, in addition to its then elevated valuation. A remarkably similar setup now faces Amazon, if less extreme.

In summary, there is growing evidence that Amazon's AWS customers are facing a reversion to the mean post-COVID. This points toward a heightened risk that Amazon too will revert to the mean leaving consensus sales estimates at risk of disappointment. If sales in fact mean revert and disappoint, the 63x PE on 2022 estimates will expand even higher as earnings estimates will need to be further reduced.

Heightened Risk Example: Apple

The second example of the heightened risk of multiple contraction is Apple, which accounts for over 12% of the QQQ. No one would suggest that Apple is not a great company, however, Microsoft was viewed in the identical light at the 2000 market peak and saw its stock price crushed and become dead money for 13 years. Given the stage of the economic cycle, the greatest risk facing Apple's shares is its reliance on hardware sales. The following table was compiled from Apple's 2021 10-K filed with the SEC and displays the company's sales by category and geography. I have highlighted the key data points.

Apple: Sales by Category (Millions USD)	% of Total	2021	% Change	2020	% Change	2019
iPhone	52.48%	$191,973	39	$137,781	-3	$142,381
Mac	9.62%	$35,190	23	$28,622	11	$25,740
iPad	8.71%	$31,862	34	$23,724	11	$21,280
Wearables, Home and Accessories	10.49%	$38,367	25	$30,620	25	$24,482
Services	18.70%	$68,425	27	$53,768	16	$46,291
Total net sales		$365,817	33	$274,515	6	$260,174
Apple: Sales by Segment	**% of Total**	**2021**	**% Change**	**2020**	**% Change**	**2019**
Americas	41.91%	$153,306	23	$124,556	7	$116,914
Europe	24.41%	$89,307	30	$68,640	14	$60,288
Greater China	18.69%	$68,366	70	$40,308	-8	$43,678
Japan	7.79%	$28,482	33	$21,418	—	$21,506
Rest of Asia Pacific	7.20%	$26,356	35	$19,593	10	$17,788
Total net sales		$365,817	33	$274,515	6	$260,174

Created by Brian Kapp, stoxdox

Notice that Services account for only 19% of Apple's sales (highlighted in yellow). 81% of Apple's sales are hardware dependent. From an industry perspective, hardware sales have a history of becoming quite cyclical once a product matures. To return to the 2000 analogy, Dell (NYSE: DELL) and HP (NYSE: HPQ) were the hardware growth stocks of the day, riding the personal computer adoption cycle to a bull market peak in 2000. Like Microsoft, they too lost a substantial portion of their value and were dead money for the following decade plus.

Given the maturity of the smart phone market and that the iPhone represents 52% of Apple's sales, hardware cyclicality and the lack of industry unit volume growth carry considerable risks. Amplifying this natural cyclical risk is the recent COVID boom which sent total sales higher by 33% in fiscal 2021. The following table compiled from Apple's income statement (provided by Seeking Alpha) places the COVID spike in context. I have highlighted in blue Apple's largest growth years and in yellow the remaining mediocre sales growth years over the past decade.

Apple: Sales (Millions USD)	Sep-12	Sep-13	Sep-14	Sep-15	Sep-16
Revenues	$156,508	$170,910	$182,795	$233,715	$215,639
YoY growth	-	9.20%	6.95%	27.86%	-7.73%
Apple: Sales	**Sep-17**	**Sep-18**	**Sep-19**	**Sep-20**	**Sep-21**
Revenues	$229,234	$265,595	$260,174	$274,515	$365,817
YoY growth	6.30%	15.86%	-2.04%	5.51%	33.26%

Source: Seeking Alpha. Created by Brian Kapp, stoxdox

Two-thirds of the years experienced poor sales growth (highlighted in yellow). Importantly, following the two prior sales growth spurts, Apple experienced a sales contraction the following year which was then followed by mid-single digit sales growth the next. The 33% spike in 2021 is highly likely to follow a similar trend. The added maturity of Apple's core products in conjunction with the unusually strong COVID spike in fiscal year 2021, sets the stage for what could be an unusually weak fiscal 2022 and 2023. The following table from Seeking Alpha displays the consensus earnings and sales estimates for Apple.

AAPL	EPS	Growth	PE	Low	High	Analysts
Sep-22	$6.16	9.75%	26.81	$5.83	$6.61	40
Sep-23	$6.55	6.36%	25.21	$5.98	$7.29	41
Sep-24	$6.90	5.40%	23.91	$6.15	$7.80	12
Sep-25	$7.32	5.97%	22.57	$6.26	$8.37	2
AAPL	**Sales**	**Growth**	**P/S**	**Low**	**High**	**Analysts**
Sep-22	395.82B	8.20%	6.81	384.52B	408.30B	38
Sep-23	417.60B	5.50%	6.45	397.30B	441.73B	39
Sep-24	436.81B	4.60%	6.17	401.17B	475.74B	13
Sep-25	461.03B	5.54%	5.84	416.20B	508.99B	3

Source: Seeking Alpha. Created by Brian Kapp, stoxdox

I have highlighted the periods of greatest disappointment risk. While mid-single digits sales growth generally follows historical trends, the market does not currently foresee a sales contraction in Apple's future. This is unusual from the perspective of Apple's historical cyclicality.

Additionally, one would expect cyclicality to pick up or become more amplified as Apple's largest product is much more mature than during prior cycles. For example, a double-digit total sales decline in the coming years would certainly fit well within the historical pattern given the extreme COVID spike and maturing product line. If this were to occur in 2022 or 2023, earnings estimates are likely to be materially too high. This is especially the case when combined with increasing cost pressures given the new inflationary environment.

QQQs: A 2-Portfolio View

Now that we have covered the half of the QQQ portfolio that is invested in seven stocks, it is time to look at the whole portfolio. As above, I found it useful to breakdown the QQQ portfolio into two baskets of stocks: those with heightened risk and those with more market-like risk.

I separated the portfolio first along pure quantitative lines. Those with a PE > 25 or a PEG ratio > 2 were placed in the potentially heightened risk camp leaving the rest in the potential market risk camp. PEG stands for PE-to-growth and is calculated as 22'PE/23' EPS % from the tables herein. I then reviewed each stock quantitatively and qualitatively using my familiarity with each and my experience to make a final judgement as to which list or portfolio each stock should be placed in.

Please note that I do not use PEG statistics generally, however, the concept underlying the statistic is rock solid and underlies investment analysis. I find the PEG ratio to be an excellent tool for doing a preliminary sort of larger stock data sets.

In the end, 44 companies in the QQQ settled into the Heightened Risk category while 57 made it to the Market Risk category. A full company list and summary statistics for each category is provided at the end of this section for those interested. In those tables, please note that the yellow highlighted cells represent companies for which my most

recent report carried a negative risk/reward rating while the blue highlighted cells represent positive risk/reward rating reports.

A summary of each portfolio or category is displayed in the following table. The upper portion of the table summarizes the Heightened Risk portfolio which accounts for 58% of the value of the QQQs, and the lower section summarizes the Market Risk portfolio. I have highlighted the key data points from each for ease of contrast. At the portfolio level, the median statistics are more meaningful than the average as they better reflect the central tendency of the portfolios and remove outlier effects.

Heightened Risk: 58% of Portfolio	22' PE	22' Eyld %	23' EPS %	PEG: 22/23
Average: 44 companies	101	1.93%	28.60%	4.20
Median: 44 companies	43	2.32%	18.26%	3.02
Market Risk: 42% of Portfolio	**22' PE**	**22' Eyld %**	**23' EPS %**	**PEG: 22/23**
Average: 57 companies	19	5.97%	14.07%	1.62
Median: 57 companies	19	5.26%	13.26%	1.34

Created by Brian Kapp, stoxdox

Notice that the 2-portfolio view of the QQQs produces two distinct portfolio types. Most investors would consider the 42% of the portfolio invested in the Market Risk category to be quite reasonably priced at 19x earnings, assuming that 13% earnings growth is sustainable. On the other hand, the vast majority of seasoned investors would view the 58% of the portfolio invested in the Heightened Risk category to be quite generous, if not extreme. The PEG ratio does a good job in capturing the essence of the extreme valuation of the Heightened Risk portfolio at 3x compared to 1.34x for the Market Risk portfolio.

Heightened Risk Portfolio

Company	Ticker	Weight	22' PE	22' Eyld %	23' EPS %	PEG: 22/23
Apple Inc	AAPL	12.62%	27	3.74%	6.36%	4.20
Microsoft Corp	MSFT	9.81%	30	3.37%	13.52%	2.20
Amazon.com Inc	AMZN	7.22%	63	1.60%	52.28%	1.20
Tesla Inc	TSLA	4.76%	94	1.07%	29.87%	3.14
NVIDIA Corp	NVDA	3.50%	38	2.63%	20.04%	1.90
Costco Wholesale Corp	COST	2.03%	45	2.23%	10.53%	4.26
PepsiCo Inc	PEP	1.85%	25	3.92%	8.57%	2.97
Adobe Inc	ADBE	1.54%	31	3.24%	18.09%	1.71
T-Mobile US Inc	TMUS	1.29%	57	1.76%	134.18%	0.42
Intuit Inc	INTU	1.02%	40	2.51%	18.01%	2.21
Intuitive Surgical Inc	ISRG	0.78%	55	1.80%	18.42%	3.01
Automatic Data Processing Inc	ADP	0.75%	33	3.00%	11.00%	3.03
Mondelez International Class A	MDLZ	0.69%	21	4.73%	8.07%	2.62
Airbnb Inc Class A	ABNB	0.49%	127	0.79%	55.55%	2.29
Palo Alto Networks Inc	PANW	0.48%	85	1.17%	24.15%	3.53
Fortinet Inc	FTNT	0.41%	66	1.51%	21.14%	3.14
Illumina Inc	ILMN	0.41%	80	1.25%	26.86%	2.98
Keurig Dr Pepper Inc	KDP	0.41%	22	4.58%	8.99%	2.43
MercadoLibre Inc	MELI	0.41%	126	0.79%	73.02%	1.73
Paychex Inc	PAYX	0.38%	36	2.75%	8.17%	4.45
CrowdStrike Holdings Class A	CRWD	0.38%	206	0.49%	49.71%	4.14
ASML Holding NV ADR	ASML	0.38%	33	2.99%	18.82%	1.78
DexCom Inc	DXCM	0.37%	140	0.72%	39.20%	3.57
Lululemon Athletica Inc	LULU	0.37%	42	2.40%	19.79%	2.10
Synopsys Inc	SNPS	0.35%	38	2.67%	15.15%	2.48
Workday Inc Class A	WDAY	0.34%	60	1.67%	28.28%	2.12
Cintas Corp	CTAS	0.33%	36	2.74%	8.15%	4.48
IDEXX Laboratories Inc	IDXX	0.32%	51	1.94%	15.77%	3.26
Cadence Design Systems Inc	CDNS	0.32%	40	2.51%	13.63%	2.92
Atlassian Corporation PLC A	TEAM	0.29%	164	0.61%	6.13%	26.75
Datadog Inc Class A	DDOG	0.28%	250	0.40%	59.05%	4.23
Lucid Group Inc Shs	LCID	0.27%	406	-4.84%	14.62%	27.77
Verisk Analytics Inc	VRSK	0.27%	37	2.73%	11.55%	3.17
Zscaler Inc	ZS	0.25%	406	0.25%	73.80%	5.49
Fastenal Co	FAST	0.25%	29	3.41%	7.97%	3.68
Align Technology Inc	ALGN	0.25%	32	3.15%	24.06%	1.32
Old Dominion Freight Line Inc	ODFL	0.24%	24	4.20%	8.79%	2.71
Copart Inc	CPRT	0.22%	26	3.87%	5.29%	4.89
Seagen Inc Ordinary Shares	SGEN	0.21%	406	-2.48%	74.73%	5.43
Ansys Inc	ANSS	0.19%	35	2.84%	11.39%	3.09
VeriSign Inc	VRSN	0.18%	33	3.02%	17.62%	1.88
Okta Inc Class A	OKTA	0.17%	406	-0.89%	56.70%	7.16
Splunk Inc	SPLK	0.17%	406	-0.07%	92.92%	4.37
DocuSign Inc	DOCU	0.15%	49	2.04%	18.44%	2.66
Average (Weight = total)		**58.00%**	**101**	**1.93%**	**28.60%**	**4.20**
Median			**43**	**2.32%**	**18.26%**	**3.02**

Created by Brian Kapp, stoxdox

Market Risk Portfolio

Company	Ticker	Weight	22' PE	22' Eyld %	23' EPS %	PEG: 22/23
Alphabet Inc Class C (GOOG) & A	GOOG	7.33%	22	4.54%	16.99%	1.30
Meta Platforms Inc Class A	FB	3.40%	17	5.84%	19.72%	0.87
Broadcom Inc	AVGO	1.82%	16	6.07%	9.08%	1.81
Comcast Corp Class A	CMCSA	1.67%	13	7.51%	11.77%	1.13
Cisco Systems Inc	CSCO	1.65%	15	6.72%	8.35%	1.78
Intel Corp	INTC	1.44%	15	6.49%	4.68%	3.29
Texas Instruments Inc	TXN	1.24%	19	5.24%	2.60%	7.34
Qualcomm Inc	QCOM	1.20%	12	8.58%	6.06%	1.92
Netflix Inc	NFLX	1.18%	30	3.34%	29.46%	1.02
Advanced Micro Devices Inc	AMD	1.18%	23	4.35%	20.33%	1.13
Amgen Inc	AMGN	1.10%	14	6.99%	9.24%	1.55
Honeywell International Inc	HON	1.04%	22	4.45%	13.17%	1.71
PayPal Holdings Inc	PYPL	0.93%	22	4.63%	25.23%	0.86
Applied Materials Inc	AMAT	0.78%	14	7.10%	15.49%	0.91
Charter Communications Inc Class A	CHTR	0.74%	18	5.57%	20.16%	0.89
Booking Holdings Inc	BKNG	0.71%	25	4.05%	37.10%	0.67
Starbucks Corp	SBUX	0.71%	24	4.17%	15.76%	1.52
Analog Devices Inc	ADI	0.64%	19	5.28%	9.32%	2.03
Regeneron Pharmaceuticals Inc	REGN	0.61%	17	6.03%	5.18%	3.20
Micron Technology Inc	MU	0.61%	7	13.55%	32.22%	0.23
Gilead Sciences Inc	GILD	0.60%	10	10.49%	0.00%	-
CSX Corp	CSX	0.60%	19	5.16%	9.62%	2.02
Vertex Pharmaceuticals Inc	VRTX	0.57%	20	5.08%	7.59%	2.59
Moderna Inc	MRNA	0.52%	6	17.58%	-65.28%	(0.09)
Fiserv Inc	FISV	0.50%	16	6.45%	15.51%	1.00
Lam Research Corp	LRCX	0.49%	14	7.06%	17.38%	0.81
Activision Blizzard Inc	ATVI	0.48%	22	4.52%	22.05%	1.00
Marriott International Inc Class A	MAR	0.46%	33	3.02%	29.02%	1.14
Marvell Technology Inc	MRVL	0.40%	27	3.72%	26.32%	1.02
American Electric Power Co Inc	AEP	0.40%	20	4.88%	6.16%	3.32
The Kraft Heinz Co	KHC	0.40%	16	6.23%	3.56%	4.51
KLA Corp	KLAC	0.38%	16	6.32%	16.26%	0.97
Exelon Corp	EXC	0.37%	22	4.61%	6.70%	3.23
O'Reilly Automotive Inc	ORLY	0.37%	22	4.62%	11.70%	1.85
NXP Semiconductors NV	NXPI	0.35%	13	7.43%	6.31%	2.13
Autodesk Inc	ADSK	0.34%	29	3.45%	21.02%	1.38
Monster Beverage Corp	MNST	0.34%	29	3.45%	13.78%	2.10
Cognizant Technology Solutions Corp Class A	CTSH	0.34%	19	5.39%	11.37%	1.63
Xcel Energy Inc	XEL	0.31%	23	4.27%	6.93%	3.38
AstraZeneca PLC ADR	AZN	0.31%	21	4.71%	7.09%	2.99
Dollar Tree Inc	DLTR	0.30%	22	4.58%	13.26%	1.65
Walgreens Boots Alliance Inc	WBA	0.30%	9	11.32%	-3.72%	(2.38)
Ross Stores Inc	ROST	0.28%	21	4.86%	13.66%	1.51
Microchip Technology Inc	MCHP	0.28%	15	6.77%	15.38%	0.96
Electronic Arts Inc	EA	0.27%	17	5.74%	7.34%	2.37
JD.com Inc ADR	JD	0.26%	29	3.44%	47.96%	0.61

Created by Brian Kapp, stoxdox

Potential Return Spectrum

The Heightened Risk portfolio trading at 43x earnings for 18% growth represents the primary near-term risk for the QQQs. Multiple

compression is likely to occur as the vast majority of investors would favor paying 19x earnings for 13% growth given the similar growth profiles. This is especially the case when factoring in the uncertainty of future growth rates compared to the certainty of current valuations. Netflix presents an excellent case in point.

The Netflix earnings release on 4-19-22 and its subsequent 36% price decline highlight the added downside leverage that occurs when a heightened valuation meets declining growth estimates. The earnings contraction becomes amplified by the multiple compression. Interestingly, Netflix had a PEG of 1 leading into the report which highlights the weakness of relying heavily on PEG ratios. I decided to keep Netflix in the Market Risk category even though my last report was a negative risk/reward rating.

In the following table I display what I view as reasonable multiple correction scenarios for the Heightened Risk category, which is 58% of the QQQ portfolio. I combine this with a rather optimistic scenario for the Market Risk category, which is 42% of the portfolio. Each category or portfolio is always assumed to grow its earnings at the 2023 consensus earnings growth forecasts of 13.26% and 18.26%, respectively. In other words, these scenarios ignore adverse growth developments over the next five years, as was the case with Netflix, and displays only multiple contraction for 58% of the portfolio.

The Market Risk side of the portfolio is assumed to grow by 13.26% every year. For the Heightened Risk side of the portfolio, I assume the PE multiple contracts to 19 in year 2. Then I assume the multiple contracts to 20, 25 and 30 in year 1, respectively. The following table summarizes how the QQQs would perform under these four scenarios. The first row displays the price performance of the QQQs as of the year of the multiple contraction. I view this range of possibilities as likely over a 1-to-2-year time frame.

QQQ: Multiple Compression on 58% of Portfolio	19 PE Yr 2	20 PE Yr 1	25 PE Yr 1	30 PE Yr 1
QQQ: 2-Portfolio (42%: +13.26%, 58%: variable PE)	-10.28%	-20.53%	-12.55%	-4.58%
5-year maximum annualized return at ending PE	6.01%	7.04%	11.67%	15.61%

Created by Brian Kapp, stoxdox

Technicals

The bearish technical backdrop fully supports a downside test of the lower end of the range in the table above over the nearer term. If in fact this test occurs, it is likely to result from a combination of growth disappointment and multiple compression. The 5-year weekly chart below best captures the essence of the technical backdrop. I have denoted the key weekly support levels with green lines and the key monthly support levels with blue lines.

QQQ 5-year weekly chart. Created by Brian Kapp using a chart from Barchart.com

The lower green line looks highly likely to be tested given the current weekly downtrend which was confirmed by the breaking of prior lows established in Q4 2021. This prior low is represented by the orange line which is now resistance as was evidenced by the rejection at this zone in late March and early April 2022. A test of the lower weekly support level represents -16% downside and is midway between the two middle multiple compression scenarios in the table above.

A downside test of the first monthly support line is not out of the question if a Netflix-like scenario for consumer demand and a reversion to the pre-COVID growth rate mean play out. This would

represent -36% downside potential and would be a retest of the pre-COVID highs. The 2-year daily chart below provides a closer look.

QQQ 2-year daily chart. Created by Brian Kapp using a chart from Barchart.com

Notice that a death cross occurred recently with the gold line (the 50-day moving average) crossing beneath the grey line (the 200-day moving average). This bearish signal fully supports a test of the lower key weekly support level which would be a test of the September 2020 interim "blowoff" top. A test of the pre-COVID highs is likely to require a consumer-led recession which, while becoming more likely, is not yet the base case. The final monthly chart places the situation in the most important context, the long-term trend.

QQQ max monthly chart. Created by Brian Kapp using a chart from Barchart.com

All one can say when looking at the long-term chart of the QQQs is curb your enthusiasm.

Summary

The Invesco QQQ ETF is filled with the greatest success stories of the past decade plus. So much so that the top seven companies alone account for half of the portfolio value, while only three economic sectors account for a full 83% of the portfolio. With historically extreme valuations in place alongside more muted growth prospects, the risk/reward asymmetry is aligned with the technical trend to the downside.

Price as of this report: $347.62

Invesco QQQ ETF website

EXHIBIT 295

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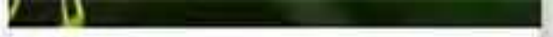

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EXHIBIT 296

I

(Legislative acts)

REGULATIONS

REGULATION (EU) 2016/1011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 8 June 2016

on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank ([1]),

Having regard to the opinion of the European Economic and Social Committee ([2]),

Acting in accordance with the ordinary legislative procedure ([3]),

Whereas:

(1) The pricing of many financial instruments and financial contracts depends on the accuracy and integrity of benchmarks. Serious cases of manipulation of interest rate benchmarks such as LIBOR and EURIBOR, as well as allegations that energy, oil and foreign exchange benchmarks have been manipulated, demonstrate that benchmarks can be subject to conflicts of interest. The use of discretion, and weak governance regimes, increase the vulnerability of benchmarks to manipulation. Failures in, or doubts about, the accuracy and integrity of indices used as benchmarks can undermine market confidence, cause losses to consumers and investors and distort the real economy. It is therefore necessary to ensure the accuracy, robustness and integrity of benchmarks and of the benchmark determination process.

(2) Directive 2014/65/EU of the European Parliament and of the Council ([4]) contains certain requirements with respect to the reliability of benchmarks used to price a listed financial instrument. Directive 2003/71/EC of the European Parliament and of the Council ([5]) contains certain requirements on benchmarks used by issuers.

([1]) OJ C 113, 15.4.2014, p. 1.
([2]) OJ C 177, 11.6.2014, p. 42.
([3]) Position of the European Parliament of 28 April 2016 (not yet published in the Official Journal) and decision of the Council of 17 May 2016.
([4]) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).
([5]) Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (OJ L 345, 31.12.2003, p. 64).

Directive 2009/65/EC of the European Parliament and of the Council ([1]) contains certain requirements on the use of benchmarks by undertakings for collective investment in transferable securities (UCITS). Regulation (EU) No 1227/2011 of the European Parliament and of the Council ([2]) contains certain provisions which prohibit the manipulation of benchmarks that are used for wholesale energy products. However, those legislative acts only cover certain aspects of certain benchmarks and they neither address all the vulnerabilities in the provision of all benchmarks, nor do they cover all uses of financial benchmarks in the financial industry.

(3) Benchmarks are vital in pricing cross-border transactions, thereby facilitating the effective functioning of the internal market in a wide variety of financial instruments and services. Many benchmarks used as reference rates in financial contracts, in particular mortgages, are provided in one Member State but used by credit institutions and consumers in other Member States. In addition, such credit institutions often hedge their risks or obtain funding for granting those financial contracts in the cross-border interbank market. Only a few Member States have adopted national rules on benchmarks, but their respective legal frameworks on benchmarks already show divergences regarding aspects such as the scope of application. In addition, the International Organisation of Securities Commissions (IOSCO) agreed principles on financial benchmarks on 17 July 2013 ('IOSCO principles for financial benchmarks'), Principles for Oil Price Reporting Agencies on 5 October 2012 ('IOSCO principles for PRAs') (together, 'the IOSCO principles'), and since those principles provide a certain flexibility as to their exact scope and means of implementation, Member States are likely to adopt rules at national level which would implement such principles in a divergent manner.

(4) Those divergent approaches would result in fragmentation of the internal market since administrators and users of benchmarks would be subject to different rules in different Member States. Thus, benchmarks provided in one Member State could be prevented from being used in other Member States. In the absence of a harmonised framework to ensure the accuracy and integrity of benchmarks used in financial instruments and financial contracts, or in order to measure the performance of investment funds, in the Union it is therefore likely that differences in Member States' laws will create obstacles to the smooth functioning of the internal market for the provision of benchmarks.

(5) Union consumer protection rules do not cover the particular issue of adequate information on benchmarks in financial contracts. As a result of consumer complaints and litigation relating to the use of benchmarks in several Member States, it is likely that divergent measures, inspired by legitimate concerns of consumer protection, would be adopted at national level, which could result in fragmentation of the internal market due to the divergent conditions of competition attached to different levels of consumer protection.

(6) Therefore, in order to ensure the proper functioning of the internal market and improve the conditions of its functioning, in particular with regard to financial markets, and to ensure a high level of consumer and investor protection, it is appropriate to lay down a regulatory framework for benchmarks at Union level.

(7) It is appropriate and necessary for that framework to take the form of a regulation in order to ensure that provisions directly imposing obligations on persons involved in the provision, contribution and use of benchmarks are applied in a uniform manner throughout the Union. Since a legal framework for the provision of benchmarks necessarily involves measures specifying precise requirements concerning aspects inherent to such provision of benchmarks, even small divergences on the approach taken regarding one of those aspects could lead to significant impediments in the cross-border provision of benchmarks. Therefore, the use of a regulation, which is directly applicable, should reduce the possibility of divergent measures being taken at national level, and should ensure a consistent approach and greater legal certainty, and prevent the appearance of significant impediments in the cross-border provision of benchmarks.

(8) The scope of this Regulation should be as broad as necessary to create a preventive regulatory framework. The provision of benchmarks involves discretion in their determination and is inherently subject to certain types of

([1]) Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

([2]) Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (OJ L 326, 8.12.2011, p. 1).

conflicts of interest, which implies the existence of opportunities and incentives to manipulate benchmarks. Such risk factors are common to all benchmarks and should be made subject to adequate governance and control requirements. The degree of risk, however, varies, and the approach adopted should therefore be tailored to the particular circumstances. Since the vulnerability and importance of a benchmark varies over time, restricting the scope by reference to indices that are currently important or vulnerable would not address the risks that any benchmark poses in the future. In particular, benchmarks that are currently not widely used could be used more in the future with the result that, in their regard, even a minor manipulation could have a significant impact.

(9) The critical determinant of the scope of this Regulation should be whether the output value of the benchmark determines the value of a financial instrument or a financial contract, or measures the performance of an investment fund. Therefore, the scope should not be dependent on the nature of the input data. Benchmarks calculated from economic input data, such as share prices and non-economic numbers, or values such as weather parameters should thus be included. The framework provided for in this Regulation should also acknowledge the existence of a large number of benchmarks and the different impact that they have on financial stability and the real economy. This Regulation should also provide for a proportionate response to the risks that different benchmarks pose. This Regulation should therefore cover benchmarks which are used to price financial instruments listed or traded on regulated venues.

(10) A large number of consumers are parties to financial contracts, in particular consumer credit agreements secured by mortgages, that reference benchmarks that are subject to the same risks. This Regulation should therefore cover credit agreements as defined in Directives 2008/48/EC ([1]) and 2014/17/EU of the European Parliament and of the Council ([2]).

(11) Many investment indices involve significant conflicts of interest and are used to measure the performance of a fund such as a UCITS fund. Some of those benchmarks are published and others are made available, for free or upon payment of a fee, to the public or a section of the public and their manipulation can adversely affect investors. This Regulation should therefore cover indices or reference rates that are used to measure the performance of an investment fund.

(12) All contributors of input data to benchmarks can exercise discretion and are potentially subject to conflicts of interest, and so risk being a source of manipulation. Contributing to a benchmark is a voluntary activity. If any initiative requires contributors to significantly change their business models, they could cease to contribute. However, for entities already subject to regulation and supervision, requiring good governance and control systems is not expected to lead to substantial costs or disproportionate administrative burden. Therefore this Regulation imposes certain obligations on supervised contributors. When a benchmark is determined on the basis of readily available data, the source of such data should not be considered to be a contributor.

(13) Financial benchmarks are not only used in the issuance and manufacturing of financial instruments and contracts. The financial industry also relies on benchmarks for measuring the performance of investment funds for the purpose of return tracking or of determining the asset allocation of a portfolio or of computing the performance fees. A given benchmark can be used either directly as a reference for financial instruments and financial contracts or to measure the performance of investment funds, or indirectly within a combination of benchmarks. In the latter case, the setting and review of the weights to be assigned to various indices within a combination for the purpose of determining the pay-out or the value of a financial instrument or a financial contract or measuring the performance of an investment fund also amounts to use as such an activity does not involve discretion, in contrast to the activity of provision of benchmarks. The holding of financial instruments referencing a certain benchmark is not considered to be use of the benchmark.

(14) Central banks already meet principles, standards and procedures which ensure that they exercise their activities with integrity and in an independent manner. It is therefore not necessary that central banks be subject to this Regulation. When central banks provide benchmarks, especially where those benchmarks are intended for transaction purposes, it is their responsibility to set appropriate internal procedures in order to ensure the

([1]) Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008, p. 66).

([2]) Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28.2.2014, p. 34).

accuracy, integrity, reliability and independence of those benchmarks, in particular with respect to transparency in governance and computation methodology.

(15) Furthermore, public authorities, including national statistics agencies, should not be subject to this Regulation where they contribute data to, provide or have control over the provision of, benchmarks for public policy purposes, including measures of employment, economic activity, and inflation.

(16) An administrator is the natural or legal person that has control over the provision of a benchmark and in particular administers the arrangements for determining the benchmark, collects and analyses the input data, determines the benchmark and publishes it. An administrator should be able to outsource to a third party one or more of those functions, including the calculation or publication of the benchmark, or other relevant services and activities in the provision of the benchmark. However, where a person merely publishes or refers to a benchmark as part of that person's journalistic activities but does not have control over the provision of that benchmark, that person should not be subject to the requirements imposed on administrators by this Regulation.

(17) An index is calculated using a formula or some other methodology on the basis of underlying values. There exists a degree of discretion in constructing the formula, performing the necessary calculation and determining the input data which creates a risk of manipulation. Therefore, all benchmarks sharing that characteristic of discretion should be covered by this Regulation.

(18) However, where a single price or value is used as a reference to a financial instrument, for example where the price of a single security is the reference price for an option or future, there is no calculation, input data or discretion. Therefore single price or single value reference prices should not be considered to be benchmarks for the purposes of this Regulation.

(19) Reference prices or settlement prices produced by central counterparties (CCPs) should not be considered to be benchmarks because they are used to determine settlement, margins and risk management and thus do not determine the amount payable under a financial instrument or the value of a financial instrument.

(20) The provision of borrowing rates by creditors should not be considered to be benchmark provision for the purposes of this Regulation. A borrowing rate provided by a creditor is either set by an internal decision or calculated as a spread or mark-up over an index (e.g. EURIBOR). In the first case, the creditor is exempt from this Regulation for activity concerning financial contracts entered into by that creditor with its own clients, while in the latter case the creditor is considered to be only a user of a benchmark.

(21) In order to ensure the integrity of benchmarks, benchmark administrators should be required to implement adequate governance arrangements to control conflicts of interest and to safeguard confidence in the integrity of benchmarks. Even where effectively managed, most administrators are subject to some conflicts of interest and could have to make judgements and decisions which affect a diverse group of stakeholders. It is therefore important that administrators have in place a function that operates with integrity to oversee the implementation and effectiveness of the governance arrangements that provide effective oversight.

(22) The manipulation or unreliability of benchmarks can cause damage to investors and consumers. Therefore, this Regulation should set out a framework for retention of records by administrators and contributors as well as for providing transparency about a benchmark's purpose and methodology which facilitates a more efficient and fairer resolution of potential claims in accordance with national or Union law.

(23) Auditing and the effective enforcement of this Regulation requires *ex post* analysis and evidence. This Regulation should therefore set out requirements for adequate record-keeping by benchmark administrators relating to the calculation of the benchmark for a sufficient period of time. The reality that a benchmark intends to measure and the environment in which it is measured are likely to change over time. Therefore it is necessary that the process and methodology of the provision of benchmarks are reviewed on a periodic basis to identify shortcomings and

possible improvements. Many stakeholders can be impacted by failures in the provision of the benchmark and can help identify such shortcomings. This Regulation should therefore set out a framework for the establishment of a complaints handling mechanism by benchmark administrators to enable stakeholders to notify the benchmark administrator of complaints and ensure that the benchmark administrator objectively evaluates the merits of any complaint.

(24) The provision of benchmarks frequently involves the outsourcing of important functions such as calculating the benchmark, gathering input data and disseminating the benchmark. In order to ensure the effectiveness of the governance arrangements, it is necessary to ensure that any such outsourcing does not relieve benchmark administrators of any of their obligations and responsibilities, and is done in such a way that it does not interfere with either the administrators' ability to meet their obligations or responsibilities, or the relevant competent authority's ability to supervise them.

(25) The benchmark administrator is the central recipient of input data and is able to evaluate the integrity and accuracy of input data on a consistent basis. It is therefore necessary that this Regulation requires administrators to take certain measures where an administrator considers that input data does not represent the market or economic reality that a benchmark intends to measure, comprising measures to change the input data, the contributors or the methodology or else to cease providing that benchmark. Furthermore, an administrator should, as part of its control framework, establish measures to monitor, where feasible, input data prior to the publication of the benchmark and to validate input data after publication, including comparing that data against historical patterns where applicable.

(26) Any discretion that can be exercised in providing input data creates an opportunity to manipulate a benchmark. Where the input data is transaction-based data, there is less discretion and therefore the opportunity to manipulate the data is reduced. As a general rule, benchmark administrators should therefore use actual transaction-based input data where possible but other data can be used in those cases where the transaction data is insufficient or inappropriate to ensure the integrity and accuracy of the benchmark.

(27) The accuracy and reliability of a benchmark in measuring the economic reality it is intended to measure depends on the methodology and input data used. It is therefore necessary to adopt a transparent methodology that ensures the benchmark's reliability and accuracy. Such transparency does not mean the publication of the formula applied for the determination of a given benchmark, but rather the disclosure of elements sufficient to allow stakeholders to understand how the benchmark is derived and to assess its representativeness, relevance and appropriateness for its intended use.

(28) It could become necessary to change the methodology to ensure the continued accuracy of the benchmark, but any changes in the methodology have an impact on users and stakeholders of the benchmark. It is therefore necessary to specify the procedures to be followed when changing the benchmark methodology, including the need for consultation, so that users and stakeholders can take the necessary action in light of those changes or notify the administrator if they have concerns about those changes.

(29) Employees of the administrator can identify possible infringements of this Regulation or potential vulnerabilities that could lead to manipulation or attempted manipulation. This Regulation should therefore put in place a framework to enable employees to alert administrators confidentially of possible infringements of this Regulation.

(30) The integrity and accuracy of benchmarks depends on the integrity and accuracy of the input data provided by contributors. It is essential that the obligations of contributors in respect of such input data are clearly specified, that compliance with those obligations can be relied upon, and that the obligations are consistent with the benchmark administrator's controls and methodology. It is therefore necessary that the benchmark administrator produces a code of conduct to specify those requirements and the contributor's responsibilities concerning the provision of input data. The administrator should be satisfied that contributors adhere to the code of conduct. Where contributors are located in third countries, the administrator should be satisfied to the extent possible.

(31) Contributors are potentially subject to conflicts of interest and are able to exercise discretion in the determination of input data. Therefore, it is necessary for contributors to be subject to governance arrangements in order to ensure that those conflicts are managed and that the input data is accurate, conforms to the administrator's requirements and can be validated.

(32) Many benchmarks are determined by the application of a formula using input data that is provided by the following entities: a trading venue, an approved publication arrangement, a consolidated tape provider, an approved reporting mechanism, an energy exchange or an emission allowance auction platform. In some situations, data collection is outsourced to a service provider that receives the data entirely and directly from those entities. In those cases, existing regulation and supervision ensure the integrity and transparency of the input data and provide for governance requirements and procedures for the notification of infringements. Therefore, those benchmarks are less vulnerable to manipulation, are subject to independent verifications, and the relevant administrators are accordingly released from certain obligations set out in this Regulation.

(33) Different types of benchmarks and different benchmark sectors have different characteristics, vulnerabilities and risks. The provisions of this Regulation should be further specified for particular benchmark sectors and types. Interest rate benchmarks are benchmarks that play an important role in the transmission of monetary policy and so it is necessary to introduce specific provisions in this Regulation for such benchmarks.

(34) Physical commodities markets have unique characteristics which should be taken into account. Commodity benchmarks are widely used and can have sector-specific characteristics, so it is necessary to introduce specific provisions in this Regulation for such benchmarks. Certain commodity benchmarks are exempt from this Regulation but would need to nevertheless respect the relevant IOSCO principles. Commodity benchmarks can become critical since the regime is not limited to benchmarks based on submissions by contributors which are in majority supervised entities. For critical commodity benchmarks subject to Annex II, the requirements of this Regulation regarding mandatory contribution and colleges are not applicable.

(35) The failure of critical benchmarks can impact market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in Member States. Those potentially destabilising effects of the failure of a critical benchmark could be felt in a single Member State or in more than one. It is therefore necessary that this Regulation provides for a process to determine those benchmarks that should be considered to be critical benchmarks and that additional requirements apply to ensure the integrity and robustness of such benchmarks.

(36) Critical benchmarks can be determined using a quantitative criterion or a combination of quantitative and qualitative criteria. In addition, in cases where a benchmark does not meet the appropriate quantitative threshold, it could nonetheless be recognised as critical where the benchmark has no or very few market-led substitutes and its existence and accuracy are relevant for market integrity, financial stability or consumer protection in one or more Member States, and where all the relevant competent authorities agree that such a benchmark should be recognised as critical. In the event of disagreement between the relevant competent authorities, the decision of the competent authority of the administrator on whether such a benchmark should be recognised as critical should prevail. In such a case, the European Securities and Markets Authority (ESMA), established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council ([1]), should be able to publish an opinion on the assessment made by the competent authority of the administrator. Furthermore, a competent authority can also designate a benchmark as critical based on certain qualitative criteria where the administrator and the majority of the contributors to the benchmark are located in its Member State. All critical benchmarks should be included in a list established by a way of an implementing act by the Commission, which should be reviewed and updated regularly.

(37) The cessation of the administration of a critical benchmark by an administrator could render financial contracts or financial instruments invalid, cause losses to consumers and investors, and impact financial stability. It is therefore necessary to include a power for the relevant competent authority to require mandatory administration of a critical benchmark in order to preserve the existence of the benchmark in question. In the event of insolvency proceedings of a benchmark administrator, the competent authority should provide an assessment for

([1]) Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

the consideration of the relevant judicial authority of whether and how the critical benchmark could be transitioned to a new administrator or could cease to be provided.

(38) Without prejudice to the application of Union competition law and the ability of Member States to take measures to facilitate compliance with it, it is necessary to require administrators of critical benchmarks, including critical commodity benchmarks, to take adequate steps to ensure that licences of, and information on, benchmarks are provided on a fair, reasonable, transparent and non-discriminatory basis to all users.

(39) Contributors that cease to contribute input data to critical benchmarks can undermine the credibility of such benchmarks, as the capability of such benchmarks to measure the underlying market or economic reality would as a result be impaired. It is therefore necessary to include a power for the relevant competent authority to require mandatory contributions from supervised entities to critical benchmarks in order to preserve the credibility of the benchmark in question. Mandatory contribution of input data is not intended to impose an obligation on supervised entities to enter into, or to commit to entering into, transactions.

(40) Due to the existence of a large variety of types and sizes of benchmarks, it is important to introduce proportionality in this Regulation and to avoid putting an excessive administrative burden on administrators of benchmarks the cessation of which poses less threat to the wider financial system. Thus, in addition to the regime for critical benchmarks, two distinct regimes should be introduced: one for significant benchmarks and one for non-significant benchmarks.

(41) Administrators of significant benchmarks should be able to choose not to apply a limited number of detailed requirements of this Regulation. Competent authorities should, however, maintain the right to require the application of those requirements, based on criteria outlined in this Regulation. Delegated acts and implementing acts that apply to significant benchmark administrators should take due account of the principle of proportionality and aim to avoid administrative burden where possible.

(42) Administrators of non-significant benchmarks are subject to a less detailed regime, whereby administrators should be able to choose not to apply some requirements of this Regulation. In such a case, the administrator in question should explain why it is appropriate not to do so in a compliance statement which should be published and provided to the administrator's competent authority. That competent authority should review the compliance statement and should be able to request additional information or require changes to ensure compliance with this Regulation. While non-significant benchmarks could still be vulnerable to manipulation, they are more easily substitutable, therefore transparency to users should be the main tool used for market participants to make informed choices about the benchmarks they consider appropriate for use. For that reason, the delegated acts in Title II should not apply to non-significant benchmark administrators.

(43) In order for users of benchmarks to choose appropriately from among, and understand the risks of, benchmarks, they need to know what a given benchmark intends to measure and its susceptibility to manipulation. Therefore, the benchmark administrator should publish a benchmark statement specifying those elements. In order to ensure uniform application and that benchmark statements are of reasonable length but at the same time focus on providing the key information needed to users in an easily accessible manner, ESMA should provide further specification of the content of the benchmark statement, differentiating appropriately among the different types and specificities of benchmarks and their administrators.

(44) This Regulation should take into account the IOSCO principles, which serve as global standards for regulatory requirements for benchmarks. As an overarching principle, in order to ensure investor protection, supervision and regulation in a third country should be equivalent to Union supervision and regulation of benchmarks. Therefore, benchmarks provided from that third country can be used by supervised entities in the Union where a positive decision on equivalence of the third- country regime has been taken by the Commission. In such circumstances, competent authorities should enter into cooperation arrangements with supervisory authorities in third countries. ESMA should coordinate the development of such cooperation arrangements and the exchange between competent authorities of information received from third countries. However, in order to avoid any adverse impact resulting from a possible abrupt cessation of the use in the Union of benchmarks provided from a third country, this Regulation also provides for certain other mechanisms (namely, recognition and endorsement) under which third-country benchmarks can be used by supervised entities located in the Union.

(45) This Regulation introduces a process for the recognition of administrators located in a third country by the competent authority of the Member State of reference. Recognition should be granted to administrators complying with the requirements of this Regulation. Acknowledging the role of the IOSCO principles as a global standard for the provision of benchmarks, the competent authority of the Member State of reference should be able to grant recognition to administrators on the basis of them applying the IOSCO principles. To do so, the competent authority should assess the application of the IOSCO principles by a specific administrator and determine whether such application is equivalent, for the administrator in question, to compliance with the various requirements established in this Regulation, taking into account the specificities of the regime of recognition as compared to the equivalence regime.

(46) This Regulation also introduces an endorsement regime allowing, under certain conditions, administrators or supervised entities located in the Union to endorse benchmarks provided from a third country in order for such benchmarks to be used in the Union. To do so, the competent authority should take into account whether, in providing the benchmark to be endorsed, compliance with the IOSCO principles would be equivalent to compliance with this Regulation, taking into account the specificities of the regime of endorsement as compared to the equivalence regime. An administrator or a supervised entity that has endorsed a benchmark provided from a third country should be fully responsible for such endorsed benchmarks and for the fulfilment of the relevant conditions referred to in this Regulation.

(47) All benchmark administrators are able to exercise discretion, are potentially subject to conflicts of interest, and risk having inadequate governance and control systems in place. As administrators control the benchmark determination process, requiring authorisation or registration and supervision of administrators is the most effective way of ensuring the integrity of benchmarks.

(48) Certain administrators should be authorised and supervised by the competent authority of the Member State where the administrator in question is located. Entities already subject to supervision and that provide financial benchmarks other than critical benchmarks should be registered and supervised by the competent authority for the purposes of this Regulation. Entities that provide only indices that qualify as non-significant benchmarks should also be registered by the relevant competent authority. Authorisation and registration should be distinct processes with authorisation requiring a more extensive assessment of the administrator's application. Whether an administrator is authorised or registered should not affect the supervision of that administrator by the relevant competent authorities. Additionally, a transitional regime should be introduced, according to which persons providing benchmarks which are not critical and are not widely used in one or more Member States could be registered, with a view to facilitating the initial phase of application of this Regulation. ESMA should maintain at the Union level a register that contains information on authorised or registered administrators, on benchmarks and the administrators that provide those benchmarks by virtue of a positive decision under either the equivalence regime or the recognition regime, on Union administrators or supervised entities that have endorsed benchmarks from a third country, and on any such endorsed benchmarks and their administrators located in a third country.

(49) In some circumstances a person provides an index but could be unaware that the index in question is being used as a reference for a financial instrument, a financial contract or an investment fund. That is particularly the case where the users and benchmark administrator are located in different Member States. It is therefore necessary to increase the level of transparency concerning which specific benchmark is being used. Such transparency can be achieved by improving the content of the prospectuses or key information documents required by Union law and the content of the notifications required by Regulation (EU) No 596/2014 of the European Parliament and of the Council ([1]).

(50) A set of effective tools and powers and resources for the competent authorities of Member States guarantees supervisory effectiveness. This Regulation should therefore, in particular, provide for a minimum set of supervisory and investigative powers which should be entrusted to competent authorities of Member States in accordance with national law. When exercising their powers under this Regulation, competent authorities and ESMA should act objectively and impartially and remain autonomous in their decision-making.

(51) For the purpose of detecting infringements of this Regulation, it is necessary for competent authorities to be able to access, in accordance with national law, the premises of legal persons in order to seize documents. Access to such premises is necessary when there is reasonable suspicion that documents and other data related to the

([1]) Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ L 173, 12.6.2014, p. 1).

subject-matter of an inspection or investigation exist and could be relevant to prove an infringement of this Regulation. Additionally, access to such premises is necessary where the person to whom a demand for information has already been made fails to comply with it, or where there are reasonable grounds for believing that if a demand were to be made, it would not be complied with, or that the documents or information to which the information requirement relates would be removed, tampered with or destroyed. If prior authorisation is needed from the judicial authority of the Member State concerned, in accordance with national law, access to premises should take place after having obtained that prior judicial authorisation.

(52) Existing recordings of telephone conversations and data traffic records from supervised entities can constitute crucial, and sometimes the only, evidence to detect and prove the existence of infringements of this Regulation, in particular the compliance with governance and control requirements. Such records and recordings can help to verify the identity of the person responsible for the submission of input data, those responsible for its approval and whether organisational separation of employees is maintained. Therefore, competent authorities should be able to require existing recordings of telephone conversations, electronic communications and data traffic records held by supervised entities, in those cases where a reasonable suspicion exists that such recordings or records related to the subject-matter of the inspection or investigation could be relevant to prove an infringement of this Regulation.

(53) This Regulation respects the fundamental rights and observes the principles recognised in the Treaty on the Functioning of the European Union (TFEU) and in the Charter of Fundamental Rights of the European Union, in particular the right to respect for private and family life, the protection of personal data, the right to freedom of expression and information, the freedom to conduct a business, the right to property, the right to consumer protection, the right to an effective remedy, the right of defence. Accordingly, this Regulation should be interpreted and applied in accordance with those rights and principles.

(54) The rights of defence of the persons concerned should be fully respected. In particular, persons subject to proceedings should be provided with access to the findings upon which the competent authorities has based the decision and should be given the right to be heard.

(55) Transparency regarding benchmarks is necessary for reasons of financial market stability and investor protection. Any exchange or transmission of information by competent authorities should take place in accordance with the rules on the transfer of personal data laid down in Directive 95/46/EC of the European Parliament and of the Council ([1]). Any exchange or transmission of information by ESMA should take place in accordance with the rules on the transfer of personal data laid down in Regulation (EC) No 45/2001 of the European Parliament and of the Council ([2]).

(56) Taking into consideration the principles set out in the Commission's Communication of 8 December 2010 on reinforcing sanctioning regimes in the financial services sector, and legal acts of the Union adopted as a follow-up to that Communication, Member States should, in order to ensure a common approach and deterrent effect, lay down rules on administrative sanctions and other administrative measures, including pecuniary sanctions, applicable to infringements of the provisions of this Regulation and should ensure that they are implemented. Those administrative sanctions and other administrative measures should be effective, proportionate and dissuasive.

(57) Administrative sanctions and other administrative measures applied in specific cases should be determined taking into account, where appropriate, factors such as the repayment of any identified financial benefit, the gravity and duration of the infringement, any aggravating or mitigating factors, the need for administrative pecuniary sanctions to have a deterrent effect and, where appropriate, include a reduction in return for cooperation with the competent authority. In particular, the actual amount of administrative pecuniary sanctions to be imposed in a specific case should be able to reach the maximum level provided for in this Regulation, or the higher level provided for in national law, for very serious infringements, while administrative pecuniary sanctions significantly lower than the maximum level should be able to be applied to minor infringements or in case of settlement. The possibility of imposing a temporary ban on the exercise of management functions within benchmark administrators or contributors should be available to the competent authority.

([1]) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

([2]) Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

(58) This Regulation should not limit the ability of Member States to provide for higher levels of administrative sanctions and should be without prejudice to any provisions in the law of Member States relating to criminal sanctions.

(59) Even though nothing prevents Member States from laying down rules for administrative and criminal sanctions for the same infringement, Member States should not be required to lay down rules for administrative sanctions for the infringements of this Regulation which are subject to national criminal law. In accordance with national law, Member States are not obliged to impose both administrative and criminal sanctions for the same offence, but they should be able to do so if their national law so permits. However, the maintenance of criminal sanctions instead of administrative sanctions for infringements of this Regulation should not reduce or otherwise affect the ability of competent authorities to cooperate, access and exchange information in a timely way with competent authorities in other Member States for the purposes of this Regulation, including after any referral of the relevant infringements to the competent judicial authorities for criminal prosecution.

(60) It is necessary to reinforce provisions on exchange of information between competent authorities and to strengthen the duties of assistance and cooperation which they owe to each other. Due to increasing cross-border activity, competent authorities should provide each other with the relevant information for the exercise of their function, so as to ensure the effective enforcement of this Regulation, including in situations where an infringement or suspected infringement is of concern to authorities in two or more Member States. When exchanging information, strict professional secrecy is needed to ensure the smooth transmission of that information and the protection of particular rights.

(61) In order to ensure that decisions made by competent authorities to impose an administrative sanction or other administrative measure have a deterrent effect on the public at large, they should be published. The publication of decisions imposing an administrative sanction or other administrative measure is also an important tool for competent authorities to inform market participants of the type of behaviour that is considered to infringe this Regulation and to promote wider good behaviour amongst market participants. If such publication risks causing disproportionate damage to the persons involved, or jeopardises the stability of financial markets or an on-going investigation, the competent authority should either publish the administrative sanction or other administrative measure on an anonymous basis or delay the publication. In addition, competent authorities should have the option not to publish a decision imposing administrative sanctions or other administrative measures at all where anonymous or delayed publication is considered insufficient to ensure that the stability of financial markets is not jeopardised. Competent authorities are also not required to publish administrative sanctions or other administrative measures which are deemed to be of a minor nature where publication would be disproportionate.

(62) Critical benchmarks can involve contributors, administrators and users in more than one Member State. Thus, the cessation of the provision of such a benchmark or any events that can significantly undermine its integrity could have an impact in more than one Member State, meaning that the supervision of such a benchmark only by the competent authority of the Member State in which the administrator of the benchmark is located will not be efficient and effective in terms of addressing the risks that the critical benchmark poses. In such a case, in order to ensure the effective exchange of supervisory information among competent authorities and coordination of their activities and supervisory measures, colleges, comprising competent authorities and ESMA, should be formed. The activities of the colleges should contribute to the harmonised application of rules under this Regulation and to the convergence of supervisory practices. The competent authority of the administrator should establish written arrangements regarding the exchange of information, the decision-making process, which could include rules on voting procedures, any cooperation for the purposes of mandatory contribution measures, and the cases where the competent authorities should consult each other. ESMA's legally binding mediation is a key element of the achievement of coordination, supervisory consistency and convergence of supervisory practices.

(63) Benchmarks can reference financial instruments and financial contracts that have a long duration. In certain cases, such benchmarks risk no longer being permitted to be provided once this Regulation comes into effect because they have characteristics that cannot be adjusted to conform to the requirements of this Regulation. At the same time, prohibiting the continued provision of such a benchmark could result in the termination or frustration of the financial instruments or financial contracts and so harm investors. It is therefore necessary to make provision to allow for the continued provision of such benchmarks for a transitional period.

(64) In cases where this Regulation captures or potentially captures supervised entities and markets covered by Regulation (EU) No 1227/2011, the Agency for the Cooperation of Energy Regulators (ACER) would need to be consulted by ESMA in order to draw upon ACER's expertise in energy markets and to mitigate any dual regulation.

(65) In order to specify further technical elements of this Regulation, the power to adopt acts in accordance with Article 290 of TFEU should be delegated to the Commission in respect of the specification of technical elements of definitions; in respect of the calculation of the nominal amounts of financial instruments, notional amount of derivatives and the net asset value of investment funds referencing a benchmark to determine whether such benchmark is critical; in respect of reviewing the calculation method used to determine the threshold for the determination of critical and significant benchmarks; in respect of establishing the objective reasons for the endorsement of a benchmark or family of benchmarks provided in a third country; in respect of establishing the elements to assess whether the cessation or the changing of an existing benchmark could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument, or the rules of any investment fund, which references such benchmark; and in respect of the extension of the 24-month period envisaged for the registration instead of authorisation of certain administrators. When adopting those acts, the Commission should take into account the market or technological developments and the international convergence of supervisory practice in relation to benchmarks, in particular the work of IOSCO. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making ([1]) of 13 April 2016. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

(66) Technical standards should ensure consistent harmonisation of the requirements for the provision of and contribution to indices used as benchmarks and adequate protection of investors and consumers across the Union. As a body with highly specialised expertise, it would be efficient and appropriate to entrust ESMA with the elaboration of draft regulatory technical standards which do not involve policy choices for submission to the Commission. The Commission should adopt draft regulatory technical standards developed by ESMA by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010, regarding the procedures and the characteristics of the oversight function; regarding how to ensure the appropriateness and the verifiability of the input data as well as the internal oversight and verification procedures of a contributor; regarding the information to be provided by an administrator about the benchmark and methodology; regarding the elements of the code of conduct; regarding the requirements concerning systems and controls; regarding the criteria that the competent authority should take into account when deciding whether to apply certain additional requirements; regarding the contents of the benchmark statement and the cases in which an update of such a statement is required; regarding the minimum content of the cooperation arrangements between the competent authorities and ESMA; regarding the form and content of the application for recognition of a third country administrator and presentation of the information that is to be provided with such an application; and regarding the information to be provided in the application for authorisation or registration.

(67) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission to establish and review a list of public authorities in the Union, to establish and review the list of critical benchmarks, and to determine the equivalence of the legal framework to which providers of benchmarks of third countries are subject for the purposes of full or partial equivalence. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council ([2]).

(68) The Commission should also be empowered to adopt implementing technical standards developed by ESMA establishing templates for the compliance statements, procedures and forms for exchange of information between competent authorities and ESMA, by means of implementing acts pursuant to Article 291 TFEU and in accordance with Article 15 of Regulation (EU) No 1095/2010.

([1]) OJ L 123, 12.5.2016, p. 1.

([2]) Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

(69) Since the objectives of this Regulation, namely to lay down a consistent and effective regime to address the vulnerabilities that benchmarks pose, cannot be sufficiently achieved by the Member States, given that the overall impact of the problems relating to benchmarks can be fully perceived only in a Union context, but can rather, by reason of the scale and effects of this Regulation, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(70) Given the urgency of the need to restore confidence in benchmarks and promote fair and transparent financial markets, this Regulation should enter into force on the day following that of its publication.

(71) Consumers are able to enter into financial contracts, in particular mortgages and consumer credit contracts, that reference a benchmark, but unequal bargaining power and the use of standard terms mean that they can have a limited choice about the benchmark used. It is therefore necessary to ensure that at least adequate information is provided by creditors or credit intermediaries to consumers. To that end, Directives 2008/48/EC and 2014/17/EU should therefore be amended accordingly.

(72) Regulation (EU) No 596/2014 requires persons discharging managerial responsibilities, as well as persons closely associated with them, to notify the issuer and the competent authority of every transaction conducted on their own account relating to financial instruments that are themselves linked to shares and debt instruments of their issuer. However, there are a variety of financial instruments that are linked to shares and debt instruments of a given issuer. Such financial instruments include units in collective investment undertakings, structured products or financial instruments embedding a derivative that provides exposure to the performance of shares or debt instruments issued by an issuer. Every transaction in such financial instruments above a *de minimis* threshold should be subject to notification to the issuer and the competent authority. An exception should be made where either the linked financial instrument provides an exposure of 20 % or less to the issuer's shares or debt instruments, or the person discharging managerial responsibilities or person closely associated with them did not and could not know the investment composition of the linked financial instrument. Regulation (EU) No 596/2014 should therefore be amended,

HAVE ADOPTED THIS REGULATION:

TITLE I

SUBJECT MATTER, SCOPE AND DEFINITIONS

Article 1

Subject-matter

This Regulation introduces a common framework to ensure the accuracy and integrity of indices used as benchmarks in financial instruments and financial contracts, or to measure the performance of investment funds in the Union. This Regulation thereby contributes to the proper functioning of the internal market while achieving a high level of consumer and investor protection.

Article 2

Scope

1. This Regulation applies to the provision of benchmarks, the contribution of input data to a benchmark and the use of a benchmark within the Union.

2. This Regulation shall not apply to:

(a) a central bank;

(b) a public authority, where it contributes data to, provides, or has control over the provision of, benchmarks for public policy purposes, including measures of employment, economic activity, and inflation;

(c) a central counterparty (CCP), where it provides reference prices or settlement prices used for CCP risk-management purposes and settlement;

(d) the provision of a single reference price for any financial instrument listed in Section C of Annex I to Directive 2014/65/EU;

(e) the press, other media and journalists where they merely publish or refer to a benchmark as part of their journalistic activities with no control over the provision of that benchmark;

(f) a natural or legal person that grants or promises to grant credit in the course of that person's trade, business or profession, only insofar as that person publishes or makes available to the public that person's own variable or fixed borrowing rates set by internal decisions and applicable only to financial contracts entered into by that person or by a company within the same group with their respective clients;

(g) a commodity benchmark based on submissions from contributors the majority of which are non-supervised entities and in respect of which both of the following conditions apply:

(i) the benchmark is referenced by financial instruments for which a request for admission to trading has been made on only one trading venue, as defined in point (24) of Article 4(1) of Directive 2014/65/EU, or which are traded on only one such trading venue;

(ii) the total notional value of financial instruments referencing the benchmark does not exceed EUR 100 million;

(h) an index provider in respect of an index provided by said provider where that index provider is unaware and could not reasonably have been aware that that index is used for the purposes referred to in point (3) of Article 3(1).

Article 3

Definitions

1. For the purposes of this Regulation, the following definitions apply:

(1) 'index' means any figure:

(a) that is published or made available to the public;

(b) that is regularly determined:

(i) entirely or partially by the application of a formula or any other method of calculation, or by an assessment; and

(ii) on the basis of the value of one or more underlying assets or prices, including estimated prices, actual or estimated interest rates, quotes and committed quotes, or other values or surveys;

(2) 'index provider' means a natural or legal person that has control over the provision of an index;

(3) 'benchmark' means any index by reference to which the amount payable under a financial instrument or a financial contract, or the value of a financial instrument, is determined, or an index that is used to measure the performance of an investment fund with the purpose of tracking the return of such index or of defining the asset allocation of a portfolio or of computing the performance fees;

(4) 'family of benchmarks' means a group of benchmarks provided by the same administrator and determined from input data of the same nature which provides specific measures of the same or similar market or economic reality;

(5) 'provision of a benchmark' means:

(a) administering the arrangements for determining a benchmark;

(b) collecting, analysing or processing input data for the purpose of determining a benchmark; and

(c) determining a benchmark through the application of a formula or other method of calculation or by an assessment of input data provided for that purpose;

(6) 'administrator' means a natural or legal person that has control over the provision of a benchmark;

(7) 'use of a benchmark' means:

(a) issuance of a financial instrument which references an index or a combination of indices;

(b) determination of the amount payable under a financial instrument or a financial contract by referencing an index or a combination of indices;

(c) being a party to a financial contract which references an index or a combination of indices;

(d) providing a borrowing rate as defined in point (j) of Article 3 of Directive 2008/48/EC calculated as a spread or mark-up over an index or a combination of indices and that is solely used as a reference in a financial contract to which the creditor is a party;

(e) measuring the performance of an investment fund through an index or a combination of indices for the purpose of tracking the return of such index or combination of indices, of defining the asset allocation of a portfolio, or of computing the performance fees;

(8) 'contribution of input data' means providing any input data not readily available to an administrator, or to another person for the purposes of passing to an administrator, that is required in connection with the determination of a benchmark, and is provided for that purpose;

(9) 'contributor' means a natural or legal person contributing input data;

(10) 'supervised contributor' means a supervised entity that contributes input data to an administrator located in the Union;

(11) 'submitter' means a natural person employed by the contributor for the purpose of contributing input data;

(12) 'assessor' means an employee of an administrator of a commodity benchmark, or any other natural person whose services are placed at the administrator's disposal or under the control of the administrator, and who is responsible for applying a methodology or judgement to input data and other information to reach a conclusive assessment about the price of a certain commodity;

(13) 'expert judgement' means the exercise of discretion by an administrator or a contributor with respect to the use of data in determining a benchmark, including extrapolating values from prior or related transactions, adjusting values for factors that might influence the quality of data such as market events or impairment of a buyer or seller's credit quality, and weighting firm bids or offers greater than a particular concluded transaction;

(14) 'input data' means the data in respect of the value of one or more underlying assets, or prices, including estimated prices, quotes, committed quotes or other values, used by an administrator to determine a benchmark;

(15) 'transaction data' means observable prices, rates, indices or values representing transactions between unaffiliated counterparties in an active market subject to competitive supply and demand forces;

(16) 'financial instrument' means any of the instruments listed in Section C of Annex I to Directive 2014/65/EU for which a request for admission to trading on a trading venue, as defined in point (24) of Article 4(1) of Directive 2014/65/EU, has been made or which is traded on a trading venue as defined in point (24) of Article 4(1) of Directive 2014/65/EU or via a systematic internaliser as defined in point (20) of Article 4(1) of that Directive;

(17) 'supervised entity' means any of the following:

(a) a credit institution as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council ([1]);

(b) an investment firm as defined in point (1) of Article 4(1) of Directive 2014/65/EU;

(c) an insurance undertaking as defined in point (1) of Article 13 of Directive 2009/138/EC of the European Parliament and of the Council ([2]);

(d) a reinsurance undertaking as defined in point (4) of Article 13 of Directive 2009/138/EC;

(e) a UCITS as defined in Article 1(2) of Directive 2009/65/EC or, where applicable, a UCITS management company as defined in point (b) of Article 2(1) of that Directive;

(f) an alternative investment fund manager (AIFM) as defined in point (b) of Article 4(1) of Directive 2011/61/EU of the European Parliament and of the Council ([3]);

(g) an institution for occupational retirement provision as defined in point (a) of Article 6 of Directive 2003/41/EC of the European Parliament and of the Council ([4]);

(h) a creditor as defined in point (b) of Article 3 of Directive 2008/48/EC for the purposes of credit agreements as defined in point (c) of Article 3 of that Directive;

(i) a non-credit institution as defined in point (10) of Article 4 of Directive 2014/17/EU for the purposes of credit agreements as defined in point (3) of Article 4 of that Directive;

(j) a market operator as defined in point (18) of Article 4(1) of Directive 2014/65/EU;

(k) a CCP as defined in point (1) of Article 2 of Regulation (EU) No 648/2012 of the European Parliament and of the Council ([5]);

(l) a trade repository as defined in point (2) of Article 2 of Regulation (EU) No 648/2012;

(m) an administrator;

(18) 'financial contract' means:

(a) any credit agreement as defined in point (c) of Article 3 of Directive 2008/48/EC;

(b) any credit agreement as defined in point (3) of Article 4 of Directive 2014/17/EU;

(19) 'investment fund' means an AIF as defined in point (a) of Article 4(1) of Directive 2011/61/EU, or a UCITS as defined in Article 1(2) of Directive 2009/65/EC;

([1]) Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

([2]) Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

([3]) Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

([4]) Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ L 235, 23.9.2003, p. 10).

([5]) Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

(20) 'management body' means the body or bodies of an administrator or another supervised entity which are appointed in accordance with national law, which are empowered to set the strategy, objectives and overall direction of the administrator or other supervised entity, and which oversee and monitor management decision-making and include persons who effectively direct the business of the administrator or other supervised entity;

(21) 'consumer' means a natural person who, in financial contracts covered by this Regulation, is acting for purposes which are outside his or her trade, business or profession;

(22) 'interest rate benchmark' means a benchmark which for the purposes of point (1)(b)(ii) of this paragraph is determined on the basis of the rate at which banks may lend to, or borrow from, other banks, or agents other than banks, in the money market;

(23) 'commodity benchmark' means a benchmark where the underlying asset for the purposes of point (1)(b)(ii) of this paragraph is a commodity within the meaning of point (1) of Article 2 of Commission Regulation (EC) No 1287/2006 ([1]), excluding emission allowances as referred to in point (11) of Section C of Annex I to Directive 2014/65/EU;

(24) 'regulated-data benchmark' means a benchmark determined by the application of a formula from:

(a) input data contributed entirely and directly from:

(i) a trading venue as defined in point (24) of Article 4(1) of Directive 2014/65/EU or a trading venue in a third country for which the Commission has adopted an implementing decision that the legal and supervisory framework of that country is considered to have equivalent effect within the meaning of Article 28(4) of Regulation (EU) No 600/2014 of the European Parliament and of the Council ([2]), or a regulated market considered to be equivalent under Article 2a of Regulation (EU) No 648/2012, but in each case only with reference to transaction data concerning financial instruments;

(ii) an approved publication arrangement as defined in point (52) of Article 4(1) of Directive 2014/65/EU or a consolidated tape provider as defined in point (53) of Article 4(1) of Directive 2014/65/EU, in accordance with mandatory post-trade transparency requirements, but only with reference to transaction data concerning financial instruments that are traded on a trading venue;

(iii) an approved reporting mechanism as defined in point (54) of Article 4(1) of Directive 2014/65/EU, but only with reference to transaction data concerning financial instruments that are traded on a trading venue and that must be disclosed in accordance with mandatory post-trade transparency requirements;

(iv) an electricity exchange as referred to in point (j) of Article 37(1) of Directive 2009/72/EC of the European Parliament and of the Council ([3]);

(v) a natural gas exchange as referred to in point (j) of Article 41(1) of Directive 2009/73/EC of the European Parliament and of the Council ([4]);

(vi) an auction platform referred to in Article 26 or 30 of Commission Regulation (EU) No 1031/2010 ([5]);

(vii) a service provider to which the benchmark administrator has outsourced the data collection in accordance with Article 10, provided that the service provider receives the data entirely and directly from an entity referred to in points (i) to (vi);

(b) net asset values of investment funds;

([1]) Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive (OJ L 241, 2.9.2006, p. 1).

([2]) Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

([3]) Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009, p. 55).

([4]) Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009, p. 94).

([5]) Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community (OJ L 302, 18.11.2010, p. 1).

(25) 'critical benchmark' means a benchmark other than a regulated-data benchmark that fulfils any of the conditions laid down in Article 20(1) and which is on the list established by the Commission pursuant to that Article;

(26) 'significant benchmark' means a benchmark that fulfils the conditions laid down in Article 24(1);

(27) 'non-significant benchmark' means a benchmark that does not fulfil the conditions laid down in Articles 20(1) and 24(1);

(28) 'located' means, in relation to a legal person, the country where that person's registered office or other official address is situated and, in relation to a natural person, the country where that person is resident for tax purposes;

(29) 'public authority' means:

(a) any government or other public administration, including the entities charged with or intervening in the management of the public debt;

(b) any entity or person either performing public administrative functions under national law or having public responsibilities or functions or providing public services, including measures of employment, economic activities and inflation, under the control of an entity within the meaning of point (a).

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 49 in order to specify further technical elements of the definitions laid down in paragraph 1 of this Article, in particular specifying what constitutes making available to the public for the purposes of the definition of an index.

Where applicable, the Commission shall take into account the market or technological developments and the international convergence of supervisory practice in relation to benchmarks.

3. The Commission shall adopt implementing acts in order to establish and review a list of public authorities in the Union falling within the definition under point (29) of paragraph 1 of this Article. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 50(2).

Where applicable, the Commission shall take into account the market or technological developments and the international convergence of supervisory practice in relation to benchmarks.

TITLE II

BENCHMARK INTEGRITY AND RELIABILITY

CHAPTER 1

Governance of and control by administrators

Article 4

Governance and conflict of interest requirements

1. An administrator shall have in place robust governance arrangements which include a clear organisational structure with well-defined, transparent and consistent roles and responsibilities for all persons involved in the provision of a benchmark.

Administrators shall take adequate steps to identify and to prevent or manage conflicts of interest between themselves, including their managers, employees or any person directly or indirectly linked to them by control, and contributors or users, and to ensure that, where any judgement or discretion in the benchmark determination process is required, it is independently and honestly exercised.

2. The provision of a benchmark shall be operationally separated from any part of an administrator's business that may create an actual or potential conflict of interest.

3. Where a conflict of interest arises within an administrator due to the latter's ownership structure, controlling interests or other activities conducted by any entity owning or controlling the administrator or by an entity that is owned or controlled by the administrator or any of the administrator's affiliates, that cannot be adequately mitigated, the relevant competent authority may require the administrator to establish an independent oversight function which shall include a balanced representation of stakeholders, including users and contributors.

4. If such a conflict of interest cannot be adequately managed, the relevant competent authority may require the administrator to either cease the activities or relationships that create the conflict of interest or cease providing the benchmark.

5. An administrator shall publish or disclose all existing or potential conflicts of interest to users of a benchmark, to the relevant competent authority and, where relevant, to contributors, including conflicts of interest arising from the ownership or control of the administrator.

6. An administrator shall establish and operate adequate policies and procedures, as well as effective organisational arrangements, for the identification, disclosure, prevention, management and mitigation of conflicts of interest in order to protect the integrity and independence of benchmark determinations. Such policies and procedures shall be regularly reviewed and updated. The policies and procedures shall take into account and address conflicts of interest, the degree of discretion exercised in the benchmark determination process and the risks that the benchmark poses, and shall:

(a) ensure the confidentiality of information contributed to or produced by the administrator, subject to the disclosure and transparency obligations under this Regulation; and

(b) specifically mitigate conflicts of interest due to the administrator's ownership or control, or due to other interests in the administrator's group or as a result of other persons that may exercise influence or control over the administrator in relation to determining the benchmark.

7. Administrators shall ensure that their employees and any other natural persons whose services are placed at their disposal or under their control and who are directly involved in the provision of a benchmark:

(a) have the necessary skills, knowledge and experience for the duties assigned to them and are subject to effective management and supervision;

(b) are not subject to undue influence or conflicts of interest and that the compensation and performance evaluation of those persons do not create conflicts of interest or otherwise impinge upon the integrity of the benchmark determination process;

(c) do not have any interests or business connections that compromise the activities of the administrator concerned;

(d) are prohibited from contributing to a benchmark determination by way of engaging in bids, offers and trades on a personal basis or on behalf of market participants, except where such way of contribution is explicitly required as part of the benchmark methodology and is subject to specific rules therein; and

(e) are subject to effective procedures to control the exchange of information with other employees involved in activities that may create a risk of conflicts of interest or with third parties, where that information may affect the benchmark.

8. An administrator shall establish specific internal control procedures to ensure the integrity and reliability of the employee or person determining the benchmark, including at least internal sign-off by management before the dissemination of the benchmark.

Article 5

Oversight function requirements

1. Administrators shall establish and maintain a permanent and effective oversight function to ensure oversight of all aspects of the provision of their benchmarks.

2. Administrators shall develop and maintain robust procedures regarding their oversight function, which shall be made available to the relevant competent authorities.

3. The oversight function shall operate with integrity and shall have the following responsibilities, which shall be adjusted by the administrator based on the complexity, use and vulnerability of the benchmark:

(a) reviewing the benchmark's definition and methodology at least annually;

(b) overseeing any changes to the benchmark methodology and being able to request the administrator to consult on such changes;

(c) overseeing the administrator's control framework, the management and operation of the benchmark, and, where the benchmark is based on input data from contributors, the code of conduct referred to in Article 15;

(d) reviewing and approving procedures for cessation of the benchmark, including any consultation about a cessation;

(e) overseeing any third party involved in the provision of the benchmark, including calculation or dissemination agents;

(f) assessing internal and external audits or reviews, and monitoring the implementation of identified remedial actions;

(g) where the benchmark is based on input data from contributors, monitoring the input data and contributors and the actions of the administrator in challenging or validating contributions of input data;

(h) where the benchmark is based on input data from contributors, taking effective measures in respect of any breaches of the code of conduct referred to in Article 15; and

(i) reporting to the relevant competent authorities any misconduct by contributors, where the benchmark is based on input data from contributors, or administrators, of which the oversight function becomes aware, and any anomalous or suspicious input data.

4. The oversight function shall be carried out by a separate committee or by means of another appropriate governance arrangement.

5. ESMA shall develop draft regulatory technical standards to specify the procedures regarding the oversight function and the characteristics of the oversight function including its composition as well as its positioning within the organisational structure of the administrator, so as to ensure the integrity of the function and the absence of conflicts of interest. In particular, ESMA shall develop a non-exhaustive list of appropriate governance arrangements as laid down in paragraph 4.

ESMA shall distinguish between the different types of benchmarks and sectors as set out in this Regulation and shall take into consideration the differences in the ownership and control structure of administrators, the nature, scale and complexity of the provision of the benchmark, and the risk and impact of the benchmark, also in light of international convergence of supervisory practice in relation to governance requirements of benchmarks. However, the ESMA draft regulatory technical standards shall not cover or apply to administrators of non-significant benchmarks.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

6. ESMA may issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010, addressed to administrators of non-significant benchmarks to specify the elements referred to in paragraph 5 of this Article.

Article 6

Control framework requirements

1. Administrators shall have in place a control framework that ensures that their benchmarks are provided and published or made available in accordance with this Regulation.

2. The control framework shall be proportionate to the level of conflicts of interest identified, the extent of discretion in the provision of the benchmark and the nature of the benchmark input data.

3. The control framework shall include:

(a) management of operational risk;

(b) adequate and effective business continuity and disaster recovery plans;

(c) contingency procedures that are in place in the event of a disruption to the process of the provision of the benchmark.

4. An administrator shall establish measures to:

(a) ensure that contributors adhere to the code of conduct referred to in Article 15 and comply with the applicable standards for input data;

(b) monitor input data including, where feasible, monitoring input data before publication of the benchmark and validating input data after publication to identify errors and anomalies.

5. The control framework shall be documented, reviewed and updated as appropriate and made available to the relevant competent authority and, upon request, to users.

Article 7

Accountability framework requirements

1. An administrator shall have in place an accountability framework, covering record-keeping, auditing and review, and a complaints process, that provides evidence of compliance with the requirements of this Regulation.

2. An administrator shall designate an internal function with the necessary capability to review and report on the administrator's compliance with the benchmark methodology and this Regulation.

3. For critical benchmarks, an administrator shall appoint an independent external auditor to review and report on the administrator's compliance with the benchmark methodology and this Regulation, at least annually.

4. Upon the request of the relevant competent authority, an administrator shall provide to the relevant competent authority the details of the reviews and reports provided for in paragraph 2. Upon the request of the relevant competent authority or any user of a benchmark, an administrator shall publish the details of the audits provided for in paragraph 3.

Article 8

Record-keeping requirements

1. An administrator shall keep records of:

(a) all input data, including the use of such data;

(b) the methodology used for the determination of a benchmark;

(c) any exercise of judgement or discretion by the administrator and, where applicable, by assessors, in the determination of a benchmark, including the reasoning for said judgement or discretion;

(d) the disregard of any input data, in particular where it conformed to the requirements of the benchmark methodology, and the rationale for such disregard;

(e) other changes in or deviations from standard procedures and methodologies, including those made during periods of market stress or disruption;

(f) the identities of the submitters and of the natural persons employed by the administrator for the determination of a benchmark;

(g) all documents relating to any complaint, including those submitted by a complainant; and

(h) telephone conversations or electronic communications between any person employed by the administrator and contributors or submitters in respect of a benchmark.

2. An administrator shall keep the records set out in paragraph 1 for at least five years in such a form that it is possible to replicate and fully understand the determination of a benchmark and enable an audit or evaluation of input data, calculations, judgements and discretion. Records of telephone conversation or electronic communications recorded in accordance with point (h) of paragraph 1 shall be provided to the persons involved in the conversation or communication upon request and shall be kept for a period of three years.

Article 9

Complaints-handling mechanism

1. An administrator shall have in place and publish procedures for receiving, investigating and retaining records concerning complaints made, including about the administrator's benchmark determination process.

2. Such a complaints-handling mechanism shall ensure that:

(a) the administrator makes available the complaints-handling policy through which complaints may be submitted on whether a specific benchmark determination is representative of market value, on a proposed change to the benchmark determination process, on an application of the methodology in relation to a specific benchmark determination, and on other decisions in relation to the benchmark determination process;

(b) complaints are investigated in a timely and fair manner and the outcome of the investigation is communicated to the complainant within a reasonable period of time, unless such communication would be contrary to objectives of public policy or to Regulation (EU) No 596/2014; and

(c) the inquiry is conducted independently of any personnel who may be or may have been involved in the subject-matter of the complaint.

Article 10

Outsourcing

1. An administrator shall not outsource functions in the provision of a benchmark in such a way as to impair materially the administrator's control over the provision of the benchmark or the ability of the relevant competent authority to supervise the benchmark.

2. Where an administrator outsources to a service provider functions or any relevant services and activities in the provision of a benchmark, the administrator shall remain fully responsible for discharging all of the administrator's obligations under this Regulation.

3. Where outsourcing takes place, the administrator shall ensure that the following conditions are fulfilled:

(a) the service provider has the ability, capacity, and any authorisation required by law, to perform the outsourced functions, services or activities reliably and professionally;

(b) the administrator makes available to the relevant competent authorities the identity and the tasks of the service provider that participates in the benchmark determination process;

(c) the administrator takes appropriate action if it appears that the service provider may not be carrying out the outsourced functions effectively and in compliance with applicable law and regulatory requirements;

(d) the administrator retains the necessary expertise to supervise the outsourced functions effectively and to manage the risks associated with the outsourcing;

(e) the service provider discloses to the administrator any development that may have a material impact on its ability to carry out the outsourced functions effectively and in compliance with applicable law and regulatory requirements;

(f) the service provider cooperates with the relevant competent authority regarding the outsourced activities, and the administrator and the relevant competent authority have effective access to data related to the outsourced activities, as well as to the business premises of the service provider, and the relevant competent authority is able to exercise those rights of access;

(g) the administrator is able to terminate the outsourcing arrangements where necessary;

(h) the administrator takes reasonable steps, including contingency plans, to avoid undue operational risk related to the participation of the service provider in the benchmark determination process.

CHAPTER 2

Input data, methodology and reporting of infringements

Article 11

Input data

1. The provision of a benchmark shall be governed by the following requirements in respect of its input data:

(a) the input data shall be sufficient to represent accurately and reliably the market or economic reality that the benchmark is intended to measure.

The input data shall be transaction data, if available and appropriate. If transaction data is not sufficient or is not appropriate to represent accurately and reliably the market or economic reality that the benchmark is intended to measure, input data which is not transaction data may be used, including estimated prices, quotes and committed quotes, or other values;

(b) the input data referred to in point (a) shall be verifiable;

(c) the administrator shall draw up and publish clear guidelines regarding the types of input data, the priority of use of the different types of input data and the exercise of expert judgement, to ensure compliance with point (a) and the methodology;

(d) where a benchmark is based on input data from contributors, the administrator shall obtain, where appropriate, the input data from a reliable and representative panel or sample of contributors so as to ensure that the resulting benchmark is reliable and representative of the market or economic reality that the benchmark is intended to measure;

(e) the administrator shall not use input data from a contributor if the administrator has any indication that the contributor does not adhere to the code of conduct referred to in Article 15, and in such a case shall obtain representative publicly available data.

2. Administrators shall ensure that their controls in respect of input data include:

(a) criteria that determine who may contribute input data to the administrator and a process for selecting contributors;

(b) a process for evaluating a contributor's input data and for stopping the contributor from providing further input data, or applying other penalties for non-compliance against the contributor, where appropriate; and

(c) a process for validating input data, including against other indicators or data, to ensure its integrity and accuracy.

3. Where the input data of a benchmark is contributed from a front office function, meaning any department, division, group, or personnel of contributors or any of its affiliates that performs any pricing, trading, sales, marketing, advertising, solicitation, structuring, or brokerage activities, the administrator shall:

(a) obtain data from other sources that corroborate that input data; and

(b) ensure that contributors have in place adequate internal oversight and verification procedures.

4. Where an administrator considers that the input data does not represent the market or economic reality that a benchmark is intended to measure, that administrator shall, within a reasonable time period, either change the input data, the contributors or the methodology in order to ensure that the input data does represent such market or economic reality, or else cease to provide that benchmark.

5. ESMA shall develop draft regulatory technical standards to specify further how to ensure that input data is appropriate and verifiable, as required under points (a) and (b) of paragraph 1, as well as the internal oversight and verification procedures of a contributor that the administrator has to ensure are in place, in compliance with point (b) of paragraph 3, in order to ensure the integrity and accuracy of input data. However, the ESMA draft regulatory technical standards shall not cover or apply to administrators of non-significant benchmarks.

ESMA shall take into account the different types of benchmarks and sectors as set out in this Regulation, the nature of input data, the characteristics of the underlying market or economic reality and the principle of proportionality, the vulnerability of the benchmarks to manipulation as well as the international convergence of supervisory practice in relation to benchmarks.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

6. ESMA may issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010, addressed to administrators of non-significant benchmarks to specify the elements referred to in paragraph 5 of this Article.

Article 12

Methodology

1. An administrator shall use a methodology for determining a benchmark that:

(a) is robust and reliable;

(b) has clear rules identifying how and when discretion may be exercised in the determination of that benchmark;

(c) is rigorous, continuous and capable of validation including, where appropriate, back-testing against available transaction data;

(d) is resilient and ensures that the benchmark can be calculated in the widest set of possible circumstances, without compromising its integrity;

(e) is traceable and verifiable.

2. When developing a benchmark methodology, a benchmark administrator shall:

(a) take into account factors including the size and normal liquidity of the market, the transparency of trading and the positions of market participants, market concentration, market dynamics, and the adequacy of any sample to represent the market or economic reality that the benchmark is intended to measure;

(b) determine what constitutes an active market for the purposes of that benchmark; and

(c) establish the priority given to different types of input data.

3. An administrator shall have in place clear published arrangements that identify the circumstances in which the quantity or quality of input data falls below the standards necessary for the methodology to determine the benchmark accurately and reliably, and that describe whether and how the benchmark is to be calculated in such circumstances.

Article 13

Transparency of methodology

1. An administrator shall develop, operate and administer the benchmark and methodology transparently. To that end, the administrator shall publish or make available the following information:

(a) the key elements of the methodology that the administrator uses for each benchmark provided and published or, when applicable, for each family of benchmarks provided and published;

(b) details of the internal review and the approval of a given methodology, as well as the frequency of such review;

(c) the procedures for consulting on any proposed material change in the administrator's methodology and the rationale for such changes, including a definition of what constitutes a material change and the circumstances in which the administrator is to notify users of any such changes.

2. The procedures required under point (c) of paragraph 1 shall provide for:

(a) advance notice, with a clear time frame, that gives the opportunity to analyse and comment upon the impact of such proposed material changes; and

(b) the comments referred to in point (a) of this paragraph, and the administrator's response to those comments, to be made accessible after any consultation, except where confidentiality has been requested by the originator of the comments.

3. ESMA shall develop draft regulatory technical standards to specify further the information to be provided by an administrator in compliance with the requirements laid down in paragraphs 1 and 2, distinguishing for different types of benchmarks and sectors as set out in this Regulation. ESMA shall take into account the need to disclose those elements of the methodology that provide for sufficient detail to allow users to understand how a benchmark is provided and to assess its representativeness, its relevance to particular users and its appropriateness as a reference for financial instruments and contracts and the principle of proportionality. However, the ESMA draft regulatory technical standards shall not cover or apply to administrators of non-significant benchmarks.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

4. ESMA may issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010, addressed to administrators of non-significant benchmarks to specify further the elements referred to in paragraph 3 of this Article.

Article 14

Reporting of infringements

1. An administrator shall establish adequate systems and effective controls to ensure the integrity of input data in order to be able to identify and report to the competent authority any conduct that may involve manipulation or attempted manipulation of a benchmark, under Regulation (EU) No 596/2014.

2. An administrator shall monitor input data and contributors in order to be able to notify the competent authority and provide all relevant information where the administrator suspects that, in relation to a benchmark, any conduct has taken place that may involve manipulation or attempted manipulation of the benchmark, under Regulation (EU) No 596/2014, including collusion to do so.

The competent authority of the administrator shall, where applicable, transmit such information to the relevant authority under Regulation (EU) No 596/2014.

3. Administrators shall have procedures in place for their managers, employees and any other natural persons whose services are placed at their disposal or under their control to report internally infringements of this Regulation.

CHAPTER 3

Code of conduct and requirements for contributors

Article 15

Code of conduct

1. Where a benchmark is based on input data from contributors, its administrator shall develop a code of conduct for each benchmark clearly specifying contributors' responsibilities with respect to the contribution of input data and shall ensure that such code of conduct complies with this Regulation. The administrator shall be satisfied that contributors adhere to the code of conduct on a continuous basis and at least annually and in case of changes to it.

2. The code of conduct shall include at least the following elements:

(a) a clear description of the input data to be provided and the requirements necessary to ensure that input data is provided in accordance with Articles 11 and 14;

(b) identification of the persons that may contribute input data to the administrator and procedures to verify the identity of a contributor and any submitters, as well as authorisation of any submitters that contribute input data on behalf of a contributor;

(c) policies to ensure that a contributor provides all relevant input data;

(d) the systems and controls that a contributor is required to establish, including:

(i) procedures for contributing input data, including requirements for the contributor to specify whether input data is transaction data and whether input data conforms to the administrator's requirements;

(ii) policies on the use of discretion in contributing input data;

(iii) any requirement for the validation of input data before it is provided to the administrator;

(iv) record-keeping policies;

(v) reporting requirements concerning suspicious input data;

(vi) requirements concerning the management of conflicts of interest.

3. Administrators may develop a single code of conduct for each family of benchmarks they provide.

4. In the event that a relevant competent authority, in the use of its powers referred to in Article 41, finds that there are elements of a code of conduct which do not comply with this Regulation, it shall notify the administrator concerned. The administrator shall adjust the code of conduct to ensure that it complies with this Regulation within 30 days of such a notification.

5. Within 15 working days from the date of application of the decision to include a critical benchmark in the list referred to in Article 20(1), the administrator of that critical benchmark shall notify the code of conduct to the relevant competent authority. The relevant competent authority shall verify within 30 days whether the content of the code of conduct complies with this Regulation. In the event that the relevant competent authority finds elements which do not comply with this Regulation, paragraph 4 of this Article shall apply.

6. ESMA shall develop draft regulatory technical standards to specify further the elements of the code of conduct referred to in paragraph 2 for different types of benchmarks, and in order to take account of developments in benchmarks and financial markets.

ESMA shall take into account the different characteristics of benchmarks and contributors, in particular in terms of differences in input data and methodologies, the risks of input data of being manipulated and international convergence of supervisory practices in relation to benchmarks.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

Article 16

Governance and control requirements for supervised contributors

1. The following governance and control requirements shall apply to a supervised contributor:

(a) the supervised contributor shall ensure that the provision of input data is not affected by any existing or potential conflict of interest and that, where any discretion is required, it is independently and honestly exercised based on relevant information in accordance with the code of conduct referred to in Article 15;

(b) the supervised contributor shall have in place a control framework that ensures the integrity, accuracy and reliability of input data and that input data is provided in accordance with this Regulation and the code of conduct referred to in Article 15.

2. A supervised contributor shall have in place effective systems and controls to ensure the integrity and reliability of all contributions of input data to the administrator, including:

(a) controls regarding who may submit input data to an administrator including, where proportionate, a process for sign-off by a natural person holding a position senior to that of the submitter;

(b) appropriate training for submitters, covering at least this Regulation and Regulation (EU) No 596/2014;

(c) measures for the management of conflicts of interest, including organisational separation of employees where appropriate and consideration of how to remove incentives, created by remuneration polices, to manipulate a benchmark;

(d) record-keeping, for an appropriate period of time, of communications in relation to provision of input data, of all information used to enable the contributor to make each submission, and of all existing or potential conflicts of interest including, but not limited to, the contributor's exposure to financial instruments which use a benchmark as a reference;

(e) record-keeping of internal and external audits.

3. Where input data relies on expert judgement, supervised contributors shall establish, in addition to the systems and controls referred to in paragraph 2, policies guiding any use of judgement or exercise of discretion and shall retain records of the rationale for any such judgement or discretion. Where proportionate, supervised contributors shall take into account the nature of the benchmark and its input data.

4. A supervised contributor shall fully cooperate with the administrator and the relevant competent authority in the auditing and supervision of the provision of a benchmark and make available the information and records kept in accordance with paragraphs 2 and 3.

5. ESMA shall develop draft regulatory technical standards to specify further the requirements concerning governance, systems and controls, and policies set out in paragraphs 1, 2 and 3.

ESMA shall take into account the different characteristics of benchmarks and supervised contributors, in particular in terms of differences in input data provided and methodologies used, the risks of manipulation of the input data and the nature of the activities carried out by the supervised contributors, and the developments in benchmarks and financial markets in light of international convergence of supervisory practices in relation to benchmarks. However, the ESMA draft regulatory technical standards shall not cover or apply to supervised contributors of non-significant benchmarks.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

6. ESMA may issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010, addressed to supervised contributors to non-significant benchmarks to specify the elements referred to in paragraph 5 of this Article.

TITLE III

REQUIREMENTS FOR DIFFERENT TYPES OF BENCHMARKS

CHAPTER 1

Regulated-data benchmarks

Article 17

Regulated-data benchmarks

1. Article 11(1)(d) and (e), Article 11(2) and (3), Article 14(1) and (2), and Articles 15 and 16 shall not apply to the provision of and the contribution to regulated-data benchmarks. Article 8(1)(a) shall not apply to the provision of regulated-data benchmarks with reference to input data that are contributed entirely and directly as specified in point (24) of Article 3(1).

2. Articles 24 and 25 or Article 26 shall, as applicable, apply to the provision of, and the contribution to, regulated-data benchmarks that are used directly or indirectly within a combination of benchmarks as a reference for financial instruments or financial contracts or for measuring the performance of investment funds, having a total value of up to EUR 500 billion, on the basis of all the range of maturities or tenors of the benchmark, where applicable.

CHAPTER 2

Interest rate benchmarks

Article 18

Interest rate benchmarks

The specific requirements laid down in Annex I shall apply to the provision of, and contribution to, interest rate benchmarks in addition to, or as a substitute for, the requirements of Title II.

Articles 24, 25 and 26 shall not apply to the provision of, and contribution to, interest rate benchmarks.

CHAPTER 3

Commodity benchmarks

Article 19

Commodity benchmarks

1. The specific requirements laid down in Annex II shall apply instead of the requirements of Title II, with the exception of Article 10, to the provision of, and contribution to, commodity benchmarks, unless the benchmark in question is a regulated-data benchmark or is based on submissions by contributors the majority of which are supervised entities.

Articles 24, 25 and 26 shall not apply to the provision of, and contribution to, commodity benchmarks.

2. Where a commodity benchmark is a critical benchmark and the underlying asset is gold, silver or platinum, the requirements of Title II shall apply instead of Annex II.

CHAPTER 4

Critical benchmarks

Article 20

Critical benchmarks

1. The Commission shall adopt implementing acts in accordance with the examination procedure referred to in Article 50(2) to establish and review at least every two years a list of benchmarks provided by administrators located within the Union which are critical benchmarks, provided that one of the following conditions is fulfilled:

(a) the benchmark is used directly or indirectly within a combination of benchmarks as a reference for financial instruments or financial contracts or for measuring the performance of investment funds, having a total value of at least EUR 500 billion on the basis of all the range of maturities or tenors of the benchmark, where applicable;

(b) the benchmark is based on submissions by contributors the majority of which are located in one Member State and is recognised as being critical in that Member State in accordance with the procedure laid down in paragraphs 2, 3, 4 and 5 of this Article;

(c) the benchmark fulfils all of the following criteria:

  (i) the benchmark is used directly or indirectly within a combination of benchmarks as a reference for financial instruments or financial contracts or for measuring the performance of investment funds having a total value of at least EUR 400 billion on the basis of all the range of maturities or tenors of the benchmark, where applicable, but not exceeding the value provided for in point (a);

  (ii) the benchmark has no, or very few, appropriate market-led substitutes;

  (iii) in the event that the benchmark ceases to be provided, or is provided on the basis of input data no longer fully representative of the underlying market or economic reality or on the basis of unreliable input data, there would be significant and adverse impacts on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in one or more Member States.

If a benchmark meets the criteria set out in point (c)(ii) and (iii) but does not meet the criterion set out in point (c)(i), the competent authorities of the Member States concerned together with the competent authority of the Member State where the administrator is established may agree that such benchmark should be recognised as critical under this subparagraph. In any case, the competent authority of the administrator shall consult the competent authorities of the Member States concerned. In the event of disagreement between the competent authorities, the competent authority of the administrator shall decide whether the benchmark should be recognised as critical under this subparagraph, taking into account the reasons for the disagreement. The competent authorities or, in the event of disagreement, the competent authority of the administrator, shall transmit the assessment to the Commission. After receiving the assessment, the Commission shall adopt an implementing act in accordance with this paragraph. In addition, in the event of disagreement, the competent authority of the administrator shall transmit its assessment to ESMA, which may publish an opinion.

2. Where the competent authority of a Member State referred to in point (b) of paragraph 1 considers that an administrator under its supervision provides a benchmark that should be recognised as critical, it shall notify ESMA and transmit to ESMA a documented assessment.

3. For the purposes of paragraph 2, the competent authority shall assess whether the cessation of the benchmark or its provision on the basis of input data or of a panel of contributors no longer representative of the underlying market or economic reality would have an adverse impact on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in its Member State. The competent authority shall take into consideration in its assessment:

(a) the value of financial instruments and financial contracts that reference the benchmark and the value of investment funds referencing the benchmark for measuring their performance within the Member State and their relevance in terms of the total value of financial instruments and of financial contracts outstanding, and of the total value of investment funds, in the Member State;

(b) the value of financial instruments and financial contracts that reference the benchmark and the value of investment funds referencing the benchmark for measuring their performance within the Member State and their relevance in terms of the gross national product of the Member State;

(c) any other figure to assess on objective grounds the potential impact of the discontinuity or unreliability of the benchmark on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in the Member State.

The competent authority shall review its assessment of the criticality of the benchmark at least every two years, and shall notify and transmit the new assessment to ESMA.

4. Within six weeks of receipt of the notification referred to in paragraph 2, ESMA shall issue an opinion on whether the assessment of the competent authority complies with the requirements of paragraph 3 and shall transmit such opinion to the Commission, together with the competent authority's assessment.

5. The Commission, after receiving the opinion referred to in paragraph 4, shall adopt implementing acts in accordance with paragraph 1.

6. The Commission shall be empowered to adopt delegated acts in accordance with Article 49 in order to:

(a) specify how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds are to be assessed, including in the event of an indirect reference to a benchmark within a combination of benchmarks, in order to be compared with the thresholds referred to in paragraph 1 of this Article and in point (a) of Article 24(1);

(b) review the calculation method used to determine the thresholds referred to in paragraph 1 of this Article in the light of market, price and regulatory developments as well as the appropriateness of the classification of benchmarks with a total value of financial instruments, financial contracts, or investment funds referencing them that is close to the thresholds; such review shall take place at least every two years as from 1 January 2018;

(c) specify how the criteria referred to in point (c)(iii) of paragraph 1 of this Article are to be applied, taking into consideration any data which helps assess on objective grounds the potential impact of the discontinuity or unreliability of the benchmark on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in one or more Member States.

Where applicable, the Commission shall take into account relevant market or technological developments.

Article 21

Mandatory administration of a critical benchmark

1. If an administrator of a critical benchmark intends to cease providing such benchmark, the administrator shall:

(a) immediately notify its competent authority; and

(b) within four weeks of such notification submit an assessment of how the benchmark:

(i) is to be transitioned to a new administrator; or

(ii) is to be ceased to be provided, taking into account the procedure established in Article 28(1).

During the period referred to in point (b) of the first subparagraph, the administrator shall not cease provision of the benchmark.

2. Upon receipt of the assessment of the administrator referred to in paragraph 1, the competent authority shall:

(a) inform ESMA and, where applicable, the college established under Article 46; and

(b) within four weeks, make its own assessment of how the benchmark is to be transitioned to a new administrator or be ceased to be provided, taking into account the procedure established in accordance with Article 28(1).

During the period of time referred to in point (b) of the first subparagraph of this paragraph, the administrator shall not cease the provision of the benchmark without the written consent of the competent authority.

3. Following completion of the assessment referred to in point (b) of paragraph 2, the competent authority shall have the power to compel the administrator to continue publishing the benchmark until such time as:

(a) the provision of the benchmark has been transitioned to a new administrator;

(b) the benchmark can be ceased to be provided in an orderly fashion; or

(c) the benchmark is no longer critical.

For the purposes of the first subparagraph, the period for which the competent authority may compel the administrator to continue to publish the benchmark shall not exceed 12 months.

By the end of that period, the competent authority shall review its decision to compel the administrator to continue to publish the benchmark and may, where necessary, extend the time period by an appropriate period not exceeding a further 12 months. The maximum period of mandatory administration shall not exceed 24 months in total.

4. Without prejudice to paragraph 1, in the event that the administrator of a critical benchmark is to be wound down due to insolvency proceedings, the competent authority shall make an assessment of whether and how the critical benchmark can be transitioned to a new administrator or can cease to be provided in an orderly fashion, taking into account the procedure established in accordance with Article 28(1).

Article 22

Mitigation of market power of critical benchmark administrators

Without prejudice to the application of Union competition law, when providing a critical benchmark, the administrator shall take adequate steps to ensure that licences of, and information relating to, the benchmark are provided to all users on a fair, reasonable, transparent and non-discriminatory basis.

Article 23

Mandatory contribution to a critical benchmark

1. This Article shall apply to critical benchmarks based on submissions by contributors the majority of which are supervised entities.

2. Administrators of one or more critical benchmarks shall, every two years, submit to their competent authority an assessment of the capability of each critical benchmark they provide to measure the underlying market or economic reality.

3. If a supervised contributor to a critical benchmark intends to cease contributing input data, it shall promptly notify in writing the benchmark administrator, which shall inform without delay its competent authority. Where the supervised contributor is located in another Member State, the competent authority of the administrator shall inform, without delay, the competent authority of that contributor. The benchmark administrator shall submit to its competent authority an assessment of the implications on the capability of the benchmark to measure the underlying market or economic reality as soon as possible but no later than 14 days after the notification made by the supervised contributor.

4. Upon receipt of an assessment of the benchmark administrator referred to in paragraphs 2 and 3 of this Article and on the basis of such assessment, the competent authority of the administrator shall promptly inform ESMA and, where applicable, the college established under Article 46, and make its own assessment on the capability of the benchmark to measure the underlying market and economic reality, taking into account the administrator's procedure for cessation of the benchmark established in accordance with Article 28(1).

5. From the date on which the competent authority of the administrator is notified of the intention of a contributor to cease contributing input data and until such time as the assessment referred to in paragraph 4 is complete, it shall have the power to require the contributors which made the notification in accordance with paragraph 3 to continue contributing input data, in any event for a period of no more than four weeks, without imposing an obligation on supervised entities to either trade or commit to trade.

6. In the event that the competent authority, after the period specified in paragraph 5 and on the basis of its own assessment referred to in paragraph 4, considers that the representativeness of a critical benchmark is put at risk, it shall have the power to:

(a) require supervised entities selected in accordance with paragraph 7 of this Article, including entities that are not yet contributors to the relevant critical benchmark, to contribute input data to the administrator in accordance with the administrator's methodology, the code of conduct referred to in Article 15 and other rules. Such requirement shall be in place for an appropriate period of time not exceeding 12 months from the date on which the initial decision requiring mandatory contribution was taken pursuant to paragraph 5 or, for those entities that are not yet contributors, from the date on which the decision requiring mandatory contribution is taken under this point;

(b) extend the period of mandatory contribution by an appropriate period of time not exceeding 12 months, following a review under paragraph 9 of any measures adopted pursuant to point (a) of this paragraph;

(c) determine the form in which, and the time by which, any input data is to be contributed without imposing an obligation on supervised entities to either trade or commit to trade;

(d) require the administrator to change the methodology, the code of conduct referred to in Article 15 or other rules of the critical benchmark.

The maximum period of mandatory contribution under points (a) and (b) of the first subparagraph shall not exceed 24 months in total.

7. For the purposes of paragraph 6, supervised entities that are to be required to contribute input data shall be selected by the competent authority of the administrator, with the close cooperation of the competent authorities of the supervised entities, on the basis of the size of the supervised entity's actual and potential participation in the market that the benchmark intends to measure.

8. The competent authority of a supervised contributor that has been required to contribute to a benchmark through measures taken in accordance with point (a), (b) or (c) of paragraph 6 shall cooperate with the competent authority of the administrator in the enforcement of such measures.

9. By the end of the period referred to in point (a) of the first subparagraph of paragraph 6, the competent authority of the administrator shall review the measures adopted under paragraph 6. It shall revoke any of them if it considers that:

(a) the contributors are likely to continue contributing input data for at least one year if the measure were revoked, which shall be evidenced by at least:

  (i) a written commitment by the contributors to the administrator and the competent authority to continue contributing input data to the critical benchmark for at least one year if the measure were revoked;

  (ii) a written report by the administrator to the competent authority providing evidence for its assessment that the critical benchmark's continued viability can be assured once mandatory contribution has been revoked;

(b) the provision of the benchmark is able to continue once the contributors mandated to contribute input data have ceased contributing;

(c) an acceptable substitute benchmark is available and users of the critical benchmark can switch to this substitute at minimal costs which shall be evidenced by at least a written report by the administrator detailing the means of transition to a substitute benchmark and the ability and costs to users of transitioning to this benchmark; or

(d) no appropriate alternative contributors can be identified and the cessation of contributions from the relevant supervised entities would weaken the benchmark to such an extent to require the cessation of the benchmark.

10. In the event that a critical benchmark is to be ceased to be provided, each supervised contributor to that benchmark shall continue to contribute input data for a period of time determined by the competent authority, but not exceeding the maximum 24-month period laid down in the second subparagraph of paragraph 6.

11. The administrator shall notify the relevant competent authority in the event that any contributors breach the requirements set out in paragraph 6 as soon as reasonably possible.

12. In the event that a benchmark is recognised as critical in accordance with the procedure laid down in Article 20 (2), (3), (4) and (5), the competent authority of the administrator shall have the power to require input data in accordance with paragraph 5, and points (a), (b) and (c) of paragraph 6, of this Article only from supervised contributors located in its Member State.

CHAPTER 5

Significant benchmarks

Article 24

Significant benchmarks

1. A benchmark which does not fulfil any of the conditions laid down in Article 20(1) is significant when:

(a) it is used directly or indirectly within a combination of benchmarks as a reference for financial instruments or financial contracts or for measuring the performance of investments funds having a total average value of at least EUR 50 billion on the basis of all the range of maturities or tenors of the benchmark, where applicable, over a period of six months; or

(b) it has no or very few appropriate market-led substitutes and, in the event that the benchmark ceases to be provided or is provided on the basis of input data no longer fully representative of the underlying market or economic reality or unreliable input data, there would be a significant and adverse impact on market integrity, financial stability, consumers, the real economy or the financing of households or businesses in one or more Member States.

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 49 in order to review the calculation method used to determine the threshold referred to in point (a) of paragraph 1 of this Article in the light of market, price and regulatory developments as well as the appropriateness of the classification of benchmarks with a total value of financial instruments, financial contracts or investment funds referencing them that is close to that threshold. Such review shall take place at least every two years as from 1 January 2018.

3. An administrator shall immediately notify its competent authority when its significant benchmark falls below the threshold mentioned in point (a) of paragraph 1.

Article 25

Exemptions from specific requirements for significant benchmarks

1. An administrator may choose not to apply Article 4(2), points (c), (d) and (e) of Article 4(7), point (b) of Article 11(3) or Article 15(2) with respect to its significant benchmark where that administrator considers that the application of one or more of those provisions would be disproportionate taking into account the nature or impact of the benchmark or the size of the administrator.

2. In the event that an administrator chooses not to apply one or more of the provisions referred to in paragraph 1, it shall immediately notify the competent authority and provide it with all relevant information confirming the administrator's assessment that the application of one or more of those provisions would be disproportionate taking into account the nature or impact of the benchmarks or the size of the administrator.

3. A competent authority may decide that the administrator of a significant benchmark is nevertheless to apply one or more of the requirements laid down in Article 4(2), points (c), (d) and (e) of Article 4(7), point (b) of Article 11(3) and Article 15(2) if it considers that it would be appropriate taking into account the nature or the impact of the benchmarks or the size of the administrator. In its assessment, the competent authority shall, based on the information provided by the administrator, take into account the following criteria:

(a) the vulnerability of the benchmark to manipulation;

(b) the nature of the input data;

(c) the level of conflicts of interest;

(d) the degree of discretion of the administrator;

(e) the impact of the benchmark on markets;

(f) the nature, scale and complexity of the provision of the benchmark;

(g) the importance of the benchmark to financial stability;

(h) the value of financial instruments, financial contracts or investment funds that reference the benchmark;

(i) the administrator's size, organisational form or structure.

4. Within 30 days of receipt of a notification from an administrator under paragraph 2, the competent authority shall notify that administrator of its decision to apply an additional requirement pursuant to paragraph 3. In the event that the notification to the competent authority is made during the course of an authorisation or registration procedure, the deadlines set out in Article 34 shall apply.

5. When exercising its supervisory powers in accordance with Article 41, a competent authority shall regularly review whether its assessment pursuant to paragraph 3 of this Article is still valid.

6. If a competent authority finds, on reasonable grounds, that the information submitted to it pursuant to paragraph 2 of this Article is incomplete or that supplementary information is needed, the 30-day time limit referred to in paragraph 4 of this Article shall apply only from the date on which such complementary information is provided by the administrator, unless the deadlines of Article 34 apply pursuant to paragraph 4 of this Article.

7. Where an administrator of a significant benchmark does not comply with one or more of the requirements laid down in Article 4(2), points (c), (d) and (e) of Article 4(7), point (b) of Article 11(3) and Article 15(2), it shall publish and maintain a compliance statement that clearly states why it is appropriate for that administrator not to comply with those provisions.

8. ESMA shall develop draft implementing technical standards to develop a template for the compliance statement referred to in paragraph 7.

ESMA shall submit the draft implementing technical standards referred to in the first subparagraph to the Commission by 1 April 2017.

Power is conferred to the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

9. ESMA shall develop draft regulatory technical standards to specify further the criteria referred to in paragraph 3.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

CHAPTER 6

Non-significant benchmarks

Article 26

Non-significant benchmarks

1. An administrator may choose not to apply Articles 4(2), points (c), (d) and (e) of Article 4(7), Articles 4(8), 5(2), 5(3), 5(4), 6(1), 6(3), 6(5), 7(2), point (b) of Article 11(1), points (b) and (c) of Article 11(2), and Articles 11(3), 13(2), 14(2), 15(2), 16(2) and (3) with respect to its non-significant benchmarks.

2. An administrator shall immediately notify its competent authority when the administrator's non-significant benchmark exceeds the threshold mentioned in point (a) of Article 24(1). In that case, it shall comply with the requirements applicable to significant benchmarks within three months.

3. Where an administrator of a non-significant benchmark chooses not to apply one or more of the provisions referred to in paragraph 1, it shall publish and maintain a compliance statement which shall clearly state why it is appropriate for that administrator not to comply with those provisions. The administrator shall provide the compliance statement to its competent authority.

4. The relevant competent authority shall review the compliance statement referred to in paragraph 3 of this Article. The competent authority may also request additional information from the administrator in respect of its non-significant benchmarks in accordance with Article 41 and may require changes to ensure compliance with this Regulation.

5. ESMA shall develop draft implementing technical standards to develop a template for the compliance statement referred to in paragraph 3.

ESMA shall submit the draft implementing technical standards referred to in the first subparagraph to the Commission by 1 April 2017.

Power is conferred to the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

TITLE IV

TRANSPARENCY AND CONSUMER PROTECTION

Article 27

Benchmark statement

1. Within two weeks of the inclusion of an administrator in the register referred to in Article 36, the administrator shall publish, by means that ensure fair and easy access, a benchmark statement for each benchmark or, where applicable, for each family of benchmarks, that may be used in the Union in accordance with Article 29.

Where that administrator begins providing a new benchmark or family of benchmarks that may be used in the Union in accordance with Article 29, the administrator shall publish, within two weeks and by means that ensure a fair and easy access, a benchmark statement for each new benchmark or, where applicable, family of benchmarks.

The administrator shall review and, where necessary, update the benchmark statement for each benchmark or family of benchmarks in the event of any changes to the information to be provided under this Article and at least every two years.

The benchmark statement shall:

(a) clearly and unambiguously define the market or economic reality measured by the benchmark and the circumstances in which such measurement may become unreliable;

(b) lay down technical specifications that clearly and unambiguously identify the elements of the calculation of the benchmark in relation to which discretion may be exercised, the criteria applicable to the exercise of such discretion and the position of the persons that can exercise discretion, and how such discretion may be subsequently evaluated;

(c) provide notice of the possibility that factors, including external factors beyond the control of the administrator, may necessitate changes to, or the cessation of, the benchmark; and

(d) advise users that changes to, or the cessation of, the benchmark may have an impact upon the financial contracts and financial instruments that reference the benchmark or the measurement of the performance of investment funds.

2. A benchmark statement shall contain at least:

(a) the definitions for all key terms relating to the benchmark;

(b) the rationale for adopting the benchmark methodology and procedures for the review and approval of the methodology;

(c) the criteria and procedures used to determine the benchmark, including a description of the input data, the priority given to different types of input data, the minimum data needed to determine a benchmark, the use of any models or methods of extrapolation and any procedure for rebalancing the constituents of a benchmark's index;

(d) the controls and rules that govern any exercise of judgement or discretion by the administrator or any contributors, to ensure consistency in the use of such judgement or discretion;

(e) the procedures which govern the determination of the benchmark in periods of stress or periods where transaction data sources may be insufficient, inaccurate or unreliable and the potential limitations of the benchmark in such periods;

(f) the procedures for dealing with errors in input data or in the determination of the benchmark, including when a re-determination of the benchmark is required; and

(g) the identification of potential limitations of the benchmark, including its operation in illiquid or fragmented markets and the possible concentration of inputs.

3. ESMA shall develop draft regulatory technical standards to specify further the contents of a benchmark statement and the cases in which an update of such statement is required.

ESMA shall distinguish between the different types of benchmarks and sectors as set out in this Regulation and shall take into account the principle of proportionality.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

Article 28

Changes to and cessation of a benchmark

1. An administrator shall publish, together with the benchmark statement referred to in Article 27, a procedure concerning the actions to be taken by the administrator in the event of changes to or the cessation of a benchmark which may be used in the Union in accordance with Article 29(1). The procedure may be drafted, where applicable, for families of benchmarks and shall be updated and published whenever a material change occurs.

2. Supervised entities other than an administrator as referred to in paragraph 1 that use a benchmark shall produce and maintain robust written plans setting out the actions that they would take in the event that a benchmark materially changes or ceases to be provided. Where feasible and appropriate, such plans shall nominate one or several alternative benchmarks that could be referenced to substitute the benchmarks no longer provided, indicating why such benchmarks would be suitable alternatives. The supervised entities shall, upon request, provide the relevant competent authority with those plans and any updates and shall reflect them in the contractual relationship with clients.

TITLE V

USE OF BENCHMARKS IN THE UNION

Article 29

Use of a benchmark

1. A supervised entity may use a benchmark or a combination of benchmarks in the Union if the benchmark is provided by an administrator located in the Union and included in the register referred to in Article 36 or is a benchmark which is included in the register referred to in Article 36.

2. Where the object of a prospectus to be published under Directive 2003/71/EC or Directive 2009/65/EC is transferable securities or other investment products that reference a benchmark, the issuer, offeror, or person asking for admission to trade on a regulated market shall ensure that the prospectus also includes clear and prominent information stating whether the benchmark is provided by an administrator included in the register referred to in Article 36 of this Regulation.

Article 30

Equivalence

1. In order for a benchmark or a combination of benchmarks provided by an administrator located in a third country to be used in the Union in accordance with Article 29(1), the benchmark and the administrator shall be included in the register referred to in Article 36. The following conditions shall be complied with in order to be included in the register:

(a) an equivalence decision is adopted by the Commission in accordance with paragraph 2 or 3 of this Article;

(b) the administrator is authorised or registered, and is subject to supervision, in the third country in question;

(c) ESMA is notified by the administrator of its consent that its actual or prospective benchmarks may be used by supervised entities in the Union, of the list of the benchmarks for which they have given consent to be used in the Union and of the competent authority responsible for its supervision in the third country; and

(d) the cooperation arrangements referred to in paragraph 4 of this Article are operational.

2. The Commission may adopt an implementing decision stating that the legal framework and supervisory practice of a third country ensures that:

(a) administrators authorised or registered in that third country comply with binding requirements which are equivalent to the requirements under this Regulation, in particular taking account of whether the legal framework and supervisory practice of a third country ensures compliance with the IOSCO principles for financial benchmarks or, where applicable, with the IOSCO principles for PRAs; and

(b) the binding requirements are subject to effective supervision and enforcement on an on-going basis in that third country.

Such implementing decision shall be adopted in accordance with the examination procedure referred to in Article 50(2).

3. Alternatively, the Commission may adopt an implementing decision stating that:

(a) binding requirements in a third country with respect to specific administrators or specific benchmarks or families of benchmarks are equivalent to the requirements under this Regulation, in particular taking account of whether the legal framework and supervisory practice of a third country ensures compliance with the IOSCO principles for financial benchmarks or, where applicable, with the IOSCO principles for PRAs; and

(b) such specific administrators or specific benchmarks or families of benchmarks are subject to effective supervision and enforcement on an on-going basis in that third country.

Such implementing decision shall be adopted in accordance with the examination procedure referred to in Article 50(2).

4. ESMA shall establish cooperation arrangements with the competent authorities of third countries whose legal framework and supervisory practices have been recognised as equivalent in accordance with paragraph 2 or 3. Such arrangements shall specify at least:

(a) the mechanism for the exchange of information between ESMA and the competent authorities of third countries concerned, including access to all relevant information regarding the administrator authorised in that third country that is requested by ESMA;

(b) the mechanism for prompt notification to ESMA where a third country competent authority deems that the administrator authorised in that third country that it is supervising is in breach of the conditions of its authorisation or other national legislation in the third country;

(c) the procedures concerning the coordination of supervisory activities, including on-site inspections.

5. ESMA shall develop draft regulatory technical standards to determine the minimum content of the cooperation arrangements referred to in paragraph 4 so as to ensure that the competent authorities and ESMA are able to exercise all their supervisory powers under this Regulation.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

Article 31

Withdrawal of registration of an administrator located in a third country

1. ESMA shall withdraw the registration of an administrator located in a third country by removing that administrator from the register referred to in Article 36 where it has well-founded reasons, based on documented evidence, that the administrator:

(a) is acting in a manner which is clearly prejudicial to the interests of the users of its benchmarks or the orderly functioning of markets; or

(b) has seriously infringed the national legislation in the third country or other provisions applicable to it in the third country and on the basis of which the Commission has adopted the implementing decision in accordance with Article 30(2) or (3).

2. ESMA shall take a decision under paragraph 1 only if the following conditions are fulfilled:

(a) ESMA has referred the matter to the competent authority of the third country and that competent authority has not taken the appropriate measures needed to protect investors and the orderly functioning of the markets in the Union, or has failed to demonstrate that the administrator concerned complies with the requirements applicable to it in the third country;

(b) ESMA has informed the competent authority of the third country of its intention to withdraw the registration of the administrator, at least 30 days before the withdrawal.

3. ESMA shall inform the other competent authorities of any measure adopted in accordance with paragraph 1 without delay and shall publish its decision on its website.

Article 32

Recognition of an administrator located in a third country

1. Until such time as an equivalence decision in accordance with Article 30(2) or (3) is adopted, a benchmark provided by an administrator located in a third country may be used by supervised entities in the Union provided that the administrator acquires prior recognition by the competent authority of its Member State of reference in accordance with this Article.

2. An administrator located in a third country intending to obtain prior recognition as referred to in paragraph 1 of this Article shall comply with the requirements established in this Regulation, excluding Article 11(4) and Articles 16, 20, 21 and 23. The administrator may fulfil that condition by applying the IOSCO principles for financial benchmarks or the IOSCO principles for PRAs, as applicable, provided that such application is equivalent to compliance with the requirements established in this Regulation, excluding Article 11(4), and Articles 16, 20, 21 and 23.

For the purposes of determining whether the condition referred to in the first subparagraph is fulfilled, and in order to assess compliance with the IOSCO principles for financial benchmarks or the IOSCO principles for PRAs, as applicable, the competent authority of the Member State of reference may rely on an assessment by an independent external auditor or, where the administrator located in a third country is subject to supervision, on the certification provided by the competent authority of the third country where the administrator is located.

If, and to the extent that, an administrator is able to demonstrate that a benchmark it provides is a regulated-data benchmark or a commodity benchmark that is not based on submissions by contributors the majority of which are supervised entities, there shall be no obligation on the administrator to comply with requirements not applicable to the provision of regulated-data benchmarks and of commodity benchmarks as provided for in Article 17 and Article 19(1) respectively.

3. An administrator located in a third country intending to obtain prior recognition as referred to in paragraph 1 shall have a legal representative established in its Member State of reference. The legal representative shall be a natural or legal person located in the Union, and which, expressly appointed by the administrator located in a third country, acts on behalf of such administrator vis-à-vis the authorities and any other person in the Union with regard to the administrator's obligations under this Regulation. The legal representative shall perform the oversight function relating to the provision of benchmarks performed by the administrator under this Regulation together with the administrator and, in that respect, shall be accountable to the competent authority of the Member State of reference.

4. The Member State of reference of an administrator located in a third country shall be determined as follows:

(a) where an administrator is part of a group that contains one supervised entity located in the Union, the Member State of reference shall be the Member State where that supervised entity is located. Such supervised entity shall be appointed as the legal representative for the purposes of paragraph 3;

(b) if point (a) does not apply, where an administrator is part of a group that contains more than one supervised entity located in the Union, the Member State of reference shall be the Member State where the highest number of supervised entities are located or, in the event that there is an equal number of supervised entities, the Member State of reference shall be the one where the value of financial instruments, financial contracts or investment funds that reference the benchmark is highest. One of the supervised entities located in the Member State of reference determined pursuant to this point shall be appointed as the legal representative for the purposes of paragraph 3;

(c) if neither point (a) nor (b) of this paragraph applies, where one or more benchmarks provided by the administrator are used as a reference for financial instruments admitted to trading in a trading venue as defined in point (24) of Article 4(1) of Directive 2014/65/EU in one or more Member States, the Member State of reference shall be the Member State where the financial instrument referencing any of those benchmarks was admitted to trading or traded on a trading venue for the first time and is still traded. If the relevant financial instruments were admitted to trading or traded for the first time simultaneously on trading venues in different Member States, and are still traded, the Member State of reference shall be the one where the value of financial instruments, financial contracts or investment funds that reference the benchmark is highest;

(d) if points (a), (b) and (c) do not apply, where one or more benchmarks provided by the administrator are used by supervised entities in more than one Member State, the Member State of reference shall be the Member State where the highest number of such supervised entities are located or, in the event that there is an equal number of supervised entities, the Member State of reference shall be the one where the value of financial instruments, financial contracts or investment funds that reference the benchmark is highest;

(e) if points (a), (b), (c) and (d) do not apply and if the administrator enters into an agreement consenting to the use of a benchmark it provides with a supervised entity, the Member State of reference shall be the Member State where such supervised entity is located.

5. An administrator located in a third country intending to obtain prior recognition as referred to in paragraph 1 shall apply for recognition with the competent authority of its Member State of reference. The applicant administrator shall provide all information necessary to satisfy the competent authority that it has established, at the time of recognition, all the necessary arrangements to meet the requirements referred to in paragraph 2 and shall provide the list of its actual or prospective benchmarks which may be used in the Union and shall, where applicable, indicate the competent authority responsible for its supervision in the third country.

Within 90 working days of receipt of the application referred to in the first subparagraph of this paragraph, the competent authority shall verify that the conditions laid down in paragraphs 2, 3 and 4 are fulfilled.

If the competent authority considers that the conditions laid down in paragraphs 2, 3 and 4 are not fulfilled, it shall refuse the recognition request and set out the reasons for that refusal. In addition, no recognition shall be granted unless the following additional conditions are fulfilled:

(a) where an administrator located in a third country is subject to supervision, an appropriate cooperation arrangement is in place between the competent authority of the Member State of reference and the competent authority of the third country where the administrator is located, in compliance with the regulatory technical standards adopted pursuant to Article 30(5), in order to ensure an efficient exchange of information that allows the competent authority to carry out its duties in accordance with this Regulation;

(b) the effective exercise by the competent authority of its supervisory functions under this Regulation is neither prevented by the laws, regulations or administrative provisions of the third country where the administrator is located, nor, where applicable, by limitations in the supervisory and investigatory powers of that third country's supervisory authority.

6. In the event that the competent authority of the Member State of reference considers that an administrator located in a third country provides a benchmark that fulfils the conditions of a significant or non-significant benchmark, as provided for in Articles 24 and 26 respectively, it shall, without undue delay, notify ESMA thereof. It shall support such assessment with the information provided by the administrator in the relevant application for recognition.

Within one month of receipt of the notification referred to in the first subparagraph, ESMA shall issue advice to the competent authority about the type of the benchmark and the requirements applicable to its provision, as provided for in Articles 24, 25 and 26. The advice may, in particular, address whether ESMA considers that the conditions for such type are fulfilled on the basis of the information provided by the administrator in the application for recognition.

The period of time referred to in paragraph 5 shall be suspended from the date on which the notification is received by ESMA, until such time as ESMA issues advice in accordance with this paragraph.

If the competent authority of the Member State of reference proposes to grant recognition contrary to ESMA's advice referred to in the second subparagraph, it shall inform ESMA thereof, stating its reasons. ESMA shall publish the fact that the competent authority does not comply or intend to comply with that advice. ESMA may also decide, on a case-by-case basis, to publish the reasons provided by the competent authority for not complying with that advice. The competent authority concerned shall receive advance notice of such publication.

7. The competent authority of the Member State of reference shall notify ESMA of any decision to recognise an administrator located in a third country within five working days, along with the list of the benchmarks provided by the administrator which may be used in the Union and, where applicable, the competent authority responsible for its supervision in the third country.

8. The competent authority of the Member State of reference shall suspend or, where appropriate, withdraw the recognition granted in accordance with paragraph 5 if it has well-founded reasons, based on documented evidence, to consider that the administrator is acting in a manner which is clearly prejudicial to the interests of users of its benchmarks or the orderly functioning of markets or the administrator has seriously infringed the relevant requirements set out in this Regulation, or that the administrator made false statements or used any other irregular means to obtain the recognition.

9. ESMA may develop draft regulatory technical standards to determine the form and content of the application referred to in paragraph 5 and, in particular, the presentation of the information required in paragraph 6.

In the event that such draft regulatory technical standards are developed, ESMA shall submit them to the Commission.

Power is conferred on the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

Article 33

Endorsement of benchmarks provided in a third country

1. An administrator located in the Union and authorised or registered in accordance with Article 34, or any other supervised entity located in the Union with a clear and well-defined role within the control or accountability framework of a third country administrator, which is able to monitor effectively the provision of a benchmark, may apply to the relevant competent authority to endorse a benchmark or a family of benchmarks provided in a third country for their use in the Union, provided that all of the following conditions are fulfilled:

(a) the endorsing administrator or other supervised entity has verified and is able to demonstrate on an on-going basis to its competent authority that the provision of the benchmark or family of benchmarks to be endorsed fulfils, on a mandatory or on a voluntary basis, requirements which are at least as stringent as the requirements of this Regulation;

(b) the endorsing administrator or other supervised entity has the necessary expertise to monitor effectively the activity of the provision of a benchmark in a third country and to manage the associated risks;

(c) there is an objective reason to provide the benchmark or family of benchmarks in a third country and for said benchmark or family of benchmarks to be endorsed for their use in the Union.

For the purpose of point (a), when assessing whether the provision of the benchmark or family of benchmarks to be endorsed fulfils requirements which are at least as stringent as the requirements of this Regulation, the competent authority may take into account whether the compliance of the provision of the benchmark or family of benchmarks with the IOSCO principles for financial benchmarks or the IOSCO principles for PRAs, as applicable, would be equivalent to compliance with the requirements of this Regulation.

2. An administrator or other supervised entity that makes an application for endorsement as referred to in paragraph 1 shall provide all information necessary to satisfy the competent authority that, at the time of application, all the conditions referred to in that paragraph are fulfilled.

3. Within 90 working days of receipt of the application for endorsement referred to in paragraph 1, the relevant competent authority shall examine the application and adopt a decision either to authorise the endorsement or to refuse it. An endorsed benchmark or an endorsed family of benchmarks shall be notified by the competent authority to ESMA.

4. An endorsed benchmark or an endorsed family of benchmarks shall be considered to be a benchmark or family of benchmarks provided by the endorsing administrator or other supervised entity. The endorsing administrator or other supervised entity shall not use the endorsement with the intention of avoiding the requirements of this Regulation.

5. An administrator or other supervised entity that has endorsed a benchmark or a family of benchmarks provided in a third country shall remain fully responsible for such a benchmark or family of benchmarks and for compliance with the obligations under this Regulation.

6. Where the competent authority of the endorsing administrator or other supervised entity has well-founded reasons to consider that the conditions laid down under paragraph 1 of this Article are no longer fulfilled, it shall have the power to require the endorsing administrator or other supervised entity to cease the endorsement and shall inform ESMA thereof. Article 28 shall apply in case of cessation of the endorsement.

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 49 concerning measures to determine the conditions under which the relevant competent authorities may assess whether there is an objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union. The Commission shall take into account elements such as the specificities of the underlying market or economic reality the benchmark intends to measure, the need for proximity of the provision of the benchmark to such market or economic reality, the need for proximity of the provision of the benchmark to contributors, the material availability of input data due to different time zones, and specific skills required in the provision of the benchmark.

TITLE VI

AUTHORISATION, REGISTRATION AND SUPERVISION OF ADMINISTRATORS

CHAPTER 1

Authorisation and registration

Article 34

Authorisation and registration of an administrator

1. A natural or legal person located in the Union that intends to act as an administrator shall apply to the competent authority designated under Article 40 of the Member State in which that person is located in order to receive:

(a) authorisation if it provides or intends to provide indices which are used or intended to be used as benchmarks within the meaning of this Regulation;

(b) registration if it is a supervised entity, other than an administrator, that provides or intends to provide indices which are used or intended to be used as benchmarks within the meaning of this Regulation, on condition that the activity of provision of a benchmark is not prevented by the sectoral discipline applying to the supervised entity and that none of the indices provided would qualify as a critical benchmark; or

(c) registration if it provides or intends to provide only indices which would qualify as non-significant benchmarks.

2. An authorised or registered administrator shall comply at all times with the conditions laid down in this Regulation and shall notify the competent authority of any material changes thereof.

3. The application referred to in paragraph 1 shall be made within 30 working days of any agreement entered into by a supervised entity to use an index provided by the applicant as a reference to a financial instrument or financial contract or to measure the performance of an investment fund.

4. The applicant shall provide all information necessary to satisfy the competent authority that the applicant has established, at the time of authorisation or registration, all the necessary arrangements to meet the requirements laid down in this Regulation.

5. Within 15 working days of receipt of the application, the relevant competent authority shall assess whether the application is complete and shall notify the applicant accordingly. If the application is incomplete, the applicant shall submit the additional information required by the relevant competent authority. The time limit referred to in this paragraph shall apply from the date on which such additional information is provided by the applicant.

6. The relevant competent authority shall:

(a) examine the application for authorisation and adopt a decision to authorise or refuse to authorise the applicant within four months of receipt of a complete application;

(b) examine the application for registration and adopt a decision to register or refuse to register the applicant within 45 working days of receipt of a complete application.

Within five working days of the adoption of a decision referred to in the first subparagraph, the competent authority shall notify it to the applicant. Where the competent authority refuses to authorise or to register the applicant, it shall give reasons for its decision.

7. The competent authority shall notify ESMA of any decision to authorise or to register an applicant within five working days of the date of adoption of said decision.

8. ESMA shall develop draft regulatory technical standards to specify further the information to be provided in the application for authorisation and in the application for registration, taking into account that authorisation and registration are distinct processes where authorisation requires a more extensive assessment of the administrator's application, the principle of proportionality, the nature of the supervised entities applying for registration under point (b) of paragraph 1 and the costs to the applicants and competent authorities.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

Article 35

Withdrawal or suspension of authorisation or registration

1. A competent authority may withdraw or suspend the authorisation or registration of an administrator where the administrator:

(a) expressly renounces the authorisation or registration or has provided no benchmarks for the preceding 12 months;

(b) has obtained the authorisation or registration, or has endorsed a benchmark, by making false statements or by any other irregular means;

(c) no longer meets the conditions under which it was authorised or registered; or

(d) has seriously or repeatedly infringed the provisions of this Regulation.

2. The competent authority shall notify ESMA of its decision within five working days of the adoption of said decision.

ESMA shall promptly update the register provided for in Article 36.

3. Following the adoption of a decision to suspend the authorisation or registration of an administrator, and where cessation of the benchmark would result in a force majeure event, or frustrate or otherwise breach the terms of any financial contract or financial instrument, or the rules of any investment fund, which references that benchmark, as specified in the delegated act adopted pursuant to Article 51(6), the provision of the benchmark in question may be permitted by the relevant competent authority of the Member State where the administrator is located until the decision of suspension has been withdrawn. During that period of time, the use of such benchmark by supervised entities shall be permitted only for financial contracts, financial instruments and investment funds that already reference the benchmark.

4. Following the adoption of a decision to withdraw the authorisation or registration of an administrator, Article 28(2) shall apply.

Article 36

Register of administrators and benchmarks

1. ESMA shall establish and maintain a public register that contains the following information:

(a) the identities of the administrators authorised or registered pursuant to Article 34 and the competent authorities responsible for the supervision thereof;

(b) the identities of administrators that comply with the conditions laid down in Article 30(1), the list of benchmarks referred to in point (c) of Article 30(1) and the third country competent authorities responsible for the supervision thereof;

(c) the identities of the administrators that acquired recognition in accordance with Article 32, the list of benchmarks referred to in Article 32(7) and, where applicable, the third country competent authorities responsible for the supervision thereof;

(d) the benchmarks that are endorsed in accordance with the procedure laid down in Article 33, the identities of their administrators, and the identities of the endorsing administrators or endorsing supervised entities.

2. The register referred to in paragraph 1 shall be publicly accessible on the website of ESMA and shall be updated promptly, as necessary.

CHAPTER 2

Supervisory cooperation

Article 37

Delegation of tasks between competent authorities

1. In accordance with Article 28 of Regulation (EU) No 1095/2010, a competent authority may delegate its tasks under this Regulation to the competent authority of another Member State with its prior consent.

The competent authorities shall notify ESMA of any proposed delegation 60 days prior to such delegation taking effect.

2. A competent authority may delegate some of its tasks under this Regulation to ESMA, subject to the agreement of ESMA.

3. ESMA shall notify the Member States of a proposed delegation within seven days. ESMA shall publish details of any agreed delegation within five working days of notification.

Article 38

Disclosure of information from another Member State

A competent authority may disclose information received from another competent authority only if:

(a) it has obtained the written agreement of that competent authority and the information is disclosed only for the purposes for which that competent authority gave its agreement; or

(b) such disclosure is necessary for legal proceedings.

Article 39

Cooperation on on-site inspections and investigations

1. A competent authority may request the assistance of another competent authority with regard to on-site inspections or investigations. The competent authority receiving the request shall cooperate to the extent possible and appropriate.

2. A competent authority making a request referred to in paragraph 1 shall inform ESMA thereof. In the event of an investigation or inspection with cross-border effect, the competent authorities may request ESMA to coordinate the on-site inspection or investigation.

3. Where a competent authority receives a request from another competent authority to carry out an on-site inspection or an investigation, it may:

(a) carry out the on-site inspection or investigation itself;

(b) allow the competent authority which submitted the request to participate in the on-site inspection or investigation;

(c) appoint auditors or experts to support or carry out the on-site inspection or investigation.

CHAPTER 3

Role of competent authorities

Article 40

Competent authorities

1. For administrators and supervised entities, each Member State shall designate the relevant competent authority responsible for carrying out the duties under this Regulation and shall inform the Commission and ESMA thereof.

2. Where a Member State designates more than one competent authority, it shall clearly determine their respective roles and shall designate a single authority to be responsible for coordinating cooperation and the exchange of information with the Commission, ESMA and other Member States' competent authorities.

3. ESMA shall publish on its website a list of the competent authorities designated in accordance with paragraphs 1 and 2.

Article 41

Powers of competent authorities

1. In order to fulfil their duties under this Regulation, competent authorities shall have, in conformity with national law, at least the following supervisory and investigatory powers:

(a) access to any document and other data in any form, and to receive or take a copy thereof;

(b) require or demand information from any person involved in the provision of, and contribution to, a benchmark, including any service provider to which functions, services or activities in the provision of a benchmark have been outsourced as provided for in Article 10, as well as their principals, and if necessary, summon and question any such person with a view to obtaining information;

(c) request, in relation to commodity benchmarks, information from contributors on related spot markets according, where applicable, to standardised formats and reports on transactions, and direct access to traders' systems;

(d) carry out on-site inspections or investigations, at sites other than the private residences of natural persons;

(e) enter premises of legal persons, without prejudice to Regulation (EU) No 596/2014, in order to seize documents and other data in any form, where a reasonable suspicion exists that documents and other data related to the subject-matter of the inspection or investigation may be relevant to prove a breach of this Regulation. Where prior authorisation is needed from the judicial authority of the Member State concerned, in accordance with national law, such power shall only be used after having obtained that prior authorisation;

(f) require existing recordings of telephone conversations, electronic communications or other data traffic records held by supervised entities;

(g) request the freezing or sequestration of assets or both;

(h) require temporary cessation of any practice that the competent authority considers contrary to this Regulation;

(i) impose a temporary prohibition on the exercise of professional activity;

(j) take all necessary measures to ensure that the public is correctly informed about the provision of a benchmark, including by requiring the relevant administrator or a person that has published or disseminated the benchmark or both to publish a corrective statement about past contributions to or figures of the benchmark.

2. Competent authorities shall exercise their functions and powers referred to in paragraph 1 of this Article and the powers to impose sanctions referred to in Article 42, in accordance with their national legal frameworks, in any of the following ways:

(a) directly;

(b) in collaboration with other authorities or with market undertakings;

(c) under their responsibility by delegation to such authorities or to market undertakings;

(d) by application to the competent judicial authorities.

For the exercise of those powers, competent authorities shall have in place adequate and effective safeguards in regard to the right of defence and fundamental rights.

3. Member States shall ensure that appropriate measures are in place so that competent authorities have all the supervisory and investigatory powers that are necessary to fulfil their duties.

4. An administrator or any other supervised entity making information available to a competent authority in accordance with paragraph 1 shall not be considered to be in breach of any restriction on disclosure of information posed by any contractual, legislative, regulatory or administrative provision.

Article 42

Administrative sanctions and other administrative measures

1. Without prejudice to the supervisory powers of competent authorities in accordance with Article 41, and the right of Member States to provide for and impose criminal sanctions, Member States shall, in conformity with national law, provide for competent authorities to have the power to impose appropriate administrative sanctions and other administrative measures in relation to at least the following infringements:

(a) any infringement of Articles 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 21, 23, 24, 25, 26, 27, 28, 29 and 34 where they apply; and

(b) any failure to cooperate or comply in an investigation or with an inspection or request covered by Article 41.

Those administrative sanctions and other administrative measures shall be effective, proportionate and dissuasive.

2. In the event of an infringement referred to in paragraph 1, Member States shall, in conformity with national law, confer on competent authorities the power to impose at least the following administrative sanctions and other administrative measures:

(a) an order requiring the administrator or supervised entity responsible for the infringement to cease the conduct and to desist from repeating that conduct;

(b) the disgorgement of the profits gained or losses avoided because of the infringement where those can be determined;

(c) a public warning which indicates the administrator or supervised entity responsible and the nature of the infringement;

(d) withdrawal or suspension of the authorisation or the registration of an administrator;

(e) a temporary ban prohibiting any natural person, who is held responsible for such infringement, from exercising management functions in administrators or supervised contributors;

(f) the imposition of maximum administrative pecuniary sanctions of at least three times the amount of the profits gained or losses avoided because of the infringement where those can be determined;

(g) in respect of a natural person, maximum administrative pecuniary sanctions of at least:

(i) for infringements of Articles 4, 5, 6, 7, 8, 9, 10, points (a), (b), (c) and (e) of Article 11(1), Article 11(2) and (3), and Articles 12, 13,14, 15, 16, 21, 23, 24, 25, 26, 27, 28, 29 and 34, EUR 500 000 or in the Member States whose official currency is not the euro, the corresponding value in the national currency on 30 June 2016; or

(ii) for infringements of point (d) of Article 11(1) or of Article 11(4), EUR 100 000 or in the Member States whose official currency is not the euro, the corresponding value in the national currency on 30 June 2016;

(h) in respect of a legal person, maximum administrative pecuniary sanctions of at least:

(i) for infringements of Articles 4, 5, 6, 7, 8, 9, 10, points (a), (b), (c) and (e) of Article 11(1), Article 11(2) and (3), and Articles 12, 13,14, 15, 16, 21, 23, 24, 25, 26, 27, 28, 29 and 34, either EUR 1 000 000 or, in the Member States whose official currency is not the euro, the corresponding value in the national currency on 30 June 2016, or 10 % of its total annual turnover according to the last available accounts approved by the management body, whichever is the higher; or

(ii) for infringements of point (d) of Article 11(1) or of Article 11(4), either EUR 250 000 or, in the Member States whose official currency is not the euro, the corresponding value in the national currency on 30 June 2016, or 2 % of its total annual turnover according to the last available accounts approved by the management body, whichever is the higher.

For the purposes of point (h)(i) and (ii), where the legal person is a parent undertaking or a subsidiary of a parent undertaking which has to prepare consolidated financial accounts in accordance with Directive 2013/34/EU of the European Parliament and of the Council ([1]), the relevant total annual turnover shall be the total annual turnover or the corresponding type of income in accordance with Council Directive 86/635/EEC ([2]) for banks and Council Directive 91/674/EEC ([3]) for insurance companies according to the last available consolidated accounts approved by the management body of the ultimate parent undertaking or if the person is an association, 10 % of the aggregate turnovers of its members.

3. By 1 January 2018, Member States shall notify the rules regarding paragraphs 1 and 2 to the Commission and ESMA.

Member States may decide not to lay down rules for administrative sanctions as provided for in paragraph 1 where the infringements referred to in that paragraph are subject to criminal sanctions under their national law. In that case, Member States shall communicate to the Commission and ESMA the relevant criminal law provisions along with the notification referred to in the first subparagraph of this paragraph.

They shall notify the Commission and ESMA without delay of any subsequent amendment thereto.

4. Member States may provide competent authorities under national law to have other powers to impose sanctions in addition to those referred to in paragraph 1 and may provide for higher levels of sanctions than those established in paragraph 2.

([1]) Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

([2]) Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions (OJ L 372, 31.12.1986, p. 1).

([3]) Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings (OJ L 374, 31.12.1991, p. 7).

Article 43

Exercise of supervisory powers and imposition of sanctions

1. Member States shall ensure that, when determining the type and level of administrative sanctions and other administrative measures, competent authorities take into account all relevant circumstances, including where appropriate:

(a) the gravity and duration of the infringement;

(b) the criticality of the benchmark to financial stability and the real economy;

(c) the degree of responsibility of the responsible person;

(d) the financial strength of the responsible person, as indicated, in particular, by the total annual turnover of the responsible legal person or the annual income of the responsible natural person;

(e) the level of the profits gained or losses avoided by the responsible person, insofar as they can be determined;

(f) the level of cooperation of the responsible person with the competent authority, without prejudice to the need to ensure disgorgement of profits gained or losses avoided by that person;

(g) previous infringements by the person concerned;

(h) measures taken, after the infringement, by a responsible person to prevent the repetition of the infringement.

2. In the exercise of their powers to impose administrative sanctions and other administrative measures under Article 42, competent authorities shall cooperate closely to ensure that the supervisory and investigative powers and administrative sanctions and other administrative measures produce the desired results of this Regulation. They shall also coordinate their action in order to avoid possible duplication and overlap when applying supervisory and investigative powers and administrative sanctions, including pecuniary sanctions, and other administrative measures to cross-border cases.

Article 44

Obligation to cooperate

1. Where Member States have chosen, in accordance with Article 42, to lay down criminal sanctions for infringements of the provisions referred to in that Article, they shall ensure that appropriate measures are in place so that competent authorities have all the necessary powers to liaise with judicial authorities within their jurisdiction to receive specific information relating to criminal investigations or proceedings commenced for possible infringements of this Regulation. Those competent authorities shall provide that information to other competent authorities and ESMA, in order to fulfil their obligation to cooperate with each other and ESMA for the purposes of this Regulation.

2. Competent authorities shall provide assistance to competent authorities of other Member States. In particular, they shall exchange information and cooperate in any investigation or supervisory activities. Competent authorities may also cooperate with competent authorities of other Member States with respect to facilitating the recovery of pecuniary sanctions.

Article 45

Publication of decisions

1. Subject to paragraph 2, a competent authority shall publish any decision imposing an administrative sanction or other administrative measure in relation to infringements of this Regulation on its official website immediately after the person subject to that decision has been informed of that decision. Such publication shall include at least information on the type and nature of the infringement and the identity of the persons subject to the decision.

The first subparagraph does not apply to decisions imposing measures that are of an investigatory nature.

2. Where a competent authority considers that the publication of the identity of the legal person or of the personal data of a natural person, would be disproportionate following a case-by-case assessment conducted on the proportionality of the publication of such data, or where such publication would jeopardise the stability of financial markets or an on-going investigation, it shall do any of the following:

(a) defer publication of the decision until such time as the reasons for that deferral cease to exist;

(b) publish the decision on an anonymous basis in accordance with national law where such anonymous publication ensures an effective protection of the personal data concerned;

(c) not publish the decision at all in the event that the competent authority is of the opinion that publication in accordance with point (a) or (b) will be insufficient to ensure:

(i) that the stability of financial markets is not jeopardised; or

(ii) the proportionality of the publication of such decisions with regard to measures which are deemed to be of a minor nature.

Where a competent authority decides to publish a decision on an anonymous basis as referred to in point (b) of the first subparagraph, it may postpone the publication of the relevant data for a reasonable period of time where it is foreseeable that the reasons for anonymous publication shall cease to exist during that period.

3. Where the decision is subject to an appeal before a national judicial, administrative or other authority, the competent authority shall also publish, immediately, on its official website such information and any subsequent information on the outcome of such appeal. Any decision annulling a previous decision to impose a sanction or a measure shall also be published.

4. The competent authority shall ensure that any decision that is published in accordance with this Article shall remain accessible on its official website for a period of at least five years after its publication. Personal data contained in the publication shall only be kept on the official website of the competent authority for the period which is necessary in accordance with the applicable data protection rules.

5. Member States shall annually provide ESMA with aggregated information regarding all administrative sanctions and other administrative measures imposed pursuant to Article 42. That obligation does not apply to measures of an investigatory nature. ESMA shall publish that information in an annual report.

Where Member States have chosen, in accordance with Article 42, to lay down criminal sanctions for infringements of the provisions referred to in that Article, their competent authorities shall annually provide ESMA with anonymised and aggregated data regarding all criminal investigations undertaken and criminal sanctions imposed. ESMA shall publish data on criminal sanctions imposed in an annual report.

Article 46

Colleges

1. Within 30 working days from the inclusion of a benchmark referred to in points (a) and (c) of Article 20(1) in the list of critical benchmarks, with the exception of benchmarks where the majority of contributors are non-supervised entities, the competent authority shall establish a college.

2. The college shall comprise the competent authority of the administrator, ESMA, and the competent authorities of supervised contributors.

3. Competent authorities of other Member States shall have the right to be members of the college where, if the critical benchmark in question were to cease to be provided, it would have a significant adverse impact on the market integrity, financial stability, consumers, real economy, or financing of households and businesses of those Member States.

Where a competent authority intends to become a member of a college, it shall submit a request to the competent authority of the administrator containing evidence that the requirements of the first subparagraph of this paragraph are fulfilled. The relevant competent authority of the administrator shall consider the request and notify the requesting authority within 20 working days of receipt of the request whether or not it considers those requirements to be fulfilled. Where it considers those requirements not to be fulfilled, the requesting authority may refer the matter to ESMA in accordance with paragraph 9.

4. ESMA shall contribute to promoting and monitoring the efficient, effective and consistent functioning of colleges referred to in this Article in accordance with Article 21 of Regulation (EU) No 1095/2010. To that end, ESMA shall participate as appropriate and shall be considered to be a competent authority for that purpose.

Where ESMA acts in accordance with Article 17(6) of Regulation (EU) No 1095/2010 regarding a critical benchmark, it shall ensure appropriate exchange of information and cooperation with the other members of the college.

5. The competent authority of an administrator shall chair the meetings of the college, coordinate the actions of the college and ensure efficient exchange of information among members of the college.

Where an administrator provides more than one critical benchmark, the competent authority of that administrator may establish a single college in respect of all the benchmarks provided by that administrator.

6. The competent authority of an administrator shall establish written arrangements within the framework of the college regarding the following matters:

(a) the information to be exchanged between competent authorities;

(b) the decision-making process between the competent authorities and the time frame within which each decision has to be taken;

(c) the cases in which the competent authorities must consult each other;

(d) the cooperation to be provided under Article 23(7) and (8).

7. The competent authority of an administrator shall give due consideration to any advice provided by ESMA concerning the written arrangements under paragraph 6 before agreeing their final text. The written arrangements shall be set out in a single document containing full reasons for any significant deviation from the advice of ESMA. The competent authority of the administrator shall transmit the written arrangements to the members of the college and to ESMA.

8. Before taking any measures referred to in Article 23(6), (7) and (9), and Articles 34, 35 and 42, the competent authority of an administrator shall consult the members of the college. The members of the college shall do everything reasonable within their power to reach an agreement within the time frame specified in the written arrangements referred to in paragraph 6 of this Article.

Any decision of the competent authority of the administrator to take such measures shall take into account the impact on the other Member States concerned, in particular the potential impact on the stability of their financial systems.

With regard to the decision to withdraw the authorisation or registration of an administrator in accordance with Article 35, whenever the cessation of a benchmark would result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument, or the rules of any investment fund, which references that benchmark in the Union, within the meaning specified by the Commission in any delegated act adopted pursuant to Article 51(6), the competent authorities within the college shall consider whether to adopt measures to mitigate the effects referred to in this paragraph, including:

(a) a change to the code of conduct referred to in Article 15, the methodology or other rules of the benchmark;

(b) a transitional period, during which the procedures envisaged under Article 28(2) shall apply.

9. In the absence of agreement between the members of a college, competent authorities may refer to ESMA any of the following situations:

(a) where a competent authority has not communicated essential information;

(b) where, following a request made under paragraph 3, the competent authority of the administrator has notified the requesting authority that the requirements of that paragraph are not fulfilled or where it has not acted upon such request within a reasonable time;

(c) where the competent authorities have failed to reach an agreement on the matters set out in paragraph 6;

(d) where there is a disagreement concerning the measures to be taken in accordance with Articles 34, 35 and 42;

(e) where there is a disagreement concerning the measures to be taken in accordance with Article 23(6);

(f) where there is a disagreement concerning the measures to be taken in accordance with the third subparagraph of paragraph 8 of this Article.

10. In the situations referred to in points (a), (b), (c), (d) and (f) of paragraph 9, if the issue is not settled within 30 days after referral to ESMA, the competent authority of an administrator shall take the final decision and provide a detailed explanation of its decision in writing to the competent authorities referred to in that paragraph and to ESMA.

The period of time referred to in point (a) of Article 34(6) shall be suspended from the date of referral to ESMA until such time as a decision is taken in accordance with the first subparagraph of this paragraph.

Where ESMA considers that the competent authority of the administrator has taken any measures referred to in paragraph 8 of this Article which may not be in conformity with Union law it shall act in accordance with Article 17 of Regulation (EU) No 1095/2010.

11. In the situation referred to in point (e) of paragraph 9 of this Article, and without prejudice to Article 258 TFEU, ESMA may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

The power of the competent authority of an administrator under Article 23(6) may be exercised until such time as ESMA publishes its decision.

Article 47

Cooperation with ESMA

1. The competent authorities shall cooperate with ESMA for the purposes of this Regulation, in accordance with Regulation (EU) No 1095/2010.

2. The competent authorities shall, without delay, provide ESMA with all information necessary to carry out its duties, in accordance with Article 35 of Regulation (EU) No 1095/2010.

3. ESMA shall develop draft implementing technical standards to determine the procedures and forms for exchange of information as referred to in paragraph 2.

ESMA shall submit the draft implementing technical standards referred to in the first subparagraph to the Commission by 1 April 2017.

Power is conferred to the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

Article 48

Professional secrecy

1. Any confidential information received, exchanged or transmitted pursuant to this Regulation shall be subject to the conditions of professional secrecy laid down in paragraph 2.

2. The obligation of professional secrecy applies to all persons who work or who have worked for the competent authority or for any authority or market undertaking or natural or legal person to whom the competent authority has delegated its powers, including auditors and experts contracted by the competent authority.

3. Information covered by professional secrecy may not be disclosed to any other person or authority except by virtue of provisions laid down by Union or national law.

4. All information exchanged between the competent authorities under this Regulation that concerns business or operational conditions and other economic or personal affairs shall be considered confidential and shall be subject to the requirements of professional secrecy, except where the competent authority states at the time of communication that such information may be disclosed or where such disclosure is necessary for legal proceedings.

TITLE VII

DELEGATED AND IMPLEMENTING ACTS

Article 49

Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt delegated acts referred to in Articles 3(2), 20(6), 24(2), 33(7), 51(6) and 54(3) shall be conferred on the Commission for an indeterminate period of time from 30 June 2016.

3. The delegation of power referred to in Articles 3(2), 20(6), 24(2), 33(7), 51(6) and 54(3) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of power specified in that decision. It shall take effect on the day following the publication of the decision in the *Official Journal of the European Union* or on a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016.

5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

6. A delegated act adopted pursuant to Articles 3(2), 20(6), 24(2), 33(7), 51(6) and 54(3) shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or of the Council.

Article 50

Committee procedure

1. The Commission shall be assisted by the European Securities Committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply, having regard to the provisions of Article 8 thereof.

TITLE VIII

TRANSITIONAL AND FINAL PROVISIONS

Article 51

Transitional provisions

1. An index provider providing a benchmark on 30 June 2016 shall apply for authorisation or registration in accordance with Article 34 by 1 January 2020.

2. By 1 January 2020, the competent authority of the Member State where an index provider applying for authorisation in accordance with Article 34 is located shall have the power to decide to register that index provider as an administrator even if it is not a supervised entity, under the following conditions:

(a) the index provider does not provide a critical benchmark;

(b) the competent authority is aware, on a reasonable basis, that the index or indices provided by the index provider are not widely used, within the meaning of this Regulation, in the Member State where the index provider is located as well as in other Member States.

The competent authority shall notify ESMA of its decision adopted in accordance with the first subparagraph.

The competent authority shall keep evidence of the reasons for its decision adopted in accordance with the first subparagraph, in such a form that it is possible to fully understand the evaluations of the competent authority that the index or indices provided by the index provider are not widely used, including any market data, judgement or other information, as well as information received from the index provider.

3. An index provider may continue to provide an existing benchmark which may be used by supervised entities until 1 January 2020 or, where the index provider submits an application for authorisation or registration in accordance with paragraph 1, unless and until such authorisation or registration is refused.

4. Where an existing benchmark does not meet the requirements of this Regulation, but ceasing or changing that benchmark to fulfil the requirements of this Regulation would result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument or the rules of any investment fund, which references that benchmark, the use of the benchmark shall be permitted by the competent authority of the Member State where the index provider is located. No financial instruments, financial contracts, or measurements of the performance of an investment fund shall add a reference to such an existing benchmark after 1 January 2020.

5. Unless the Commission has adopted an equivalence decision as referred to in Article 30(2) or (3) or unless an administrator has been recognised pursuant to Article 32, or a benchmark has been endorsed pursuant to Article 33, the use in the Union by supervised entities of a benchmark provided by an administrator located in a third country where the benchmark is already used in the Union as a reference for financial instruments, financial contracts, or for measuring the performance of an investment fund, shall be permitted only for such financial instruments, financial contracts and measurements of the performance of an investment fund that already reference the benchmark in the Union on, or which add a reference to such benchmark prior to, 1 January 2020.

6. The Commission shall be empowered to adopt delegated acts in accordance with Article 49 concerning measures to determine the conditions on which the relevant competent authority may assess whether the cessation or the changing of an existing benchmark to conform with the requirements of this Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument or the rules of any investment fund which references such benchmark.

Article 52

Deadline for updating the prospectuses and key information documents

Article 29(2) is without prejudice to outstanding prospectuses approved under Directive 2003/71/EC prior to 1 January 2018. For prospectuses approved prior to 1 January 2018 under Directive 2009/65/EC, the underlying documents shall be updated at the first occasion or at the latest within 12 months after that date.

Article 53

ESMA reviews

1. ESMA shall seek to build a common European supervisory culture and consistent supervisory practices and ensure consistent approaches among competent authorities in relation to the application of Articles 32 and 33. To that end, the recognitions granted in accordance with Article 32 and the endorsements authorised in accordance with Article 33 shall be reviewed by ESMA every two years.

ESMA shall issue an opinion to each competent authority that has recognised a third country administrator or endorsed a third country benchmark assessing how that competent authority applies the relevant requirements of Articles 32 and 33 respectively and the requirements of any relevant delegated act and regulatory or implementing technical standard based on this Regulation.

2. ESMA shall have the power to require the documented evidence from a competent authority for any of the decisions adopted in accordance with the first subparagraph of Article 51(2), Article 24(1) and Article 25(2).

Article 54

Review

1. By 1 January 2020, the Commission shall review and submit a report to the European Parliament and to the Council on this Regulation and in particular on:

(a) the functioning and effectiveness of the critical benchmark, mandatory administration and mandatory contribution regime under Articles 20, 21 and 23 and the definition of a critical benchmark in point (25) of Article 3(1);

(b) the effectiveness of the authorisation, registration and supervision regime of administrators under Title VI and the colleges under Article 46 and the appropriateness of supervision of certain benchmarks by a Union body;

(c) the functioning and effectiveness of Article 19(2), in particular the scope of its application.

2. The Commission shall review the evolution of international principles applicable to benchmarks and of legal frameworks and supervisory practices in third countries concerning the provision of benchmarks and report to the European Parliament and to the Council every five years after 1 January 2018. That report shall assess in particular whether there is a need to amend this Regulation and shall be accompanied by a legislative proposal, if appropriate.

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 49 in order to extend the 42-month period referred to in Article 51(2) by 24 months, if the report referred to in point (b) of paragraph 1 of this Article provides evidence that the transitional registration regime under Article 51(2) is not detrimental to a common European supervisory culture and consistent supervisory practices and approaches among competent authorities.

Article 55

Notification of benchmarks referenced and their administrators

When a benchmark is referenced in a financial instrument covered by Article 4(1) of Regulation (EU) No 596/2014, the notifications under Article 4(1) of that Regulation shall include the name of the benchmark referenced and its administrator.

Article 56

Amendments to Regulation (EU) No 596/2014

Regulation (EU) No 596/2014 is amended as follows:

(1) Article 19 is amended as follows:

(a) the following paragraph is inserted:

'1a. The notification obligation referred to in paragraph 1 shall not apply to transactions in financial instruments linked to shares or to debt instruments of the issuer referred to in that paragraph where at the time of the transaction any of the following conditions is met:

(a) the financial instrument is a unit or share in a collective investment undertaking in which the exposure to the issuer's shares or debt instruments does not exceed 20 % of the assets held by the collective investment undertaking;

(b) the financial instrument provides exposure to a portfolio of assets in which the exposure to the issuer's shares or debt instruments does not exceed 20 % of the portfolio's assets;

(c) the financial instrument is a unit or share in a collective investment undertaking or provides exposure to a portfolio of assets and the person discharging managerial responsibilities or person closely associated with such a person does not know, and could not know, the investment composition or exposure of such collective investment undertaking or portfolio of assets in relation to the issuer's shares or debt instruments, and furthermore there is no reason for that person to believe that the issuer's shares or debt instruments exceed the thresholds in point (a) or (b).

If information regarding the investment composition of the collective investment undertaking or exposure to the portfolio of assets is available, then the person discharging managerial responsibility or person closely associated with such a person shall make all reasonable efforts to avail themselves of that information.';

(b) in paragraph 7, the following subparagraph is inserted after the second subparagraph:

'For the purposes of point (b), transactions executed in shares or debt instruments of an issuer or derivatives or other financial instruments linked thereto by managers of a collective investment undertaking in which the person discharging managerial responsibilities or a person closely associated with them has invested do not need to be notified where the manager of the collective investment undertaking operates with full discretion, which excludes the manager receiving any instructions or suggestions on portfolio composition directly or indirectly from investors in that collective investment undertaking.'.

(2) Article 35 is amended as follows:

(a) in paragraphs (2) and (3), the phrase 'and Article 19(13) and (14)' is replaced by ', Article 19(13) and (14) and Article 38';

(b) paragraph (5) is replaced by the following:

'5. A delegated act adopted pursuant to Article 6(5) or (6), Article 12(5), the third subparagraph of Article 17(2), Article 17(3), Article 19(13) or (14) or Article 38, shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or the Council.'.

(3) In Article 38, the following paragraphs are added:

'By 3 July 2019, the Commission shall, after consulting ESMA, submit a report to the European Parliament and to the Council on the level of the thresholds set out in Article 19(1a)(a) and (b) in relation to managers' transactions where the issuer's shares or debt instruments form part of a collective investment undertaking or provide exposure to a portfolio of assets, with a view to assessing whether that level is appropriate or should be adjusted.

The Commission shall be empowered to adopt delegated acts in accordance with Article 35 adjusting the thresholds in Article 19(1a)(a) and (b), if it determines in that report that those thresholds should be adjusted.'.

Article 57

Amendments to Directive 2008/48/EC

Directive 2008/48/EC is amended as follows:

(1) In Article 5(1), the following subparagraph is inserted after the second subparagraph:

'Where the credit agreement references a benchmark as defined in point 3 of Article 3(1) of Regulation (EU) 2016/1011 of the European Parliament and of the Council (*), the name of the benchmark and of its administrator and the potential implications on the consumer shall be provided by the creditor, or where applicable, by the credit intermediary, to the consumer in a separate document, which may be annexed to the Standard European Consumer Credit Information form.

(*) Regulation (EU) 2016/1011, of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (OJ L 171, 29.6.2016, p. 1).'.

(2) In Article 27(1), the following subparagraph is inserted after the second subparagraph:

'By 1 July 2018 Member States shall adopt and publish the provisions necessary to comply with the third subparagraph of Article 5(1) and shall communicate them to the Commission. They shall apply those provisions from 1 July 2018.'.

Article 58

Amendments to Directive 2014/17/EU

Directive 2014/17/EU is amended as follows:

(1) In the second subparagraph of Article 13(1), the following point is inserted:

'(ea) where contracts that reference a benchmark as defined in point (3) of Article 3(1) of Regulation (EU) 2016/1011 of the European Parliament and of the Council (*) are available, the names of the benchmarks and of their administrators and the potential implications on the consumer;

(*) Regulation (EU) 2016/1011, of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (OJ L 171, 29.6.2016, p. 1).';

(2) In Article 42(2), the following subparagraph is inserted after the first subparagraph:

'By 1 July 2018, Member States shall adopt and publish the provisions necessary to comply with point (ea) of the second subparagraph of Article 13(1) and shall communicate them to the Commission. They shall apply those provisions from 1 July 2018.';

(3) In Article 43(1), the following subparagraph is added:

'Point (ea) of the second subparagraph of Article 13(1) shall not apply to credit agreements existing before 1 July 2018.'.

Article 59

Entry into force

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 January 2018.

Notwithstanding the second paragraph of this Article, Articles 3(2), 5(5), 11(5), 13(3), 15(6), 16(5), Article 20 (excluding point (b) of paragraph (6)), Articles 21 and 23, Articles 25(8), 25(9), 26(5), 27(3), 30(5), 32(9), 33(7), 34(8), Article 46, and Articles 47(3) and 51(6) shall apply from 30 June 2016.

Notwithstanding the second paragraph of this Article, Article 56 shall apply from 3 July 2016.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 8 June 2016.

For the European Parliament	*For the Council*
The President	*The President*
M. SCHULZ	A.G. KOENDERS

ANNEX I

INTEREST RATE BENCHMARKS

Accurate and sufficient data

1. For the purposes of points (a) and (c) of Article 11(1), in general the priority of use of input data shall be as follows:

   (a) a contributor's transactions in the underlying market that a benchmark intends to measure or, if not sufficient, its transactions in related markets, such as:

   — the unsecured inter-bank deposit market,

   — other unsecured deposit markets, including certificates of deposit and commercial paper, and

   — other markets such as overnight index swaps, repurchase agreements, foreign exchange forwards, interest rate futures and options, provided that those transactions comply with the input data requirements in the code of conduct;

   (b) a contributor's observations of third party transactions in the markets described in point (a);

   (c) committed quotes;

   (d) indicative quotes or expert judgements.

2. For the purposes of point (a) of Article 11(1) and Article 11(4), input data may be adjusted.

   In particular, input data may be adjusted by application of the following criteria:

   (a) proximity of transactions to the time of provision of the input data and the impact of any market events between the time of the transactions and the time of provision of the input data;

   (b) interpolation or extrapolation from transactions data;

   (c) adjustments to reflect changes in the credit standing of the contributors and other market participants.

Oversight function

3. The following requirements shall apply in substitution for the requirements of Article 5(4) and (5):

   (a) the administrator of an interest rate benchmark shall have in place an independent oversight committee. Details of the membership of that committee shall be made public, along with any declarations of any conflict of interest and the processes for election or nomination of its members;

   (b) the oversight committee shall hold no less than one meeting every four months and shall keep minutes of each such meeting;

   (c) the oversight committee shall operate with integrity and shall have all of the responsibilities provided for in Article 5(3).

Auditing

4. The administrator of an interest rate benchmark shall appoint an independent external auditor to review and report on the administrator's compliance with the benchmark methodology and this Regulation. The external audit of the administrator shall be carried out for the first time six months after the introduction of the code of conduct and subsequently every two years.

The oversight committee may require an external audit of a contributor to an interest rate benchmark if dissatisfied with any aspects of its conduct.

Contributor systems and controls

5. The following requirements shall apply to contributors to interest rate benchmarks, in addition to the requirements set out in Article 16. Article 16(5) shall not apply.

6. Each contributor's submitter and the direct managers of that submitter shall acknowledge in writing that they have read the code of conduct and that they will comply with it.

7. A contributor's systems and controls shall include:

(a) an outline of responsibilities within each firm, including internal reporting lines and accountability, including the location of submitters and managers and the names of relevant individuals and alternates;

(b) internal procedures for sign-off of contributions of input data;

(c) disciplinary procedures in respect of attempts to manipulate, or any failure to report, actual or attempted manipulation by parties external to the contribution process;

(d) effective conflicts of interest management procedures and communication controls, both within contributors and between contributors and other third parties, to avoid any inappropriate external influence over those responsible for submitting rates. Submitters shall work in locations physically separated from interest rate derivatives traders;

(e) effective procedures to prevent or control the exchange of information between persons engaged in activities involving a risk of conflict of interest where the exchange of that information may affect the benchmark data contributed;

(f) rules to avoid collusion among contributors, and between contributors and the benchmark administrators;

(g) measures to prevent, or limit, any person from exercising inappropriate influence over the way in which persons involved in the provision of input data carries out those activities;

(h) the removal of any direct link between the remuneration of employees involved in the provision of input data and the remuneration of, or revenues generated by, persons engaged in another activity, where a conflict of interest may arise in relation to those activities;

(i) controls to identify any reverse transaction subsequent to the provision of input data.

8. A contributor to an interest rate benchmark shall keep detailed records of:

(a) all relevant aspects of contributions of input data;

(b) the process governing input data determination and the sign-off of input data;

(c) the names of submitters and their responsibilities;

(d) any communications between the submitters and other persons, including internal and external traders and brokers, in relation to the determination or contribution of input data;

(e) any interaction of submitters with the administrator or any calculation agent;

(f) any queries regarding the input data and their outcome of those queries;

(g) sensitivity reports for interest rate swap trading books and any other derivative trading book with a significant exposure to interest rate fixings in respect of input data.

9. Records shall be kept on a medium that allows the storage of information to be accessible for future reference with a documented audit trail.

10. The compliance function of the contributor to an interest rate benchmark shall report any findings, including reverse transactions, to management on a regular basis.

11. Input data and procedures shall be subject to regular internal reviews.

12. An external audit of the input data of a contributor to an interest rate benchmark, compliance with the code of conduct and the provisions of this Regulation shall be carried out for the first time six months after the introduction of the code of conduct, and subsequently every two years.

ANNEX II

COMMODITY BENCHMARKS

Methodology

1. The administrator of a commodity benchmark shall formalise, document, and make public any methodology that the administrator uses for a benchmark calculation. At a minimum, such methodology shall contain and describe the following:

   (a) all criteria and procedures that are used to develop the benchmark, including how the administrator uses input data including the specific volume, concluded and reported transactions, bids, offers and any other market information in its assessment or assessment time periods or windows, why a specific reference unit is used, how the administrator collects such input data, the guidelines that control the exercise of judgement by assessors and any other information, such as assumptions, models or extrapolation from collected data that are considered in making an assessment;

   (b) procedures and practices that are designed to ensure consistency between its assessors in exercising their judgement;

   (c) the relative importance that shall be assigned to each criterion used in benchmark calculation, in particular the type of input data used and the type of criterion used to guide judgement so as to ensure the quality and integrity of the benchmark calculation;

   (d) criteria that identify the minimum amount of transaction data required for a particular benchmark calculation. If no such threshold is provided for, the reasons why a minimum threshold is not established shall be explained, including setting out the procedures to be used where no transaction data exist;

   (e) criteria that address the assessment periods where the submitted data fall below the methodology's recommended transaction data threshold or the requisite administrator's quality standards, including any alternative methods of assessment including theoretical estimation models. Those criteria shall explain the procedures to be used where no transaction data exist;

   (f) criteria for timeliness of contributions of input data and the means for such contributions of input data whether electronically, by telephone or otherwise;

   (g) criteria and procedures that address assessment periods where one or more contributors submit input data that constitute a significant proportion of the total input data for that benchmark. The administrator shall also define in those criteria and procedures what constitutes a significant proportion for each benchmark calculation;

   (h) criteria according to which transaction data may be excluded from a benchmark calculation.

2. The administrator of a commodity benchmark shall publish or make available the key elements of the methodology that the administrator uses for each commodity benchmark provided and published or, when applicable, for each family of benchmarks provided and published.

3. Along with the methodology referred to in paragraph 2, the administrator of a commodity benchmark shall also describe and publish all of the following:

   (a) the rationale for adopting a particular methodology, including any price adjustment techniques and a justification of why the time period or window within which input data is accepted is a reliable indicator of physical market values;

   (b) the procedure for internal review and approval of a given methodology, as well as the frequency of such review;

   (c) the procedure for external review of a given methodology, including the procedures to gain market acceptance of the methodology through consultation with users on important changes to their benchmark calculation processes.

Changes to a methodology

4. The administrator of a commodity benchmark shall adopt and make public to users explicit procedures and the rationale of any proposed material change in its methodology. Those procedures shall be consistent with the overriding objective that an administrator must ensure the continued integrity of its benchmark calculations and implement changes for good order of the particular market to which such changes relate. Such procedures shall provide:

   (a) advance notice in a clear time frame that gives users sufficient opportunity to analyse and comment on the impact of such proposed changes, having regard to the administrator's calculation of the overall circumstances;

   (b) for users' comments, and the administrator's response to those comments, to be made accessible to all market users after any given consultation period, except where the commenter has requested confidentiality.

5. The administrator of a commodity benchmark shall regularly examine its methodologies for the purpose of ensuring that they reliably reflect the physical market under assessment and shall include a process for taking into account the views of relevant users.

Quality and integrity of benchmark calculations

6. The administrator of a commodity benchmark shall:

   (a) specify the criteria that define the physical commodity that is the subject of a particular methodology;

   (b) give priority to input data in the following order, where consistent with its methodologies:

      (i) concluded and reported transactions;

      (ii) bids and offers;

      (iii) other information.

      If concluded and reported transactions are not given priority, the reasons should be explained, as required in point 7(b).

   (c) employ sufficient measures designed to use input data submitted and considered in a benchmark calculation which are bona fide, meaning that the parties submitting the input data have executed, or are prepared to execute, transactions generating such input data and the concluded transactions were executed at arms-length from each other and particular attention shall be paid to inter-affiliate transactions;

   (d) establish and employ procedures to identify anomalous or suspicious transaction data and keep records of decisions to exclude transaction data from the administrator's benchmark calculation process;

   (e) encourage contributors to submit all of their input data that falls within the administrator's criteria for that calculation. Administrators shall seek, so far as they are able and is reasonable, to ensure that input data submitted is representative of the contributors' actual concluded transactions; and

   (f) employ a system of appropriate measures to ensure that contributors comply with the administrator's applicable quality and integrity standards for input data.

7. The administrator of a commodity benchmark shall describe and publish for each calculation, to the extent reasonable without prejudicing due publication of the benchmark:

   (a) a concise explanation, sufficient to facilitate a benchmark subscriber's or competent authority's ability to understand how the calculation was developed including, at a minimum, the size and liquidity of the physical market being assessed (such as the number and volume of transactions submitted), the range and average volume and range and average of price, and indicative percentages of each type of input data that have been considered in a calculation; terms referring to the pricing methodology shall be included such as transaction-based, spread-based or interpolated or extrapolated; and

(b) a concise explanation of the extent to which, and the basis upon which, any judgement including the exclusions of data which otherwise conformed to the requirements of the relevant methodology for that calculation, basing prices on spreads or interpolation, extrapolation, or weighting bids or offers higher than concluded transactions, if any, was used in any calculation.

Integrity of the reporting process

8. The administrator of a commodity benchmark shall:

(a) specify the criteria that define who may submit input data to the administrator;

(b) have in place quality control procedures to evaluate the identity of a contributor and any submitter who reports input data and the authorisation of such submitter to report input data on behalf of a contributor;

(c) specify the criteria applied to employees of a contributor who are permitted to submit input data to an administrator on behalf of a contributor; encourage contributors to submit transaction data from back office functions and seek corroborating data from other sources where transaction data is received directly from a trader; and

(d) implement internal controls and written procedures to identify communications between contributors and assessors that attempt to influence a calculation for the benefit of any trading position (whether of the contributor, its employees or any third party), attempt to cause an assessor to violate the administrator's rules or guidelines or identify contributors that engage in a pattern of submitting anomalous or suspicious transaction data. Those procedures shall include, to the extent possible, provision for escalation of the inquiry by the administrator within the contributor's company. Controls shall include cross-checking market indicators to validate submitted information.

Assessors

9. In relation to the role of an assessor, the administrator of a commodity benchmark shall:

(a) adopt and have in place explicit internal rules and guidelines for selecting assessors, including their minimum level of training, experience and skills, as well as the process for periodic review of their competence;

(b) have in place arrangements to ensure that calculations can be made on a consistent and regular basis;

(c) maintain continuity and succession planning in respect of its assessors in order to ensure that calculations are made consistently and by employees who possess the relevant levels of expertise; and

(d) establish internal control procedures to ensure the integrity and reliability of calculations. At a minimum, such internal controls and procedures shall require the ongoing supervision of assessors to ensure that the methodology was properly applied and procedures for internal sign-off by a supervisor prior to releasing prices for dissemination to the market.

Audit trails

10. The administrator of a commodity benchmark shall have rules and procedures in place to document contemporaneously relevant information, including:

(a) all input data;

(b) the judgements that are made by assessors in reaching each benchmark calculation;

(c) whether a calculation excluded a particular transaction which otherwise conformed to the requirements of the relevant methodology for that calculation, and the rationale for doing so;

(d) the identity of each assessor and of any other person who submitted or otherwise generated any of the information in points (a), (b) or (c).

11. The administrator of a commodity benchmark shall have rules and procedures in place to ensure that an audit trail of relevant information is retained for at least five years in order to document the construction of its calculations.

Conflicts of interest

12. The administrator of a commodity benchmark shall establish adequate policies and procedures for the identification, disclosure, management or mitigation and avoidance of any conflict of interest and the protection of integrity and independence of calculations. Those policies and procedures shall be reviewed and updated regularly and shall:

    (a) ensure that benchmark calculations are not influenced by the existence of, or potential for, a commercial or personal business relationship or interest between the administrator or its affiliates, its personnel, clients, any market participant or persons connected with them;

    (b) ensure that personal interests and business connections of the administrator's personnel are not permitted to compromise the administrator's functions, including outside employment, travel, and acceptance of entertainment, gifts and hospitality provided by the administrator's clients or other commodity market participants;

    (c) ensure, in respect of identified conflicts, appropriate segregation of functions within the administrator by way of supervision, compensation, systems access and information flows;

    (d) protect the confidentiality of information submitted to or produced by the administrator, subject to the disclosure obligations of the administrator;

    (e) prohibit managers, assessors and other employees of the administrator from contributing to a benchmark calculation by way of engaging in bids, offers and trades on either a personal basis or on behalf of market participants; and

    (f) effectively address any identified conflict of interest which may exist between the administrator's provision of a benchmark (including all employees who perform or otherwise participate in benchmark calculation responsibilities), and any other business of the administrator.

13. The administrator of a commodity benchmark shall ensure that its other business operations have in place appropriate procedures and mechanisms designed to minimise the likelihood that a conflict of interest will affect the integrity of benchmark calculations.

14. The administrator of a commodity benchmark shall ensure that it has in place segregated reporting lines amongst its managers, assessors and other employees and from the managers to the administrator's most senior level management and its board to ensure:

    (a) that the administrator satisfactorily implements the requirements of this Regulation; and

    (b) that responsibilities are clearly defined and do not conflict or cause a perception of conflict.

15. The administrator of a commodity benchmark shall disclose to its users as soon as it becomes aware of a conflict of interest arising from the ownership of the administrator.

Complaints

16. The administrator of a commodity benchmark shall have in place and publish a complaints handling policy setting out procedures for receiving, investigating and retaining records concerning complaints made about an administrator's calculation process. Such complaint mechanisms shall ensure that:

    (a) subscribers of the benchmark may submit complaints on whether a specific benchmark calculation is representative of market value, proposed benchmark calculation changes, applications of methodology in relation to a specific benchmark calculation and other editorial decisions in relation to the benchmark calculation processes;

(b) there is in place a target timetable for the handling of complaints;

(c) formal complaints made against the administrator and its personnel are investigated by that administrator in a timely and fair manner;

(d) the inquiry is conducted independently of any personnel who may be involved in the subject of the complaint;

(e) the administrator aims to complete its investigation promptly;

(f) the administrator advises the complainant and any other relevant parties of the outcome of the investigation in writing and within a reasonable period;

(g) there is recourse to an independent third party appointed by the administrator. if a complainant is dissatisfied with the way a complaint has been handled by the relevant administrator or the administrator's decision in the situation no later than six months from the time of the original complaint; and

(h) all documents relating to a complaint, including those submitted by the complainant as well as an administrator's own record, are retained for a minimum of five years.

17. Disputes as to daily pricing determinations, which are not formal complaints, shall be resolved by the administrator of a commodity benchmark with reference to its appropriate standard procedures. If a complaint results in a change in price, the details of that change in price shall be communicated to the market as soon as possible.

External auditing

18. The administrator of a commodity benchmark shall appoint an independent external auditor with appropriate experience and capability to review and report on the administrator's adherence to its stated methodology criteria and with the requirements of this Regulation. Audits shall take place annually and be published three months after each audit is completed with further interim audits carried out as appropriate.

EXHIBIT 297

QONTIGO AXIOMA | DAX | STOXX

STOXX Governance Structure

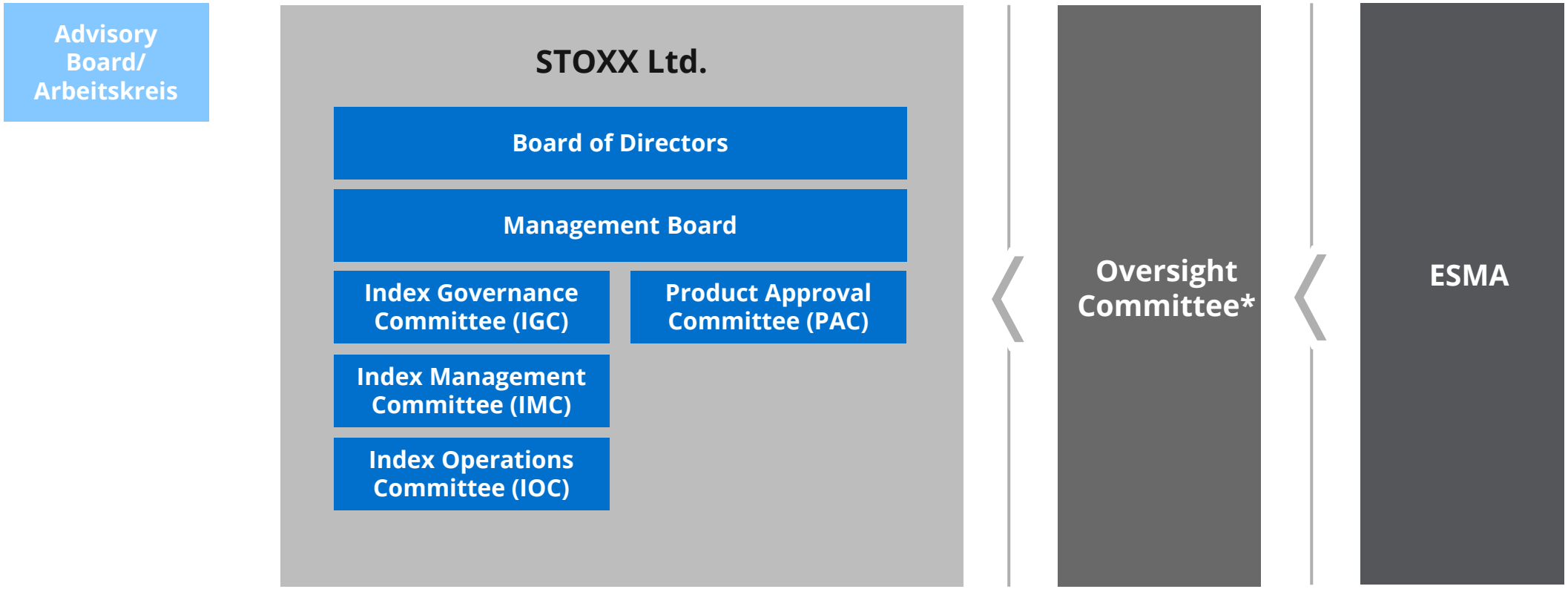
26 April 2023

Qontigo Compliance

Governance and Oversight

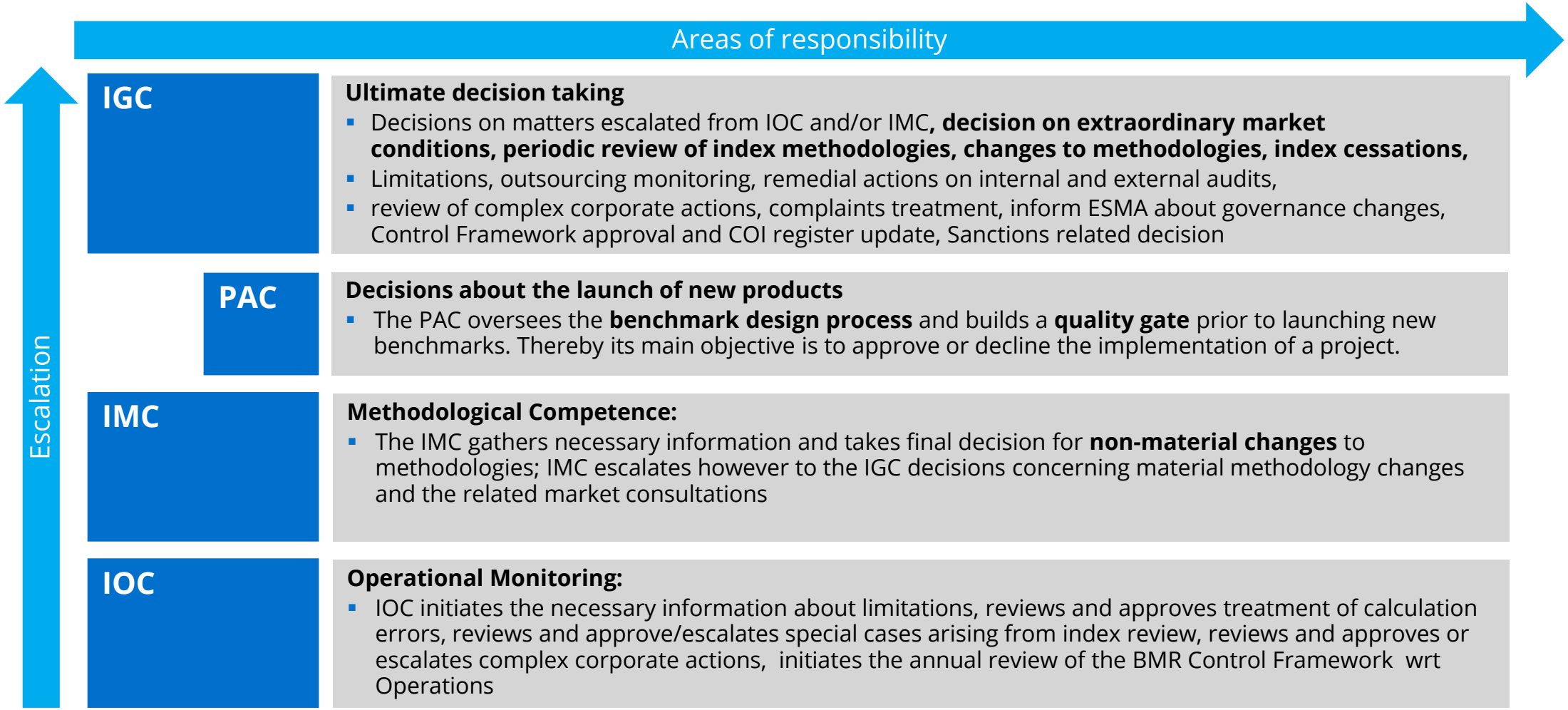
QONTIGO AXIOMA | DAX | STOXX

STOXX internal governance and external oversight



*4 voting members from DBAG (whereof 1 as Legal Representative) and 5 members from STOXX Ltd. (whereof 2 non-voting)

Internal BMR governance tasks



Oversight Committee

Tasks and informational flow to oversight function – Oversight Committee (art. 5 BMR)

	Task	IOC[1)]	IMC[1)]	IGC[1)]
Art. 5.3 a)	> **reviewing** the benchmark's definition and **methodology** at least annually;		DOC	✓
Art. 5.3 b)	> **overseeing** any **changes to the benchmark methodology** and being able to request the administrator to **consult** on such changes;		DOC	✓
Art. 5.3 c)	> **overseeing** the administrator's **control framework**, the management and operation of the benchmark, and, where the benchmark is based on input data from contributors, the code of conduct referred to in Article 15;	for Operations related topics DOC	for PD related topics DOC	for all topics not Operations and PD related respective departments provide IGC directly ✓
Art. 5.3 d)	> **reviewing** and **approving** procedures for **cessation** of the benchmark, including any **consultation** about a cessation;		DOC	✓
Art. 5.3 e)	> **overseeing any third party** involved in the provision of the benchmark, including calculation or dissemination agents;	for Operations related topics DOC	for PD related topics DOC	for all topics not Operations and PD related respective departments provide IGC directly ✓
Art. 5.3 f)	> **assessing internal and external audits or reviews**, and monitoring the implementation of identified remedial actions;			✓
Art. 5.3 g)	> where the benchmark is based on input data from contributors, monitoring the input data and contributors and the actions of the administrator in challenging or validating contributions of input data;			✓
Art. 5.3 h)	> where the benchmark is based on input data from contributors, taking effective measures in respect of any breaches of the code of conduct referred to in Article 15;	DOC		✓
Art. 5.3 i)	> **reporting** to the **relevant competent authorities any misconduct by** contributors, where the benchmark is based on input data from contributors, or **administrators**, of which the oversight function becomes aware, and any **anomalous or suspicious input data.**	DOC		✓

1) A more detailed description of each committees responsibilities and the escalation process is described in the provided "STOXX Governance Business Committee Responsibilities" document

✓ responsible for provision DOC responsible for preparation of documents

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Composition of STOXX Oversight Committee

Stakeholder	Member	Member's title / Function	Company	Competence
DBAG	Martin Oakley	Global Head Regulatory Affairs and Group Chief Compliance Officer	360T	Chief Counsel for regulatory affairs and Group Compliance Officer covering overseeing 360T and its subsidiaries
	Barbara Georg	Vice President	Deutsche Börse AG	Various functions within Group Compliance DBAG; previously: Head of Listing & Issuer Services of Deutsche Börse AG
LR EU (DBAG)	Monir Taik	Head of Unit, Regulatory Legal	Deutsche Börse AG	Legal Counsel
STOXX	Markus Zellmann	Senior Director, Legal (Chairman)	STOXX Ltd.	Legal Counsel
	Leonardo Scimmi	Principal, Compliance (Vice-Chairman)	STOXX Ltd.	Compliance Officer
	Markus Leippold	University Professor	UZH Zurich	Professor and Chair in Financial Engineering
STOXX (non-voting members)	Aukse Papinigyte*	Director, Surveillance & Monitoring, EMEA	STOXX Ltd.	Operations
	Serkan Batir*	Managing Director, Global Head, Benchmarks DAX and STOXX	STOXX Ltd.	Product

Voting members are not involved in the provision of the benchmark.
* Non voting members

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BMR Committees

Index Governance: Index Governance Committee (IGC)

Responsibilities	Voting	Members
The responsibilities of the IGC and the interactions with the OC with regard to all STOXX Benchmarks are described in Annex 1 of the Terms of Reference of the IGC. These responsibilities include i.a.: IGC takes final decision on topics escalated from IOC and/or IMC, e.g. ▪ final decision on extraordinary market conditions, ▪ periodic review of index methodologies, ▪ changes to methodologies, ▪ index cessations, ▪ Limitations (e.g. insufficient or unclear rules, insufficient data quantity or quality, extreme market events), ▪ outsourcing monitoring, ▪ remedial actions on internal and external audits, ▪ monitoring of quarterly input data report, ▪ review of complex corporate actions, ▪ complaints treatment ▪ confirmations regarding significant benchmarks (significant vs non-significant benchmarks) ▪ launches of indices when escalated from PAC ▪ inform ESMA about governance changes ▪ Approve Conflict of Interest register and BMR Control Framework	The approval of any matter requires a simple majority of at least 51% of all members present.	1. Chief Product Officer, Indices[1] 2. Data & Operations[2] 3. Global Head, Benchmarks DAX and STOXX 4. CTO Index 5. Sales, EMEA 6. Operations

1) Chair of the Committee, 2) Vice-Chair of the Committee

Index Governance: Committees under the IGC

Committee	Responsibilities	Voting	Members
Product Approval Committee (PAC)	The purpose of the Product Approval Committee ("PAC") is to carry out the activities as detailed in Annex 1 of the Terms of Reference and provide a governance structure to oversee the benchmark design process and built a quality gate prior to launching of new benchmarks. Its main task is to approve or decline the implementation of the launch of a benchmark.	The approval of any matter requires a simple majority of at least 51% of all members present.	1. TBA 2. TBA 3. (Chair ad interim) Operations 4. Index Operations 5. Sales, EMEA 6. Chief Product Officer - Indices
Index Management Committee (IMC)	The responsibilities of the IMC and the interactions with the IGC and the OC are described in Annex 1 of the Terms of Reference of the IMC. The IMC gathers necessary information and takes final decision for non-material changes to methodologies. IMC escalates however to the IGC decisions concerning material methodology changes and the related market consultations. IMC also usually gathers relevant information and escalates to IGC about limitations, annual methodology reviews, index cessations, exceed of threshold to significant benchmarks and complex corporate actions treatment.	The approval of any matter requires a simple majority of at least 51% of all members present.	1. Product R&D Specialty Indices, ESG[1] 2. Product R&D Specialty Indices, ESG 3. Index Operations 4. Index Product Architecture 5. Strategic Accounts
Index Operations Committee (IOC)	The responsibilities of the IOC and the interactions with the IMC, the IGC and the OC with regard to all STOXX Benchmarks are described in Annex 1 of the Terms of Reference of the IOC. IOC initiates the annual review of the BMR Control Framework, prepares the necessary information about limitations, prepares measures to monitor input data, reviews and approves treatment of calculation errors, reviews and approve/escalates special cases arising from index review, reviews and approves/escalates complex corporate actions.	The approval of any matter requires a simple majority of at least 51% of all members present.	1. Index Operations[1] 2. STOXX Index Review 3. DAX & Fixed Income Index Review 4. Corporate Actions, EMEA / Corporate Actions, APAC 5. Surveillance and Monitoring, EMEA/ Surveillance and Monitoring, APAC

1) Chair of the Committee

EXHIBIT 298

Principles for Financial Benchmarks

Final Report

THE BOARD
OF THE
INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS

FR07/13	**JULY 2013**

Copies of publications are available from:
The International Organization of Securities Commissions website www.iosco.org

Foreword

The Board of the International Organization of Securities Commissions (IOSCO) has published this Final Report.

This Report, which has been prepared by the IOSCO Board Level Task Force on Financial Market Benchmarks (Task Force), sets out IOSCO's final Principles on Financial Benchmarks. This report also summarizes and discusses the comments received on a *Consultation Report: Principles for Financial Benchmarks*,[1] published by IOSCO on 16 April 2013.

Key terms are defined in the Glossary in Annex A.

Contents

[1] See CR04/13 *Principles for Financial Benchmarks, Consultation Report,* The Board of IOSCO, 16 April 2013, available at: http://www.iosco.org/library/pubdocs/pdf/IOSCOPD409.pdf.

Chapter 1 Introduction

Background

On 16 April 2013 the International Organization of Securities Commissions published a *Consultation Report*: *Principles for Financial Benchmarks*[2] (April Consultation Report), which requested comments from the public on proposed final Principles for Financial Benchmarks. The principles were developed by IOSCO's Board Level Task Force on Financial Market Benchmarks. The IOSCO Board created the Task Force in light of investigations and enforcement actions regarding attempted manipulation of major interest rate Benchmarks[3]. Those investigations and enforcement actions raised concerns over the fragility of certain Benchmarks – in terms of both their integrity and their continuity of provision - that has the

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[2] *Principles for Financial Benchmarks,* IOSCO, April 2013, supra fn No 1

[3] Japan Financial Services Agency (JFSA) took administrative action against RBS Securities Japan Limited (12 April 2013): http://www.fsa.go.jp/en/news/2013/20130412.html

US Commodity Futures Trading Commission (CFTC) Order against UBS AG and UBS Securities Japan Co. Ltd to pay a $700 million penalty to settle charges of manipulation, attempted manipulation and false reporting of certain global benchmark interest rates (19 December 2012): http://www.cftc.gov/PressRoom/PressReleases/pr6472-12 and http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfubsorder121912.pdf

UK Financial Services Authority (FSA), fined UBS AG £160 million for significant failings in relation to the London Interbank Offered Rate (LIBOR) and the Euro Interbank Offered Rate (EURIBOR) (19 December 2012: http://www.fsa.gov.uk/library/communication/pr/2012/116.shtml and http://www.fsa.gov.uk/static/pubs/final/ubs.pdf

Swiss Financial Market Supervisory Authority (FINMA) ordered UBS AG to disgorge CHF 59 million in profits to the Swiss Confederation for seriously violating financial market legislation in connection with the submission of interest rates, particularly LIBOR (19 December 2012): http://www.finma.ch/e/aktuell/Pages/mm-ubs-libor-20121219.aspx

US CFTC Order against Barclays PLC, Barclays Bank PLC and Barclays Capital Inc. to pay a $200 million penalty for attempted manipulation of and false reporting concerning LIBOR and EURIBOR (27 June 2012): http://www.cftc.gov/PressRoom/PressReleases/pr6289-12 and http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfbarclaysorder062712.pdf

UK FSA fined Barclays Bank PLC £59.5 million for misconduct relating to LIBOR and EURIBOR (27 June 2012): http://www.fsa.gov.uk/library/communication/pr/2012/070.shtml and http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf.

JFSA took administrative action against UBS Securities Japan Ltd and UBS AG, Japan branches, (16 December 2011): http//www.fsa.go.jp/en/news/2011/20111216-3.html

JFSA took administrative action against Citigroup Global Market Japan Inc. (16 December 2011): http://www.fsa.go.jp/en/news/2011/20111216-2.html

JFSA took administrative action against Citibank Japan Ltd. (16 December 2011): http://www.fsa.go.jp/en/news/2011/20111216-1.html

potential to undermine market confidence potentially harming both investors and the real economy.

The April Consultation Report was informed by the comments received to IOSCO's initial Consultation Report in January 2013 (January Consultation Report),[4] as well as by comments received at stakeholder meetings on 21 February 2013 at the Financial Services Authority (FSA) (the predecessor organisation to the UK Financial Conduct Authority (FCA) in London and on 26 February 2013 at the US Commodity Futures Trading Commission (CFTC).

During the course of this work, the Task Force also has taken into consideration the related work undertaken within a variety of regulatory and industry fora. These include:

Regulatory Work streams:

- The IOSCO *Principles for Oil Price Reporting Agencies* (PRA Principles) which was undertaken by IOSCO Committee 7 on Commodity Futures Markets;
- Significant reviews of domestic interbank Benchmarks, notably the CFTC *UBS Order*, the CFTC *Barclays Order* [5]and FSA Order, and *The Wheatley Review of LIBOR: final report*;[6]
- The European Commission's Consultation on the *Regulation of Indices*;[7]
- The European Securities and Markets Authority/European Banking Authority's *Principles for Benchmark-Setting Processes in the EU*;[8] and
- The Bank for International Settlements' Board of Governors Economic Consultative Committee report.[9]

Industry Work streams:

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4 CR01/13 *Financial Benchmarks: Consultation Report*, Report of the IOSCO Board 10 Jan. 2013: http://www.iosco.org/library/pubdocs/pdf/IOSCOPD399.pdf

5 See *Principles for Financial Benchmarks,* IOSCO, April 2013, supra fn No 1

6 *The Wheatley Review of LIBOR: Final Report* (Sept 2012): http://cdn.hm-treasury.gov.uk/wheatley_review_libor_finalreport_280912.pdf

7 European Commission, consultation document on *The Regulation of Indices: a Possible Framework for the Regulation of the Production and Use of Indices serving as Benchmarks in Financial and other Contracts* (5 September – 29 November 2012): http://ec.europa.eu/internal_market/consultations/2012/benchmarks_en.htm

8 European Securities and Markets Authority (ESMA) and European Banking Authority (EBA), *Principles for Benchmarks-Setting Processes in the EU*, ESMA/2013/658 (5 June 2013 : http://eba.europa.eu/documents/10180/217545/2013-658+ESMA-EBA+Principles+on+Benchmarks+Final+Report.pdf

9 See press release: http://www.bis.org/press/wnew.htm and Bank for International Settlements report *Towards better reference rate practices: a central bank perspective (*18 March 2013): http://www.bis.org/publ/othp19.pdf.

- Best practice standards for conducting Benchmark price assessments issued by the Global Financial Markets Association (GFMA);[10] and
- The proposal by Argus Media, ICIS and Platts for a price reporting code for independent price reporting agencies (IPRO).[11]

Objective of IOSCO's Work on Benchmarks

As stated in the January Consultation Report, IOSCO's objective is to create an overarching framework of Principles for Benchmarks used in financial markets[12]. Specifically, the IOSCO Board seeks to articulate policy guidance and principles for Benchmark-related activities that will address conflicts of interest in the Benchmark-setting process, as well as transparency and openness when considering issues related to transition.

To inform this work, IOSCO's Task Force initially reviewed a selection of Benchmarks, representing a number of asset classes in different jurisdictions. That review, as well as IOSCO's consideration of Benchmark issues in the context of oil price reporting agencies and in work being conducted in other fora, helped identify certain broad, generic risks to the credibility of Benchmarks arising from vulnerabilities in the Benchmarks' Methodology, transparency and governance arrangements.[13]

As discussed in both consultation reports, these risks arise from incentives stemming from conflicts of interests, which may be amplified when Expert Judgement is used in Benchmark determinations. The following factors should be taken into account when assessing the risk of a Benchmark:

1. Submissions to Benchmarks: As described in the January Consultation Report, there are a variety of methods by which different forms of data are developed, collected and transmitted to Administrators. The Submission process may create additional vulnerabilities to the determination process if not addressed by appropriate controls and policies. For example, there may be conflicts of interests in and incentives to manipulate the determination process where the Submitters are also Market Participants with stakes in the level of the Benchmarks. Furthermore, there may be other conflicts of interests and opportunities for manipulative conduct created by the possibility of voluntary and/or selective Submissions, the varied composition of Submitters, and discretion in the selection of data to be submitted.
2. Content and transparency of Methodologies: If the procedures and policies concerning the Methodology do not contain adequate detail, the ability of Stakeholders to evaluate

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10 Global Financial Markets Association (GFMA), *Principles for Financial Benchmarks* (November 2012) and
GFMA *Updated Principles for Financial Benchmarks* (November 2012)

11 *The Price Reporting Code for Independent Price Reporting Organizations* (Draft) 30 April 2012: http://platts.com/IM.Platts.Content/aboutplatts/mediacenter/mediakits/draftiprcode30apr12.pdf

12 CR01/13 *Financial Benchmarks, Consultation Report*, IOSCO, 10 Jan. 2013, supra fn 4.

13 See Id. at Appendix B. As stated in the January 2013 Consultation Report at p.8, IOSCO's Task Force did not make recommendations relating to any given Benchmark

the credibility of a Benchmark may be restricted. Furthermore, a lack of transparency may allow abusive conduct to influence Benchmark determinations. Low transparency in the absence of strong internal controls may also create opportunities for gaming Submissions to influence a Benchmark.

3. Governance processes: The enforcement cases reviewed by the Task Force illustrate that conflicts of interest at both the Submitter and Administrator levels can create incentives for abusive conduct. These conflicts can arise within the variety of structures that may exist in the Benchmark Submission and compilation processes. For example, Submitters, Administrators, Calculation Agents or other third parties may attempt to manipulate a Benchmark by submitting false or misleading data or by attempting to influence personnel at the Administrator level who are responsible for the exercise of Expert Judgment.

The final Principles have been developed, and should be read collectively, to address these vulnerabilities.

Scope

As noted above, IOSCO's objective is to create an overarching framework of Principles for Benchmarks used in financial markets. Consistent with this objective, the definition of Benchmark that has been adopted for these Principles is very broad.

Benchmark Administration by a National Authority used for public policy purposes (e.g., labour, economic activity, inflation or consumer price indices) is not within the scope of the Principles. However, Benchmarks where a National Authority acts as a mechanical Calculation Agent are within the scope of the Principles. The Principles also exclude reference prices or settlement prices produced by Central Counterparties (CCPs), provided that they are produced solely for the purposes of risk management and settlement. The prices of single financial securities (e.g., equity securities underlying stock options or futures) are not considered Benchmarks for the purposes of these Principles.

However, because the universe of Benchmarks is large and diverse - a point repeatedly stressed in the comment letters and Stakeholder meetings - the Task Force has first developed a set of high level Principles that would be applicable to all Benchmarks. A subset of more detailed Principles also has been developed that address Benchmarks having specific risks arising from their reliance on Submissions (Principles 4, 5, 11, 14 and 18) and/or ownership structures (Principles 3 and 5), as set out below.

Benchmark Administrators Should Adopt the Recommended Practices

The Principles should be understood as a set of recommended practices that should be implemented by Benchmark Administrators and Submitters. The application of these Principles should be proportional to the size and risks posed by each Benchmark and/or Administrator and the Benchmark-setting process.

Implementation

The consultation feedback brought to light a number of questions regarding the application of the Principles, in particular about the more detailed Administrators' and Submitters' control framework, accountability and transparency requirements.

IOSCO recognized in its April Consultation Report that "although the Principles set out uniform expectations, IOSCO does not expect a *one-size-fits-all* method of implementation to achieve the objectives of the Principles." Given the large universe of Benchmarks in scope of this work, IOSCO believes the implementation of the Principles will not be identical for each Benchmark. Rather, the Principles provide a framework of standards, which might be met in different ways depending on the specificities of each Benchmark. In particular, the application and implementation of the Principles should be proportional to the size and risks posed by each Benchmark and/or Administrator and the Benchmark-setting process. This would also include the proportional application to new or emerging Benchmarks, in order to avoid material regulatory barriers to entry.

The proportional implementation of Principles should also take into account the source of underlying data inputs[14]. In particular, the application of the Principles to Benchmarks that are derived from data sourced from Regulated Markets or Exchanges with mandatory post-trade transparency requirements could be less intensive.[15] This is justified by the nature of checks and monitoring in place at the Regulated Markets or Exchanges, as well as an IOSCO member's authority over rules governing the listing and trading of financial instruments referencing these Benchmarks.

As examples, complying with the Principles in a proportional manner could mean for some Benchmarks:

- For Principle 3(c): Explaining why segregation of reporting lines may not be feasible, for instance because of limited staff numbers, and explaining the control measures that can mitigate this.
- For Principle 3(d): Explaining why the individual sign-off of each Benchmark determination is not possible, for instance because of the large numbers of determinations. Instead a general framework to validate determinations could be proposed. This might include sampling, such as regular or random manual validation of individual Benchmark determinations.
- For Principle 5: Clearly explaining to Stakeholders in a Benchmark how the oversight functions described in the Principle are performed, and explaining why, if a specific oversight committee is not used, the type of governance structure in place is appropriate. If the full terms and individual membership (including names) cannot be made public for confidentiality reasons, the Administrator should explain the composition in terms of positions, skills and experience.

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[14] The concept of proportionality is not intended to affect the requirement in Principle 7 that a Benchmark must be anchored in an active market having observable, Arms-length Transactions.

[15] For example, Benchmarks that regularly publish their Methodologies would satisfy Principle 9 when derived from data sourced from Regulated Markets or Exchanges with mandatory post-trade transparency requirements would satisfy Principle 9. See Principle 9.

- For Principle 17: Explaining why the form of audit (internal, external or independent) is adequate for the size of the operation and the risk features it displays.

In some of the examples above, general procedures may be used by the Administrator to comply with those Principles as long as they demonstrate that the functions required by the Principles are met.

Benchmark Administrators Should Disclose Compliance with Principles

Benchmark Administrators should publically disclose the extent of their compliance with the Principles annually. If implementation in any way deviates from the Principles, the Administrator should explain why it believes it meets the objectives and functions of the Principles, including to the extent they are relying on a proportionate view of the Principles (as that concept has been described above).

Benchmark Administrators should publically disclose their compliance with the Principles within twelve months of the publication of this report.

Specific Application for Oil PRAs

In October 2012, IOSCO adopted the PRA Principles, which were developed in collaboration with the International Energy Agency (IEA), International Energy Forum (IEF), and the Organization of Petroleum Exporting Countries (OPEC)[16]. IOSCO recommended voluntary adoption and implementation of the PRA Principles and established a review process over the 18 months following their publication, pursuant to which IOSCO, in collaboration with the IEA, IEF and OPEC, will evaluate the degree to which the PRA Principles have been implemented by PRAs. IOSCO further stated that it will seek the input of market authorities, stakeholders and PRAs and make further recommendations as appropriate at the end of the evaluation period.

As noted above, IOSCO took into consideration the PRA Principles during the development of these Principles for Financial Benchmarks[17]. Moreover, the PRA Principles were developed with due regard to the specifics of the oil markets, while these Principles for Financial Benchmarks focus on Benchmarks generally. As a result, while both sets of principles reflect similar high-level concerns, they differ in specifics.

In order to respect the circumstances under which these two sets of principles have been adopted, as well as the on-going evaluation process of the PRA Principles, IOSCO expects that the oil PRAs should continue to comply with and implement the PRA Principles.
IOSCO will, in the context of its collaboration with the IEA, IEF and OPEC, consider the need in due course for any modification of the PRA Principles to align them more closely with these Principles for Financial Benchmarks.

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[16] FR06/12 *Principles for Oil Price Reporting Agencies*, Report of the Board of IOSCO, October 2012, http://www.iosco.org/library/pubdocs/pdf/IOSCOPD391.pdf

[17] For example, Principle 9 of the principles for Financial Benchmarks is based on principle 2.3 of the oil PRA Principles.

IOSCO members should encourage implementation of the Principles including through regulatory action where appropriate.

This Report does not make specific recommendations with respect to any particular Benchmarks. The majority of IOSCO members do not regulate Benchmark Administrators or Submitters. Nonetheless, IOSCO members should consider whether regulatory action (or recommendations for action by other relevant National Authorities in their own jurisdiction) may be appropriate to encourage implementation of the Principles. A policy decision in this regard will depend upon, many factors, including:

- Facts and circumstances of Benchmark activity in a particular IOSCO member's jurisdiction;
- Impact of such activity on the IOSCO member's regulatory responsibilities;
- Investor and retail usage;
- Economic and financial stability impacts of such activity;
- Existing review and approval authority over rules governing the listing and trading of securities and derivatives that reference Benchmarks; [18]
- Allocation of regulatory responsibility within the jurisdiction; and
- An IOSCO member's determination as to the need for, and effectiveness of, any policy changes.

The factors discussed in the January Consultation Report on drawing regulatory distinctions are also pertinent to this inquiry.[19] Moreover, different approaches may be appropriate for different Benchmarks.

IOSCO Statement on Appropriate Enforcement Powers

An effective and credible enforcement programme should include robust powers over market manipulation, including attempted manipulation and securities fraud. These powers might be general in their application or they might relate directly to Benchmark activity.

In practice, despite not commonly having express powers to take action for Benchmark misconduct, Regulatory Authorities have deployed their existing powers in relation to securities breaches in order to bring cases against manipulation and attempted manipulation of

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[18] The January 2013 Consultation Report noted that the *IOSCO Objectives and Principles of Securities Regulation* provide that a regulator should be informed of the types of securities and products to be traded on an exchange or trading system and review or approve the rules governing the trading of the product. FRO8/11 *Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation* (October 2011), Principle 33, key issue 4, products and participants at p. 207.

[19] See discussion at pages 34-37 in CR01/13 Financial Benchmark's, Report of the Board of IOSCO (10 January 2013). Supra fn 4.

Benchmarks. For example, the US CFTC and the UK FSA have fined three banks in aggregate more than US$ 2.6 billion between June 2012 and February 2013. These investigations involved significant information-sharing and cooperation under the IOSCO Multilateral Memorandum of Understanding (MMoU) in accordance with the paragraph 7 of the IOSCO MMoU stating that signatories provide one another with the "fullest assistance permissible" to secure compliance with the securities laws applicable in their jurisdictions.

The momentum of these recent events has led to a number of proposals for regulators to be given express powers to take action against Benchmark misconduct. For example, with effect from 1 April 2013 the UK FCA has the power to prosecute a new criminal offence, which has been introduced if a person makes false or misleading statements in relation to LIBOR-setting (section 91, Financial Services Act 2012). In the European Economic Area, the new Market Abuse Regulation (expected to come into force by 2014) introduces provisions specifying that manipulation of the calculation of a Benchmark constitutes misconduct under the European Market Abuse regime.[20] These developments are welcome.

Accordingly, IOSCO Members should initiate action (or recommendations for action by other relevant National Authorities in their own jurisdiction), appropriate to their jurisdiction's legal and regulatory structure, to adopt enforcement regulations that make manipulation and attempted manipulation of a Benchmark an offense where such Benchmark is referenced in a financial contract or financial instrument.

Principles are Not Intended to Supersede Existing National Laws

The Principles are not intended to supersede existing laws, regulations or relevant regulatory or supervisory frameworks in specific jurisdictions, including any IOSCO Principles or undertakings agreed with Regulatory Authorities relating to a specific type of Benchmark, or a related activity. Rather, these Principles are intended to provide guidance to Administrators, Submitters and regulators and supplement existing IOSCO Principles.

Evaluation

Following the publication of the Principles, IOSCO intends to review within an 18-month period the extent to which the Principles have been implemented by obtaining the input of Stakeholders, Market Authorities and, as appropriate, Benchmark Administrators.

[20] http://ec.europa.eu/internal_market/securities/abuse/index_en.htm

Chapter 2 –Principles for Financial Benchmarks

Summary of the Principles

These Principles are intended to promote the reliability of Benchmark determinations, and address Benchmark governance, quality and accountability mechanisms. Although the Principles set out uniform expectations, IOSCO does not expect a *one-size-fits-all* method of implementation to achieve these objectives. The Principles provide a framework of standards that Administrators should implement according to the specificities of each Benchmark. In particular, the application and implementation of the Principles should be proportional to the size and risks posed by each Benchmark and/or Administrator and the Benchmark-setting process. Moreover, nothing in these Principles is intended to restrict an Administrator from adopting its own unique Methodology or from adapting their Methodologies to changing market conditions in order to meet the Principles.

Governance:

These Principles are intended to ensure that Administrators will have appropriate governance arrangements in place in order to protect the integrity of the Benchmark determination process and to address conflicts of interest. Specifically, these Principles address:

- The retention by the Administrator of primary responsibility for all aspects of the Benchmark determination process, such as the development and determination of a Benchmark and establishing credible and transparent governance, oversight and accountability procedures. This Principle makes clear that, regardless of the particular structure for Benchmark determination and administration, there should be an overall entity which is responsible for the integrity of the Benchmark. **[1. Overall Responsibility of the Administrator]**
- The adoption by the Administrator (and its oversight function) of clearly defined written arrangements setting out the roles and obligations of the parties involved in the Benchmark determination and the monitoring of any third party's compliance with those arrangements. This Principle reflects the concern that any outsourcing of functions should be subject to oversight by the Administrator. This Principle applies only where activities relating to the Benchmark determination process are undertaken by third parties, for example with respect to collection of inputs, or where a third party acts as the Calculation Agent or Publisher of the Benchmark. **[2. Oversight of Third Parties]**
- The documentation, implementation and enforcement of policies and procedures for the identification, disclosure, management and avoidance of conflicts of interest, including the disclosure of any material conflicts of interest to Stakeholders and any relevant Regulatory Authority. This framework should be appropriately tailored to the level of existing or potential conflicts of interest identified by the Administrator and should seek to mitigate existing or potential conflicts of interest created by the ownership or control structure or due to other interests arising from the Administrators' staff or wider group in relation to Benchmark determinations. This Principle is intended to address the

vulnerabilities that create incentives for Benchmark manipulation. [**3. Conflicts of Interest for Administrators]**

- An appropriate control framework at the Administrator for the process of determining and distributing the Benchmark, which should be appropriately tailored to the materiality of the potential or existing conflicts of interest identified, and to the nature of Benchmark inputs and outputs. The control framework should be documented, available to any relevant Regulatory Authority and Published or Made Available to Stakeholders. Among other things, a control framework should include an effective whistleblowing mechanism in order to facilitate early awareness of potential misconduct. **[4. Control Framework for Administrators]**

- An oversight function to review and provide challenge on all aspects of the Benchmark determination process, which should be appropriate to the Benchmark in question (i.e., including its size, scale and complexity) and provide effective oversight of the Administrator. The oversight function and its composition should include consideration of the features and intended, expected or known usage of the Benchmark and the materiality of existing or potential conflicts of interest identified. A separate committee or other appropriate governance arrangements should carry out the oversight function. [**5. Internal Oversight**]

Quality of the Benchmark:

These Principles are intended to promote the quality and integrity of Benchmark determinations through the application of design factors that result in a Benchmark that reflects a credible market for an Interest measured by that Benchmark. The Principles also clarify that a variety of data may be appropriately used to construct a Benchmark, as long as the Data Sufficiency Principle is met (i.e., based on an active market). Specifically, these Principles address:

- The design of a Benchmark should take into account generic design factors that are intended to result in a reliable representation of the economic realities of the Interest that the Benchmark seeks to measure and to eliminate factors that might result in a distortion of the price, rate, index or value of that Benchmark. The factors presented are generic and non-exclusive illustrations. **[6. Benchmark Design]**

- The data used to construct a Benchmark should be based on prices, rates, indices or values that have been formed by the competitive forces of supply and demand (i.e., in an active market) and be anchored by observable transactions entered into at arm's length between buyers and sellers in the market for the Interest the Benchmark measures.[21] This Principle recognizes that *Bona Fide* observable transactions in active markets provide a

[21] The term "*active market*" is not defined, as this is a determination that is made by the Administrator during the design of the Benchmark (Principle 6) as well as in its periodic review of the selected reference market (Principle 10). The January Consultation Report discusses a variety of factors, such as size, liquidity, market concentration and market dynamics that will be relevant to this inquiry. See discussion at pages 40-42 in CR01/13 Financial Benchmarks, Report of the Board of IOSCO 10 Jan. 2013, supra fn 4.

level of confidence that the prices or values used as the basis of the Benchmark are credible. Principle 7 does not mean that every individual Benchmark determination must be constructed solely from transaction data. Provided that an active market exists, conditions in the market on any given day might require the Administrator to rely on different forms of data tied to observable market data as an adjunct or supplement to transactions.[22] Depending upon the Administrator's Methodology, this could result in an individual Benchmark determination based predominantly, or exclusively, on bids and offers or extrapolations from prior transactions.

- Provided that an active market exists, Principle 7 does not preclude Benchmark Administrators from using executable bids or offers as a means to construct Benchmarks where anchored in an observable market consisting of *Bona Fide*, Arms-length transactions. For example, this approach might be appropriate in a market where overall transaction volume is high over sustained periods, though on any given day there might be more firm bids and offers than posted transactions taking place.

- The Principle also recognizes that various indices may be designed to measure or reflect the performance of a rule-based investment strategy, the volatility or behaviour of an index or market or other aspects of an active market. The Principle also does not preclude the use of non-transactional data for indices that are not designed to represent transactions and where the nature of the index is such that non-transactional data is used to reflect what the index is designed to measure. For example, certain volatility indices, which are designed to measure the expected volatility of an index of securities transactions, rely on non-transactional data, but the data is derived from and thus *anchored* in an actual functioning securities or options market. **[7. Data Sufficiency]**

- The establishment of clear guidelines regarding the hierarchy of data inputs and the exercise of Expert Judgment used for the determination of Benchmarks. This Principle is intended to make transparent to users the manner in which data and Expert Judgment may be used for the construction of a Benchmark. This Principle is not intended to create a rigid checklist or otherwise restrict an Administrator's flexibility to use inputs consistent with the Administrator's approach to ensuring the quality, integrity, continuity and reliability of its Benchmark determinations, set out in the Benchmark Methodology, provided that the Data Sufficiency Principle is met. **[8. Hierarchy of Data Inputs]**

- The publication with each Benchmark determination, to the extent reasonable without delaying the Administrator's publication deadline, of a concise explanation sufficient to facilitate a Subscriber's or Market Authority's ability to understand how the Benchmark determination was developed, as well as a concise explanation of the extent to which and the basis upon which judgment, if any, was used by the Administrator in establishing a

[22] As noted in the January Consultation Report, a low liquidity market that reflects the commercial realities of a market and functions as a price discovery market could support a Benchmark consistent with this Principle, even though non-transactional data such as verifiable (firm) bids and offers might be used as an adjunct to the low number of transactions in compiling a Benchmark. See id. at 41.

benchmark determination. Benchmarks that regularly publish their Methodologies would satisfy principle 9 when derived from data sourced from Regulated Markets or Exchanges with mandatory post-trade transparency requirements. In addition, a Benchmark that is based exclusively on executable quotes as contemplated by Principle 7 would not need to explain in each determination why it has been constructed with executable bids or offers, provided there is disclosure in the Methodology. **[9. Transparency of Benchmark Determinations]**

- The periodic review by the Administrator of the conditions in the underlying Interest that the Benchmark measures to determine whether the Interest has undergone structural changes that might require changes to the design of the Methodology (e.g., the Interest has diminished to the extent that it can no longer function as the basis for a credible Benchmark). In order to facilitate Stakeholders' understanding of the viability of a Benchmark, a summary of such reviews should be Published or Made Available when material revisions have been made to a Benchmark, including the rationale for the revisions. **[10. Periodic Review]**

Quality of the Methodology:

These Principles are intended to promote the quality and integrity of Methodologies by setting out minimum information that should be addressed within a Methodology, which should be Published or Made Available so that Stakeholders may understand and make their own judgments concerning the overall credibility of a Benchmark. The Methodology should also address the need for procedures that control when material changes are planned, as a means of alerting Stakeholders to these changes that might affect their positions, financial instruments or contracts.

The Principles also establish that Administrators should have credible policies in case a Benchmark ceases to exist or Stakeholders need to transition to another Benchmark. These policies are intended to encourage Administrators and Stakeholders to plan prospectively for the possible cessation of a Benchmark.

These Principles also address vulnerabilities in the Submission process (e.g., conflict of interest, improper communication between Submitters and Administrators, selective Submission of data) by outlining the responsibilities that should be undertaken by Submitters (i.e., a Submitter Code of Conduct). These Principles also make clear the Administrator's responsibilities to have internal controls over the collection of data from regulated sources. Specifically, these Principles address:

- The documentation and publication of the Methodology used to make Benchmark determinations, with sufficient detail to allow Stakeholders to understand how the Benchmark is derived and to assess its representativeness, its relevance to particular Stakeholders, and its appropriateness as a reference for financial instruments. **[11. Content of the Methodology]**

- The publication of the rationale of any proposed material change in its Methodology, and procedures for making such changes. These procedures should clearly define what constitutes a material change, and the method and timing for consulting or notifying

Subscribers (and other Stakeholders where appropriate, taking into account the breadth and depth of Benchmark use) of changes. **[12. Changes to the Methodology]**

- Clearly written policies and procedures that address the need for possible cessation of a Benchmark, due to market structure change, product definition changes, or any other condition, which makes the Benchmark no longer representative of its intended function. These policies and procedures should be proportionate to the estimated breadth and depth of contracts and financial instruments that reference a Benchmark and the economic and financial stability impact that might result from the cessation of the Benchmark. The Administrator should take into account the views of Stakeholders and any relevant Regulatory and National Authorities in determining what policies and procedures are appropriate for a particular Benchmark. Administrators should encourage Subscribers and Stakeholders to have robust fall-back provisions in contracts or financial instruments that reference a Benchmark. **[13. Transition]**

- The development of guidelines for Submitters ("Submitter Code of Conduct, which should be available to any relevant Regulatory Authorities and Published or Made Available to Stakeholders. Note: This Principle is only applicable to a Benchmark based on Submissions. **[14. Submitter Code of Conduct]**

- Appropriate internal controls over the Administrator's data collection and transmission processes – when an Administrator collects data directly from a Regulated Market, Exchange or other data aggregator, which address the process for selecting the source, collecting the data and protecting the integrity and confidentiality of the data. **[15. Internal Controls over Data Collection]**

Accountability:

These Principles establish complaints processes, documentation standards and audit reviews that are intended to provide evidence of compliance by the Administrator with its quality standards, as defined by these Principles and its own policies. The Principles also address making the foregoing information available to relevant Market Authorities. Specifically, these Principles address:

- The establishment and publication of a written complaints policy by which Stakeholders may submit complaints concerning whether a specific Benchmark determination is representative of the underlying Interest it seeks to measure, application of the Methodology to a specific Benchmark determination and other Administrator decisions in relation to a Benchmark determination. This Principle is intended to promote the reliability of Benchmark determinations through Stakeholder input and alert Market Authorities to possible factors that might affect the reliability of determinations. **[16. Complaints procedures]**

- The appointment of an independent internal or external auditor with appropriate experience and capability to periodically review and report on the Administrator's adherence to its stated criteria and the requirements of the Principles. The frequency of audits should be proportionate to the size and complexity of the Administrator's operations. Under certain circumstances (i.e., appropriate to the level of existing or

potential conflicts of interest identified by the Administrator) an Administrator should appoint an independent external auditor to periodically review and report on the Administrator's adherence to its stated Methodology criteria. These provisions are intended to promote compliance with the Principles and provide confirmation to relevant Market Authorities and Stakeholders of such compliance. **[17. Audits]**

- The retention of written records by the Administrator for five years, subject to applicable national legal or regulatory requirements. This Principle is intended to safeguard necessary documents for Audits. Additional requirements apply for Benchmarks based on Submissions. **[18. Audit Trail]**

- Relevant documents, Audit Trails and other documents addressed by these Principles shall be made readily available by the relevant parties to the relevant Regulatory Authorities in carrying out their regulatory or supervisory duties and handed over promptly upon request. This is intended to facilitate a Regulatory Authority's ability to access information that might be needed to determine the reliability of a given Benchmark determination or to access information that might be needed to investigate misconduct. **[19. Cooperation with Regulatory Authorities]**

Principles for Benchmarks

Governance

A Benchmark should have appropriate governance arrangements in place to protect the integrity of the Benchmark and to address conflicts of interests.

1. Overall Responsibility of the Administrator

The Administrator should retain primary responsibility for all aspects of the Benchmark determination process. For example, this includes:

a) Development: The definition of the Benchmark and Benchmark Methodology;
b) Determination and Dissemination: Accurate and timely compilation and publication and distribution of the Benchmark;
c) Operation: Ensuring appropriate transparency over significant decisions affecting the compilation of the Benchmark and any related determination process, including contingency measures in the event of absence of or insufficient inputs, market stress or disruption, failure of critical infrastructure, or other relevant factors; and
d) Governance: Establishing credible and transparent governance, oversight and accountability procedures for the Benchmark determination process, including an identifiable oversight function accountable for the development, issuance and operation of the Benchmark.

2. Oversight of Third Parties

Where activities relating to the Benchmark determination process are undertaken by third parties - for example collection of inputs, publication or where a third party acts as Calculation Agent - the Administrator should maintain appropriate oversight of such third parties. The Administrator (and its oversight function) should consider adopting policies and procedures that:

a) Clearly define and substantiate through appropriate written arrangements the roles and obligations of third parties who participate in the Benchmark determination process, as well as the standards the Administrator expects these third parties to comply with;
b) Monitor third parties' compliance with the standards set out by the Administrator;
c) Make Available to Stakeholders and any relevant Regulatory Authority the identity and roles of third parties who participate in the Benchmark determination process; and
d) Take reasonable steps, including contingency plans, to avoid undue operational risk related to the participation of third parties in the Benchmark determination process.

This Principle does not apply in relation to a third party from whom an Administrator sources data if that third party is a Regulated Market or Exchange.

3. Conflicts of Interest for Administrators

To protect the integrity and independence of Benchmark determinations, Administrators should document, implement and enforce policies and procedures for the identification, disclosure, management, mitigation or avoidance of conflicts of interest. Administrators should review and update their policies and procedures as appropriate.

Administrators should disclose any material conflicts of interest to their users and any relevant Regulatory Authority, if any.

The framework should be appropriately tailored to the level of existing or potential conflicts of interest identified and the risks that the Benchmark poses and should seek to ensure:

a) Existing or potential conflicts of interest do not inappropriately influence Benchmark determinations;
b) Personal interests and connections or business connections do not compromise the Administrator's performance of its functions;
c) Segregation of reporting lines within the Administrator, where appropriate, to clearly define responsibilities and prevent unnecessary or undisclosed conflicts of interest or the perception of such conflicts;
d) Adequate supervision and sign-off by authorised or qualified employees prior to releasing Benchmark determinations;
e) The confidentiality of data, information and other inputs submitted to, received by or produced by the Administrator, subject to the disclosure obligations of the Administrator;
f) Effective procedures to control the exchange of information between staff engaged in activities involving a risk of conflicts of interest or between staff and third parties, where that information may reasonably affect any Benchmark determinations; and
g) Adequate remuneration policies that ensure all staff who participate in the Benchmark determination are not directly or indirectly rewarded or incentivised by the levels of the Benchmark.

An Administrator's conflict of interest framework should seek to mitigate existing or potential conflicts created by its ownership structure or control, or due to other interests the Administrator's staff or wider group may have in relation to Benchmark determinations. To this end, the framework should:

a) Include measures to avoid, mitigate or disclose conflicts of interest that may exist between its Benchmark determination business (including all staff who perform or otherwise participate in Benchmark production responsibilities), and any other business of the Administrator or any of its affiliates; and
b) Provide that an Administrator discloses conflicts of interest arising from the ownership structure or the control of the Administrator to its Stakeholders and any relevant Regulatory Authority in a timely manner.

4. Control Framework for Administrators

An Administrator should implement an appropriate control framework for the process of determining and distributing the Benchmark. The control framework should be appropriately tailored to the materiality of the potential or existing conflicts of interest identified, the extent of the use of discretion in the Benchmark setting process and to the nature of Benchmark inputs and outputs. The control framework should be documented and available to relevant Regulatory Authorities, if any. A summary of its main features should be Published or Made Available to Stakeholders.

This control framework should be reviewed periodically and updated as appropriate. The framework should address the following areas:

a) Conflicts of interest in line with Principle 3 on conflicts of interests;
b) Integrity and quality of Benchmark determination:

   i. Arrangements to ensure that the quality and integrity of Benchmarks is maintained, in line with principles 6 to 15 on the quality of the Benchmark and Methodology;
   ii. Arrangements to promote the integrity of Benchmark inputs, including adequate due diligence on input sources;
   iii. Arrangements to ensure accountability and complaints mechanisms are effective, in line with principles 16 to 19; and
   iv. Providing robust infrastructure, policies and procedures for the management of risk, including operational risk.

c) Whistleblowing mechanism:

   Administrators should establish an effective whistleblowing mechanism to facilitate early awareness of any potential misconduct or irregularities that may arise. This mechanism should allow for external reporting of such cases where appropriate.

d) Expertise:

   i. Ensuring Benchmark determinations are made by personnel who possess the relevant levels of expertise, with a process for periodic review of their competence; and
   ii. Staff training, including ethics and conflicts of interest training, and continuity and succession planning for personnel.

Where a Benchmark is based on Submissions: Administrators should promote the integrity of inputs by:

a) Ensuring as far as possible that the Submitters comprise an appropriately representative group of participants taking into consideration the underlying Interest measured by the Benchmark;
b) Employing a system of appropriate measures so that, to the extent possible, Submitters comply with the Submission guidelines, as defined in the Submitter Code of Conduct and the Administrators' applicable quality and integrity standards for Submission;
c) Specifying how frequently Submissions should be made and specifying that inputs or Submissions should be made for every Benchmark determination; and
d) Establishing and employing measures to effectively monitor and scrutinise inputs or Submissions. This should include pre-compilation or pre-publication monitoring to identify and avoid errors in inputs or Submissions, as well as *ex-post* analysis of trends and outliers.

5. Internal Oversight

Administrators should establish an oversight function to review and provide challenge on all aspects of the Benchmark determination process. This should include consideration of the features and intended, expected or known usage of the Benchmark and the materiality of existing or potential conflicts of interest identified.

The oversight function should be carried out either by a separate committee, or other appropriate governance arrangements. The oversight function and its composition should be appropriate to provide effective scrutiny of the Administrator. Such oversight function could consider groups of Benchmarks by type or asset class, provided that it otherwise complies with this Principle.

An Administrator should develop and maintain robust procedures regarding its oversight function, which should be documented and available to relevant Regulatory Authorities, if any. The main features of the procedures should be Made Available to Stakeholders. These procedures should include:

a) The terms of reference of the oversight function;
b) Criteria to select members of the oversight function;
c) The summary details of membership of any committee or arrangement charged with the oversight function, along with any declarations of conflicts of interest and processes for election, nomination or removal and replacement of committee members.

The responsibilities of the oversight function include:

a) Oversight of the Benchmark design:
    i. Periodic review of the definition of the Benchmark and its Methodology;
    ii. Taking measures to remain informed about issues and risks to the Benchmark, as well as commissioning external reviews of the Benchmark (as appropriate);

iii. Overseeing any changes to the Benchmark Methodology, including assessing whether the Methodology continues to appropriately measure the underlying Interest, reviewing proposed and implemented changes to the Methodology, and authorising or requesting the Administrator to undertake a consultation with Stakeholders where known or its Subscribers on such changes as per Principle 12; and

iv. Reviewing and approving procedures for termination of the Benchmark, including guidelines that set out how the Administrator should consult with Stakeholders about such cessation.

b) Oversight of the integrity of Benchmark determination and control framework:

i. Overseeing the management and operation of the Benchmark, including activities related to Benchmark determination undertaken by a third party;

ii. Considering the results of internal and external audits, and following up on the implementation of remedial actions highlighted in the results of these audits; and

iii. Overseeing any exercise of Expert Judgment by the Administrator and ensuring Published Methodologies have been followed.

Where conflicts of interests may arise in the Administrator due to its ownership structures or controlling interests, or due to other activities conducted by any entity owning or controlling the Administrator or by the Administrator or any of its affiliates: the Administrator should establish an independent oversight function which includes a balanced representation of a range of Stakeholders where known, Subscribers and Submitters, which is chosen to counterbalance the relevant conflict of interest.

Where a Benchmark is based on Submissions: the oversight function should provide suitable oversight and challenge of the Submissions by:

a) Overseeing and challenging the scrutiny and monitoring of inputs or Submissions by the Administrator. This could include regular discussions of inputs or Submission patterns, defining parameters against which inputs or Submissions can be analysed, or querying the role of the Administrator in challenging or sampling unusual inputs or Submissions;
b) Overseeing the Code of Conduct for Submitters;
c) Establishing effective arrangements to address breaches of the Code of Conduct for Submitters; and
d) Establishing measures to detect potential anomalous or suspicious Submissions and in case of suspicious activities, to report them, as well as any misconduct by Submitters of which it becomes aware to the relevant Regulatory Authorities, if any.

Quality of the Benchmark

6. Benchmark Design

The design of the Benchmark should seek to achieve, and result in an accurate and reliable representation of the economic realities of the Interest it seeks to measure, and eliminate factors that might result in a distortion of the price, rate, index or value of the Benchmark.

Benchmark design should take into account the following generic non-exclusive features, and other factors should be considered, as appropriate to the particular Interest:

a) Adequacy of the sample used to represent the Interest;
b) Size and liquidity of the relevant market (for example whether there is sufficient trading to provide observable, transparent pricing);
c) Relative size of the underlying market in relation to the volume of trading in the market that references the Benchmark;
d) The distribution of trading among Market Participants (market concentration);
e) Market dynamics (e.g., to ensure that the Benchmark reflects changes to the assets underpinning a Benchmark).

7. Data Sufficiency

The data used to construct a Benchmark determination should be sufficient to accurately and reliably represent the Interest measured by the Benchmark and should:

a) Be based on prices, rates, indices or values that have been formed by the competitive forces of supply and demand in order to provide confidence that the price discovery system is reliable; and
b) Be anchored by observable transactions entered into at arm's length between buyers and sellers in the market for the Interest the Benchmark measures in order for it to function as a credible indicator of prices, rates, indices or values.

This Principle requires that a Benchmark be based upon (i.e., *anchored in*) an active market having observable *Bona Fide*, Arms-Length Transactions. This does not mean that every individual Benchmark determination must be constructed solely of transaction data. Provided that an active market exists, conditions in the market on any given day might require the Administrator to rely on different forms of data tied to observable market data as an adjunct or supplement to transactions. Depending upon the Administrator's Methodology, this could result in an individual Benchmark determination being based predominantly, or exclusively, on bids and offers or extrapolations from prior transactions. This is further clarified in Principle 8.

Provided that subparagraphs (a) and (b) above are met, Principle 7 does not preclude Benchmark Administrators from using executable bids or offers as a means to construct Benchmarks where anchored in an observable market consisting of *Bona Fide*, Arms-Length transactions.[23]

This Principle also recognizes that various indices may be designed to measure or reflect the performance of a rule-based investment strategy, the volatility or behaviour of an index or market or other aspects of an active market. Principle 7 does not preclude the use of non-transactional data for such indices that are not designed to represent transactions and where the nature of the index is such that non-transactional data is used to reflect what the index is designed to measure. For example, certain volatility indices, which are designed to measure the expected volatility of an index of securities transactions, rely on non-transactional data, but the data is derived from and thus "*anchored*" in an actual functioning securities or options market.

8. Hierarchy of Data Inputs

An Administrator should establish and Publish or Make Available clear guidelines regarding the hierarchy of data inputs and exercise of Expert Judgment used for the determination of Benchmarks. In general, the hierarchy of data inputs should include:

a) Where a Benchmark is dependent upon Submissions, the Submitters' own concluded arms-length transactions in the underlying interest or related markets;
b) Reported or observed concluded Arm's-length Transactions in the underlying interest;
c) Reported or observed concluded Arm's-length Transactions in related markets;
d) Firm (executable) bids and offers; and
e) Other market information or Expert Judgments.

Provided that the Data Sufficiency Principle is met (i.e., an active market exists), this Principle is not intended to restrict an Administrator's flexibility to use inputs consistent with the Administrator's approach to ensuring the quality, integrity, continuity and reliability of its Benchmark determinations, as set out in the Administrator's Methodology. The Administrator should retain flexibility to use the inputs it believes are appropriate under its Methodology to ensure the quality and integrity of its Benchmark. For example, certain Administrators may decide to rely upon Expert Judgment in an active albeit low liquidity market, when transactions may not be consistently available each day. IOSCO also recognizes that there might be circumstances (e.g., a low liquidity market) when a confirmed bid or offer might carry more meaning than an outlier transaction. Under these circumstances, non-transactional data such as bids and offers and extrapolations from prior transactions might predominate in a given Benchmark determination.

[23] For example, this approach might be appropriate in a market where overall transaction volume is high over sustained periods, though on any given day there might be more firm bids and offers than posted transactions taking place.

9. Transparency of Benchmark Determinations [24]

The Administrator should describe and publish with each Benchmark determination, to the extent reasonable without delaying an Administrator publication deadline:

a) A concise explanation, sufficient to facilitate a Stakeholder's or Market Authority's ability to understand how the determination was developed, including, at a minimum, the size and liquidity of the market being assessed (meaning the number and volume of transactions submitted), the range and average volume and range and average of price, and indicative percentages of each type of market data that have been considered in a Benchmark determination; terms referring to the pricing Methodology should be included (i.e., *transaction-based*, *spread-based* or *interpolated/extrapolated*);

b) A concise explanation of the extent to which and the basis upon which Expert Judgment if any, was used in establishing a Benchmark determination.

10. Periodic Review

The Administrator should periodically review the conditions in the underlying Interest that the Benchmark measures to determine whether the Interest has undergone structural changes that might require changes to the design of the Methodology. The Administrator also should periodically review whether the Interest has diminished or is non-functioning such that it can no longer function as the basis for a credible Benchmark.

The Administrator should Publish or Make Available a summary of such reviews where material revisions have been made to a Benchmark, including the rationale for the revisions.

Quality of the Methodology

11. Content of the Methodology

The Administrator should document and Publish or Make Available the Methodology used to make Benchmark determinations. The Administrator should provide the rationale for adopting a particular Methodology. The Published Methodology should provide sufficient detail to allow Stakeholders to understand how the Benchmark is derived and to assess its representativeness, its

[24] See Annex C for further elaboration of this Principle. Benchmarks that regularly publish their Methodologies would satisfy Principle 9 when derived from data sourced from Regulated Markets or Exchanges with mandatory post-trade transparency requirements. In addition, a Benchmark that is based exclusively on executable quotes as contemplated by Principle 7 would not need to explain in each determination why it has been constructed with executable bids or offers, provided there is disclosure in the Methodology.

relevance to particular Stakeholders, and its appropriateness as a reference for financial instruments.

At a minimum, the Methodology should contain:

a) Definitions of key terms;
b) All criteria and procedures used to develop the Benchmark, including input selection, the mix of inputs used to derive the Benchmark, the guidelines that control the exercise of Expert Judgment by the Administrator, priority given to certain data types, minimum data needed to determine a Benchmark, and any models or extrapolation methods;
c) Procedures and practices designed to promote consistency in the exercise of Expert Judgment between Benchmark determinations;
d) The procedures which govern Benchmark determination in periods of market stress or disruption, or periods where data sources may be absent (e.g., theoretical estimation models);
e) The procedures for dealing with error reports, including when a revision of a Benchmark would be applicable;
f) Information regarding the frequency for internal reviews and approvals of the Methodology. Where applicable, the Published Methodologies should also include information regarding the procedures and frequency for external review of the Methodology;
g) The circumstances and procedures under which the Administrator will consult with Stakeholders, as appropriate; and
h) The identification of potential limitations of a Benchmark, including its operation in illiquid or fragmented markets and the possible concentration of inputs.

Where a Benchmark is based on Submissions, the additional Principle also applies:

The Administrator should clearly establish criteria for including and excluding Submitters. The criteria should consider any issues arising from the location of the Submitter, if in a different jurisdiction to the Administrator. These criteria should be available to any relevant Regulatory Authorities, if any, and Published or Made Available to Stakeholders. Any provisions related to changes in composition, including notice periods should be made clear.

12. Changes to the Methodology

An Administrator should Publish or Make Available the rationale of any proposed material change in its Methodology, and procedures for making such changes. These procedures should clearly define what constitutes a material change, and the method and timing for consulting or notifying Subscribers (and other Stakeholders where appropriate, taking into account the breadth and depth of the Benchmark's use) of changes.

Those procedures should be consistent with the overriding objective that an Administrator must ensure the continued integrity of its Benchmark determinations. When changes are proposed, the Administrator should specify exactly what these changes entail and when they are intended to apply.

The Administrator should specify how changes to the Methodology will be scrutinised, by the oversight function.

The Administrator should develop Stakeholder consultation procedures in relation to changes to the Methodology that are deemed material by the oversight function, and that are appropriate and proportionate to the breadth and depth of the Benchmark's use and the nature of the Stakeholders. Procedures should:

a) Provide advance notice and a clear timeframe that gives Stakeholders sufficient opportunity to analyse and comment on the impact of such proposed material changes, having regard to the Administrator's assessment of the overall circumstances; and
b) Provide for Stakeholders' summary comments, and the Administrator's summary response to those comments, to be made accessible to all Stakeholders after any given consultation period, except where the commenter has requested confidentiality.

13. Transition

Administrators should have clear written policies and procedures, to address the need for possible cessation of a Benchmark, due to market structure change, product definition change, or any other condition which makes the Benchmark no longer representative of its intended Interest. These policies and procedures should be proportionate to the estimated breadth and depth of contracts and financial instruments that reference a Benchmark and the economic and financial stability impact that might result from the cessation of the Benchmark. The Administrator should take into account the views of Stakeholders and any relevant Regulatory and National Authorities in determining what policies and procedures are appropriate for a particular Benchmark.

These written policies and procedures should be Published or Made Available to all Stakeholders.

Administrators should encourage Subscribers and other Stakeholders who have financial instruments that reference a Benchmark to take steps to make sure that:

a) Contracts or other financial instruments that reference a Benchmark, have robust fall-back provisions in the event of material changes to, or cessation of, the referenced Benchmark; and
b) Stakeholders are aware of the possibility that various factors, including external factors beyond the control of the Administrator, might necessitate material changes to a Benchmark.

Administrators' written policies and procedures to address the possibility of Benchmark cessation could include the following factors, if determined to be reasonable and appropriate by the Administrator:

a) Criteria to guide the selection of a credible, alternative Benchmark such as, but not limited to, criteria that seek to match to the extent practicable the existing Benchmark's characteristics (e.g., credit quality, maturities and liquidity of the alternative market), differentials between Benchmarks, the extent to which an alternative Benchmark meets the asset/liability needs of Stakeholders, whether the revised Benchmark is investable, the availability of transparent transaction data, the impact on Stakeholders and impact of existing legislation;
b) The practicality of maintaining parallel Benchmarks (e.g., where feasible, maintain the existing Benchmark for a defined period of time to permit existing contracts and financial instruments to mature and publish a new Benchmark) in order to accommodate an orderly transition to a new Benchmark;
c) The procedures that the Administrator would follow in the event that a suitable alternative cannot be identified;
d) In the case of a Benchmark or a tenor of a Benchmark that will be discontinued completely, the policy defining the period of time in which the Benchmark will continue to be produced in order to permit existing contracts to migrate to an alternative Benchmark if necessary; and
e) The process by which the Administrator will engage Stakeholders and relevant Market and National Authorities, as appropriate, in the process for selecting and moving towards an alternative Benchmark, including the timeframe for any such action commensurate with the tenors of the financial instruments referencing the Benchmarks and the adequacy of notice that will be provided to Stakeholders.

14. Submitter Code of Conduct

Where a Benchmark is based on Submissions, the following additional Principle also applies:

The Administrator should develop guidelines for Submitters("Submitter Code of Conduct"), which should be available to any relevant Regulatory Authorities, if any and Published or Made Available to Stakeholders.

The Administrator should only use inputs or Submissions from entities which adhere to the Submitter Code of Conduct and the Administrator should appropriately monitor and record adherence from Submitters. The Administrator should require Submitters to confirm adherence to the Submitter Code of Conduct annually and whenever a change to the Submitter Code of Conduct has occurred.

The Administrator's oversight function should be responsible for the continuing review and oversight of the Submitter Code of Conduct.

The Submitter Code of Conduct should address:

a) The selection of inputs;
b) Who may submit data and information to the Administrator;
c) Quality control procedures to verify the identity of a Submitter and any employee(s) of a Submitter who report(s) data or information and the authorization of such person(s) to report market data on behalf of a Submitter;
d) Criteria applied to employees of a Submitter who are permitted to submit data or information to an Administrator on behalf of a Submitter;
e) Policies to discourage the interim withdrawal of Submitters from surveys or Panels;
f) Policies to encourage Submitters to submit all relevant data; and
g) The Submitters' internal systems and controls, which should include:
    i. Procedures for submitting inputs, including Methodologies to determine the type of eligible inputs, in line with the Administrator's Methodologies;
    ii. Procedures to detect and evaluate suspicious inputs or transactions, including inter-group transactions, and to ensure the *Bona Fide* nature of such inputs, where appropriate;
    iii. Policies guiding and detailing the use of Expert Judgment, including documentation requirements;
    iv. Record keeping policies;
    v. Pre-Submission validation of inputs, and procedures for multiple reviews by senior staff to check inputs;
    vi. Training, including training with respect to any relevant regulation (covering Benchmark regulation or any market abuse regime);
    vii. Suspicious Submission reporting;
    viii. Roles and responsibilities of key personnel and accountability lines;
    ix. Internal sign off procedures by management for submitting inputs;
    x. Whistle blowing policies (in line with Principle 4); and
    xi. Conflicts of interest procedures and policies, including prohibitions on the Submission of data from Front Office Functions unless the Administrator is satisfied that there are adequate internal oversight and verification procedures for Front Office Function Submissions of data to an Administrator (including safeguards and supervision to address possible conflicts of interests as per paragraphs (v) and (ix) above), the physical separation of employees and reporting lines where appropriate, the consideration of how to identify, disclose, manage, mitigate and avoid existing or potential incentives to manipulate or otherwise influence data inputs (whether or not in order to influence the Benchmark levels), including, without limitation, through appropriate remuneration policies and by effectively addressing conflicts of

interest which may exist between the Submitter's Submission activities (including all staff who perform or otherwise participate in Benchmark Submission responsibilities), and any other business of the Submitter or of any of its affiliates or any of their respective clients or customers.

15. Internal Controls over Data Collection

When an Administrator collects data from any external source the Administrator should ensure that there are appropriate internal controls over its data collection and transmission processes. These controls should address the process for selecting the source, collecting the data and protecting the integrity and confidentiality of the data. Where Administrators receive data from employees of the Front Office Function, the Administrator should seek corroborating data from other sources.

Accountability

16. Complaints Procedures

The Administrator should establish and Publish or Make Available a written complaints procedures policy, by which Stakeholders may submit complaints including concerning whether a specific Benchmark determination is representative of the underlying Interest it seeks to measure, applications of the Methodology in relation to a specific Benchmark determination(s) and other Administrator decisions in relation to a Benchmark determination.

The complaints procedures policy should:

a) Permit complaints to be submitted through a user-friendly complaints process such as an electronic Submission process;
b) Contain procedures for receiving and investigating a complaint made about the Administrator's Benchmark determination process on a timely and fair basis by personnel who are independent of any personnel who may be or may have been involved in the subject of the complaint, advising the complainant and other relevant parties of the outcome of its investigation within a reasonable period and retaining all records concerning complaints;
c) Contain a process for escalating complaints, as appropriate, to the Administrator's governance body; and
d) Require all documents relating to a complaint, including those submitted by the complainant as well as the Administrator's own record, to be retained for a minimum of five years, subject to applicable national legal or regulatory requirements.

Disputes about a Benchmarking determination, which are not formal complaints, should be resolved by the Administrator by reference to its standard appropriate procedures. If a complaint results in a change in a Benchmark determination, that should be Published or Made Available to Subscribers and Published or Made Available to Stakeholders as soon as possible as set out in the Methodology.

17. Audits

The Administrator should appoint an independent internal or external auditor with appropriate experience and capability to periodically review and report on the Administrator's adherence to its stated criteria and with the Principles. The frequency of audits should be proportionate to the size and complexity of the Administrator's operations.

Where appropriate to the level of existing or potential conflicts of interest identified by the Administrator (except for Benchmarks that are otherwise regulated or supervised by a National Authority other than a relevant Regulatory Authority), an Administrator should appoint an independent external auditor with appropriate experience and capability to periodically review and report on the Administrator's adherence to its stated Methodology. The frequency of audits should be proportionate to the size and complexity of the Administrator's Benchmark operations and the breadth and depth of Benchmark use by Stakeholders.

18. Audit Trail

Written records should be retained by the Administrator for five years, subject to applicable national legal or regulatory requirements on:

a) All market data, Submissions and any other data and information sources relied upon for Benchmark determination;
b) The exercise of Expert Judgment made by the Administrator in reaching a Benchmark determination;
c) Other changes in or deviations from standard procedures and Methodologies, including those made during periods of market stress or disruption;
d) The identity of each person involved in producing a Benchmark determination; and
e) Any queries and responses relating to data inputs.

If these records are held by a Regulated Market or Exchange the Administrator may rely on these records for compliance with this Principle, subject to appropriate written record sharing agreements.

When a Benchmark is based on Submissions, the following additional Principle also applies:

Submitters should retain records for five years subject to applicable national legal or regulatory requirements on:

a) The procedures and Methodologies governing the Submission of inputs;
b) The identity of any other person who submitted or otherwise generated any of the data or information provided to the Administrator;
c) Names and roles of individuals responsible for Submission and Submission oversight;
d) Relevant communications between submitting parties;
e) Any interaction with the Administrator;

f) Any queries received regarding data or information provided to the Administrator;
g) Declaration of any conflicts of interests and aggregate exposures to Benchmark related instruments;
h) Exposures of individual traders/desks to Benchmark related instruments in order to facilitate audits and investigations; and
i) Findings of external/internal audits, when available, related to Benchmark Submission remedial actions and progress in implementing them.

19. Cooperation with Regulatory Authorities

Relevant documents, Audit Trails and other documents subject to these Principles shall be made readily available by the relevant parties to the relevant Regulatory Authorities in carrying out their regulatory or supervisory duties and handed over promptly upon request.

Chapter 3 – Discussion of Consultation Feedback

Key Issues raised by the consultation feedback and revisions to the final report

The final report has been informed by the public comment letters received as part of the consultation process on the draft Principles on Financial Benchmarks, the summary of which can be found in Annex B.

In general, there was a good level of support for the Principles with the majority of comments on the technical detail rather than the substantive policy approach.

Below are a number of common issues raised in the feedback, which IOSCO considers warranted further clarifications. These clarifications are designed to help address misconceptions about the intended scope and implementation of the Principles and describe in further detail some key issues concerning the usage of transactions.

This chapter also describes how IOSCO has responded to the consultation feedback, both in terms of revised Principles and suitable application of the Principles.

Scope

The scope of the proposed Principles was deliberately kept very broad in the April Consultation Report, excluding only publically produced Benchmarks. Given this large scope, the Principles propose a multi-tiered approach to capture the particular risks of certain types of Benchmarks.

This approach and coverage was broadly supported by the public comments, including that the Principles should apply to equity Benchmarks, a point on which a specific question was asked. Nevertheless some respondents argued that certain Principles were not relevant for indices based on transaction data obtained from Regulated Markets and Exchanges and queried the definition of Submission.

It is therefore important to stress that those Principles or portions of Principles which apply to Submission-based Benchmarks (sub-set of Principles under Principles 4, 5, 11, 14 and 18) would be less relevant for Benchmarks that are based on prices that are made public (e.g., equity indices). As a result, the report has explicitly excluded from the definition of *Submissions* data sourced from Regulated Markets or Exchanges with mandatory post-trade transparency requirements.

Related to this, a number of equity and other traded securities Benchmark providers argued that certain transparency practices should not apply to them given the strong market incentive to provide the best transparency to Stakeholders in their commercial segment of the Benchmark universe. IOSCO believes that a proportional application of the transparency Principles (as explained above) would be beneficial to Stakeholders.

Principles 4, 5 and 12 have therefore been amended to make clear that transparency to Stakeholders does not mean full disclosure of proprietary information. In particular, summary information and key features may be disclosed to Stakeholders to comply with these Principles.

Some commenters also argued that Benchmarks based on transactions in securities on regulated markets have not raised the governance and operational concerns associated with some Submission based Benchmarks. Moreover, many commenters argued that the some Principles do not always fit the practices and structures of index providers. This report is sympathetic to some of these points. Principles 2 and 18 were thus refined to reduce practices on such Benchmarks.

IOSCO believes that the objectives set out in the general Principles remain relevant to all Benchmark providers, albeit not all details will be relevant to every index provider's practices and structure.

As set out in the April Consultation Report, IOSCO has developed these Principles as a set of recommended practices and all Administrators, including index providers, should apply the Principles to the extent that those Principles apply to their practices and structures. In this regard IOSCO does not expect a *one-size-fits-all* method of implementation. See the discussion of *Proportionality* in Chapter 1 in this regard.

Although IOSCO has not made specific recommendations about the practices and structures of equity index providers, IOSCO noted in its January Consultation Report that the listing of securities and derivatives containing such Benchmarks remain subject to the authority of the relevant Market Authority and could form the basis for drawing a regulatory distinction with regard to implementation of the Principles[25]. The January Consultation Report also took into consideration responses which sought to exclude smaller, customised or bilateral Benchmarks and Benchmarks used to assess returns against a standardised portfolio (performance Benchmarks) from the scope of the Principles. In keeping with the policy put forward by the January Consultation Report, it was considered by IOSCO that proportional application of the Principles should be sufficient to ensure unnecessary burdens are not borne by the industry, whilst making sure that confidence is restored in the integrity of Benchmarks used in financial markets.

Finally, the report reflects a number of comments in letters that sought to exclude Central Counterparty (CCP reference and settlement prices. In IOSCO's view, prices produced exclusively for the purpose of risk management and settlement by regulated CCPs should be excluded from the Principles, since those CCPs that are regulated already have to comply with stringent governance and risk management requirements. Additional obligations may have the impact of reducing the publication of such reference prices and may have impacts on the risk management of CCPs which is not the intention of this report. IOSCO notes that broader use of such prices and references beyond CCP risk management purposes would fall within the scope of the Principles.

As noted above, the consultation feedback questioned the application of certain features of the Principles to all Benchmark Administrators. In response, IOSCO has clarified that the application of the Principles should be proportional to the size and risk posed by each Benchmark and/or Administrator and the Benchmark-setting process.

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[25] *Financial Benchmarks*, Consultation Report, IOSCO, 10 Jan. 2013, supra fn 4, pp.32-34 and 36

Voluntary Submission

The January Consultation Report illustrated the dependence of many Benchmarks on Submissions and data provided voluntarily by market participants who are not always regulated. The feedback received in the April Consultation Report also mentioned this dependence and highlighted risks that excessive requirements on the Submission process could decrease the participation in Benchmark Submissions and potentially reduce the representativeness of each Benchmark.

IOSCO recognises the importance of maintaining participation in Benchmarks and recognises the risks that degrading Benchmark representativeness may have on the transparency brought by Benchmarks to the Interests they seek to measure. However, it also believes that some measures are necessary at Submitter level to ensure the robustness of the data submitted.

IOSCO therefore has focused on creating incentives for Administrators to institute processes that IOSCO believes will enhance reliability of Benchmarks for the benefit of all Market Participants. The Principle on codes of conduct for Submitters (Principle 14) should therefore be seen in light of this strengthening of market integrity. IOSCO considers this should provide incentives to participate whilst also providing confidence in the integrity of the Benchmark determination process.

Front Office Submissions

Some consultation responses argued that it might not always to be possible or desirable to prevent front office staff from participating in the Benchmark determination. It was argued that smaller organisations may not be able to segregate staff and valuable market information may be lost by applying such a ban. However IOSCO is still of the view that the conflicts of interest and incentives to manipulate Benchmark Submission are amplified when front office staff are involved.

In light of this, the Principle 14(g)(xi) has been amended to make clear that Submissions from Front Office Functions are disfavoured but permissible, as long as the Administrator is satisfied that there are adequate internal oversight and verification procedures, including safeguards and supervision to address possible conflicts of interest.

Transparency Regarding the Use of Expert Judgment

In response to the specific question in the April Consultation Report, there was a good level of support for the general proposition that there should be transparency as to how an individual Benchmark was developed and with respect to the use of Expert Judgment (consultation question 3). Commenters were concerned, however, that such a principle would impose burdens that would delay the publication of a Benchmark determination or add undue costs.

IOSCO notes that the proposed requirements to concisely explain the source of the determination and to note the usage of Expert Judgment (subsections (a) and (b) of consultation question 3) track paragraphs 2.3 (a) and (b) of the PRA Principles. Benchmarks that regularly publish their Methodologies would satisfy Principle 9 when derived from data sourced from Regulated Markets or Exchanges with mandatory post-trade transparency requirements. In addition, a Benchmark that is based exclusively on executable quotes as contemplated by Principle 7 would not need to explain in each determination why it has been constructed with executable bids or offers, provided there is disclosure in the Methodology.

Moreover, IOSCO addressed concerns regarding the perceived burdensome scope of these requirements in the context of the PRA Principles in a *Frequently Asked Questions* paper issued on 15 March 2013 (Oil PRA FAQ).[26] The specific question and answer from the Oil PRA FAQ has been included as part of this Report in Annex C.

Based on the responses received, IOSCO believes that the information contemplated by the addition of Principle 9 will provide material information to Benchmark users and is therefore adopting the proposed paragraphs. This is not intended to require disclosure by an Administrator of every situation that resulted in the use of discretion nor a detailed explanation. Rather the intent is that the use of discretion be noted using standard rationales and descriptions, as provided in the Oil PRA FAQ, which has been referenced in this Report as Annex C.

Data Sufficiency and hierarchy of data inputs (Principle 7 and 8)

Commenters generally supported the objective that Benchmarks should be *anchored* in transactions. Cautionary comments that were received on the Data Sufficiency Principle appear to be based on perceptions that the Principle required the sole usage of transactions, imposed a rigid hierarchy of data use, excluded the consideration of bids and offers or Expert Judgment, failed to take into account the characteristics of less transparent or low liquidity market characteristics and prohibited adjustments to data based on quality considerations.

IOSCO does not share these interpretations of the Principles.

The Data Sufficiency Principle is based on the underlying concept that Benchmarks should be based on prices, rates, indices or values that have been formed by the competitive forces of supply and demand (i.e., an active market) in order to provide confidence that the price discovery system is reliable. As noted by some commenters, the existence of a market does not preclude manipulation. However, the existence of a transparent, active market[27] with *observable*

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[26] *See* International Organization of Securities Commissions (IOSCO), *Frequently Asked Questions on IOSCO Principles for Price Reporting Agencies Report* (Oil PRA FAQ) (Mar. 15, 2013), http://www.iosco.org/library/pubdocs/pdf/IOSCOPD406.pdf.

[27] IOSCO made clear in the January Consultation Report that a low liquidity market could function as an active market. See discussion in *Financial Benchmarks*, Consultation Report, IOSCO, 10 Jan. 2013, supra fn. No.4, pp. 40-41

transactions provides visible evidence of market metrics and commercial practices, which can provide confidence to market participants and facilitate surveillance by relevant Market Authorities. Accordingly, as stated in the Data Sufficiency Principle a Benchmark should be underpinned or *anchored* by an active market with observable transactions.

IOSCO reiterates that this does not mean that Benchmarks must be constructed solely of transaction data, or that data must always be used in a rigid order. IOSCO recognises that there might be circumstances when a confirmed bid or offer might carry more meaning than an outlier transaction or when non-transactional data such as bids and offers and extrapolations from prior transactions might predominate (e.g., in a low liquidity market). All of these other forms of data usage are permissible in line with the Administrator's Methodology. This is encapsulated in the Data Hierarchy Principle which makes clear that provided that the Data Sufficiency Principle is met (i.e., data is based on an active market), an Administrator retains flexibility to use inputs consistent with the Administrator's approach to ensuring the quality, integrity, continuity and reliability of its Benchmark determinations (as set out in the Administrator's Methodology).

Provided that subparagraphs (a) and (b) of Principle 7 are met, Principle 7 does not preclude Benchmark Administrators from using executable bids or offers as a means to construct Benchmarks where anchored in an observable market consisting of *Bona Fide*, Arms-length Transactions. For example, this approach might be appropriate in a market where overall transaction volume is high over sustained periods, though on any given day there might be more firm bids and offers than posted transactions taking place.

IOSCO also recognizes that various indices may be designed to measure or reflect the performance of a rule-based investment strategy, the volatility or behaviour of an index, market or other aspects of an active market. Accordingly, Data Sufficiency Principle 7, has been revised to make clear that the Principle does not preclude the use of non-transactional data for such types of indices that are not designed to represent transactions and where the nature of the index is such that non-transactional data is used to reflect what the index is designed to measure. For example, certain volatility indices, which are designed to measure the expected volatility of an index of securities transactions, rely on non-transactional data, but the data is derived from and thus *anchored* in an actual functioning securities or options market.

ANNEX A

GLOSSARY OF KEY TERMS

Administration: Includes all stages and processes involved in the production and dissemination of a Benchmark, including:

a) Collecting, analysing and/or processing information or expressions of opinion for the purposes of the determination of a Benchmark;

b) Determining a Benchmark through the application of a formula or another method of calculating the information or expressions of opinions provided for that purpose; and

c) Dissemination to users, including any review, adjustment and modification to this process.

Administrator: An organisation or legal person that controls the creation and operation of the Benchmark Administration process, whether or not it owns the intellectual property relating to the Benchmark. In particular, it has responsibility for all stages of the Benchmark Administration process, including:

a) The calculation of the Benchmark;

b) Determining and applying the Benchmark Methodology; and

c) Disseminating the Benchmark.

Arm's-length Transaction: A transaction between two parties that is concluded on terms that are not influenced by a conflict of interest (e.g., conflicts of interest that arise from a relationship such as a transaction between affiliates).

Audit Trail: For the purposes of the Benchmark-setting process, the documentation and retention of all relevant data, Submissions, other information, judgments (including the rationale for any exclusions of data), analyses and identities of Submitters used in the Benchmark-setting process for an appropriate period.

Benchmark: The Benchmarks in scope of this report are prices, estimates, rates, indices or values that are:

a) Made available to users, whether free of charge or for payment;

b) Calculated periodically, entirely or partially by the application of a formula or another method of calculation to, or an assessment of, the value of one or more underlying Interests;

c) Used for reference for purposes that include one or more of the following:

- determining the interest payable, or other sums due, under loan agreements or under other financial contracts or instruments;
- determining the price at which a financial instrument may be bought or sold or traded or redeemed, or the value of a financial instrument; and/or
- measuring the performance of a financial instrument.

Benchmark Publisher: A legal entity publishing the Benchmark values, which includes Making Available such values to Subscribers, on the internet or by any other means, whether free of charge or not.

Bona Fide: Refers to data where the parties submitting the data have executed, or are prepared to execute, transactions generating such data and the concluded transactions were executed at arm's-length from each other.

Calculation Agent: A legal entity with delegated responsibility for determining a Benchmark through the application of a formula or other method of calculating the information or expressions of opinions provided for that purpose, in accordance with the Methodology set out by the Administrator.

Expert Judgment: Refers to the exercise of discretion by an Administrator or Submitter with respect to the use of data in determining a Benchmark. Expert Judgment includes extrapolating values from prior or related transactions, adjusting values for factors that might influence the quality of data such as market events or impairment of a buyer or seller's credit quality, or weighting firm bids or offers greater than a particular concluded transaction.

Front Office Function: This term means any department, division, group, or personnel of Submitter or any of its affiliates, whether or not identified as such, that performs, or personnel exercising direct supervisory authority over the performance of, any pricing (excluding price verification for risk management purposes), trading, sales, marketing, advertising, solicitation, structuring, or brokerage activities on behalf of a third party or for proprietary purposes .

Interest: Refers to any physical commodity, currency or other tangible goods, intangibles (such as an equity security, bond, futures contract, swap or option, interest rates, another index, including indexes that track the performance of a rule-based trading strategy or the volatility of a financial instrument or another index), any financial instrument on an Interest, which is intended to be measured by a Benchmark. Depending on the context, it is assumed that the word "Interest" also includes the market for such Interest.

Market Authority: A Regulatory Authority, a Self-Regulatory Organisation, a Regulated Market or Exchange, or a clearing organisation (as the context requires).

Market Participants: Legal entities involved in the production, structuring, use or trading of financial contracts or financial instruments used to inform the Benchmark, or which reference the Benchmark.

Methodology: The written rules and procedures according to which information is collected and the Benchmark is determined.

National Authority: Refers to a relevant governmental authority such as a central bank, which might not be a Market or Regulatory Authority, but which has responsibility for or a governmental interest in Benchmark policies.

Panel: Subset of Market Participants who are Benchmark Submitters.

Publish or Make Available: Refers to the expectation that a party such as an Administrator should provide a document or notice to Stakeholders. The means by which such notice is made should be proportionate to the breadth and depth of Benchmark use by Stakeholders, as determined by the Administrator on a "best efforts" basis. Ordinarily, posting a document or notice on the Administrator's website will meet this expectation.

Regulated Market or Exchange: A market or exchange that is regulated and/or supervised by a Regulatory Authority.

Regulatory Authority: A governmental or statutory body (not being a Self-Regulatory Organisation) with responsibility for securities and/or commodities and futures regulation.

Self-Regulatory Organisation or "SRO": An organisation that has been given the power or responsibility to regulate itself, whose rules are subject to meaningful sanctions regarding any part of the securities market or industry. This authority may be derived from a statutory delegation of power to a non-governmental entity or through a contract between an SRO and its members as is authorized or recognized by the governmental regulator. See *IOSCO Methodology*, Principle 9, p.50. http://www.iosco.org/library/pubdocs/pdf/IOSCOPD359.pdf

Stakeholder: Refers to Subscribers and other persons or entities who own contracts or financial instruments that reference a Benchmark.

Submission(s): Prices, estimates, values, rates or other information that is provided by a Submitter to an Administrator for the purposes of determining a Benchmark. This excludes data sourced from Regulated Markets or Exchanges with mandatory post-trade transparency requirements.

Submitter: A legal person providing information to an Administrator or Calculation Agent required in connection with the determination of a Benchmark

Subscriber: A person or entity that purchases Benchmark determination services from an Administrator.

ANNEX B

FEEDBACK STATEMENT

Process: IOSCO's April Consultation Report, published on 16th April 2013, provided for a one month consultation period on the issues presented in the report. The consultation closed on 16th May 2013.

Respondents: 40 responses were received, of which 9 came from industry associations and trade bodies, 10 from Benchmark Administrators, 7 from exchanges and clearing houses, 5 from buy side firms and 2 from authorities.

Questions: The Consultation report asked the four questions below:

1. ***Equity indices****: Indices may be used to measure a wide range of underlying Interests, using a variety of calculation methodologies and inputs. In the specific case of equity indices, inputs are typically based on transactions concluded on Regulated Markets. In light of this: are there any Principles or parts of the Principles that cannot, or should not, be applied to equity indices? If so, please identify these Principles and explain why their application is inappropriate.*

2. ***Additional measures to address risks resulting from Submission-based Benchmarks or ownership or control structures:*** *Additional measures have been specified within certain Principles to address specific risks arising from a reliance on Submissions (Principles 4, 10, 13 and 17) and/or from ownership or control structures (Principles 2, 5 and 16).*

    a. *Should these additional requirements apply to Submitters and Administrators of all Submission-based Benchmarks or Benchmarks with the specified ownership/control structures?*

    b. *If not, please explain why all or some Submission-based Benchmarks or Benchmarks with the specified ownership/control structures should be exempt.*

3. ***Notice Concerning Use of Expert Judgment:*** *Should Administrators be required to briefly describe and Publish with each Benchmark determination:*

    a. *a concise explanation, sufficient to facilitate a User's or Market Authority's ability to understand how the Benchmark determination was developed, terms referring to the pricing methodology should be included (e.g., spread-based, interpolated/extrapolated or estimate-based); and*

    b. *a concise explanation of the extent to which and the basis upon which judgment (i.e. exclusions of data which otherwise conformed to the requirements of the relevant methodology for that Benchmark determination, basing determinations on spreads, interpolation/extrapolation or estimates, or weighting bids or offers higher than concluded transactions etc.), if any, was used in establishing a determination.*

4. ***Revisions to the Principles****: Please provide any suggested changes to specific Principles or definitions of key terms set out in Annex A, including drafting proposals and rationale.*

   Are any other Principles needed*: Should Principles to address any additional issues, risks or conflicts of interest be developed? Please provide a summary of the issue and drafting for the proposed Principle.*

Consultation Question 1:

Commenters generally supported IOSCO's proportionate approach to the application of the principles and cautioned against any attempt to find a *one-size-fits-all* approach for the wide and diverse universe of indices and Benchmarks. Many commenters believed that IOSCO should develop principles applicable to equity indices, but most commenters noted that particular Principles were inapplicable or unnecessary for equity indices.

Commenters largely agreed in their observation that certain principles should not apply to equity indices. There was a wide range of responses, however, as to which specific principles were inapplicable to equity indices. Several principles were commonly identified, while other principles were identified by only few commenters. Nearly all principles were mentioned at least once as needing to be revisited if applied to equity indices (not 10 and 15).

Several commenters suggested that IOSCO's question regarding equity indices should be expanded to include other indices based on observable transaction data, such as fixed-income indices. Many commenters proposed a different bifurcation to determine the proportionate treatment of the Principles, proposing categories such as: public data versus survey Benchmarks; objective versus subjective Benchmarks; commercial indices versus survey-based Benchmarks; Benchmarks with a certain market impact versus Benchmarks without; and Benchmarks set by a single estimation or survey versus indices derived in substantial part from market transaction data and/or multi-participant estimation.

Many commenters highlighted the fundamental differences in the production of reference rates and market indices, noting that market indices' reliance on transaction data and operation in a competitive market demanding adequate disclosure and transparency minimized, if not eliminated, the risks of conflicts of interest and manipulation present with reference rates. Numerous commenters expressed the view that commercial indices already adhere to robust standards and codes of conduct, and thus should either be excluded from the principles altogether or permitted to proportionately implement the principles. Many of these commenters believed that existing regulation and voluntary codes of conduct were sufficient for transaction-based indices, which they suggested do not present the same weaknesses and structural concerns of reference rates like the IBORs.

Several commenters identified the diverse ways in which market indices are used by market participants to manage risks, to implement trading strategies, or to measure portfolio performance, and concluded with the view that only Benchmarks used to price financial instruments should be subject to the principles, due to a concern that even a minimal amount of added compliance burden could discourage innovation and competition for these purposes. Numerous commenters suggested that IOSCO revisit the definition of "Benchmark" to clarify the application of the principles to indices that are used for purposes other than pricing financial instruments or contracts. These commenters believed that strategy indices, settlement prices used by clearing firms for risk management purposes, indices used to evaluate returns or performance of portfolios, economic or market sentiment indices, and prices for single instruments should be excluded from the scope of the report by adoption of a narrower definition of "Benchmark."

Consultation Question 2:

Commenters generally supported IOSCO's approach that additional measures should apply to Submitters and Administrators of Submission-based Benchmarks or Benchmarks with specified ownership/control structures. However, a number of commenters did not, however, address question 2. Several commenters stated that the process of data Submission leads to additional risk, especially where the Submitters are market participants with stakes in the level of the Benchmark. Commenters also generally supported IOSCO's approach to proportional implementation of the Principles, taking into account the size and risks posed by each Benchmark Administrator and Benchmark-setting process.

Several commenters argued that the additional measures should not apply to products subject to the PRA Principles. In particular it was noted that additional controls for Submitters (Submitter Code of Conduct) were not identical to those in the PRA Principles. They also argued that the Principles on Financial Benchmarks are seeking to reintroduce provisions that were considered and ultimately rejected in the context of the PRA Principles, in recognition of the voluntary nature of commodity market participants' interactions with PRA price reporting processes.

Some commenters suggested that IOSCO include or clarify the definition of some terms, in order to provide certainty about the scope of the Principles on Financial Benchmarks. These terms included Front Office Functions, Submitters, Submissions and Submissions-based. One commenter argued that for the additional measures to apply, the terms Submitter and Submission should exclude, at a minimum, data reflecting observable transactions and other actual market information.

Several commenters also argued that IOSCO should further refine the definition of Benchmarks to ensure that certain indices are not inadvertently caught. Commenters were primarily

concerned about strategy indices, reference prices produced by central counterparties to measure their positions and exposure, prices discovered on a Regulated Market or Exchange, settlement prices used for clearing, and prices for individual instruments.

Some commenters argued that IOSCO's framework assumes that a transaction-based Benchmark is *per se* more credible and reliable than an estimation-based one without providing a basis for this. Commenters argued that Expert Judgment is necessary and a transaction-based Benchmark cannot replace a well-established IBOR Benchmark. Even where Benchmarks are anchored in observable transactions, Expert Judgment is necessary to filter out unrepresentative market volatility and outlier transaction data. One commenter also criticised IOSCO for not considering the risks associated with transactions-based Benchmarks and suggested that IOSCO should develop a framework for risks associated with transactions-based processes and market rates, whether Submission-based or not.

Consultation question 3

Commenters generally supported IOSCO's approach that additional transparency requirements should apply to Benchmark determinations based on estimates and Expert Judgment. However, a number of commenters did not address question 3.

Many commenters argued that that the underlying methodologies for exercising expert judgement including fall-back provisions and downgrades in the data input hierarchy must be disclosed transparently and in detail.

Several commenters argued that the scope of these requirements should be limited e.g., to large and relevant Benchmarks or Benchmarks that are prone to conflicts of interest or that rely on subjective Submissions.

Several commenters argued that a notice that is Published with each Benchmark determination could be disproportionate and burdensome for administrators and suggested that explanations and standards for the exercise of Expert Judgment should be addressed at the level of the Benchmark Methodology and the Code of Conduct.

One commenter suggested a clarification of the term "concise explanation" which should allow administrators to decide how and when judgment will be used, but not so that every exercise of judgment must be explained and disclosed.

One commenter argued that a Benchmark Administrator would not be able to explain Expert Judgment exercised on the level of the Benchmark Submitter. In addition, detailed explanations could compromise the vital confidentiality of the Submitter inputs.

One commenter suggested that the content and method for the publication of an explanation regarding Expert Judgment should be discussed between the Administrator and the Submitters and should be determined based on the characteristics of each Benchmark.

Consultation Question 4

Overall there is general support for two levels of Principles and for the overarching aims of most of the Principles. The comments received were more technical than arguing the aims and objectives of the Principles.

Some respondents argued that the scope needs to be more focused to clearly define which Benchmarks would fall under the proposed Principles and which would not (e.g., equity indices, CCP reference prices, proprietary Benchmarks). Many definitional issues/revisions were highlighted in addition to revisions of stated Principles

Some respondents are against the Principle which gives hierarchy to transactional data over other inputs (such as bid-offer quotes). These respondents stressed that not all markets are liquid or transparent enough to take into account non-transactional data or Expert Judgment only as a supplement to transactional data.

Generally, the commenters were in support of the Code of Conduct. However, some commenters argued that the Code of Conduct imposed on Submitters should be reconsidered by IOSCO. Given the voluntary nature of most data Submissions, some commenter said the burden would discourage data Submitters. Some commenters also suggested that IOSCO should state that the Code of Conduct applies only if a cost-benefit analysis has been undertaken.

Some respondents suggested that the restriction on Submissions from Front Office Functions (in the code of conduct for Submitters) should be removed since they will have the most expertise and proximity to the underlying interest for a Benchmark. Limiting to non-front office Submissions would adversely impact the quality of the Benchmark. Other controls are adequate to manage the relevant conflicts faced by front office staff.

Some respondents were concerned that the proposed procedures and audits may increase efforts and cost to Submitters of less prominent Benchmarks driving them out of the market. Similarly, there is concern that certain costs such as maintaining an audit trail, may exceed the benefits, and those costs would likely be passed on to investors. Thus, the application of Principles should follow a proportional approach and allow more lead time for adoption.

Some respondents felt that the responsibility of the Benchmark was too concentrated within the administrator's function and that other stakeholders that are also involved in the Benchmark setting process should be held accountable or share the responsibility.

Some commenters said that information about IT policies and human resource are often confidential, which will make it difficult to implement Principles related to disclosing

information on control framework (Principle 4). Similarly, there is the risk that making the methodology publicly available would divulge confidential or proprietary information to competitors.

ANNEX C

Guidance on Principle 9 - Transparency of Benchmark Determinations

The following guidance is based substantially on the guidance that previously was issued in relation to the PRA Principles[28] and also will apply to Principle 9 "Transparency of Benchmark Determinations" in these Principles for Financial Benchmarks.

Question: With respect to judgment referenced throughout the Principles, how detailed should a description of a specific judgment be?

Response:

The focus of Principle 9 is on providing Stakeholders with sufficient information to allow Stakeholders to understand how a determination was developed. Whilst the format of disclosure is within the discretion of the Administrator, the minimum information called for in Principle 9 should be provided with each published Benchmark determination.

Principle 9 contemplates that each published Benchmark determination would identify, and explain the rationale for, the exercise of judgment in each published Benchmark determination. The term *judgment* is illustrated in Principle 9 as being employed in the exclusion of data otherwise conforming to the requirements of the relevant Methodology, in basing a Benchmark determination on spreads, in interpolation or extrapolation, in weighting bids or offers higher than concluded transactions, or, in general, in a more qualitative assessment in the absence of hard data.

With respect to the level of detail needed, the Principles for Financial Benchmarks report makes clear in the introduction that "the application and implementation of the Principles should be proportional to the size and risks posed by each Benchmark and/or Administrator and the benchmarking process."

For example, consistent with the proportionality concept, it would be appropriate for Administrators to develop standard descriptions and rationales for the type of judgments that tend to be exercised in Benchmark determinations and publish those descriptions and rationales as relevant with each Benchmark determination but with a degree of aggregation where appropriate.

Although Administrators may therefore develop disclosures in the most efficient manner, any such disclosures should provide more than the permissive procedures of the methodology. However, a Benchmark that is based exclusively on executable quotes as contemplated by

[28] Frequently Asked Questions (FAQ) on IOSCO Principles for Price Reporting Agencies (Oil PRA FAQ)(March 2013) http://www.iosco.org/library/pubdocs/pdf/IOSCOPD406.pdf supra fn No26

Principle 7 would not need to explain in each determination why it has been constructed with executable quotes, provided there is disclosure in the Methodology.

Benchmarks that regularly publish their Methodologies would satisfy Principle 9 when derived from data sourced from Regulated Markets or Exchanges with mandatory post-trade transparency requirements.

EXHIBIT 299

WHITEPAPER - NOVEMBER 2019

STOXX European Flagship Indices For Overseas Investors

STOXX is synonymous with equity indexing in Europe. The EURO STOXX 50® Index, EURO STOXX® Index and STOXX® Europe 600 Index have for over 20 years provided liquid and effective access to the region's stock market, based on transparent rules and an objective methodology.

A new research paper reviews the profile of these three benchmarks and the range of investment vehicles tracking them. The study examines fundamental characteristics including country and industry exposure, liquidity and tradability, and provides analysis on valuation, dividend yield and performance.

The paper is intended as a comprehensive guide particularly for non-domestic investors looking to reduce home bias and diversify their portfolios into Europe. According to one study, the average weight of domestic equities holdings in the pensions industry of 22 countries fell to 40% in 2018 from 69% in 1998.[1]

[1] Willis Towers Watson, Thinking Ahead Institute, Global Pension Assets Study 2019.

November 2019

STOXX EUROPEAN FLAGSHIP INDICES FOR OVERSEAS INVESTORS

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STOXX | QONTIGO

STOXX EUROPEAN FLAGSHIP INDICES FOR OVERSEAS INVESTORS

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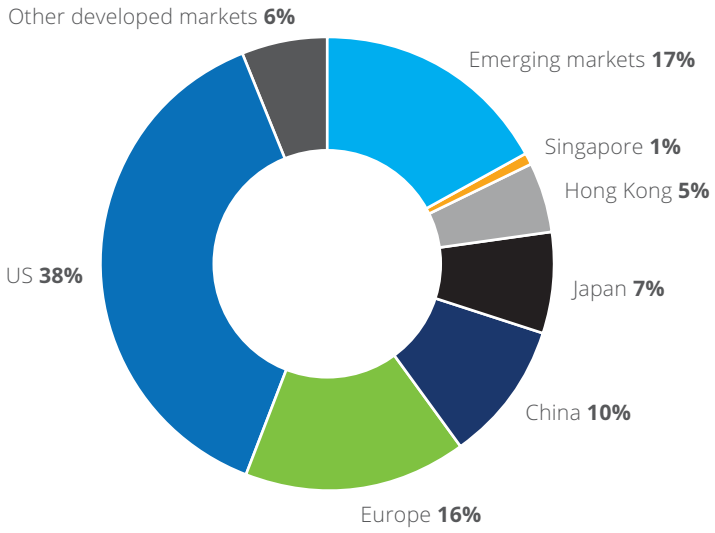
STOXX EUROPEAN FLAGSHIP INDICES FOR OVERSEAS INVESTORS

INTRODUCTION

Europe accounts for approximately 25% of global output[1] and about 16% of the total global equity market capitalization of USD 85 trillion (Figure 1). As a result, the region has an important place in almost all strategic and tactical equity allocations by global/overseas investors. Research shows clear signs of a reduced home bias in equities over the last 10 years, with average domestic allocations falling from 68.7% in 1998 to 40.2% in 2018[2]. STOXX offers efficient and effective access to the European equity market for overseas investors seeking to diversify their portfolios and invest outside their domestic markets thanks to its comprehensive range of investment vehicles based on market-leading indices such as the STOXX® Europe 600, EURO STOXX® and EURO STOXX 50®.

FIGURE 1: Global equity market capitalization



Source: SIFMA – 2019 Outlook | Trends in the Capital Markets

The STOXX® Europe 600 Index is a broad but tradable benchmark for the European equity market. Its comprehensive coverage offers diversified country and industry allocation, replicating the underlying total market. The index captures a good portion of mid- and small cap securities and hence the relative outperformance provided by these securities. The EURO STOXX® Index is the euro-denominated subset of the STOXX® Europe 600 Index that represents nearly 93% of the free-float market capitalization for the euro-denominated total market index. The iconic EURO STOXX 50® Index provides diversified access to the largest supersector leaders within the Eurozone. In this paper, we offer insights into how the three STOXX European flagship indices compares with a few regional domestic benchmarks for overseas equity investors, in some typical characteristics they may consider in their evaluation process.

[1] IMF World Economic Outlook Database, October 2019 data
[2] Thinking Ahead Institute: Global Pensions Assets Study – 2018

STOXX EUROPEAN FLAGSHIP INDICES FOR OVERSEAS INVESTORS

DIVERSIFICATION

In this section, we shall look at the diversification that the three STOXX indices offer, both at the country and the sector level.

COUNTRY PROFILE

The European equity market is highly capitalized; it has a free-float market cap of EUR 9.7 trillion[3] and spans 26 countries within STOXX's coverage universe. It offers overseas investors who wish to express a broad interest in the region, a range of capital allocation opportunities. Since Western Europe accounts for 96% of the region's total market cap as measured by the STOXX® Europe Total Market Index, this geographical segment presents a compelling and inclusive investment opportunity.

FIGURE 2: European STOXX indices – Market coverage

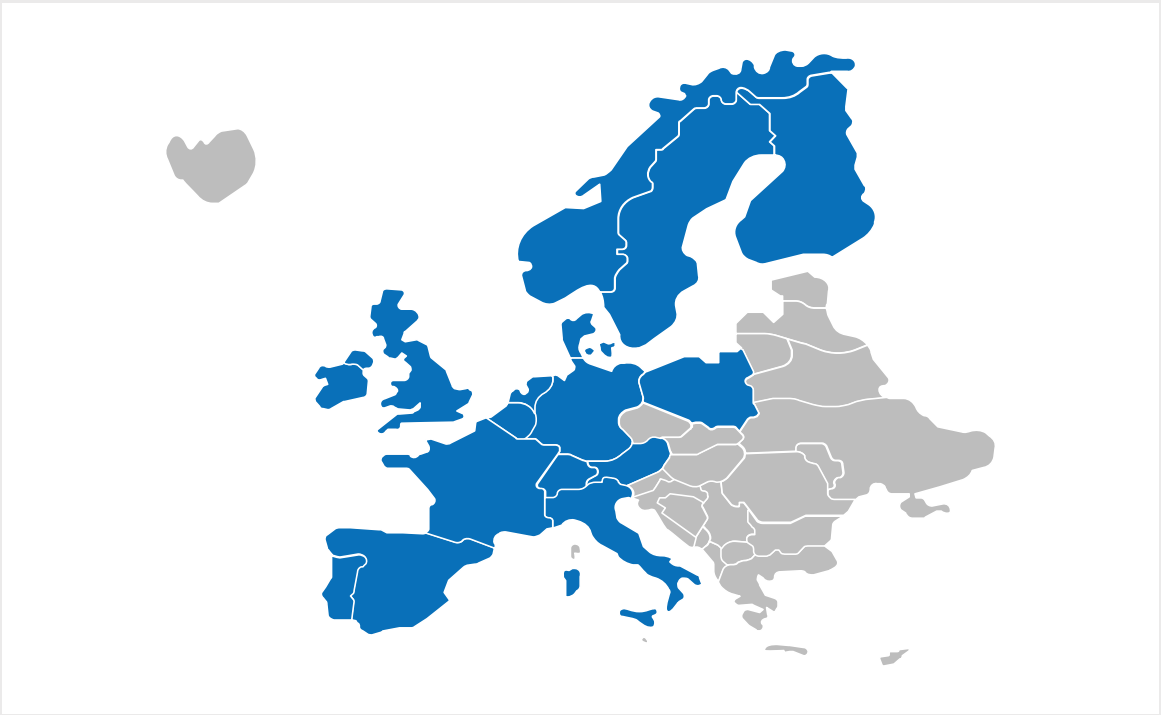
Source: STOXX Ltd. (as of Sep. 30, 2019)

Launched in 1998, the STOXX® Europe 600 Index provides exposure to the 600 largest companies in the narrower subset of 17 European countries that have been classified as developed[4]. At present, this list comprises Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland and the United Kingdom. With a market cap of EUR 8.5 trillion, the STOXX® Europe 600 Index currently accounts for 91% of the broader region's total market cap as represented by the STOXX® Europe Total Market Index. Country classification for the STOXX® Europe 600 Index is based on a STOXX model that uses a rules-based methodology. Factors taken into consideration include macroeconomic data, market capitalization, market liquidity, currency convertibility, restrictions on capital flows and governance.

[3] Source: STOXX All Europe Total Market Index (TMI), as of Sep. 30, 2019
[4] https://www.stoxx.com/documents/stoxxnet/Documents/Resources/Methodology/Country_Classification/stoxx_regional_classification_20190923.pdf

STOXX EUROPEAN FLAGSHIP INDICES FOR OVERSEAS INVESTORS

FIGURE 3: STOXX developed markets – European country coverage



Source: STOXX Ltd.

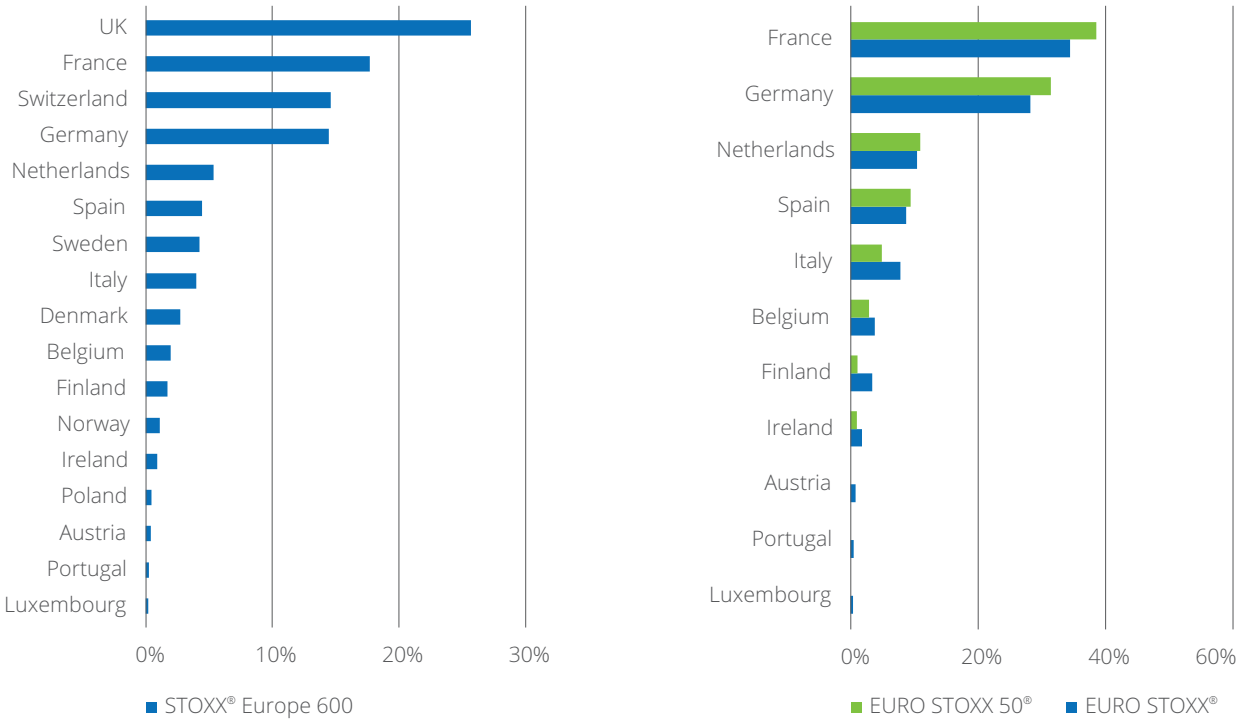
The United Kingdom contributes the most listed companies to the STOXX® Europe 600 Index, representing just over one-quarter of its total market cap (Figure 4). Unsurprisingly, country allocations have changed over time, with new entrants such as Poland, which was admitted in September 2018, and the exclusion of Greece in August 2016.

In light of the continuing uncertainty surrounding Brexit and its impact on UK stocks and the GBP, overseas investors may prefer to eliminate their exposure to GBP and other regional currencies to minimize FX volatility, whilst still reaping the diversification benefits that Europe has to offer. The EURO STOXX® Index offers a solution here that allows overseas investors exposure to just the euro currency. Like other indices, this index is additionally offered as a currency hedged variant that, depending on their views, almost completely eliminates currency risk for overseas investors. The EURO STOXX® Index currently comprises large, mid- and small cap stocks from a total of 11 Eurozone countries: Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal and Spain. With over 300 stocks (as of Sep. 30, 2019), it captures around 93% of the Eurozone's free float market capitalization (as represented by the EURO STOXX® Total Market Index), offering representation across a variety of Eurozone countries and hence providing diversification.

STOXX EUROPEAN FLAGSHIP INDICES FOR OVERSEAS INVESTORS

The EURO STOXX 50® Index is an iconic blue-chip gauge comprising the Eurozone's largest 50 stocks (the supersector leaders). As such, it is a subset of the EURO STOXX® Index, currently including qualifying stocks from eight countries: Belgium, Finland, France, Germany, Ireland, Italy, the Netherlands and Spain. Its components represent around EUR 2.6 trillion in market capitalization, or approximately 60% of the Eurozone's total stock market capitalization as measured by the broader parent index (as of Sep. 30, 2019). France and Germany have the largest allocations in the index, with weights of 39% and 31% respectively (Figure 4).

FIGURE 4: Country weights across STOXX European flagship indices



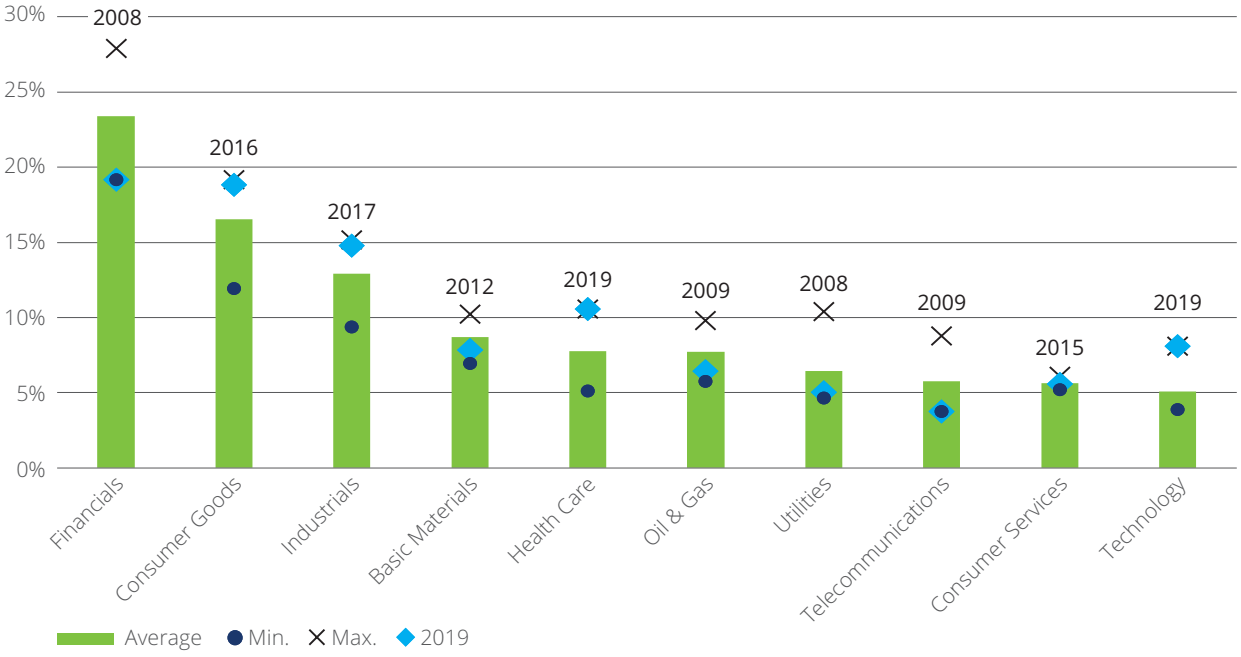
Source: STOXX Ltd. (as of Sep. 30, 2019)

INDUSTRY EXPOSURES

All three STOXX indices – the STOXX® Europe 600, the EURO STOXX® and the EURO STOXX 50® – are well diversified in terms of industry exposures. Financials and Consumer Goods lead the way, accounting for an aggregate of more than 35% of each index. Like country weights, the historical industry composition has also changed over time, with the allocation to Financials decreasing significantly from highs of 28% (average across the three indices) prior to the onset of the global financial crisis to the current allocation of 19% (Figure 5). Conversely, both the Health Care and Technology sectors have seen steady increases over the same observation period and are currently at historical highs.

STOXX EUROPEAN FLAGSHIP INDICES FOR OVERSEAS INVESTORS

FIGURE 5: Evolution of ICB sector weights over time (data points are averages across STOXX® Europe 600, EURO STOXX® and EURO STOXX 50®)



Source: STOXX Ltd.

The industry allocations represented by these indices offer significant diversification benefits in relation to selected regional markets, and in many instances allow overseas investors to make tactical and strategic sector plays on the back of relatively concentrated home market exposures. For instance, with a weight of 21% the S&P 500 has a comparatively large allocation to Information Technology stocks, in contrast to the STOXX European indices where the figure is between 5% and 9%. The Straits Times Index has zero exposure to Energy, Health Care, Materials and Utility stocks, categories that account for 4%–13% of the STOXX European indices. Additionally, the Straits Times Index, the Hang Seng and the S&P/ASX 200 have a sizeable allocation to Financials, which accounts for over 25% of each index (Figure 6).

STOXX EUROPEAN FLAGSHIP INDICES FOR OVERSEAS INVESTORS

FIGURE 6: Sector allocations for various regional indices, converted to the Global Industry Classification Standard (GICS) for comparison. Darker shades of green represent comparatively larger sector concentrations for specific indices relative to their counterparts.

	Europe			Americas		Asia Pacific			
GICS sectors	STOXX® Europe 600	EURO STOXX®	EURO STOXX50®	S&P 500	S&P/TSX	TOPIX	Straits Times	S&P/ASX 200	Hang Seng
Consumer Discretionary	12.9%	18.4%	19.7%	10.0%	4.8%	19.5%	4.3%	6.1%	3.5%
Consumer Staples	14.0%	12.1%	15.1%	7.8%	5.1%	8.8%	10.9%	5.0%	1.6%
Energy	6.3%	4.6%	5.4%	4.1%	15.3%	0.8%	0.0%	4.9%	11.1%
Financials	16.5%	14.7%	14.3%	12.8%	31.5%	10.0%	30.0%	26.4%	46.5%
Health Care	12.5%	7.7%	6.9%	12.8%	1.4%	8.5%	0.0%	9.8%	1.2%
Industrials	13.6%	14.1%	12.3%	9.0%	11.4%	20.6%	28.4%	7.6%	4.0%
Information Technology	5.1%	7.6%	8.9%	21.1%	4.8%	11.7%	0.8%	2.4%	0.8%
Materials	7.9%	6.9%	7.3%	2.5%	10.4%	6.1%	0.0%	23.6%	0.0%
Real Estate	1.9%	2.3%	0.0%	2.8%	4.3%	2.6%	15.4%	8.1%	9.2%
Communication Services	4.7%	5.0%	5.2%	13.9%	5.4%	10.1%	10.2%	4.4%	19.1%
Utilities	4.6%	6.6%	4.8%	3.1%	5.5%	1.4%	0.0%	1.7%	3.0%

Source: STOXX Ltd., Bloomberg (as of Sep. 30, 2019)

Energy stocks are poorly represented in Japan's TOPIX Index, where they account for less than 1%, whereas they have exposures of between 4.6% and 6.3% in the three STOXX European indices.

ACCESSIBILITY

We look at the liquidity profile of the index and its tradability while evaluating accessibility to the three indices.

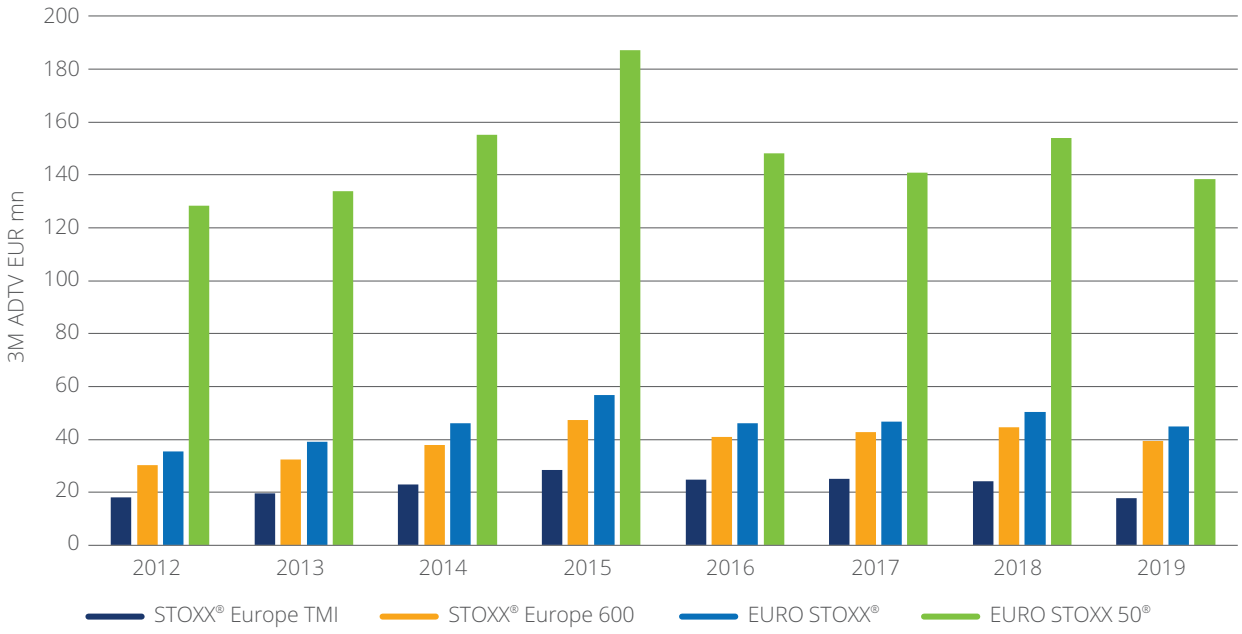
LIQUIDITY

Equity markets typically display a positive correlation between company size and the liquidity or turnover of the company's shares. The addition of a minimum liquidity threshold for inclusion of stocks in the STOXX® Europe 600 and consequently that of the EURO STOXX® and EURO STOXX 50® indices, which are derived from it, significantly improves the liquidity profile of these indices relative to the broader STOXX® Europe Total Market Index (Figure 7). Typically, the following liquidity criteria are applied:

» For each company only the most liquid stock is considered
» Stocks must have a minimum liquidity of greater than one million EUR measured by 3-month average daily trading value (ADTV)

STOXX EUROPEAN FLAGSHIP INDICES FOR OVERSEAS INVESTORS

FIGURE 7: Yearly average 3M ADTV



Source: STOXX Ltd., Bloomberg

TRADABILITY

There is a range of investment vehicles such as Exchange-Traded Funds (ETFs), exchange-traded derivatives (futures & options) linked to the three STOXX European Indices. These investment vehicles provide accessibility and tradability to the European markets and thus widen their appeal to overseas investors.

ETFs

ETFs provide broad market access through a single trade at a comparatively lower cost than other strategies. The rise of passive investing has seen these vehicles increase in popularity over the years with an estimated USD 5.6 trillion of assets invested in the Global ETF industry. There are over 1,700 European listed ETFs that currently account for USD 870 billion of this total, which represents a CAGR of 14.4% within the last 10 years (Figure 8). Equity funds, unsurprisingly hold the majority of the assets, followed by bond funds.

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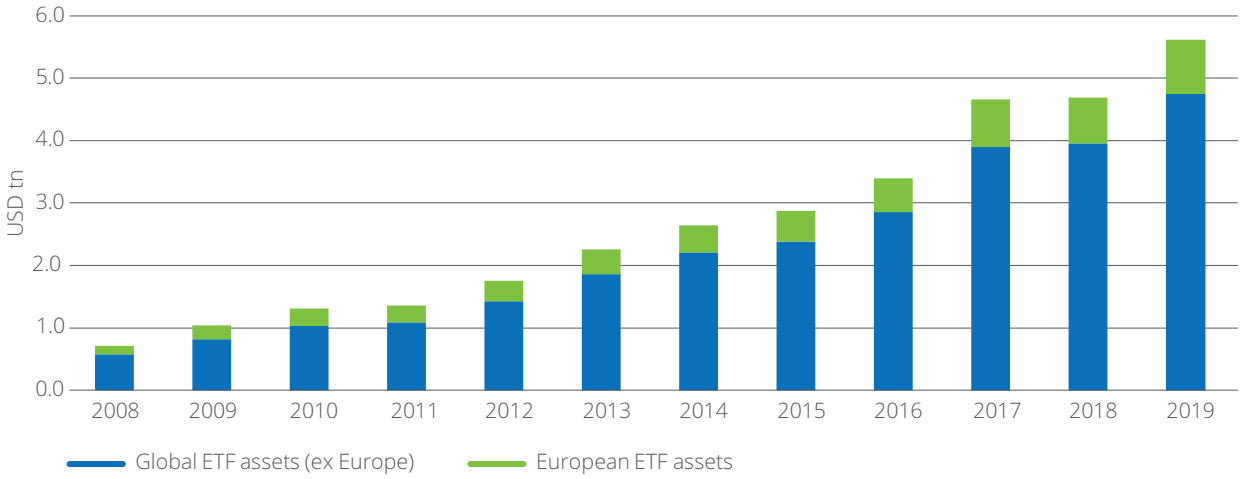
FIGURE 8: Growth of ETF assets (2008 – 2019)



Source: etfgi.com

The first ETF launched on the STOXX® Europe 600 was in June 1998, which also marked STOXX's first related ETF product. Since then, the total assets tracking the index and its variants has grown to over EUR 18 billion (Figure 9). In 2000, the first ETF products to track the EURO STOXX® and the EURO STOXX 50® index were launched and these indices along with their variants have since amassed over EUR 40 billion in assets under management (AUM). There is now more than EUR 60 billion in AUM across 200 ETF products tracking STOXX European based indices.

FIGURE 9: ETF AUM across EURO STOXX 50®, STOXX® Europe 600, EURO STOXX® and other European based STOXX indices[5]

	AUM EUR mn	% total index assets	% total regional assets
STOXX® Europe 600 & Variants	**18,178**		
STOXX® Europe 600	10,401	57%	16%
STOXX® Europe 600 Oil & Gas	985		
STOXX® Europe 600 Health Care	967		
STOXX® Europe 600 Banks	920		
EURO STOXX® & Variants	**7,041**		
EURO STOXX®	1,844	26%	3%
EURO STOXX® Select Dividend 30	1,929		
EURO STOXX® Banks 30 –15	1,089		
EURO STOXX® Small	551		
EURO STOXX 50® & Variants	**33,890**		
EURO STOXX 50®	32,823	97%	52%
EURO STOXX 50® Daily Short	665		
EURO STOXX 50® Daily Leverage	114		
EURO STOXX 50® Daily Double Short	106		
Europe based other	**4,275**		
STOXX® Europe 50	1,294		
STOXX® Europe Select Dividend 30	888		
STOXX® Europe Small 200	450		
	63,383		

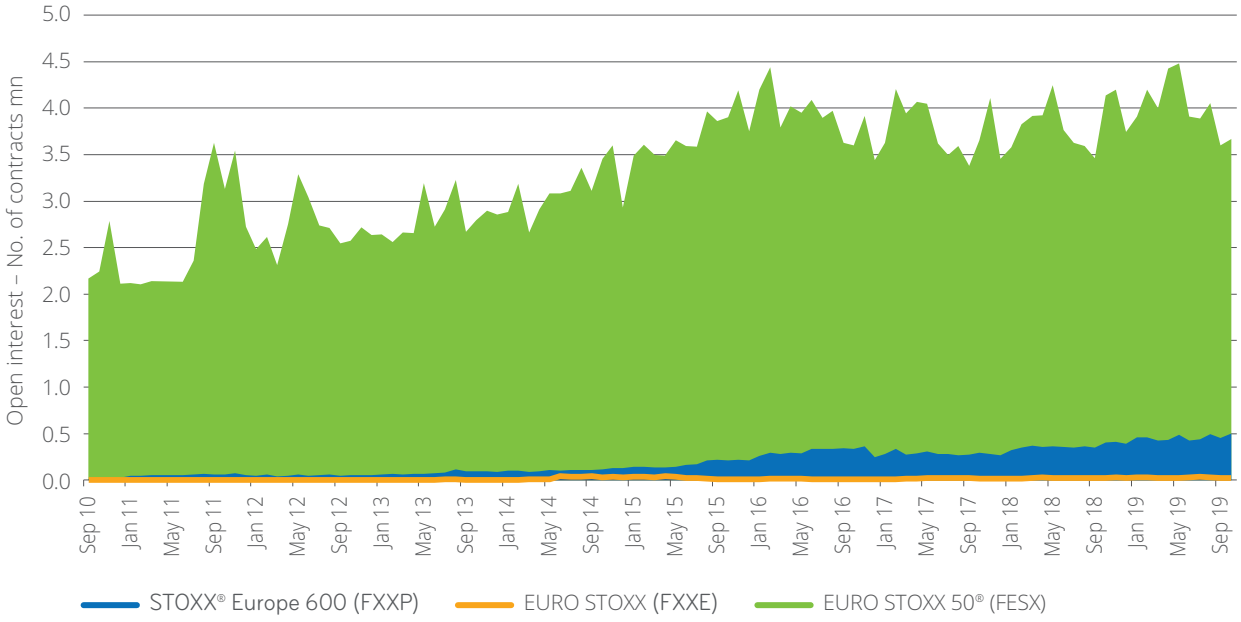
[5] Only top 3 variants of each index are shown.
Source: STOXX Ltd., Lipper (as of Sep. 30, 2019)

STOXX EUROPEAN FLAGSHIP INDICES FOR OVERSEAS INVESTORS

Exchange-traded derivatives

Futures and options on the EURO STOXX 50® index, traded on Eurex, are among the most liquid of such products in Europe and the world. Eurex lists futures and options on all 19 EURO STOXX®/STOXX® Europe 600 ICB sectors, providing investors direct access to European economic sectors, most importantly banks, insurance, and oil & gas. As evident from Figure 10, trading futures (and options, although not shown in the figure) on this index family is proving increasingly popular with investors looking for a benchmark with a broader European representation.

FIGURE 10: Futures open interest of STOXX European flagship indices



Source: Eurex

The considerable growth of ESG investing has created demand for sophisticated or diversified index concepts that incorporate sustainability measures to existing benchmarks, ETFs and derivatives to versions that reflect these sustainability factors. Europe is at the forefront of this trend, accounting for nearly half of total global assets managed under sustainable investment strategies with USD 14 trillion[6]. To address this increasing demand, this year marked the launch of both ETFs and derivatives contracts on the ESG versions of the STOXX® Europe 600 and EURO STOXX 50®. Overseas investors are now presented with a range of solutions to help achieve their ESG objectives.

[6] Source: Global Sustainable Investment Review 2018, 2016 and 2014

STOXX EUROPEAN FLAGSHIP INDICES FOR OVERSEAS INVESTORS

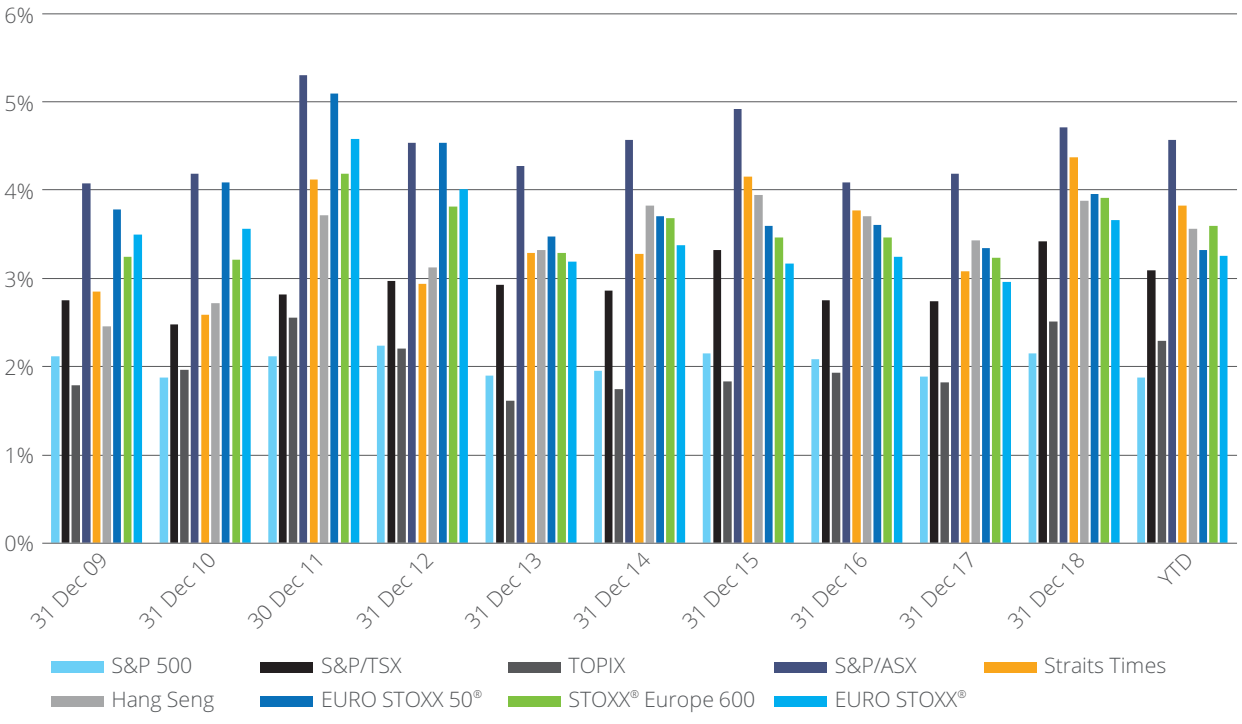
FUNDAMENTALS

Although we understand that there may be many other different (distinct or combination of) metrics, for the sake of simplicity we consider dividend yields from an income perspective, and price/earnings (P/E) ratio to assess the valuation of the indices.

DIVIDEND YIELDS

Given the prevailing economic environment of very low interest rates, stock dividends are often looked at to provide an additional source of portfolio returns and income. The STOXX European indices at present offer dividend yields between 3.3% – 3.6% and have collectively averaged 3.7% over the last 10 years on a trailing basis. This presents an attractive investment opportunity (from an income perspective), in particular for Canadian and American investors where their domestic equity markets as measured by the S&P/TSX and S&P 500 have offered 2.9% and 2.0% respectively on average over the same investment horizon. Asian markets are more heterogenous with respect to dividend yields, Japanese investors over the same time period have averaged dividend yields of 2% whereas its regional counterparts have seen yields on average in the range of 3.5% – 4.6%.

FIGURE 11: Dividend yields on offer across regional indices



Source: STOXX Ltd., Bloomberg

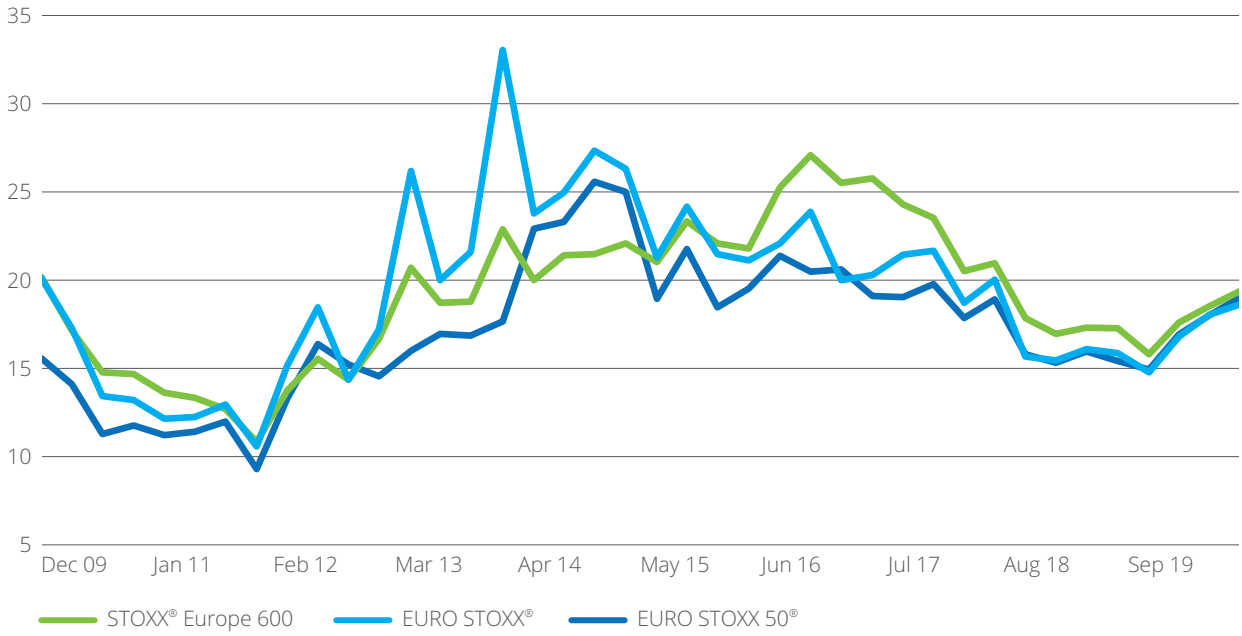
STOXX EUROPEAN FLAGSHIP INDICES FOR OVERSEAS INVESTORS

VALUATIONS

Although the current valuations of European indices (as measured by P/E ratio) are comparable or in cases appear more expensive relative to other domestic markets for overseas investors, STOXX European indices have actually cheapened since 2016 based on P/E ratios, on the back of growth concerns in Europe and Brexit uncertainty.

At current levels, research from some sell-side firms seems to suggest a favorable entry point for overseas investors in anticipation of a bounce back in economic growth and earnings, and/or supplemented by more easing as witnessed in the latest round of ECB rate cuts and continuation of the monetary stimulus.

FIGURE 12: Historical P/E ratios



Source: STOXX Ltd., Bloomberg

FIGURE 13: Fundamental analysis: December 2015 – October 2019

	P/E				Price/book			
	Current	Average	Min.	Max.	Current	Average	Min.	Max.
STOXX® Europe 600	20.15	20.67	15.80	25.26	1.88	1.79	1.60	1.88
EURO STOXX®	19.62	18.72	14.76	22.08	1.68	1.58	1.41	1.70
EURO STOXX 50®	20.02	18.22	14.93	21.37	1.77	1.58	1.45	1.77
S&P 500	20.39	19.59	16.51	21.74	3.45	3.07	2.76	3.45
S&P/TSX	17.06	19.15	16.38	21.95	1.79	1.76	1.57	1.90
TOPIX	14.88	15.62	12.75	18.28	1.23	1.25	1.10	1.36
Straits Times	12.18	12.20	11.07	13.26	1.09	1.11	1.06	1.19
S&P/ASX	19.62	18.66	15.39	22.85	2.16	1.96	1.82	2.16
Hang Seng	10.84	11.25	10.09	12.39	1.22	1.22	1.16	1.37

Source: STOXX Ltd., Bloomberg

STOXX EUROPEAN FLAGSHIP INDICES FOR OVERSEAS INVESTORS

PERFORMANCE

Measured over the last 10 years, the STOXX European indices have posted strong returns between 7% – 9% on an annualized basis in EUR terms, which is mostly in line with what some of the Asian counterparts covered in this paper have delivered in their respective local currencies. In contrast, the S&P 500 has posted annualized returns of 13.65% during this timeframe, compared to just 7.30% for its regional Canadian equivalent, the S&P/TSX in CAD terms.

Within the last year, the STOXX European indices have delivered strong positive returns in the range of 14% – 17% in EUR terms, despite the ongoing uncertainty around Brexit. The 17% gain of the EURO STOXX 50® has only been exceeded by the S&P ASX 200 across all regions that we have compared, posting 19% in its local currency. Japanese stocks as tracked by the TOPIX have significantly lagged behind all other markets, recording just 4%.

FIGURE 14: Performance analysis for period from 31 October 2009 – 31 October 2019

	Europe			Americas		Asia Pacific			
	STOXX® Europe 600	EURO STOXX®	EURO STOXX 50®	S&P 500	S&P/ TSX	TOPIX	Straits Times	S&P ASX 200	Hang Seng
Gross returns (USD)									
Return overall (ann.)	6.0%	4.9%	3.9%	13.6%	5.2%	6.7%	5.7%	5.5%	5.7%
Return 1Y (ann.)	12.1%	12.2%	15.2%	14.3%	13.2%	8.7%	13.2%	16.1%	11.6%
Return 3Y (ann.)	9.6%	9.7%	10.0%	14.8%	7.5%	7.5%	9.3%	8.9%	9.0%
Return 5Y (ann.)	4.4%	5.3%	4.2%	10.7%	2.3%	7.6%	2.2%	3.3%	5.8%
Volatility overall (ann.)	18.4%	21.3%	22.6%	14.8%	16.5%	18.1%	14.5%	19.2%	18.0%
Volatility 1Y (ann.)	13.4%	14.6%	14.8%	15.7%	11.6%	15.3%	12.2%	13.7%	16.8%
Volatility 3Y (ann.)	11.7%	13.1%	13.4%	12.9%	11.3%	14.3%	11.8%	13.3%	15.8%
Volatility 5Y (ann.)	15.2%	16.5%	17.4%	13.5%	14.9%	17.0%	13.4%	17.0%	17.5%
Gross returns (local currency)									
Return overall (ann.)	9.0%	7.9%	6.8%	13.6%	7.3%	8.7%	5.4%	8.3%	5.8%
Return 1Y (ann.)	13.7%	13.9%	16.9%	14.3%	13.2%	3.9%	11.2%	19.2%	11.6%
Return 3Y (ann.)	9.0%	9.1%	9.4%	14.8%	6.8%	8.6%	8.5%	12.5%	9.3%
Return 5Y (ann.)	6.9%	7.8%	6.7%	10.7%	5.5%	6.8%	3.4%	8.4%	6.1%
Volatility overall (ann.)	16.0%	18.4%	19.8%	14.8%	12.0%	19.1%	12.3%	13.8%	17.9%
Volatility 1Y (ann.)	12.6%	13.7%	13.9%	15.7%	9.2%	15.9%	11.0%	11.6%	16.6%
Volatility 3Y (ann.)	11.0%	12.0%	12.5%	12.9%	8.7%	14.7%	10.7%	10.7%	15.7%
Volatility 5Y (ann.)	15.4%	16.5%	17.5%	13.5%	11.0%	18.4%	11.9%	13.0%	17.4%

Source: STOXX Ltd., Bloomberg

The STOXX European indices can offer additional diversification benefits, especially from an Asian perspective, given their very low correlations to these markets (Figure 15). Measured based on daily returns, correlation figures range from as low as 0.24 (TOPIX) to a maximum of 0.63 (S&P 500).

STOXX EUROPEAN FLAGSHIP INDICES FOR OVERSEAS INVESTORS

FIGURE 15: Correlations analysis for period from 31 October 2009 – 31 October 2019 (daily local currency returns)

	STOXX® Europe 600	EURO STOXX®	EURO STOXX 50®	S&P 500	S&P/ TSX	TOPIX	Straits Times	S&P ASX 200	Hang Seng
STOXX® EUROPE 600		0.97	0.96	0.62	0.58	0.28	0.46	0.35	0.41
EURO STOXX®	-		0.99	0.63	0.58	0.26	0.43	0.31	0.38
EURO STOXX 50®	-	-		0.62	0.56	0.24	0.41	0.29	0.36
S&P 500	-	-	-		0.74	0.15	0.27	0.19	0.22
S&P/TSX	-	-	-	-		0.18	0.33	0.26	0.27
TOPIX	-	-	-	-	-		0.46	0.52	0.47
Straits Times	-	-	-	-	-	-		0.55	0.67
S&P ASX 200	-	-	-	-	-	-	-		0.56
Hang Seng	-	-	-	-	-	-	-	-	

Source: STOXX Ltd., Bloomberg

CONCLUSION

Through the range of investment vehicles available on the STOXX® Europe 600, EURO STOXX® and EURO STOXX 50® indices, STOXX offers highly accessible alternatives for overseas investors looking to allocate capital into European equity markets. The STOXX® Europe 600, with its broader coverage both in terms of geography and stock selection provides a mechanism for accessing over 90% of the market capitalization of Western Europe. Overseas investors looking to limit their exposure to a number of currencies whilst still reaping the diversification benefits the region has to offer, may do so via the EURO STOXX® index, which represents small-, mid- and large cap stocks within the economically significant eurozone area. Given the uncertainty around Brexit and the resulting volatility in the GBP, and the recent efforts by ECB to spur growth, this may present a more attractive alternative. The iconic EURO STOXX 50® which represents supersector leaders, provides overseas investors that wish to express a view on blue chip stocks within the eurozone, an efficient and highly liquid means to do so.

The industry allocation represented by these indices offer further diversification benefits and allow overseas investors to express tactical and strategic sector plays on the back of relatively concentrated home market exposures. In comparisons to the other regional indices covered in this analysis where some sector allocations exceed 40%, no single industry within the STOXX® Europe 600, EURO STOXX® or EURO STOXX 50® accounts for more than 20%.

Overseas investors looking to gain access to European stock markets have a plethora of investment vehicles linked to STOXX indices to choose from, including ETFs, listed futures and options. Sectoral subsets of the indices are also available via similar investment vehicles. At present, there are currently over EUR 60 billion in assets across 200 ETF products tracking various STOXX European indices. Additionally, the futures and options on the EURO STOXX 50® index, traded on Eurex, are among the most liquid of such products in Europe and the world. This year has seen the addition of both ETFs and derivatives based on the ESG versions of the STOXX® Europe 600 and EURO STOXX 50® that address the increasing demand from investors for such sustainable investment products.

STOXX EUROPEAN FLAGSHIP INDICES FOR OVERSEAS INVESTORS

The STOXX® Europe 600, EURO STOXX® and EURO STOXX 50® have offered relatively consistent dividend yields over the last 10 years on a trailing basis, providing an additional source of portfolio returns and income for investors. These indices have also delivered strong positive returns over the last year, in the range of 14% – 17% in EUR terms, despite the ongoing uncertainty around Brexit. With the ECB providing a monetary boost by stating that it expects to keep rates at "present or lower levels" until inflation converges nearer to its 2% target and the resumption of its asset-purchase program, stocks in the region are likely to benefit further. This is a view that has also been supported by sell-side research houses.

Given the low correlations to other regional markets, strong performance over the last year and ease of accessibility via a range of investment vehicles, non-domestic investors looking to reduce home bias and diversify their portfolios are likely to find STOXX European indices supportive of their investment objectives.

STOXX EUROPEAN FLAGSHIP INDICES FOR OVERSEAS INVESTORS

About STOXX Ltd.

STOXX Ltd. is a global index provide that currently calculates a global, comprehensive index family of over 10,000 strictly rules-based and transparent indices. Best known for the leading European equity indices EURO STOXX 50®, STOXX® Europe 50 and STOXX® Europe 600, STOXX Ltd. maintains and calculates the STOXX Global index family which consists of total market, broad and blue-chip indices for the Americas, Europe and Asia/Pacific regions and the Latin America and BRIC (Brazil, Russia, India and China) sub-regions, as well as global markets.

To provide market participants with optimal transparency, STOXX indices are classified into four categories. Regular “STOXX” indices include all standard, theme and strategy indices that are part of STOXX’s integrated index family and follow a strict rules-based methodology. The “iSTOXX” brand typically comprises less standardized index concepts that are not integrated in the STOXX Global index family, but are nevertheless strictly rules-based. While “STOXX” and “iSTOXX” brand indices are developed by STOXX for a broad range of market participants, the “STOXX Customized” brand covers indices that are specifically developed for clients and do not include the STOXX brand in the index name. STOXX uses the Omnient brand to offer custom indices from its existing index universe.

STOXX indices are licensed to more than 600 companies around the world as underlyings for Exchange Traded Funds (ETFs), futures and options, structured products and passively managed investment funds. Three of the top ETFs in Europe and approximately 25% of all assets under management are based on STOXX indices. STOXX Ltd. holds Europe's number one and the world's number two position in the derivatives segment.

Since September 2019 STOXX is part of Qontigo.

Qontigo is a financial intelligence innovator and a leader in the modernization of investment management, from risk to return. The combination of the company’s world-class indices and best-of-breed analytics, with its technological expertise and customer-driven innovation enables its clients to achieve competitive advantage in a rapidly changing marketplace. Qontigo’s global client base includes the world’s largest financial products issuers, capital owners and asset managers. Created in 2019 through the combination of STOXX, DAX and Axioma, Qontigo is part of Deutsche Börse Group, head-quartered in Eschborn with key locations in New York, Zug and London.

Qontigo’s index provider STOXX is part of Deutsche Börse Group, and the administrator of the DAX indices under the European Benchmark Regulation.

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EXHIBIT 300

2023

INVESTMENT COMPANY Fact Book

A Review of Trends and Activities in the Investment Company Industry

INVESTMENT COMPANY INSTITUTE®

www.icifactbook.org

2022 Facts at a Glance

Total worldwide assets invested in regulated open-end funds:* $60.1 trillion			
United States	Europe	Asia-Pacific	Rest of the world
$28.6 trillion	**$19.1 trillion**	**$9.1 trillion**	**$3.4 trillion**

US-registered investment company total net assets: $28.9 trillion			
Mutual funds	Exchange-traded funds	Closed-end funds	Unit investment trusts
$22.1 trillion	**$6.5 trillion**	**$252 billion**	**$73 billion**

US-registered investment companies' share of:				
US corporate equity	US and foreign corporate bonds	US Treasury and government agency securities	US municipal securities	Commercial paper
33%	**23%**	**12%**	**27%**	**17%**

US household ownership of US-registered funds				
Number of households owning funds	Number of individuals owning funds	Percentage of households owning funds	Median mutual fund assets of mutual fund–owning households	Median number of mutual funds owned
71.7 million	**120.5 million**	**54.7%**	**$125,000**	**3**

US retirement market		
Total retirement market assets	Percentage of households with tax-advantaged retirement savings	DC plan and IRA assets invested in mutual funds
$33.6 trillion	**72%**	**$10.1 trillion**

* Regulated open-end funds include mutual funds, exchange-traded funds (ETFs), and institutional funds.

2023

INVESTMENT COMPANY Fact Book

A Review of Trends and Activities
in the Investment Company Industry

The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long term individual investor. Its members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in Europe, Asia, and other jurisdictions. ICI has offices in Washington, DC, Brussels, London, and Hong Kong and carries out its international work through ICI Global.

Sixty-third edition

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2023

INVESTMENT COMPANY Fact Book

A Review of Trends and Activities in the Investment Company Industry

INVESTMENT COMPANY INSTITUTE®

www.icifactbook.org

Contents

Appendices

Letter from the Chief Economist

Each year, ICI's *Investment Company Fact Book* seeks to bring you a wealth of data about and an update on our industry. Producing the book is a labor of love, requiring the effort of virtually everyone in ICI's Research Department and Strategic Communications Department. It also depends critically on ICI member firms, who provide so much of the data. The process starts anew for next year's version almost as soon as the ink is dry on this year's. The effort is worth it, however, as we receive many comments from the media, regulators, academics, legislators, and industry professionals about the importance of the *Fact Book* as a necessary resource.

Speaking of ink drying (or, in this case, not drying), we are going paperless with ICI's *2023 Fact Book*. We have long considered such a change. But now, as the fund industry encourages Congress to pass legislation related to e-delivery, it seems especially appropriate for our *Fact Book* to walk the walk. Equally

important, shifting to a paperless *Fact Book* will free up resources we can devote to enhancing users' experiences. As an example, our *Fact Book: Quick Facts Guide*—which we *are* printing for ICI's 2023 Leadership Summit—provides a snapshot of key facts. It also features QR codes that will take you to the *Fact Book* itself and to our comprehensive data tables (which now include even more historical data), making them just a "snapshot" away. Stay tuned and let us know how we can continue to tailor the *Fact Book* for today's audience.

In sum, we hope you will find this 63rd edition of the *Fact Book* as informative as ever. It has come a long way from the first edition, which was little more than a pamphlet—about the length of this year's *Quick Facts Guide*—to the vast compendium of industry statistics it is today.

Best regards,

Sean Collins
Chief Economist

ICI Research Publications

ICI is the primary source of analysis and statistical information about the investment company industry. In addition to the annual *Investment Company Fact Book*, the Institute's Research Department released more than 300 papers, statistical reports, and *ICI Viewpoints* posts in 2022. You can find all this content at **www.icifactbook.org/22-research.html**.

ICI Senior Research Staff

Chief Economist

Sean Collins leads the Institute's Research Department. He oversees statistical collections and research on US and global funds, financial markets, the US retirement market, financial stability, and investor demographics. Before joining ICI in 2000, Collins worked at the US Federal Reserve Board of Governors and the Reserve Bank of New Zealand. He is a member of the Group of Economic Advisors (GEA) to the European Securities and Markets Authority (ESMA). He has a PhD in economics from the University of California, Santa Barbara, and a BA in economics from Claremont McKenna College.

Senior Director of Industry and Financial Analysis

Rochelle (Shelly) Antoniewicz leads the Institute's research efforts on the structure and trends of the exchange-traded fund and mutual fund industries, as well as on financial markets in the United States and globally. Before joining ICI, Antoniewicz spent 13 years at the Federal Reserve Board of Governors. She earned a BA in management science from the University of California, San Diego, and an MS and PhD in economics from the University of Wisconsin–Madison.

Senior Director of Retirement and Investor Research

Sarah Holden leads the Institute's research efforts on retirement and tax policy, as well as investor demographics and behavior. Holden, who joined ICI in 1999, heads efforts to track trends in household retirement saving activity and ownership of funds, as well as other investments inside and outside retirement accounts. Before joining ICI, Holden served as an economist at the Federal Reserve Board of Governors. She has a PhD in economics from the University of Michigan and a BA in mathematics and economics from Smith College.

Senior Director of Statistical Research

Judy Steenstra oversees the collection and publication of weekly, monthly, quarterly, and annual data on open-end mutual funds, as well as data on closed-end funds, exchange-traded funds, unit investment trusts, and the worldwide fund industry. Steenstra joined ICI in 1987 and was appointed director of statistical research in 2000. She has a BS in marketing from The Pennsylvania State University.

Acknowledgments

Publication of the *2023 Investment Company Fact Book* was directed by James Duvall, economist, and Judy Steenstra, senior director of statistical research, working with ICI's Strategic Communications Department. Contributors from ICI's Research Department who developed and edited analysis, text, and data are Irina Atamanchuk, Steven Bass, Michael Bogdan, Alex Johnson, Sheila McDonald, Hammad Qureshi, Doug Richardson, Casey Rybak, Dan Schrass, and Shane Worner.

Data Tables

The statistical data tables for the *2023 Investment Company Fact Book* are available online as Excel files. The data tables contain historical information (e.g., total net assets and number of funds) on US mutual funds, exchange-traded funds, closed-end funds, and unit investment trusts, as well as information on worldwide regulated open-end funds. This year we have expanded the data tables by adding more historical data.

LEARN MORE

2023 Fact Book Data Tables

www.icifactbook.org/23-fb-data-tables.html

Methods and Assumptions

The following methods, unless otherwise specified, apply to all data in this book:

- Data for US-registered investment companies only include those that report statistical information to the Investment Company Institute. Assets of these companies are at least 98 percent of industry assets.
- Funds of funds are excluded from the data to avoid double counting.
- Dollars and percentages may not add to the totals presented because of rounding.
- Data for US-registered investment companies include exchange-traded funds that are not registered under the Investment Company Act of 1940.
- Long-term funds include equity funds, hybrid funds, and bond funds.

Data are subject to revision. Although information or data provided by independent sources is believed to be reliable, the Investment Company Institute is not responsible for its accuracy, completeness, or timeliness. Opinions expressed by independent sources are not necessarily those of the Institute. If you have questions or comments about this material, please contact the source directly.

CHAPTER

1

Worldwide Regulated Open-End Funds

Investors around the world have historically demonstrated strong demand for regulated open-end funds (referred to in this chapter as regulated funds). In the past decade, worldwide net sales of regulated funds have totaled $18.8 trillion, and fund providers have expanded the vast array of choices, offering investors more than 137,000 regulated funds. However, demand for regulated funds weakened considerably in 2022—several macroeconomic and geopolitical events contributed to a sharp decrease in net sales and a 15 percent decline in total net assets. By year-end 2022, regulated funds managed $60.1 trillion in total net assets.

IN THIS CHAPTER

What Are Regulated Funds?

The International Investment Funds Association (IIFA) defines regulated funds as collective investment pools that are substantively regulated, open-end investment funds.* Open-end funds generally are defined as those that issue new fund shares (or units) and redeem existing shares (or units) on demand. Such funds are typically regulated with respect to disclosure; the form of organization (for example, as either corporations or trusts); custody of fund assets; minimum capital; valuation of fund assets; and restrictions on fund investments (such as limits on leverage, types of eligible investments, and diversification of portfolio investments).

In the United States, however, regulated funds include not only open-end funds (mutual funds and exchange-traded funds [ETFs]), but also unit investment trusts and closed-end funds.† In Europe, regulated funds include Undertakings for Collective Investment in Transferable Securities (UCITS)—ETFs, money market funds, and other categories of similarly regulated funds—and alternative investment funds, commonly known as AIFs.

In many countries, regulated funds may also include institutional funds (funds that are restricted to being sold to a limited number of non-retail investors), funds that offer guarantees or protection of principal (those that offer a formal, legally binding guarantee of income or capital), and open-end real estate funds (funds that invest directly in real estate to a substantive degree).

At year-end 2022, fund providers globally offered 137,892 regulated funds (Figure 1.1). Europe had the largest number of regulated funds with 44 percent of the total, while equity funds were the most common type of regulated funds (34 percent), followed by balanced/mixed funds (25 percent), which also hold equities in their portfolios.

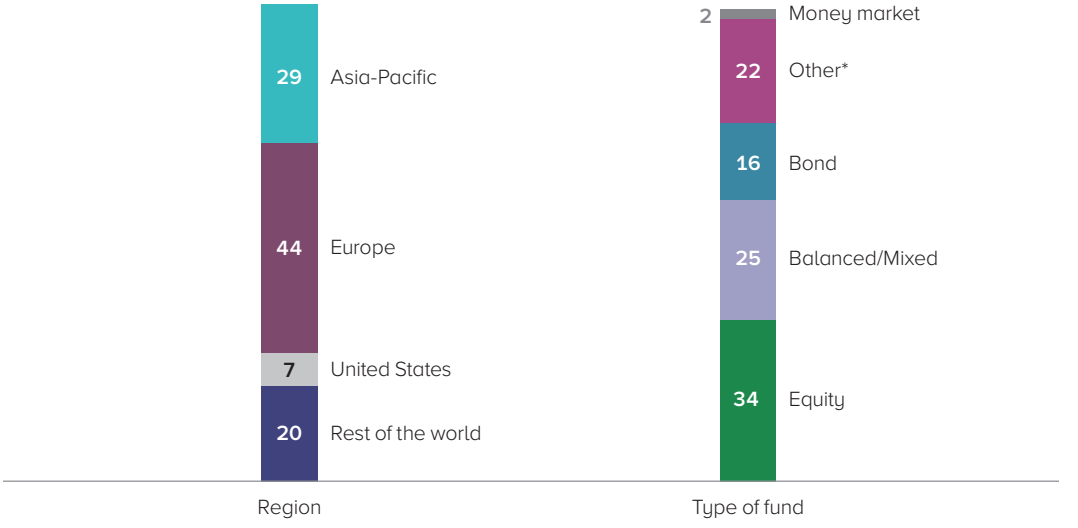
* The primary data source for worldwide regulated funds is the IIFA. In 2022, the IIFA collected data on worldwide regulated funds from 46 jurisdictions. For information on individual jurisdictions, see the statistical data tables available online at **www.icifactbook.org/23-fb-data-tables.html**. For more details about the IIFA data collection, see Worldwide Definitions of Terms and Classifications at **www.ici.org/info/ww_q3_18_definitions.xls**.

† Data for unit investment trusts and closed-end funds are not included in this chapter; these funds are discussed in chapter 2 and chapter 5, respectively.

FIGURE 1.1

Number of Worldwide Regulated Open-End Funds

Percentage of funds by region or type of fund, year-end 2022



Number of worldwide regulated open-end funds: 137,892

* Other funds include guaranteed/protected funds, real estate funds, and other funds.
Note: Regulated open-end funds include mutual funds, ETFs, and institutional funds.
Source: International Investment Funds Association

Worldwide Total Net Assets of Regulated Funds

Total net assets of worldwide regulated funds declined sharply in 2022 after three years of robust growth (Figure 1.2).* Several significant macroeconomic and geopolitical events negatively affected worldwide capital markets in 2022, leading to a substantial decrease in the value of the underlying stocks and bonds held by regulated funds. Along with other concerns that weighed on financial markets, these events included:

- ongoing global supply chain issues;
- Russia's invasion of Ukraine;
- rising inflation in countries around the world; and
- soaring interest rates in various economies as central banks aggressively tightened monetary policy.

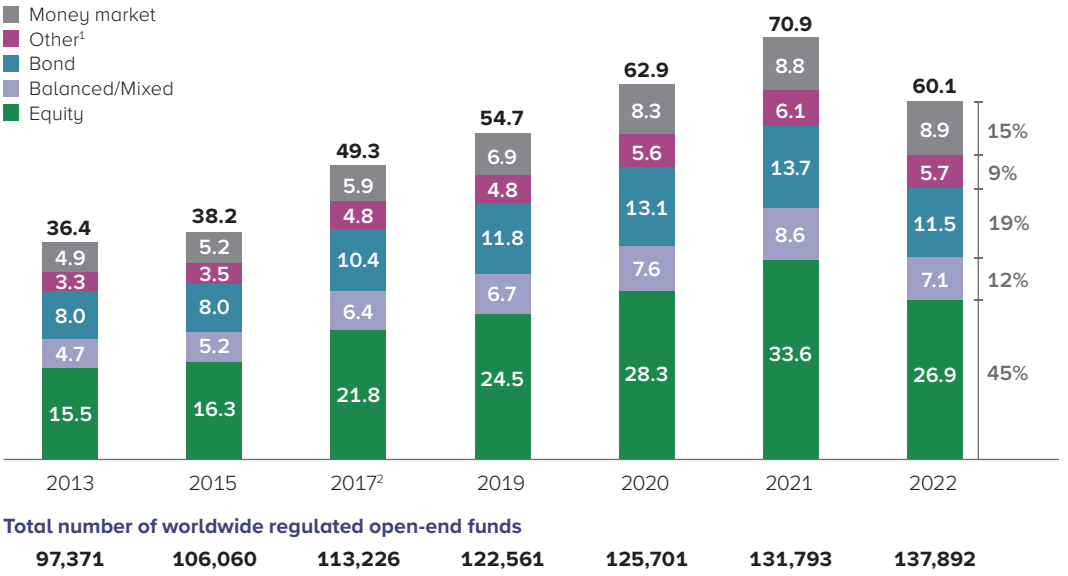
* In this chapter, unless otherwise noted, data for total net assets and net sales are denominated in US dollars.

With stock markets down across the globe in 2022—19 percent in the United States, 15 percent in Europe, and 17 percent in the Asia-Pacific region*—worldwide total net assets of equity funds, which invest primarily in publicly traded stocks, decreased by 20 percent to $26.9 trillion at year-end 2022. Bond funds—which invest primarily in fixed-income securities—saw their total net assets decrease 16 percent over the same period, primarily reflecting capital losses on bonds in the United States and Europe of 12 percent and 14 percent, respectively.† In contrast, net assets of money market funds—which are generally understood to be regulated funds that are restricted to holding short-term, high-quality debt instruments—increased slightly.

FIGURE 1.2

Total Net Assets of Worldwide Regulated Open-End Funds Declined to $60.1 Trillion in 2022

Trillions of US dollars by type of fund, year-end



Total number of worldwide regulated open-end funds

2013	2015	2017	2019	2020	2021	2022
97,371	106,060	113,226	122,561	125,701	131,793	137,892

[1] Other funds include guaranteed/protected funds, real estate funds, and other funds.

[2] Data for Russia are for 2017:Q3.

Note: Regulated open-end funds include mutual funds, ETFs, and institutional funds.

Source: International Investment Funds Association

* As measured by the Wilshire 5000 Total Market Index, the MSCI Daily Total Return Gross Europe Index, and the MSCI Daily Total Return Gross AC Asia-Pacific Index, which are all expressed in US dollars.

† As measured by the S&P US Aggregate Bond Index and the ICE BofA Euro Corporate Index (expressed in euros), both of which cover investment grade securities.

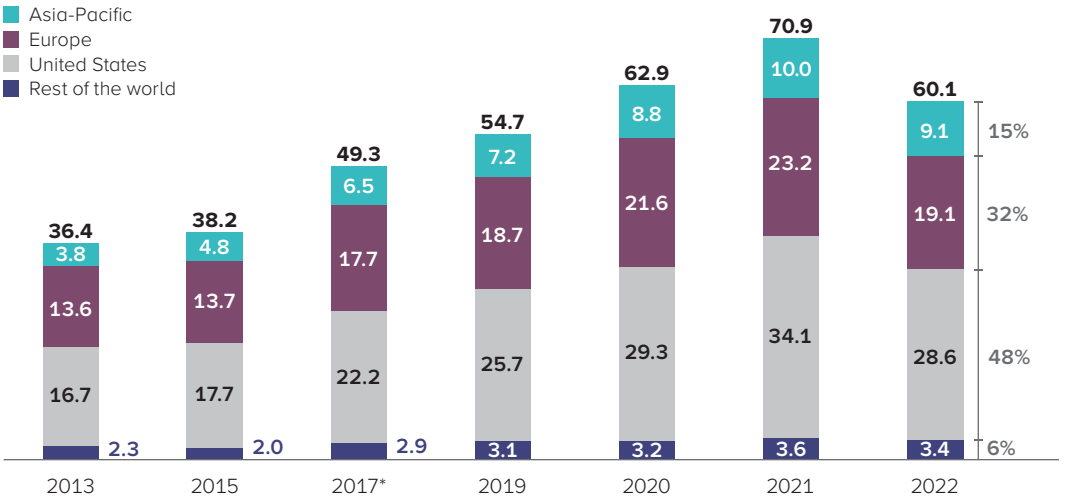
Total net assets of worldwide regulated funds also varied widely by geographic region (Figure 1.3). At year-end 2022, the majority of worldwide total net assets in regulated funds continued to be held in the United States (48 percent) and Europe (32 percent). Strong regulatory frameworks in both jurisdictions have contributed to their success. In recent decades, US regulated funds have been bolstered by their availability as investment options in tax-advantaged accounts, such as 401(k) plans. Meanwhile, the UCITS framework has many provisions that allow for the pooling of assets. These include passporting (i.e., a UCITS established in one country can be sold cross-border into one or more other European countries), the availability of UCITS in countries outside of Europe, and allowing different share classes to be denominated in a range of different currencies or adapted to different tax structures.

Regulated funds in the Asia-Pacific region held another 15 percent of worldwide total net assets. Given the size of the population, the rapidly increasing economic development and wealth in many countries, and efforts to promote individual account-based saving and investing, the region's regulated fund market has the potential for continued growth.

FIGURE 1.3

The United States Has the Largest Share of Total Net Assets of Worldwide Regulated Open-End Funds

Trillions of US dollars by region, year-end



* Data for Russia are for 2017:Q3.
Note: Regulated open-end funds include mutual funds, ETFs, and institutional funds.
Source: International Investment Funds Association

LEARN MORE

Worldwide Regulated Open-End Fund Assets and Flows
www.ici.org/research/stats/worldwide

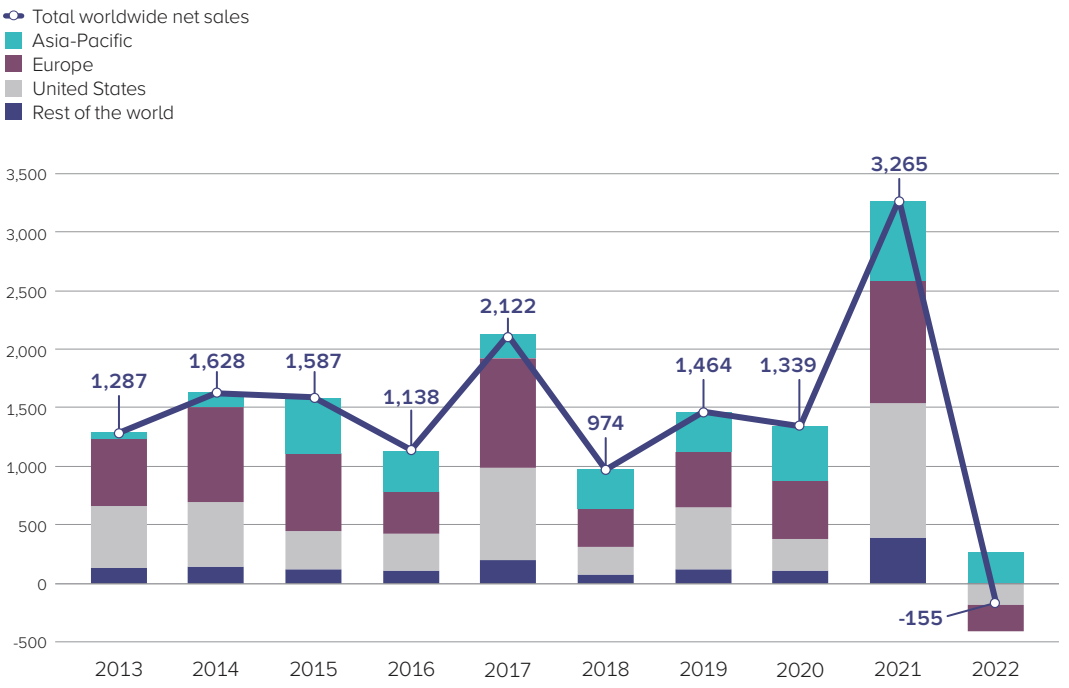
Worldwide Net Sales of Regulated Long-Term Funds

Worldwide demand for regulated long-term funds (equity, bond, balanced/mixed, and other) dropped sharply in 2022, from record net sales of $3.3 trillion in 2021 to net redemptions of $155 billion in 2022 (Figure 1.4). However, the aggregate data masks different regional experiences. While regulated long-term funds in both the United States and Europe experienced net outflows for the first time in more than a decade ($191 billion and $225 billion, respectively), regulated long-term funds in the Asia-Pacific region and the rest of the world continued to experience net inflows, with flows in the Asia-Pacific region driven largely by inflows in China and Japan.

FIGURE 1.4

Net Sales of Regulated Open-End Long-Term Funds Decreased in 2022

Billions of US dollars by region, annual



Note: Regulated open-end funds include mutual funds, ETFs, and institutional funds. Long-term funds include equity funds, balanced/mixed funds, bond funds, and other funds (guaranteed/protected, real estate, and other funds), but exclude money market funds.

Source: International Investment Funds Association

Worldwide net sales of regulated long-term funds declined significantly across all fund categories in 2022 when compared with 2021. For example, worldwide net sales of equity funds decreased from net inflows of $1.1 trillion in 2021 to net outflows of $4 billion in 2022 (Figure 1.5). The substantial slowdown in net sales was likely associated with the negative returns on global stocks, as net flows to equity funds have historically been related to world equity returns.

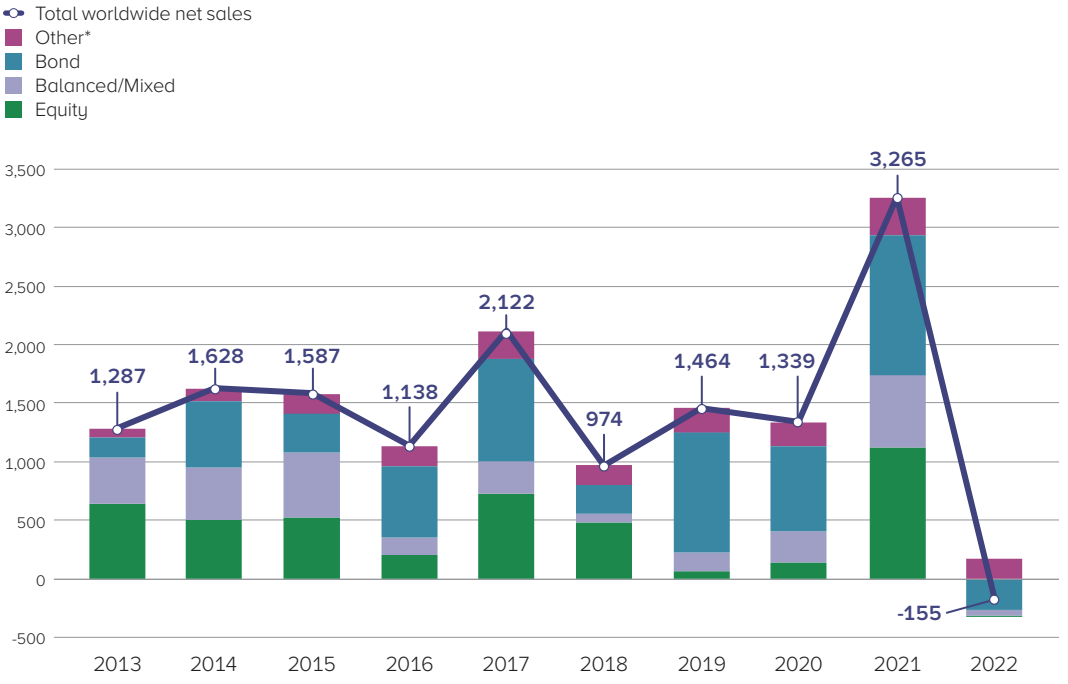
Bond funds also experienced a major shift in net sales, going from net inflows of $1.2 trillion in 2021 to net outflows of $261 billion in 2022 (Figure 1.5). This reversal was primarily driven by developments in inflation and interest rates. Inflation across the globe rose considerably during 2022—reaching 40-year highs in many countries—powered mainly by an increase in the prices of energy and goods, which later broadened out to food and core services. In response, central banks tightened monetary policy by engaging in earlier and steeper-than-expected interest rate hikes. For example, in 2022, the European Central Bank raised official rates 2.50 percentage points over four separate hikes, while the Bank of England raised rates 3.25 percentage points over eight hikes. In the United States, the Federal Reserve was even more aggressive and raised the benchmark interest rate by 4.25 percentage points over seven rate increases. The Riksbank, Norges Bank, and Swiss National Bank also raised interest rates in 2022 to help curb inflation.

The cycle of tightening monetary policy among these developed economies is important because when interest rates rise, bond prices fall. This caused the value of bonds in these jurisdictions to decrease, which led to capital losses on bond funds. Like the experience with equity fund returns and flows, net flows to bond funds have historically been related to bond returns (see Figure 3.5).

FIGURE 1.5

Worldwide Net Sales of Regulated Open-End Long-Term Funds Decreased Across All Asset Classes in 2022

Billions of US dollars by type of fund, annual



* Other funds include guaranteed/protected funds, real estate funds, and other funds.

Note: Regulated open-end funds include mutual funds, ETFs, and institutional funds.

Source: International Investment Funds Association

Ongoing Charges for UCITS in the European Union

The UCITS Directive has become a global success story since its adoption in 1985, with net assets of €9.9 trillion in EU-domiciled UCITS at year-end 2022. Investments in these funds are held by investors in Europe and other jurisdictions worldwide. In recent years, there has been renewed interest in the costs and charges paid by shareholders of investment funds. In 2019, the European Securities and Markets Authority (ESMA) issued its first annual report on the costs and charges of retail investment products in the European Union following a mandate by the European Commission. ESMA has since published other reports related to costs and charges. For example, in January 2021, ESMA launched a Common Supervisory Action (CSA) in conjunction with European national regulators on the supervision of fees and costs of UCITS. In May 2022, ESMA released a report outlining the results of this exercise.*

Like regulated fund investors in other countries, UCITS investors incur ongoing charges that cover the provision of services, including portfolio management, administration, compliance, accounting, legal, and distribution. The total cost of these charges is disclosed to investors through either the total expense ratio (TER), often found in a UCITS' annual report and other marketing documents, or the ongoing charges figure (OCF), found in the Key Investor Information Document (KIID).

Average ongoing charges of equity and fixed-income UCITS continued their downward trend in 2021 (Figure 1.6). Since 2013, asset-weighted average ongoing charges for equity and fixed-income UCITS have declined 19 percent and 31 percent, respectively. In 2021, the asset-weighted average ongoing charge for equity funds fell to 1.21 percent from 1.24 percent in 2020. In other words, for every €100 invested in 2021, fund shareholders were charged €1.21 in ongoing fees. Additionally, the asset-weighted average ongoing charges for equity and fixed-income funds were below their respective simple averages, which indicates that investors tend to concentrate their assets in lower-cost funds.

CONTINUED ON THE NEXT PAGE

* European Securities and Markets Authority, "Final Report on the 2021 CSA on costs and fees." Available at **www.esma.europa.eu/sites/default/files/library/esma34-45-1673_final_report_on_the_2021_csa_on_costs_and_fees.pdf**.

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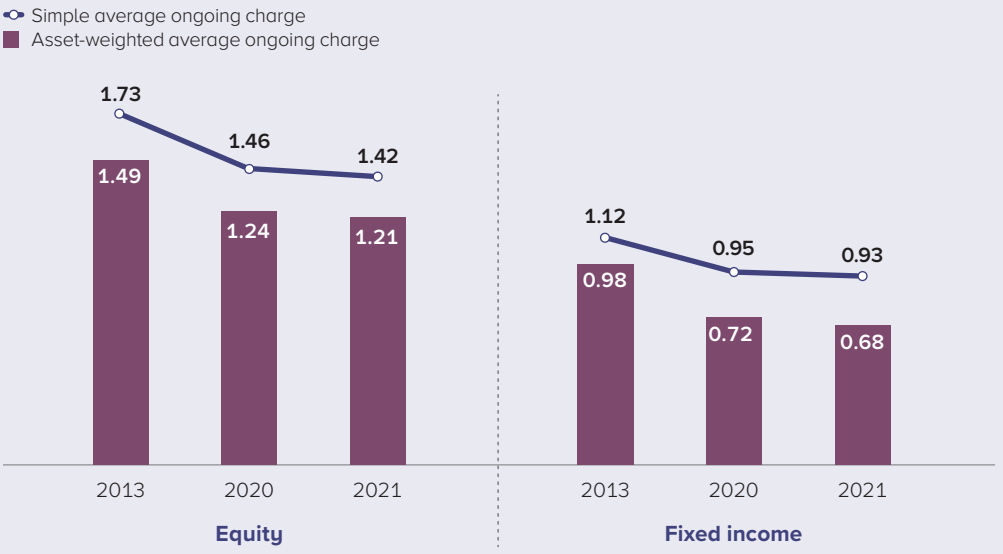
CONTINUED FROM THE PREVIOUS PAGE

FIGURE 1.6

Investors in UCITS Pay Below-Average Ongoing Charges

Percent



Note: Data exclude ETFs.

Source: Investment Company Institute calculations of Morningstar Direct data. See *ICI Research Perspective*, "Ongoing Charges for UCITS in the European Union, 2021."

LEARN MORE

Ongoing Charges for UCITS in the European Union, 2021
www.ici.org/files/2022/per28-08.pdf

Worldwide Net Sales of Money Market Funds

Worldwide net sales of money market funds totaled $171 billion in 2022, down from $673 billion in 2021 (Figure 1.7). The decline in worldwide demand for money market funds was largely driven by a decrease in net sales in the United States and the Asia-Pacific region. Investor demand for money market funds in the United States decreased from $424 billion in 2021 to $10 billion in 2022; and in the Asia-Pacific region, money market funds experienced net inflows of $132 billion in 2022, down from $254 billion in 2021.

Investors use money market funds because they are professionally managed, tightly regulated vehicles with holdings limited to high-quality, short-term debt instruments. As such, they are highly liquid, attractive, cash-like alternatives to bank deposits. Generally, demand for money market funds is dependent upon their yields and interest rate risk exposure relative to other high-quality fixed-income securities.

In the United States, net sales of money market funds fell as purchases by retail investors were offset by redemptions from institutional investors (see Figure 3.14). In 2022, short-term interest rates ramped up quickly in the United States, and in the second half of 2022, were higher than longer-dated fixed-income securities. US retail investors were particularly attracted to the relatively high yields and extremely low interest rate risk offered by money market funds, especially in light of the double-digit capital losses seen in stock and bond markets.

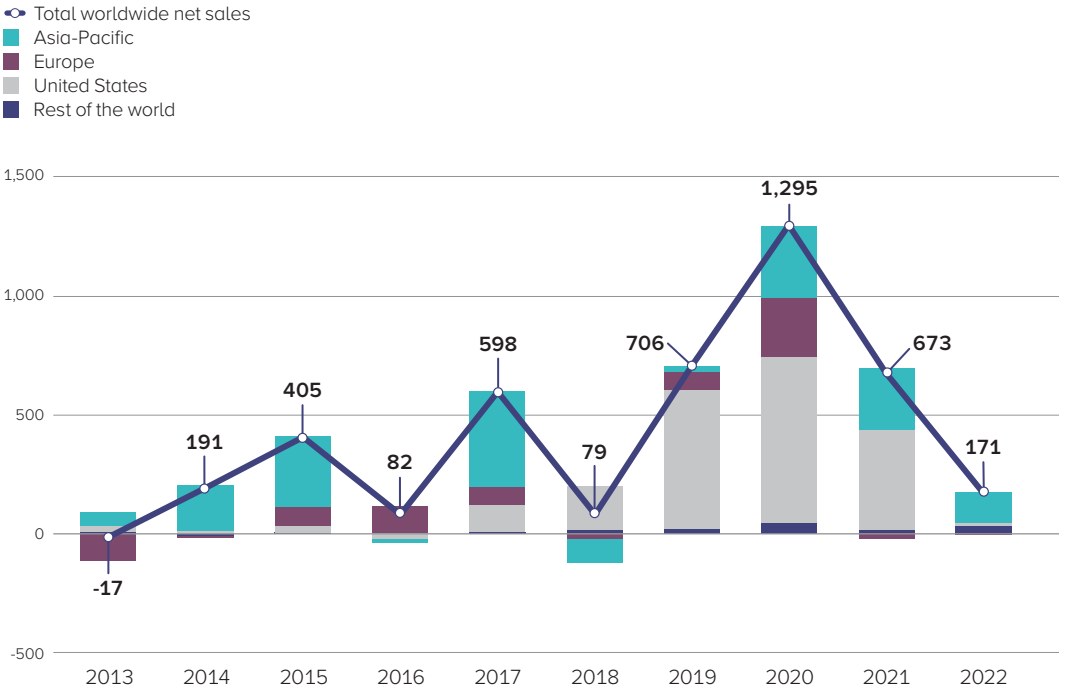
By contrast, US institutional investors, on net, redeemed cash from money market funds. This development is consistent with historical patterns in institutional money market fund flows during a monetary policy tightening cycle. Because of their size and investment knowledge, some institutional investors can easily invest directly in short-term instruments. This allows those institutional investors to capture higher yields immediately when the Federal Reserve raises the federal funds rate rather than waiting for the yield in a money market fund to catch up as older, lower-yielding short-term securities mature and are replaced with newer, higher-yielding paper.

Demand for money market funds in the Asia-Pacific region is dominated by Chinese money market funds, which hold the bulk of money market fund total net assets in the region. The People's Bank of China lowered interest rates in the summer of 2022, as China's economy was affected by the government's zero-COVID policy. As a result, net inflows into money market funds in the Asia-Pacific region in the first half of 2022 turned to net outflows, lowering the overall net sales of money market funds in the region for the year.

FIGURE 1.7

Worldwide Net Sales of Money Market Funds Decreased in 2022

Billions of US dollars by region, annual



Source: International Investment Funds Association

Size of Worldwide Regulated Funds in Global Capital Markets

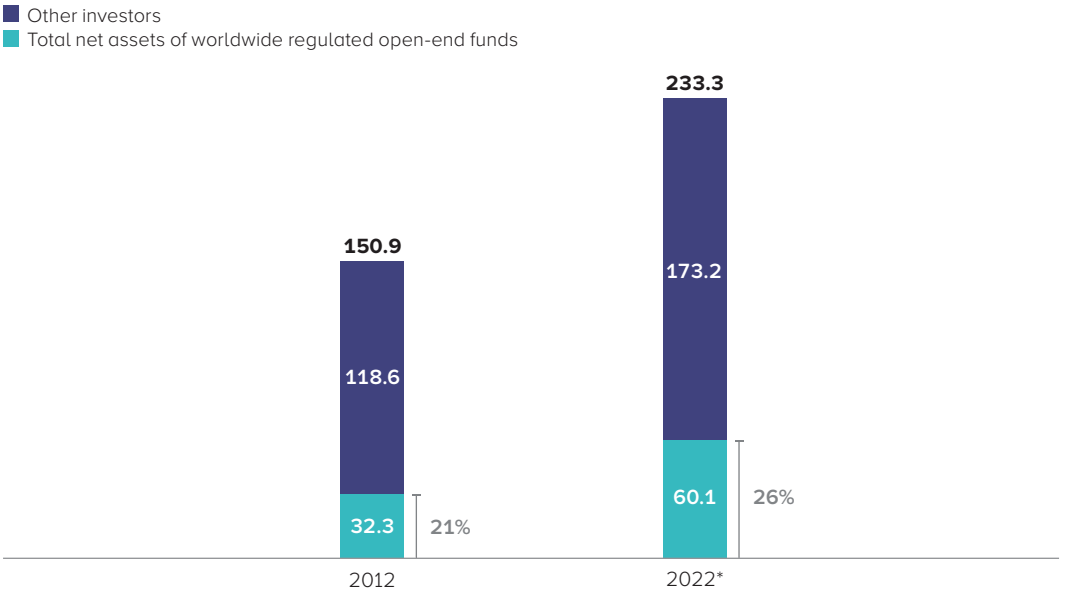
Regulated funds continue to be an important conduit for allocating capital globally, helping finance businesses, governments, and household activities. As of year-end 2022, worldwide capital markets, as measured by the value of equity and debt securities outstanding, totaled $233.3 trillion, with regulated funds holding 26 percent, or $60.1 trillion (Figure 1.8).

The share of worldwide capital markets held by regulated funds has grown somewhat over the past decade. In 2022, worldwide regulated funds held 26 percent of worldwide capital markets, compared with 21 percent in 2012 (Figure 1.8). A wide range of other investors—such as central banks, sovereign wealth funds, pension plans (both defined benefit and defined contribution), banks, insurance companies, hedge funds, broker-dealers, and households owning stocks and bonds directly—held the remaining 74 percent in 2022.

FIGURE 1.8

Worldwide Regulated Funds Held 26 Percent of Worldwide Equity and Debt Markets

Trillions of US dollars, year-end



* Data for worldwide debt markets are as of September 30, 2022.

Note: Regulated open-end funds include mutual funds, ETFs, and institutional funds.

Source: Investment Company Institute calculations of data from the International Investment Funds Association, World Federation of Exchanges, and Bank for International Settlements

Fund Ownership in Market-Based Versus Bank-Based Economies

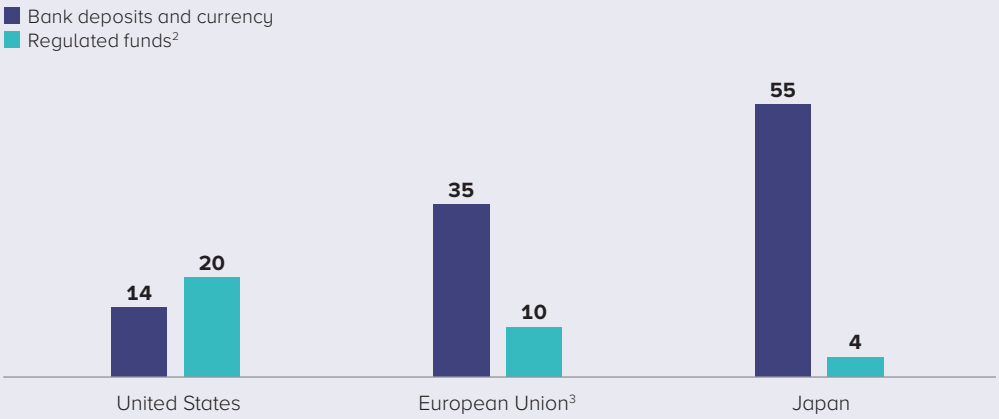
Generally speaking, a jurisdiction's financial system can be described as either market-based or bank-based, depending on how its economy deploys savings and raises capital for the production of goods and services. For example, many jurisdictions within the European Union are considered bank-based economies, since banks are more often used to mobilize investor savings and allocate capital. Conversely, the United States is usually considered a market-based economy, since capital markets are the main conduit for investor savings and deploying capital. The structure of capital allocation in an economy is a factor that can influence the demand for regulated funds, and regulated funds tend to make up a greater share of household wealth in market-based economies.

In the European Union and Japan, where investors have traditionally allocated savings and capital to banks, households hold more of their financial wealth in bank products. European and Japanese households hold 35 percent and 55 percent, respectively, of their financial wealth in bank products, with relatively little in regulated funds (Figure 1.9). By comparison, households in the United States hold a much lower share of their financial wealth in bank products and a much larger share in regulated funds.

FIGURE 1.9

US Households Hold More of Their Wealth in Regulated Funds; Bank-Based Countries Have a Lower Share

Percentage of household[1] financial wealth, year-end 2022



[1] Households include households and nonprofit institutions serving households.

[2] For the United States, regulated funds include total net assets held by mutual funds and ETFs. For the European Union and Japan, regulated funds include investment fund shares as defined by their respective systems of national accounts.

[3] Data for Poland are as of 2022:Q3.

Sources: Investment Company Institute, Federal Reserve Board, Eurostat, and Bank of Japan

CHAPTER

2

US-Registered Investment Companies

Registered investment companies are an important segment of the asset management industry in the United States. US-registered investment companies play a major role in the US economy and financial markets, and a growing role in global financial markets. These funds managed $28.9 trillion in total net assets at year-end 2022, largely on behalf of more than 120 million US retail investors. The industry has experienced robust growth over the past quarter century from asset appreciation and strong demand from households due to rising household wealth, the aging US population, and the evolution of employer-based retirement systems. US funds supply investment capital in securities markets around the world and are important investors in the US stock and municipal securities markets.

IN THIS CHAPTER

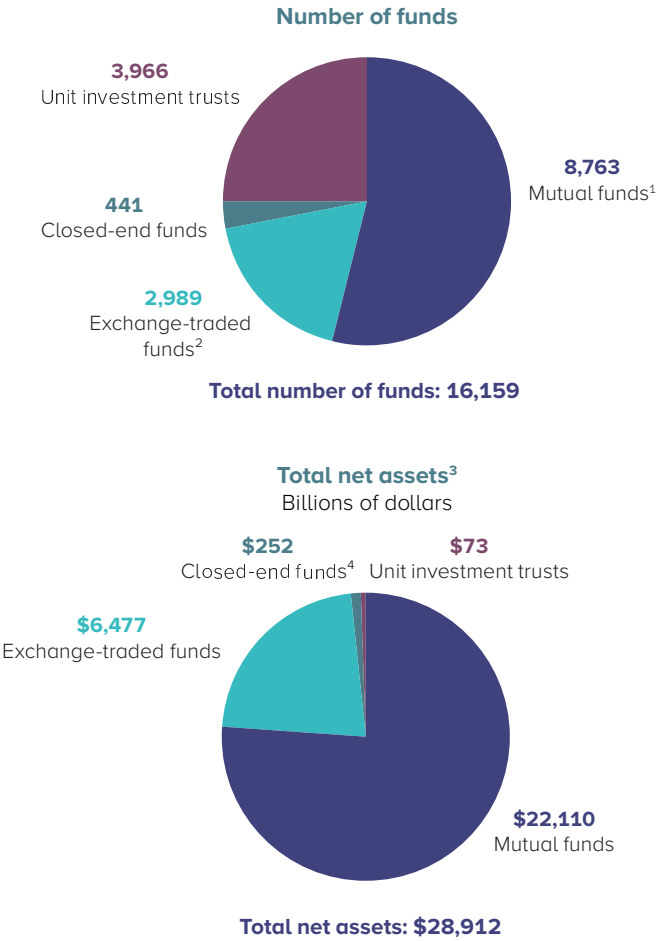
Number and Assets of Investment Companies

There were 16,159 investment companies* offered by US financial services companies at year-end 2022 (Figure 2.1). The overall number of investment companies is down from a decade ago as an increase in the number of exchange-traded funds (ETFs) only partially offset a decrease in the number of unit investment trusts (UITs) and closed-end funds.

FIGURE 2.1

Most Investment Company Total Net Assets Are in Mutual Funds

Year-end 2022



[1] Mutual fund data for number of funds include mutual funds that invest primarily in other mutual funds.

[2] ETF data for number of funds include ETFs that invest primarily in other ETFs.

[3] Total investment company assets include mutual fund holdings of closed-end funds and ETFs.

[4] Closed-end fund data for total net assets include preferred share classes.

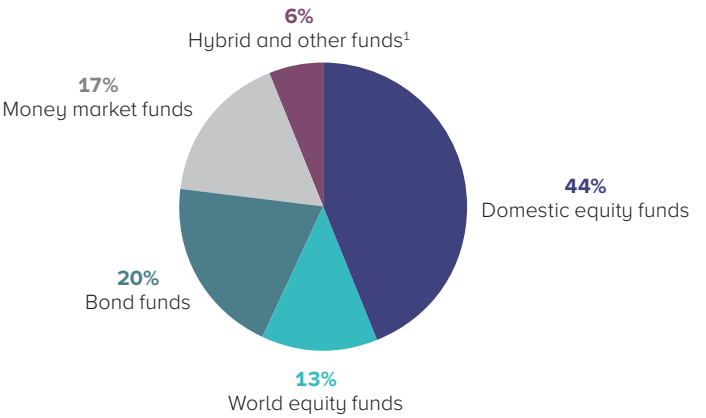
* The terms *investment companies* and *US investment companies* are used at times throughout this book in place of *US-registered investment companies*. US-registered investment companies are open-end mutual funds, exchange-traded funds, closed-end funds, and unit investment trusts.

Total net assets in US-registered investment companies decreased in 2022 to a year-end level of $28.9 trillion, with the vast majority held by mutual funds and ETFs. US-registered investment company total net assets were concentrated in long-term funds, with equity funds alone holding $16.6 trillion—57 percent of all investment company total net assets at year-end 2022 (Figure 2.2). Domestic equity funds (those that invest primarily in shares of US corporations) held $12.8 trillion in net assets; world equity funds (those that invest significantly in shares of non-US corporations) accounted for $3.8 trillion. Bond funds held $5.9 trillion in assets, while money market funds, hybrid funds, and other funds—such as those that invest primarily in commodities—held the remaining $6.4 trillion.

FIGURE 2.2

The Majority of Investment Company Total Net Assets Were in Equity Funds

Percentage of total net assets, year-end 2022



Investment company total net assets:[2] $28.9 trillion

[1] The *other funds* category includes ETFs—both registered and not registered under the Investment Company Act of 1940—that invest primarily in commodities, currencies, and futures.

[2] Closed-end fund data for total net assets include preferred share classes.

During 2022, mutual funds recorded an aggregate $1.1 trillion in net outflows, mainly occurring in long-term mutual funds (see Figure 3.3). Mutual fund shareholders reinvested $330 billion in income dividends and $380 billion in capital gains distributions that mutual funds paid out during the year. Investors continued to show strong demand for ETFs, with net share issuance (which includes reinvested dividends) totaling $609 billion in 2022 (see Figure 4.4). UITs experienced net new deposits of $51 billion, a slight decrease from the previous year, and closed-end funds had net redemptions of $489 million (see Figure 5.2).

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Monthly Trends in Mutual Fund Investing
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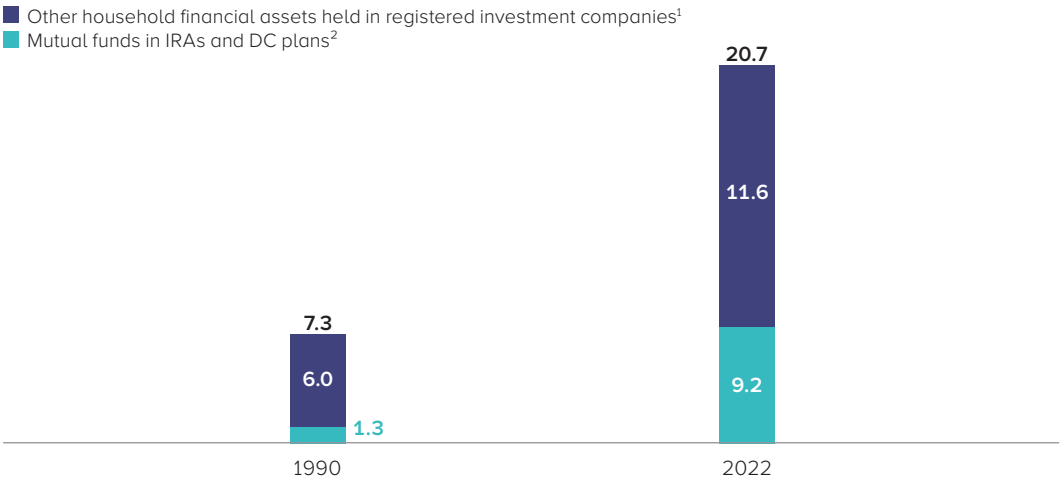
Americans' Continued Reliance on Investment Companies

Households make up the largest group of investors in funds, and registered investment companies managed 20.7 percent of household financial assets at year-end 2022 (Figure 2.3). The growth of mutual funds inside individual retirement accounts (IRAs) and defined contribution (DC) plans, particularly 401(k) plans, explains some of the increased household reliance on investment companies in the past three decades. Mutual funds in IRAs and DC plans made up about 9.2 percent of household financial assets at year-end 2022, up from 1.3 percent in 1990.

FIGURE 2.3

Households Rely More on Investment Companies—Partly from Increased Holdings Inside DC Plans and IRAs

Percentage of US household financial assets, year-end



[1] Household financial assets held in registered investment companies include holdings of mutual funds, ETFs, closed-end funds, and UITs. Mutual funds held in employer-sponsored DC plans, IRAs, and variable annuities are included.

[2] DC plans include private-sector employer-sponsored DC plans (such as 401(k) plans), 403(b) plans, and 457 plans.

Source: Investment Company Institute. For a complete list of sources, see Investment Company Institute, "The US Retirement Market, Fourth Quarter 2022."

Businesses and other institutional investors also rely on funds. For instance, institutions can use money market funds to manage some of their cash and other short-term assets. Institutional investors also have contributed to the growing demand for ETFs. Investment managers—for mutual funds, pension funds, hedge funds, and insurance companies—use ETFs to invest in markets, manage liquidity and investor flows, or hedge their exposures.

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The US Retirement Market

www.ici.org/research/stats/retirement

Role of Investment Companies in Financial Markets

Investment companies have been important investors in domestic financial markets for much of the past 30 years. They have held a largely stable share of the securities outstanding across a variety of asset classes in recent years, mainly through mutual funds. At year-end 2022, investment companies held 33 percent of US corporate equities outstanding, little changed from the 34 percent at year-end 2019 (Figure 2.4).

Investment companies held 23 percent of bonds issued by US corporations and foreign bonds held by US residents at year-end 2022 and 12 percent of the US Treasury and government agency securities outstanding (Figure 2.4). Investment companies also have been important investors in the US municipal securities market, holding 27 percent of the securities outstanding at year-end 2022. Finally, mutual funds (primarily prime money market funds) held 17 percent of the US commercial paper market—a critical source of short-term funding for many major corporations around the world.

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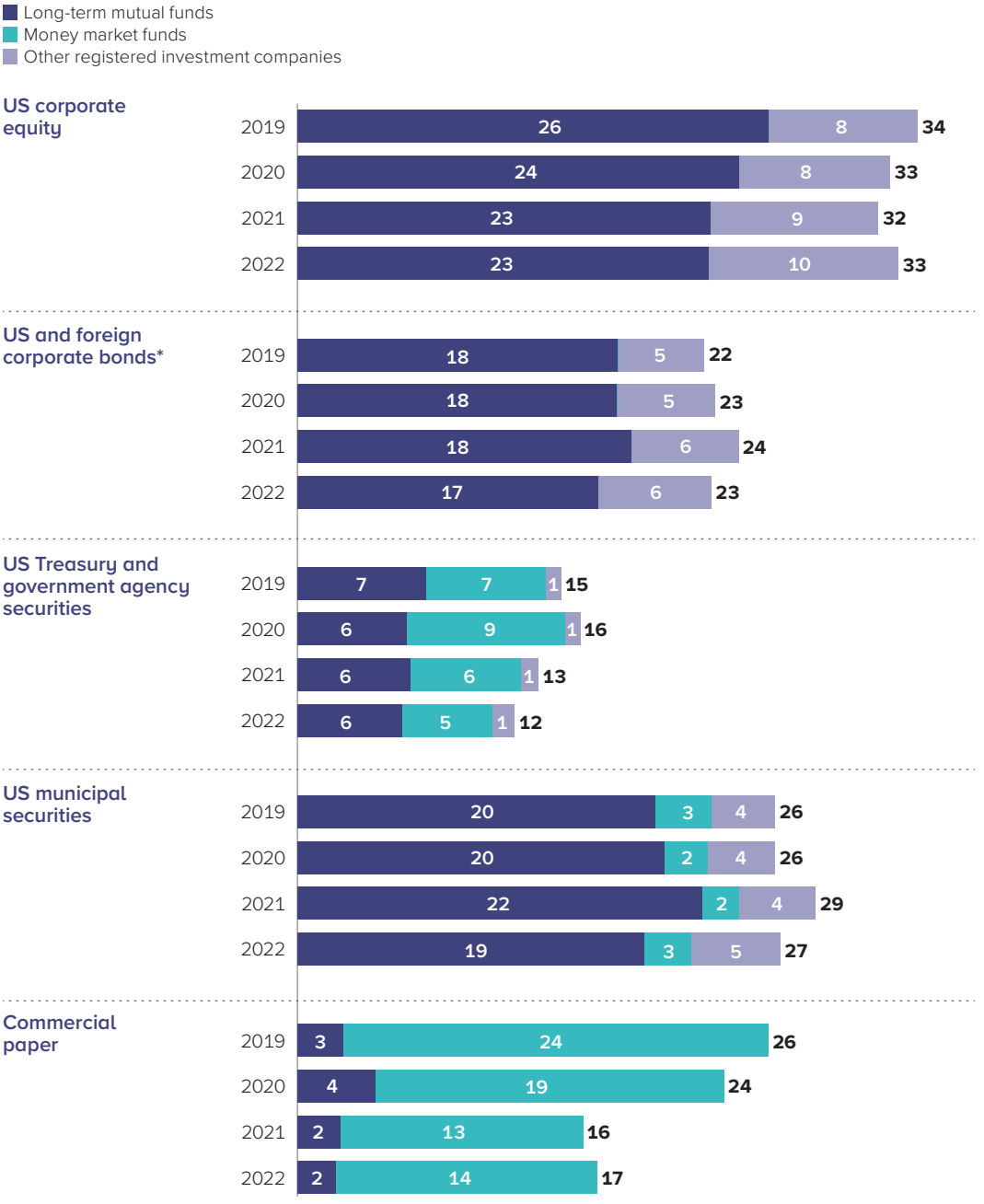
Money Market Fund Resource Center
www.ici.org/mmfs

FIGURE 2.4

Investment Companies Channel Investment to Stock, Bond, and Money Markets

Percentage of total market value of securities held by investment companies, year-end



* Money market fund holdings of US and foreign corporate bonds rounded to less than 0.1 percent in all years.

Sources: Investment Company Institute, Federal Reserve Board, and World Federation of Exchanges

Growth of Index Funds

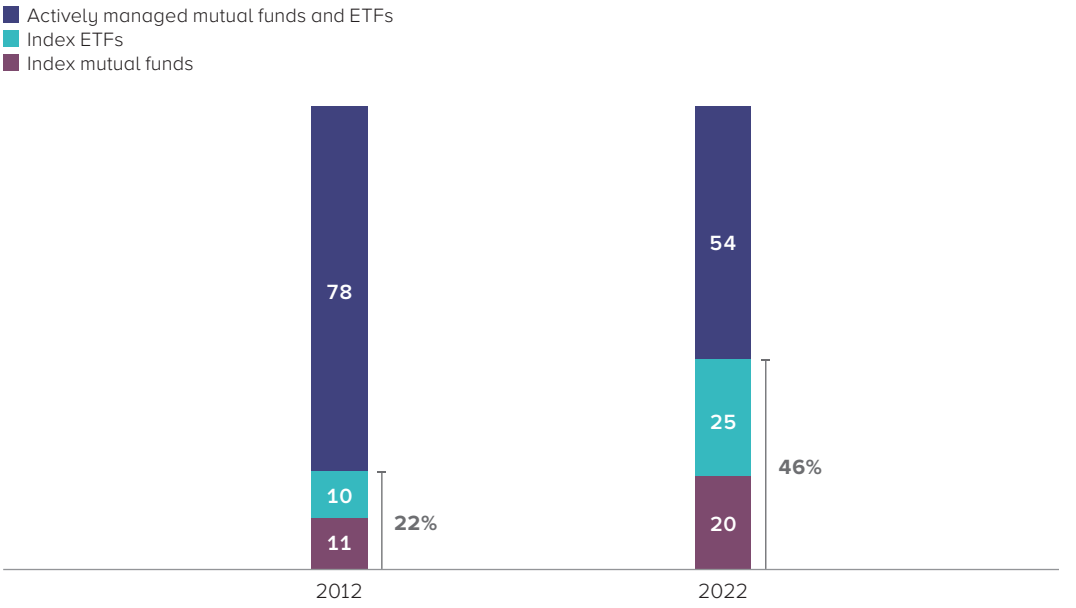
Index funds are designed to track the performance of a market index. To do this, the fund manager purchases all the securities in the index or a representative sample of them—mirroring the index composition—so that the performance of the fund tracks the value of the index. This approach to portfolio management is the primary reason that index funds tend to have below-average expense ratios (see Figures 6.6 and 6.7).

Index mutual funds were first offered in the 1970s, followed by index ETFs in the 1990s. By year-end 2022, total net assets in these two index fund categories had grown to $10.9 trillion. Along with this growth, index fund assets have become a larger share of overall fund assets. At year-end 2022, index mutual funds and index ETFs together accounted for 46 percent of assets in long-term funds, up from 22 percent at year-end 2012 (Figure 2.5). Nevertheless, actively managed funds still accounted for more than half of long-term fund assets (54 percent) at year-end 2022.

FIGURE 2.5

Index Funds Have Grown as a Share of the Fund Market

Percentage of total net assets, year-end



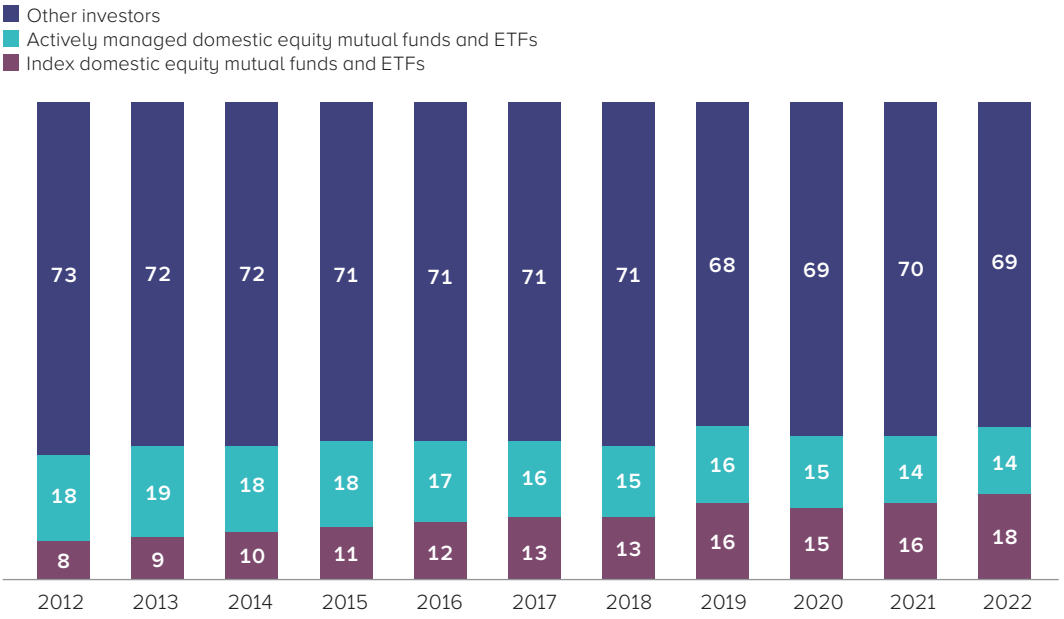
Note: Data for ETFs exclude non–1940 Act ETFs. Data for mutual funds exclude money market funds.

The growth in index funds has been concentrated in funds that invest primarily in US equities, with 44 percent of inflows into index funds over the past decade going to domestic equity funds. But despite their significant growth, index domestic equity mutual funds and ETFs remain relatively small investors in the US stock markets, holding only 18 percent of the value of US stocks at year-end 2022 (Figure 2.6). Actively managed domestic equity mutual funds and ETFs held another 14 percent, while other investors—including hedge funds, pension funds, life insurance companies, and individuals—held the majority (69 percent).

FIGURE 2.6

Index Fund Share of US Stock Market Is Small

Percentage of US stock market capitalization, year-end



Sources: Investment Company Institute and World Federation of Exchanges

Unit Investment Trusts

Unit investment trusts (UITs) are registered investment companies with characteristics of both mutual funds and closed-end funds. Like mutual funds, UITs issue redeemable shares (called units), and like closed-end funds, they typically issue a specific, fixed number of shares. But unlike either mutual funds or closed-end funds, UITs have a preset termination date based on the portfolio's investments and the UIT's investment goals. UITs investing in long-term bonds might have a preset termination date of 20 to 30 years, depending on the maturity of the bonds they hold. UITs investing in stocks might seek to capture capital appreciation in a few years or less. When a UIT terminates, proceeds from the securities are paid to unit holders or, at a unit holder's election, reinvested in another trust.

UITs fall into two main categories: bond (or debt) trusts and equity trusts. Bond trusts are classified as taxable or tax-free; equity trusts are classified as domestic or international/global. The first UIT, introduced in 1961, held tax-free bonds, and historically, most UIT total net assets were invested in bonds. Equity UITs, however, have grown in popularity over the past three decades. At year-end 2022, assets in equity UITs far exceeded those of bond UITs, constituting 93 percent of UIT total net assets (Figure 2.7). The number of trusts outstanding has decreased as sponsors have created fewer new trusts and existing trusts have reached their preset termination dates.

Federal law requires that UITs have a largely fixed portfolio—one that is not actively managed or traded. Once the trust's portfolio has been selected, its composition may change only in very limited circumstances. Most UITs hold a diversified portfolio, described in detail in the prospectus, with securities professionally selected to meet a stated investment goal, such as growth, income, or capital appreciation.

Investors can obtain UIT price quotes from brokerage or investment firms and investment company websites. Some UITs list their prices on Nasdaq's Fund Network. Some broker-dealers offer their own trusts or sell trusts offered by nationally recognized independent sponsors. Units of these trusts can be bought through their registered representatives. Units can also be bought from the representatives of smaller investment firms that sell trusts sponsored by third-party firms.

Though a fixed number of units of a UIT are sold in a public offering, a trust sponsor is likely to maintain a secondary market, where investors can sell their units back to the sponsor and other investors can buy those units. Even absent a secondary market, UITs are required by law to redeem outstanding units at their net asset value (NAV), which is based on the underlying securities' current market value.

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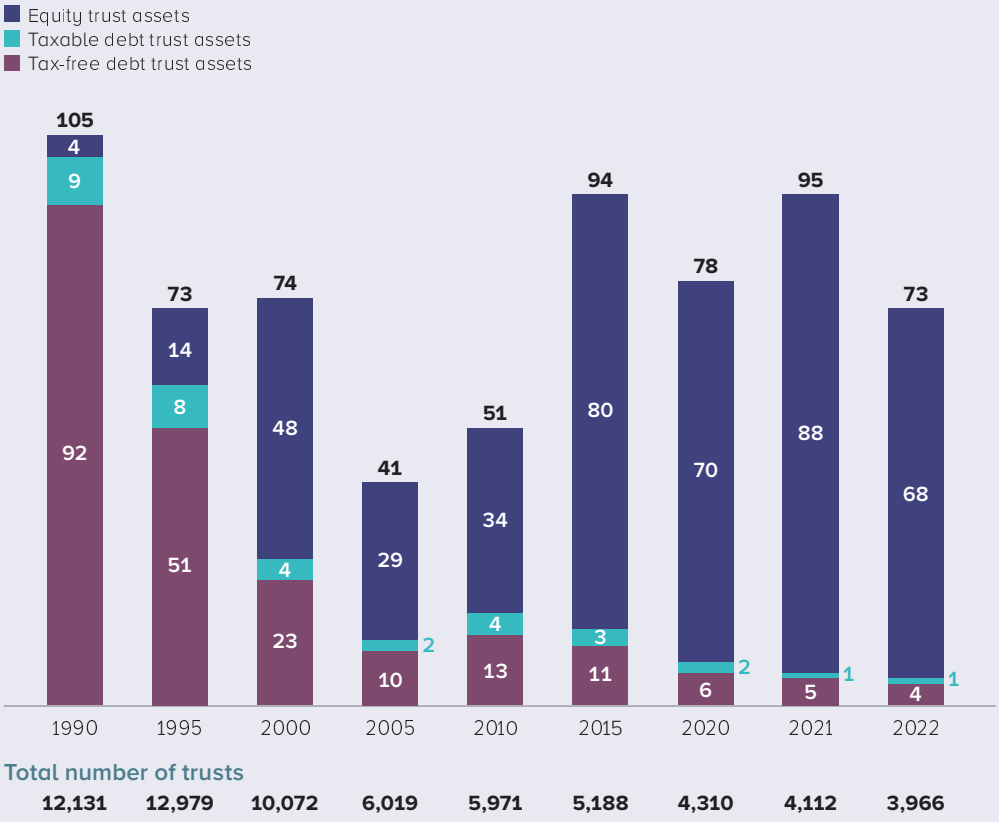
FIGURE 2.7

Total Net Assets of UITs Have Shifted from Tax-Free Debt Trusts to Equity Trusts

Billions of dollars, year-end



Total number of trusts								
12,131	12,979	10,072	6,019	5,971	5,188	4,310	4,112	3,966

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Unit Investment Trust Data

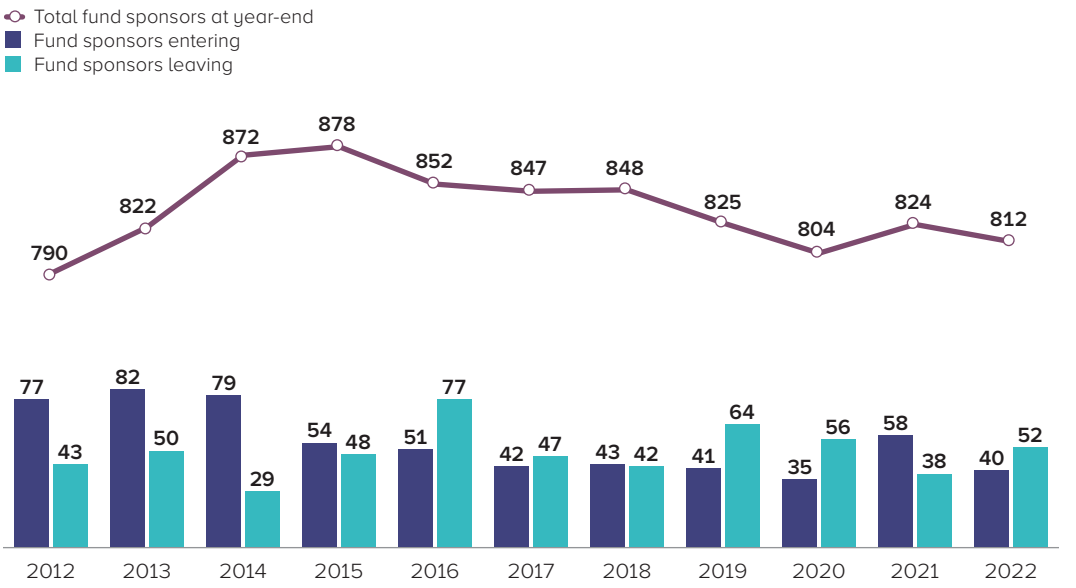
www.ici.org/research/stats/uit

Fund Complexes and Sponsors

At year-end 2022, 812 fund sponsors from around the world competed in the US market to provide investment management services to fund investors (Figure 2.8). The decline in the number of fund sponsors since year-end 2015 may be due to a variety of business decisions, including larger fund sponsors acquiring smaller ones, fund sponsors liquidating funds and leaving the business, or larger sponsors selling their advisory businesses. Prior to 2015, the number of fund sponsors had been increasing as the economy and financial markets recovered from the 2007–2009 financial crisis. Overall, from year-end 2012 through year-end 2022, 525 sponsors entered the market while 503 left, for a net increase of 22.

FIGURE 2.8

Number of Fund Sponsors Has Generally Declined Since 2015



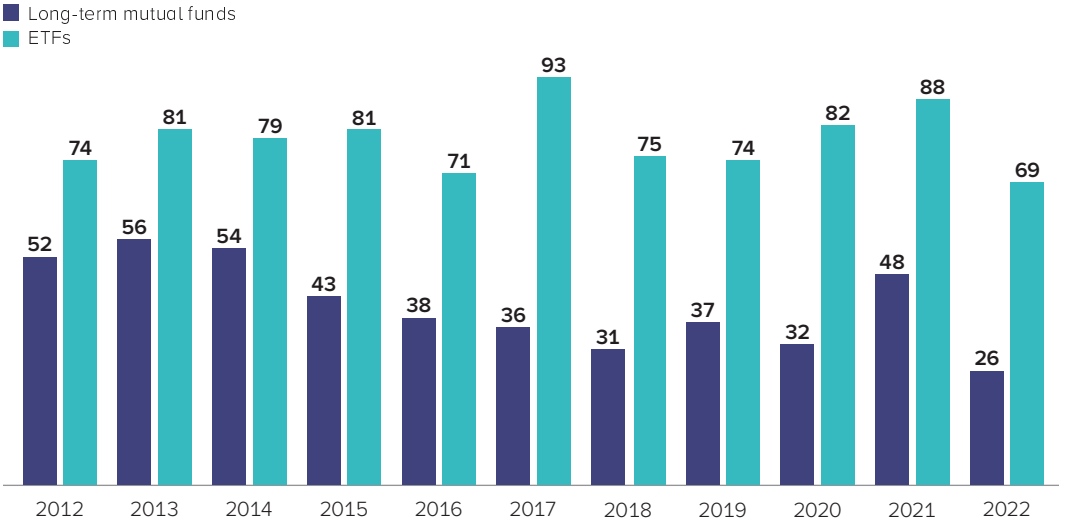
Many recent entrants to the fund industry have adopted solutions in which the fund's sponsor arranges for a third party to provide certain services (e.g., audit, trustee, some legal) through a turnkey setup. This allows the sponsor to focus more on managing portfolios and gathering assets. Through an arrangement known as a series trust, the third party provides services to multiple independent fund sponsors under a single complex that serves as an "umbrella." This can be cost-efficient because the costs of operating funds are spread across the combined assets of a number of funds in the series trust.

The increased availability of other investment products has led to changes in how investors are allocating their portfolios. The percentage of mutual fund companies retaining assets and attracting net new investments generally has been lower in recent years. In 2022, 26 percent of fund complexes saw positive flows to their long-term mutual funds, while 69 percent of ETF sponsors had positive net share issuance (Figure 2.9).

FIGURE 2.9

Easier Access to Other Investment Products Has Dampened Inflows into Long-Term Mutual Funds

Percentage of fund complexes



Note: Long-term mutual fund data include net new cash flow and reinvested dividends; ETF data for net share issuance include reinvested dividends.

The concentration of mutual fund and ETF assets managed by the largest fund complexes has increased over time. The share of assets managed by the five largest firms rose from 35 percent at year-end 2005 to 55 percent at year-end 2022 (Figure 2.10). Some of the increase in market share occurred at the expense of the middle tier of firms—those ranked from 11 to 25—whose market share fell from 21 percent in 2005 to 16 percent in 2022.

FIGURE 2.10

Share of Mutual Fund and ETF Assets at the Largest Fund Complexes Has Increased

Percentage of total net assets of mutual funds and ETFs, year-end

	2005	2010	2015	2020	2021	2022
Largest 5 complexes	35	42	45	53	54	55
Largest 10 complexes	46	55	56	64	66	68
Largest 25 complexes	67	74	75	81	83	84

Note: Data include only mutual funds and ETFs registered under the Investment Company Act of 1940.

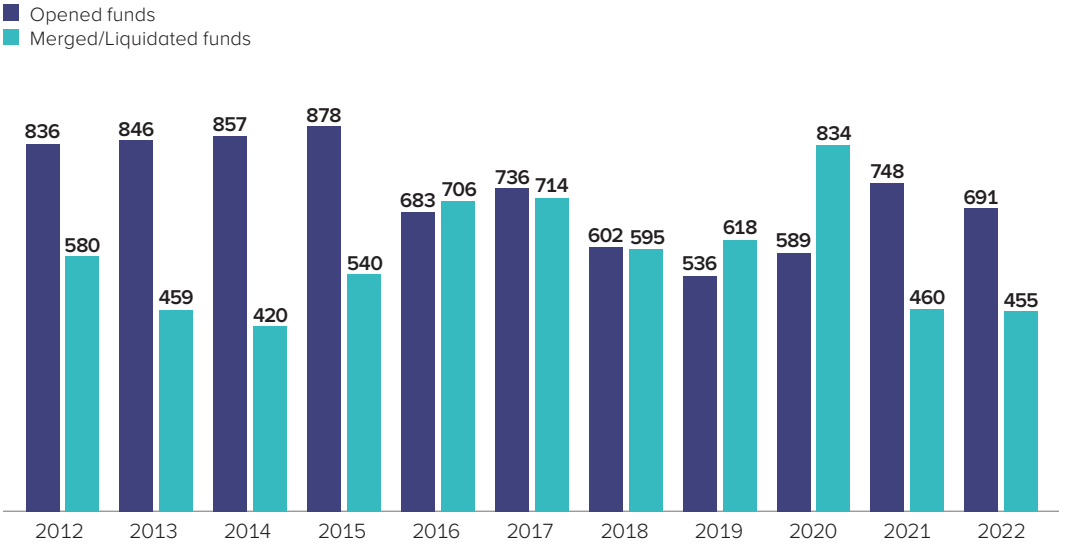
At least two factors have contributed to the rise in industry concentration. First, the increased concentration reflects the growing popularity of index funds—the 10 largest fund complexes manage most of the assets in index mutual funds. Actively managed domestic equity mutual funds had outflows in every year after 2005, while index domestic equity mutual funds had inflows in each of these years except for 2020 and 2021. Index domestic equity ETFs had positive net share issuance in each of these years. Second, generally strong inflows over the past decade to bond mutual funds (see Figure 3.7), which are fewer in number and are less likely to be offered by smaller fund sponsors, helped boost the share of assets managed by large fund complexes.

Macroeconomic conditions and competitive dynamics can affect the supply of funds offered for sale. Fund sponsors create new funds to meet investor demand and merge or liquidate those that do not attract sufficient investor interest. A total of 691 mutual funds and ETFs opened in 2022, down from 748 in 2021 and lower than the 2012–2021 annual average of 731 (Figure 2.11). The number of mutual fund and ETF mergers and liquidations stayed relatively flat—455 in 2022 compared with 460 in 2021.

FIGURE 2.11

Mutual Funds and ETFs Enter and Exit in a Competitive Market

Number of funds



Note: Data include mutual funds that do not report statistical information to the Investment Company Institute and mutual funds that invest primarily in other mutual funds. ETF data include ETFs that invest primarily in other ETFs.

Fund Proxy Voting Reflects Heterogeneous Industry

Investment companies are major shareholders of public companies and have held a steady share of US-issued corporate equities outstanding over the past several years (Figure 2.4). Like any company shareholder, they are entitled to vote on proxy proposals put forth by a company's board or its shareholders. Funds normally delegate proxy voting responsibilities to fund advisers, which have a fiduciary duty to vote in the best interest of fund shareholders.

During proxy year 2020 (the 12 months that ended June 30, 2020), shareholders of the 3,000 largest public companies considered 23,970 proposals—98 percent (23,523) of these were proposed by management and 2 percent (447) were submitted by shareholders. Investment companies cast more than 7.6 million votes on these proposals, with each investment company voting, on average, on about 1,500 separate proxy proposals. Because management proposals account for the bulk of proxy proposals, 74 percent of funds' votes were cast on management proposals related to uncontested elections of directors, with an additional 13 percent and 11 percent related to management proposals on management compensation and ratification of audit firms, respectively.

Investment companies voted in favor of management proposals 93 percent of the time. The strong support for management proxy proposals likely reflects that the vast majority of them are not controversial—85 percent of management proposals were uncontested elections of directors and ratifications of the audit firms that companies selected.

During the same proxy year, 4 percent of the votes that investment companies cast were on 447 shareholder proxy proposals. Among the shareholder proposals, 39 percent were related to social and environmental matters; 27 percent to board structures and elections; and the remainder to shareholder rights and anti-takeover issues, compensation matters, and miscellaneous issues. Shareholder proxy proposals received support from investment companies, on average, 41 percent of the time.

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Investment companies' support for shareholder proposals varied considerably depending on a range of factors. These factors included, among other things, the details of the proposal, the issuer to whom the proposal applied, and the backdrop and context in which the proposal was set. Investment companies tend to offer more support for shareholder proxy proposals that are likely to increase their rights as company shareholders. For example, investment companies voted in favor of shareholder proxy proposals related to shareholder rights or anti-takeover measures nearly 53 percent of the time in proxy year 2020.

Investment companies, on average, have provided more limited support for social and environmental proposals. In proxy year 2020, these proposals received a favorable vote 39 percent of the time. Average levels of support can mask important nuances of how investment companies vote on such issues. These kinds of proposals, though classified generally as "social and environmental," cover a wide array of issues, including the environment, diversity in hiring practices, human rights matters, and the safety of a company's business operations.

In addition, these proposals must be viewed in context. For example, suppose virtually identical proposals are directed to two different companies. An investment company might view the proposal as appropriate for the first company, but inappropriate for the second because the latter has already taken steps to address the proposal's concerns.

In short, there is no one-size-fits-all description of how funds vote, other than to say that investment companies seek to vote in the interests of their shareholders and in a way that is consistent with their investment objectives and policies.

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Environmental, Social, and Governance Investing

Perhaps one of the most significant recent global trends is the increasing attention being paid to environmental, social, and governance (ESG) matters. These matters vary widely but are generally considered to include topics related to climate change, diversity and inclusion, human rights, the rights of company shareholders, and company compensation structures. The fund industry is responding to increased investor interest in ESG investing by, among other things, creating new funds that explicitly tailor their investments to specific ESG criteria.

Funds consider ESG factors to varying degrees. For decades, some funds have incorporated ESG factors into their investment processes as a way to enhance fund performance, manage investment risks, and identify emerging investment risks and opportunities, just as they would consider macroeconomic or interest rate risks; idiosyncratic business risks; and investment exposures to particular companies, industries, or geographical regions. Because these funds "integrate" ESG factors into the investment process, this type of investing is known as ESG integration.

Funds' use of ESG integration is distinct from funds' use of "sustainable investing strategies," which use ESG analysis as a significant part of the fund's investment thesis as a way to pursue investment returns and ESG-related outcomes.

Approaches to ESG Investing

The investment strategies funds use vary, as do the ways they describe their approaches. This section describes some of the most common approaches.

- **Exclusionary investing:** Investment strategies that exclude, or "screen out," investments in particular industries or companies that do not meet certain ESG criteria. This may also be described as negative screening, sustainable investing, or socially responsible investing (SRI).
- **Inclusionary investing:** Investment strategies that generally seek investment returns by pursuing a strategic investing thesis focusing on investments that systematically tilt a portfolio based on ESG factors alongside traditional financial analysis. This may also be described as best-in-class, ESG thematic investing, ESG tilt, positive screening, or sustainable investing.
- **Impact investing:** Investment strategies that seek to generate positive, measurable social and environmental impact alongside a financial return. This may also be described as community, goal-based, sustainable, or thematic investing.

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Funds' Use of ESG Integration and Sustainable Investing Strategies: An Introduction
www.ici.org/system/files/attachments/pdf/20_ppr_esg_integration.pdf

These common approaches to ESG investing are not mutually exclusive—a single fund may use multiple approaches (e.g., a best-in-class fund that excludes certain types of investments). As a result, seeking to classify funds that invest according to ESG criteria as solely exclusionary, inclusionary, or impact can be challenging. Applying ICI's long-standing general approach to classifying funds enables research into these funds (e.g., tracking data and monitoring trends).

How ICI Categorizes Funds for Research and Statistical Purposes

ICI seeks to categorize funds as objectively as possible by applying predetermined rules and definitions to the prospectus language of mutual funds, ETFs, and closed-end funds, with a special focus on the "investment objective" and "principal investment strategies" sections.

For example, ICI Research uses prospectus language to determine which of four broad categories to place a fund in: equity, bond, hybrid, or money market. Funds are then placed in subcategories—for example, classifying equity funds as large-, mid-, or small-cap; or bond funds as investment grade or high-yield. To keep fund classifications up to date, ICI monitors funds' prospectuses for material revisions.

This approach produces fund classifications that are consistent and relatively stable, which is very helpful when monitoring current and historical trends in fund data.

Using ICI's Approach to Classify Funds That Invest According to ESG Criteria

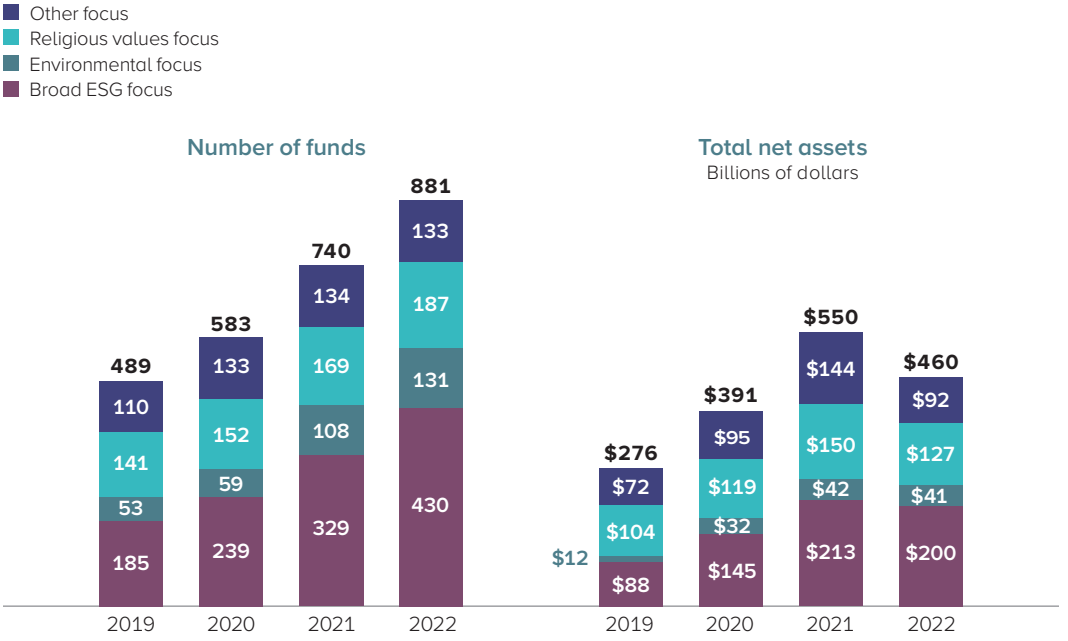
ICI Research examines the prospectuses of funds to classify those that invest according to ESG criteria using the same approach that it does for other categories across all funds. In particular, ICI looks for language indicating that a fund places an important and explicit emphasis on environmental, social, or governance criteria to achieve certain goals.

Following this approach, in 2022, 881 mutual funds and ETFs with assets of $460 billion (Figure 2.12) were classified generally as investing according to exclusionary, inclusionary, or impact investing ESG criteria. The number of funds that invest according to ESG criteria has increased in each year since 2019 (the year ICI began tracking data for these funds) reflecting growing investor interest in these funds.

FIGURE 2.12

Number of Funds That Invest According to ESG Criteria Is Steadily Rising

By focus, year-end



Note: Data include mutual funds and ETFs. Data include mutual funds that invest primarily in other mutual funds and ETFs that invest primarily in other ETFs.

Among funds that use such criteria in selecting their investments, ICI classifies these funds into groups based on the frameworks or guidelines expressed at the forefront of their principal investment strategies sections.

- **Broad ESG focus:** These funds focus broadly on ESG matters. They consider all three elements of ESG (rather than focusing on one or two of the considerations) or may include ESG in their names. Index funds in this group may track a socially responsible index such as the MSCI KLD 400 Social Index.
- **Environmental focus:** These funds focus more narrowly on environmental matters. They may include terms such as alternative energy, climate change, clean energy, environmental solutions, or low carbon in their principal investment strategies or fund names.
- **Religious values focus:** These funds invest in accordance with specific religious values.
- **Other focus:** These funds focus more narrowly on some combination of environmental, social, and/or governance elements, but not all three. They often negatively screen to eliminate certain types of investments.

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ESG Resource Center
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CHAPTER

3

US Mutual Funds

A mutual fund is an investment company that pools money from shareholders and invests in a portfolio of securities. In 2022, 115.3 million individual investors in 68.6 million US households owned mutual funds, relying on them to meet long-term personal financial objectives, such as preparing for retirement, education, or a home purchase. US households and institutions also use money market funds as cash management tools. Mutual funds had net outflows of $1.1 trillion in 2022, or 4.2 percent of year-end 2021 total net assets. Changing demographics, portfolio rebalancing, and investors' reactions to US and worldwide economic and financial conditions play important roles in determining how demand for specific types of mutual funds—and for mutual funds in general—evolves.

IN THIS CHAPTER

Overview of Mutual Fund Trends

With $22.1 trillion in total net assets, the US mutual fund industry remained the largest in the world at year-end 2022. The majority of US mutual fund net assets at year-end 2022 were in long-term mutual funds, with equity funds alone making up 51 percent of US mutual fund net assets. Money market funds were the second-largest category, with 22 percent of net assets. Bond funds (20 percent) and hybrid funds (7 percent) held the remainder.

Investor Demand for US Mutual Funds

A variety of factors influence investor demand for mutual funds, such as funds' ability to assist investors in achieving their investment objectives. For example, US households rely on equity, bond, and hybrid mutual funds to meet long-term personal financial objectives, such as preparing for retirement, saving for emergencies, or saving for education. US households, as well as businesses and other institutional investors, use money market funds as cash management tools because they provide a high degree of liquidity and competitive short-term yields.

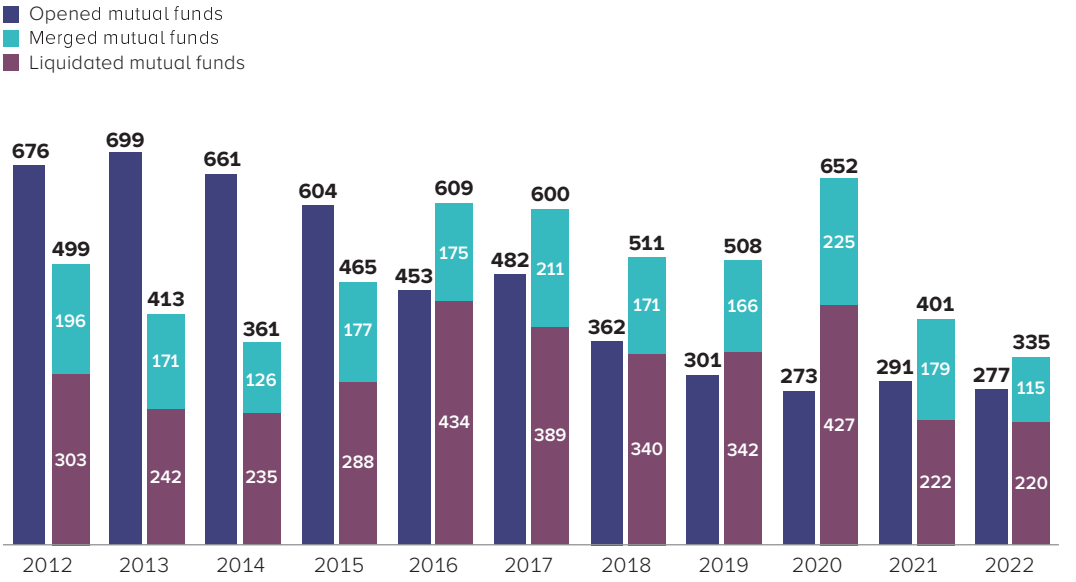
Investor demand for mutual funds decreased sharply in 2022—driven by outflows from long-term mutual funds. Equity mutual funds experienced significant outflows in 2022, reflecting the sharp decline in equity markets and an ongoing shift to other products. In addition, demand for bond mutual funds weakened considerably in 2022, as the Federal Reserve raised interest rates at the fastest pace in four decades to combat rising inflation, which led to significant losses in bond markets. Demand for money market funds steadily shifted from outflows to inflows as investors—particularly retail investors—were attracted to rising short-term yields.

Entry and Exit of US Mutual Funds

Mutual fund sponsors create new funds to meet investor demand, and they merge or liquidate those that do not attract sufficient investor interest. A total of 277 mutual funds opened in 2022 (Figure 3.1). The number of new mutual funds offered in 2022 was relatively even with 2021, as an increase in the number of equity fund launches offset a decrease in the number of hybrid and taxable bond fund launches. During the same time, the number of mutual funds that were either merged or liquidated decreased 16 percent to 335 funds, as sponsors eliminated fewer equity mutual funds from their lineups.

FIGURE 3.1

Mutual Funds Enter and Exit the Industry Because of Competition and Investor Demand



Note: Data include mutual funds that do not report statistical information to the Investment Company Institute and mutual funds that invest primarily in other mutual funds.

Investors in US Mutual Funds

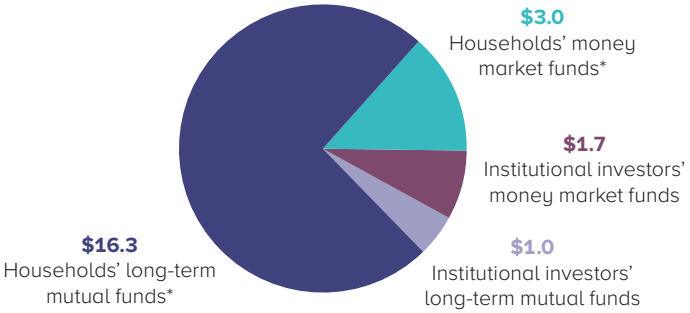
Demand for mutual funds is, in part, related to the types of investors who hold mutual fund shares. Retail investors (i.e., households) held the vast majority (88 percent) of the $22.1 trillion in US mutual fund net assets at year-end 2022 (Figure 3.2). The proportion of long-term mutual fund net assets held by retail investors is even higher (94 percent). Retail investors also held substantial money market fund net assets ($3.0 trillion), but this was a relatively small share (16 percent) of their total mutual fund net assets ($19.4 trillion).

In contrast, institutional investors, such as nonfinancial businesses, financial institutions, and nonprofit organizations, held a relatively small portion of mutual fund net assets. At year-end 2022, institutions held 12 percent of mutual fund net assets (Figure 3.2). The majority (64 percent) of the $2.7 trillion that institutions held in mutual funds was in money market funds, because one of the primary reasons institutions use mutual funds is to help manage their cash balances.

FIGURE 3.2

Households Held 88 Percent of Mutual Fund Total Net Assets

Trillions of dollars, year-end 2022



Mutual fund total net assets: $22.1 trillion
Long-term mutual fund total net assets: $17.3 trillion
Money market fund total net assets: $4.8 trillion

* Mutual funds held as investments in individual retirement accounts, defined contribution retirement plans, variable annuities, 529 plans, and Coverdell education savings accounts are counted as household holdings of mutual funds.

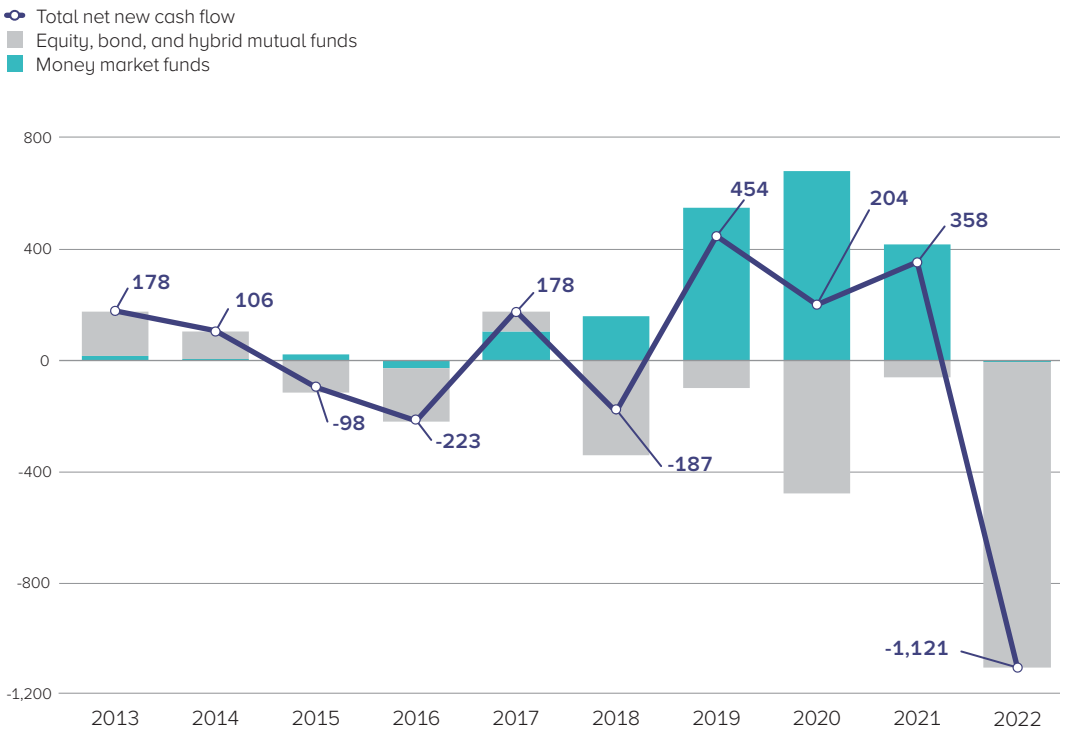
Developments in Mutual Fund Flows

Overall demand for mutual funds as measured by net new cash flow—new fund sales less redemptions, plus net exchanges—weakened considerably in 2022 (Figure 3.3). In 2022, mutual funds had net outflows of $1.1 trillion (4.2 percent of year-end 2021 total net assets), following net inflows of $358 billion in 2021. Long-term mutual funds experienced net outflows of $1.1 trillion in 2022, while money market funds saw net outflows of $4 billion. A number of factors—including broad-based declines in financial markets, a rising interest rate environment, ongoing demographic trends, and demand for indexed products—appeared to influence US mutual fund flows in 2022.

FIGURE 3.3

Net Outflows from Mutual Funds Were Primarily from Long-Term Funds in 2022

Billions of dollars, annual



The US Economy and Financial Markets in 2022

The year proved to be a challenging one for the US economy and financial markets. After expanding at a brisk 5.9 percent pace in 2021, real GDP grew more slowly (2.1 percent) in 2022, as the economy struggled with persistent inflationary pressures throughout the year. In response to stubbornly high inflation, the Federal Reserve increased the federal funds rate at a rapid pace in 2022—raising it by 25 basis points in March, followed by hikes of 50 to 75 basis points at each of the six remaining Federal Open Market Committee (FOMC) meetings to end the year at a target range of 4.25 to 4.50 percent.

The swift increase in short-term rates caused the Treasury yield curve—which illustrates the difference between the yields on long-term Treasuries and short-term Treasury bills—to flatten considerably during the year. By year-end, the yield curve had inverted, which is typically considered an indicator of a looming recession by market participants.

Capital markets experienced significant volatility and losses during 2022, as the economic outlook deteriorated amid persistently high inflation, aggressive monetary policy tightening, and the effects of Russia's invasion of Ukraine, among other factors. Stock markets in the United States ended 2022 close to bear market territory, falling 19 percent.* Additionally, rising labor costs, higher interest rates, and slowing sales growth eroded profits of corporations, while the strengthening of the US dollar—an offshoot of the Federal Reserve's interest rate hikes—further devalued the overseas earnings of US corporations. During 2022, the VIX† averaged 25.6 and surpassed 30—a level generally considered to signal heightened volatility from increased uncertainty, risk, and investor fear—on 19 percent of trading days. Bond markets also experienced significant losses during this period. Rising interest rates deteriorated bond valuations and resulted in substantial losses of 12 percent in 2022 even after including interest income.‡

Long-Term Mutual Fund Flows

Although net new cash flows into long-term mutual funds are typically correlated with market returns, they tend to be moderate as a percentage of total net assets even during episodes of market turmoil. Several factors may contribute to this phenomenon. For example, households (i.e., retail investors) own the vast majority of US long-term mutual fund net assets (Figure 3.2). Retail investors generally respond less strongly to market events than institutional investors do. Most notably, households often use mutual funds to save for the long term, such as for retirement or college. Many of these investors make stable contributions through periodic payroll deductions, even during periods of market stress. In addition, many mutual fund shareholders seek the advice of financial advisers, who may provide a steadying influence during market downturns. These factors are amplified by the fact that net assets in mutual funds are spread across 115 million individual investors who have a wide variety of individual characteristics (such as age or appetite for risk) and goals (such as saving for retirement, emergencies, or education). Investors are also bound to have a wide range of views on market conditions and how best to respond to those conditions to meet their individual goals. As a result, even during months when funds as a whole experience net outflows, many investors continue to purchase fund shares.

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* As measured by the Wilshire 5000 Total Market Index.

† The Chicago Board Options Exchange (CBOE) Volatility Index (VIX) is a widely used measure of expected stock market volatility.

‡ As measured by the S&P US Aggregate Bond Index.

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Even in Bear Markets, Equity Fund Investors Stay the Course
www.ici.org/viewpoints/view_18_equity_flows

Equity Mutual Funds

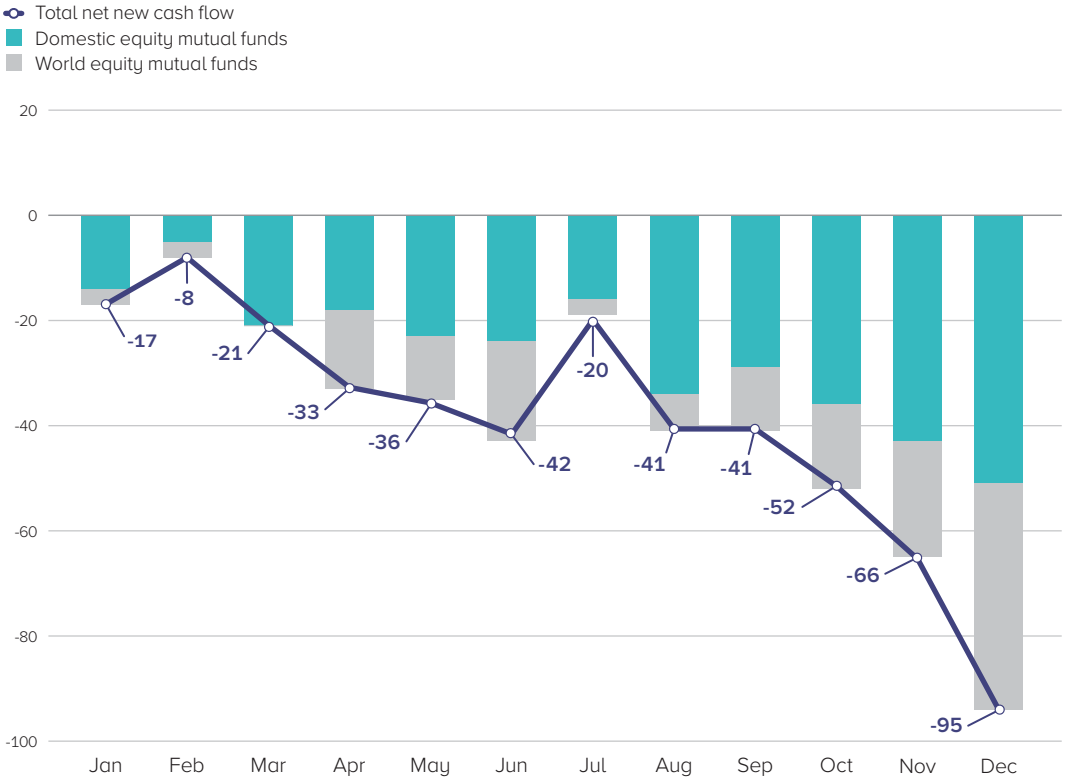
Following the decline in stock market performance around the globe, equity mutual funds experienced net outflows totaling $472 billion in 2022 (3.2 percent of year-end 2021 total net assets).

Equity mutual funds had net outflows in every month in 2022 (Figure 3.4). In the first three months of the year, investors had redeemed, on net, a modest $46 billion from equity mutual funds. Flows to mutual funds, in general, tend to be bolstered in the first quarter of the year because investors who receive year-end bonuses may invest that money relatively quickly in the new year. In addition, some investors wait to make contributions to their individual retirement accounts (IRAs) before filing their tax returns. As the year progressed, net outflows from equity mutual funds accelerated, with investors redeeming, on net, $425 billion from April through December.

FIGURE 3.4

Equity Mutual Funds Had Net Outflows in 2022

Billions of dollars; monthly, 2022



Note: In March 2022, world equity mutual funds had net inflows of less than $500 million.

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From December Outflows to January Inflows: Seasonal Factors in Mutual Fund Flows

www.ici.org/viewpoints/view_19_seasonal_nncf

In addition to declining stock prices, net outflows from domestic equity mutual funds in 2022 may have also been driven by investor demand for domestic equity exchange-traded funds (ETFs). As discussed in chapter 4, demand for ETFs has been very strong over the past several years. Except for April, domestic equity ETFs had net creations in every month of 2022, which resulted in $317 billion in net share issuance over the year (see Figure 4.4). In contrast, domestic equity mutual funds had net outflows of $316 billion in 2022 (Figure 3.4).

Demand for world equity mutual funds weakened considerably in 2022, with investors redeeming $156 billion (Figure 3.4), compared with net redemptions of $16 billion in 2021. Outflows were broad-based across emerging market equity, global equity, international equity, and regional equity funds.

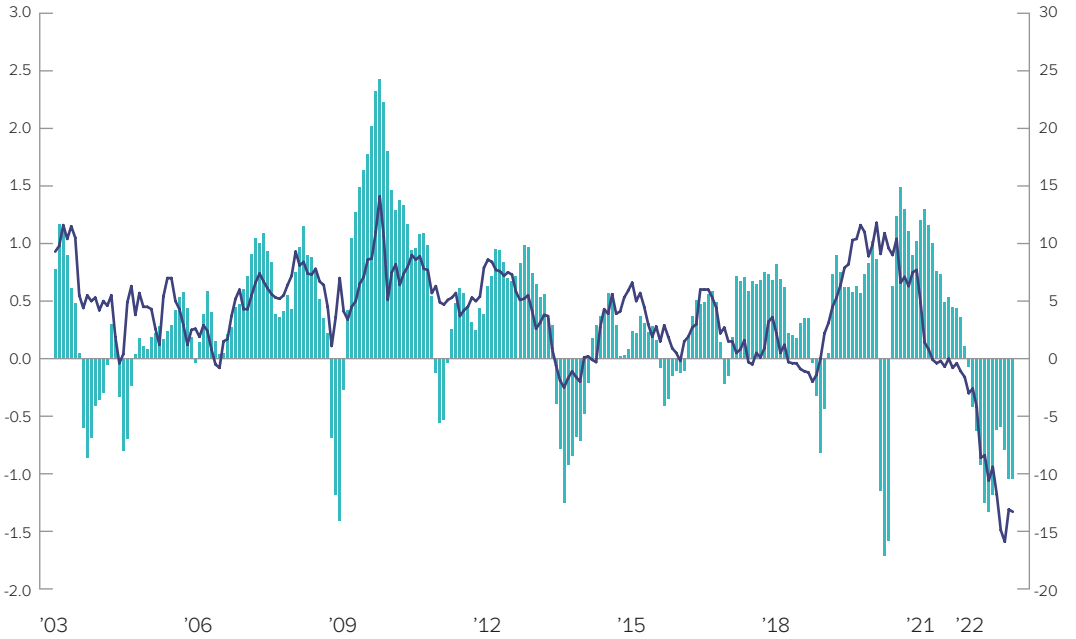
Bond Mutual Funds

Bond mutual fund net new cash flows typically are correlated with the performance of US bonds (Figure 3.5), which, in turn, is largely driven by the US interest rate environment. Long-term interest rates increased considerably in 2022, reflecting the aggressive tightening of monetary policy by the Federal Reserve to tame inflation. The yield on the 10-year Treasury started 2022 at 1.52 percent and increased to 4.25 percent in October before falling to 3.88 percent by year-end. The sharp increase in interest rates resulted in significant capital losses on US bonds in 2022.

FIGURE 3.5

Net New Cash Flow to Bond Mutual Funds Is Typically Related to Bond Returns

Monthly



[1] Net new cash flow is reported as a percentage of previous month-end bond mutual fund total net assets, plotted as a three-month moving average. Data exclude high-yield bond mutual funds.

[2] The total return on bonds is measured as the year-over-year percent change in the FTSE US Broad Investment Grade Bond Index.

Sources: Investment Company Institute, FTSE Russell, and Refinitiv

Taxable bond mutual funds experienced net outflows in each month of 2022 totaling $393 billion, or 8.5 percent of their year-end 2021 total net assets (Figure 3.6). Portfolio rebalancing may have also contributed to these outflows. With stocks underperforming bonds in 2022, investors and target date funds following asset allocation strategies would have needed to sell bond funds and buy equity funds to remain at their target allocations.

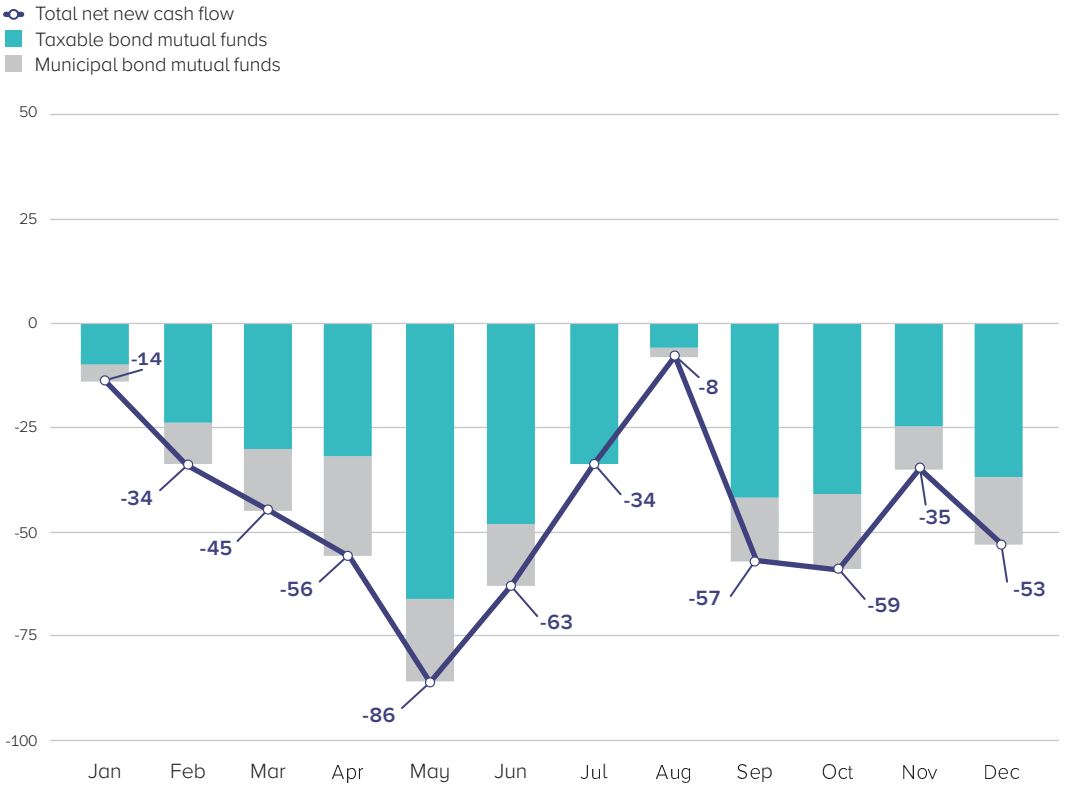
Investor demand weakened across all categories of taxable bond mutual funds in 2022, with investment grade bond funds experiencing the bulk of outflows ($198 billion), which represented 7.5 percent of their year-end 2021 total net assets. Multi-sector bond mutual funds saw outflows of $67 billion (or 10.8 percent of their net assets at year-end 2021); world bond mutual funds, which typically hold a mix of bonds denominated in US dollars and foreign currencies, saw net outflows of $50 billion (8.6 percent); high-yield bond funds saw net outflows of $46 billion (11.7 percent); and government bond mutual funds saw net outflows of $33 billion (8.0 percent).

Demand for municipal bond mutual funds also weakened in 2022, with net outflows in nearly every month totaling $148 billion for the year, or 15.2 percent of their year-end 2021 net assets.

FIGURE 3.6

Net New Cash Flow to Bond Mutual Funds

Billions of dollars; monthly, 2022



Note: In July 2022, municipal bond mutual funds had net inflows of less than $500 million.

How Bond Mutual Funds Manage Investor Flows

When meeting redemptions, fund managers' actions are guided by market conditions, expected investor flows, and other factors. A fund might decide to sell some of its holdings to raise the cash needed to fulfill redemptions. But its choice of which particular securities to sell may depend on market conditions. For example, during a market downturn, with liquidity at a premium, some fund managers might seek to add shareholder value by selling some of their funds' more liquid bonds (which, being in high demand, are trading at a premium to fundamental value). Other fund managers may conclude that it is necessary and appropriate to sell a representative "slice" of their funds' entire portfolios.

Bond mutual fund managers have other ways of meeting redemption requests. For example, a fund might already have cash on hand. Or, the fund may use the cash that bond mutual funds receive each day in the form of interest income from bonds held in the portfolio, proceeds from matured bonds, or new sales of fund shares.

In addition, bond funds often use derivatives or hold liquid assets other than cash. For example, a high-yield bond fund might hold some portion of its assets in equities, because equities are very liquid, and the return profiles of high-yield bonds and equities can be similar. Derivatives can be more liquid than their physical counterparts, and funds are required to segregate liquid assets to support their derivatives positions. As these positions are closed, this cash collateral provides a ready source of liquidity to meet redemptions. This is especially true for many of the funds commonly called liquid alternative funds, as these funds are explicitly designed to allow frequent investor trading and do so in large measure through the use of derivatives.

Long-Term Demand for Bond Mutual Funds

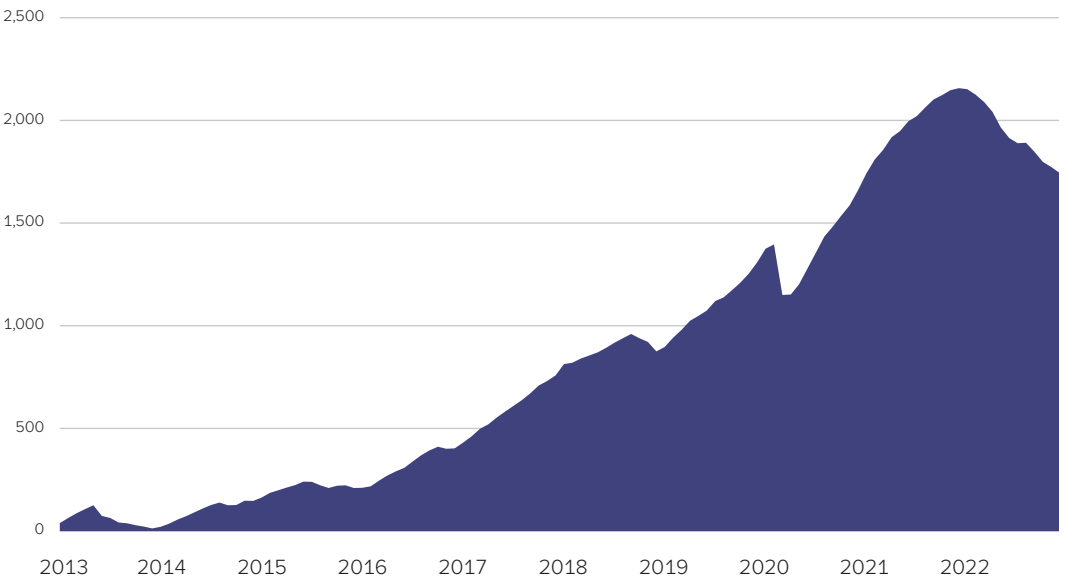
Despite outflows in 2022, bond mutual funds have received $1.7 trillion in net new cash flow and reinvested dividends in the past decade (Figure 3.7).

A number of factors have helped contribute to this long-term demand for bond mutual funds, including demographics. Older investors tend to have larger account balances because they have had more time to accumulate savings and take advantage of compounding. At the same time, as investors age, they tend to shift toward fixed-income products. Over the past decade, the aging US population has boosted flows to bond funds.

FIGURE 3.7

Bond Mutual Funds Have Experienced Net Inflows Through Most of the Past Decade

Cumulative flows to bond mutual funds, billions of dollars, monthly



Note: Bond mutual fund data include net new cash flow and reinvested dividends.

The popularity of target date mutual funds has also contributed to strong demand for bond mutual funds during this period. Target date funds invest in a changing mix of equities and fixed-income investments. As the fund approaches and passes its target date (which is usually specified in the fund's name), the fund gradually reallocates assets from equities to fixed-income investments, including bonds. Over the past 10 years, target date mutual funds have received net inflows of $405 billion. At year-end 2022, target date mutual funds had total net assets of $1.5 trillion. Investor interest in these funds likely reflects their automatic rebalancing features, as well as their inclusion as an investment option in many defined contribution (DC) plans (see Figure 8.10).

These long-term factors, combined with mostly positive annual returns on bonds and inflows from portfolio allocation strategies, have caused bond mutual fund total net assets to increase from $3.4 trillion at year-end 2012 to $4.5 trillion at year-end 2022. However, long-term mutual funds' share of bond markets—most of which is held by bond mutual funds—has stayed relatively stable in recent years (see Figure 2.4).

Hybrid Mutual Funds

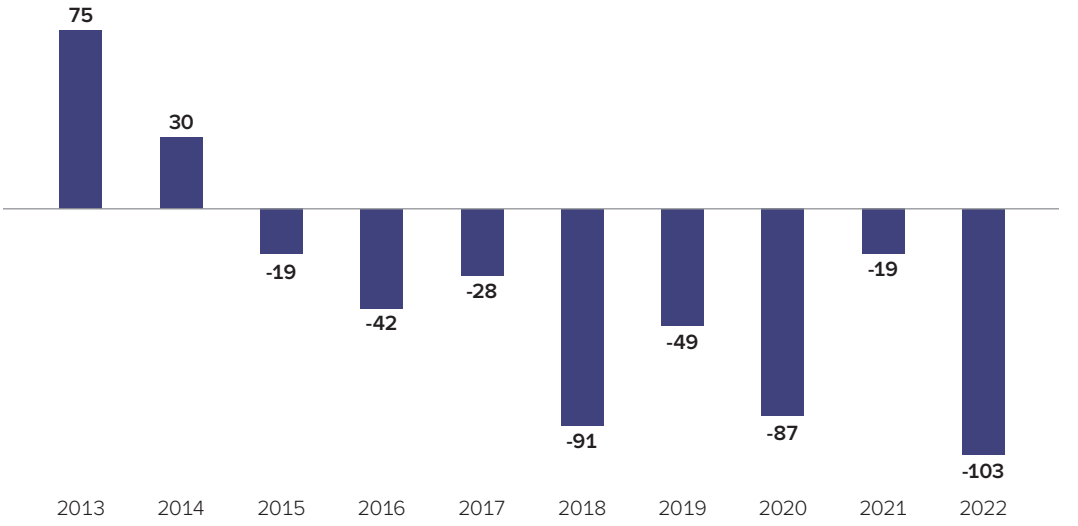
Hybrid funds (also called asset allocation funds or balanced funds) invest in a mix of stocks and bonds. This approach offers a way to balance the potential capital appreciation of stocks with the income and relative stability of bonds over the long term. The fund's portfolio may be periodically rebalanced to bring its asset allocation more in line with prospectus objectives, which could be necessary following capital gains or losses in the stock or bond markets.

Over the past eight years, investors have moved away from hybrid mutual funds, which had been a popular way to achieve a managed, balanced portfolio of stocks and bonds (Figure 3.8). In 2022, hybrid mutual funds had net outflows of $103 billion (or 5.7 percent of their net assets at year-end 2021). Many factors have likely contributed to this change. For example, investors may be shifting out of hybrid funds and into portfolios of ETFs that are periodically rebalanced, often with the assistance of a fee-based financial adviser. In addition, investors may be shifting assets toward target date funds as an alternative way to achieve a balanced portfolio.*

FIGURE 3.8

Net New Cash Flow to Hybrid Mutual Funds

Billions of dollars, annual



* ICI generally excludes funds of funds from total net asset and net new cash flow calculations to avoid double counting. Although target date funds are classified as hybrid funds by ICI, 97 percent of target date fund assets are in funds of funds, and therefore, their flows are excluded from the hybrid mutual fund flows presented in Figure 3.8.

Growth of Other Investment Products

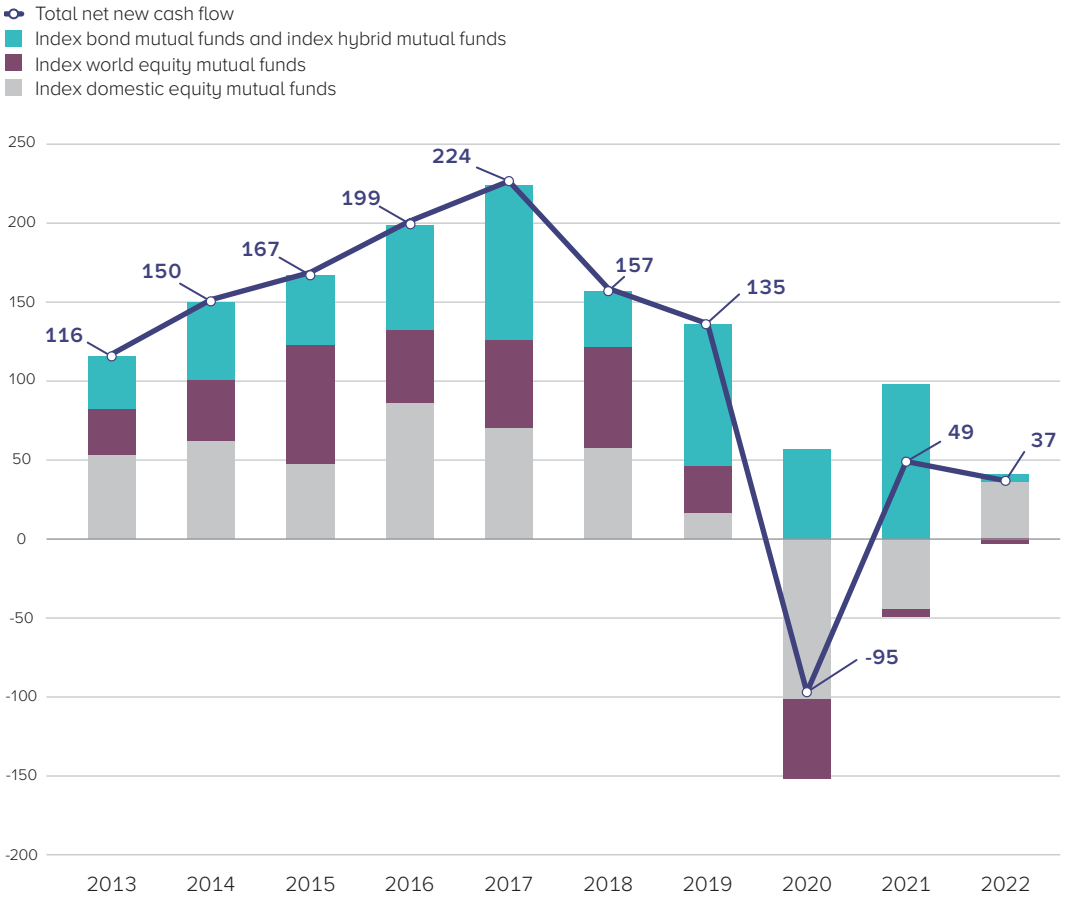
Outflows from some long-term mutual funds over the past decade reflect a broader shift, driven by both investors and retirement plan sponsors, toward other pooled investment vehicles. This trend is reflected in the outflows from actively managed mutual funds and the growth of index mutual funds, ETFs, and collective investment trusts (CITs) since 2007.

Index mutual funds—which hold all (or a representative sample) of the securities in a specified index—are popular among investors. Of households that owned mutual funds, 48 percent owned at least one index equity mutual fund in 2022. As of year-end 2022, 517 index mutual funds managed total net assets of $4.8 trillion. For 2022 as a whole, investors added $37 billion in net new cash flow to these funds (Figure 3.9). Outflows from index world equity mutual funds ($3 billion) were more than offset by inflows into index domestic equity mutual funds and index bond and hybrid mutual funds ($36 billion and $5 billion, respectively).

FIGURE 3.9

Net New Cash Flow to Index Mutual Funds

Billions of dollars, annual

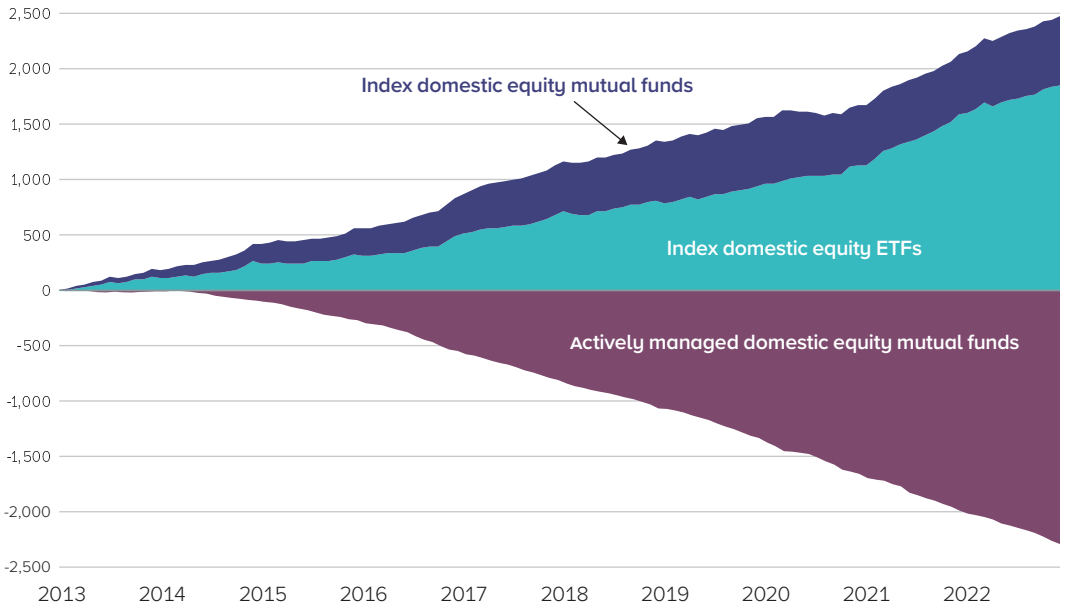


Index domestic equity mutual funds and ETFs have particularly benefited from the overall increased investor demand for index-based investment products. From 2013 through 2022, index domestic equity mutual funds and ETFs received $2.5 trillion in net new cash and reinvested dividends, while actively managed domestic equity mutual funds experienced net outflows of $2.3 trillion (including reinvested dividends) (Figure 3.10). Index domestic equity ETFs have grown particularly quickly—attracting nearly three times the amount of net inflows of index domestic equity mutual funds since 2013. Part of the recent increasing popularity of ETFs is likely attributable to more brokers and financial advisers using them in their clients' portfolios. In 2021, full-service brokers and fee-based advisers had 28 percent and 41 percent, respectively, of their clients' household assets invested in ETFs, up sharply from 6 percent and 10 percent in 2011 (Figure 3.11).

FIGURE 3.10

Some of the Outflows from Domestic Equity Mutual Funds Have Gone to ETFs

Cumulative flows to domestic equity mutual funds and net share issuance of index domestic equity ETFs, billions of dollars, monthly

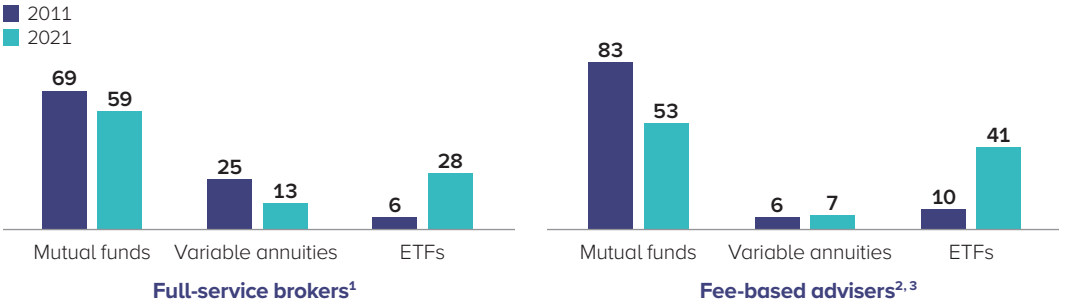


Note: Mutual fund data include net new cash flow and reinvested dividends; ETF data for net share issuance include reinvested dividends.

FIGURE 3.11

Fee-Based Advisers Are Investing Larger Portions of Client Portfolios in ETFs

Percentage of household assets invested in investment category by adviser type



[1] This category includes wirehouses as well as regional, independent, and bank broker-dealers.

[2] This category includes registered investment advisers and dually registered investment adviser broker-dealers.

[3] This category excludes an unknown portion of assets from investors who received fee-based advice but implemented trades themselves through discount brokers and fund supermarkets.

Source: Cerulli Associates, "The State of US Retail and Institutional Asset Management, 2022"

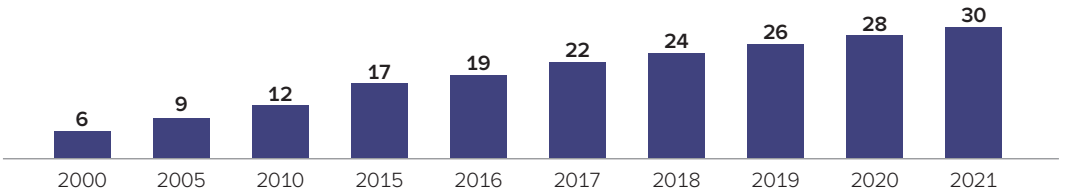
CITs are an alternative to mutual funds for DC plans. Like mutual funds, CITs pool the assets of investors and (either actively or passively) invest those assets according to a particular strategy. Much like institutional share classes of mutual funds, CITs generally require substantial minimum investment thresholds, which can limit the costs of managing pooled investment products. Unlike mutual funds, which are regulated under the Investment Company Act of 1940, CITs are regulated under banking laws and not marketed as widely as mutual funds; this can also reduce their operational and compliance costs as compared with mutual funds.

More retirement plan sponsors have begun offering CITs as options in 401(k) plan lineups. As Figure 3.12 demonstrates, this trend has translated into a growing share of assets held in CITs by large 401(k) plans. That share increased from 6 percent in 2000 to an estimated 30 percent in 2021. This recent expansion is due, in part, to the growth in target date CITs.

FIGURE 3.12

Assets of Large 401(k) Plans Are Increasingly Held in Collective Investment Trusts

Percentage of assets in large 401(k) plans*



* Large 401(k) plans are those that filed Form 5500 Schedule H (typically plans with 100 participants or more).

Note: Assets exclude Direct Filing Entity assets that are reinvested in collective investment trusts. Data prior to 2021 come from the Form 5500 Research data sets released by the Department of Labor. Data for 2021 are preliminary, based on Department of Labor Form 5500 latest data sets.

Source: Investment Company Institute calculations of Department of Labor Form 5500 data

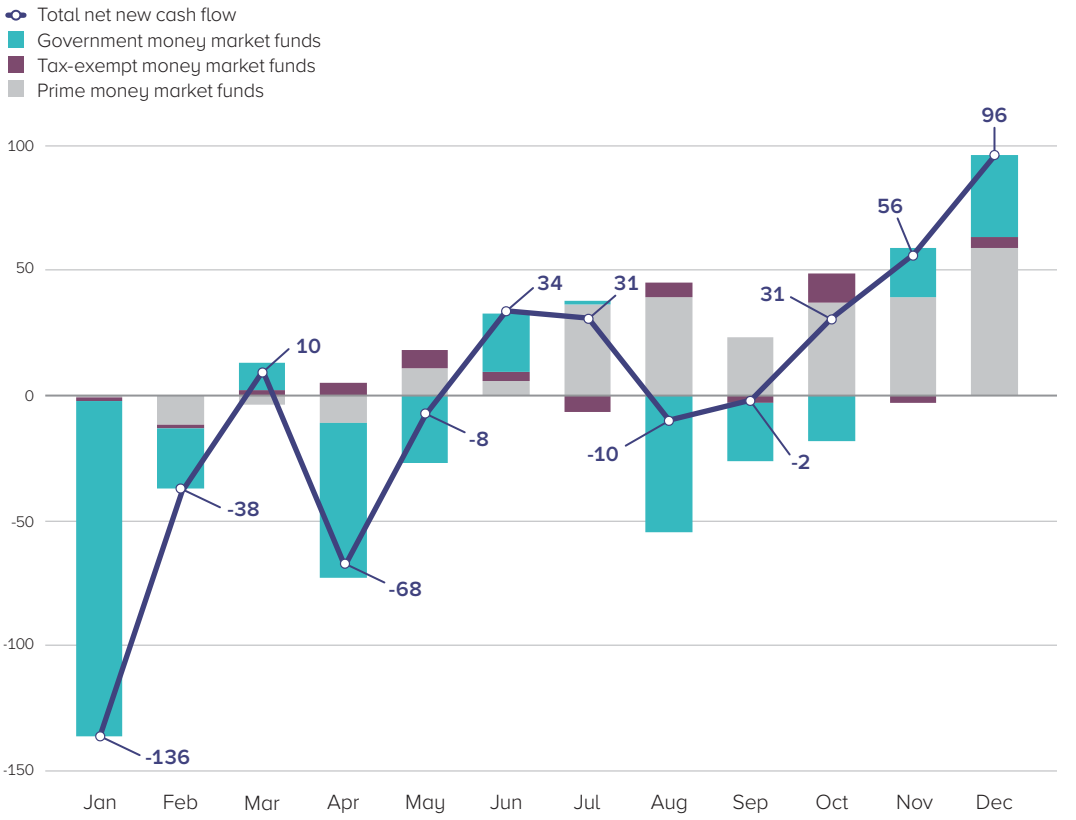
Money Market Funds

In 2022, money market funds saw net outflows of $4 billion (Figure 3.13). Prime money market funds and tax-exempt money market funds received inflows ($224 billion and $25 billion, respectively), but these flows were offset by outflows from government money market funds ($253 billion).

FIGURE 3.13

Net New Cash Flow to Money Market Funds

Billions of dollars; monthly, 2022



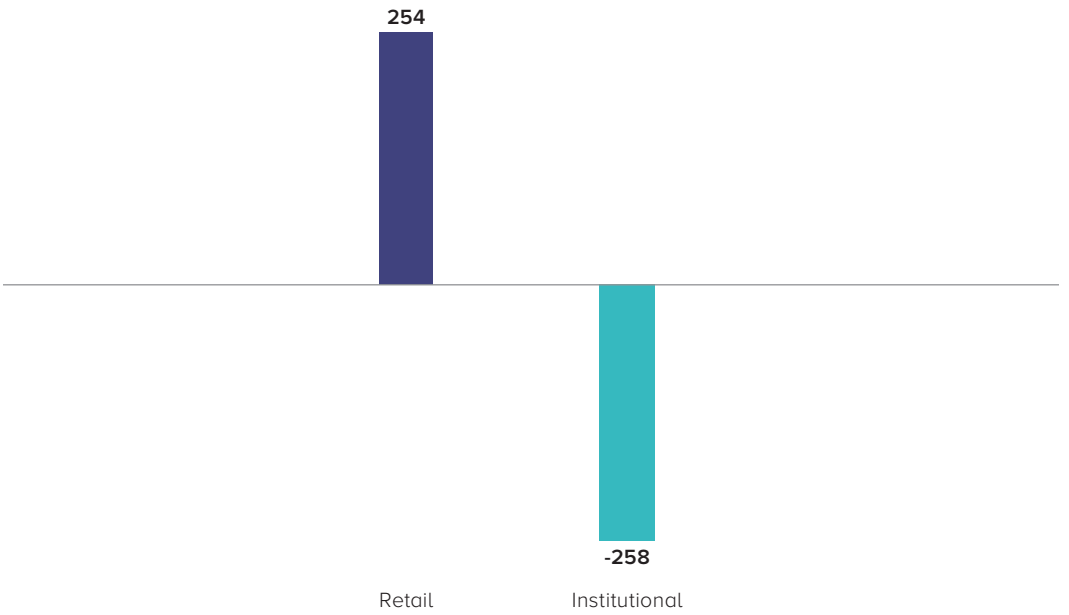
Most of the demand for money market funds in 2022 was from retail investors. Retail money market funds had net inflows of $254 billion while institutional money market funds had net outflows of $258 billion (Figure 3.14). In 2022, short-term interest rates ramped up quickly amid aggressive monetary tightening and by year-end were higher than longer dated fixed-income securities. Retail investors were particularly attracted to rising yields and extremely low interest rate risk offered by money market funds, especially in light of significant capital losses in stock and bond markets. To mitigate these losses, retail investors may have shifted some of their bond fund positions into money market funds to shorten the duration of their fixed-income investments.

In contrast, institutional investors, on net, redeemed cash from money market funds—a development that is consistent with previous monetary policy tightening cycles. Because of their size and investment knowledge, some institutional investors can easily invest directly in short-term instruments. This allows those institutional investors to capture higher yields immediately when the Federal Reserve raises the federal funds rate—rather than waiting for yields on money market funds to catch up as older, lower-yielding short-term securities mature and are replaced with newer, higher-yielding paper.

FIGURE 3.14

Inflows into Retail Money Market Funds Mostly Offset Outflows from Institutional Money Market Funds

Billions of dollars, 2022



CHAPTER

4

US Exchange-Traded Funds

ETFs are a convenient, cost-effective tool for investors seeking to gain or shed exposure to broad markets, particular sectors or geographical regions, or specific investment strategies. Demand for ETFs has grown markedly as investors—both institutional and retail—increasingly turn to them as investment options. In the past 10 years, net share issuance of ETFs has totaled $4.1 trillion. As investor demand has increased, sponsors have offered more ETFs with a greater variety of investment objectives. With $6.5 trillion in total net assets at year-end 2022, the US ETF industry remained the largest in the world.

IN THIS CHAPTER

What Is an ETF?

An exchange-traded fund (ETF) is a pooled investment vehicle with shares that investors can buy and sell throughout the day on a stock exchange at a market-determined price. Investors may buy or sell ETF shares through a broker or in a brokerage account, just as they would the shares of any publicly traded company. ETFs have been available as an investment product for 30 years in the United States. Most ETFs are structured as open-end investment companies, like mutual funds, and are governed by the same regulations. Other ETFs—primarily those investing in commodities, currencies, and futures—have different structures and are subject to different regulatory requirements.

Learn More About ETFs

ETFs have proven to be a successful financial innovation among registered investment companies since the first one was created in 1993. The demand for ETFs has grown markedly as both institutional and retail investors have gravitated toward them because of their appealing features. For an introduction to the creation, operation, and evolution of the regulation of ETFs, as well as information about authorized participants (or APs) and the key similarities and differences between ETFs and mutual funds, see the ETF Resource Center available at **www.ici.org/etf**.

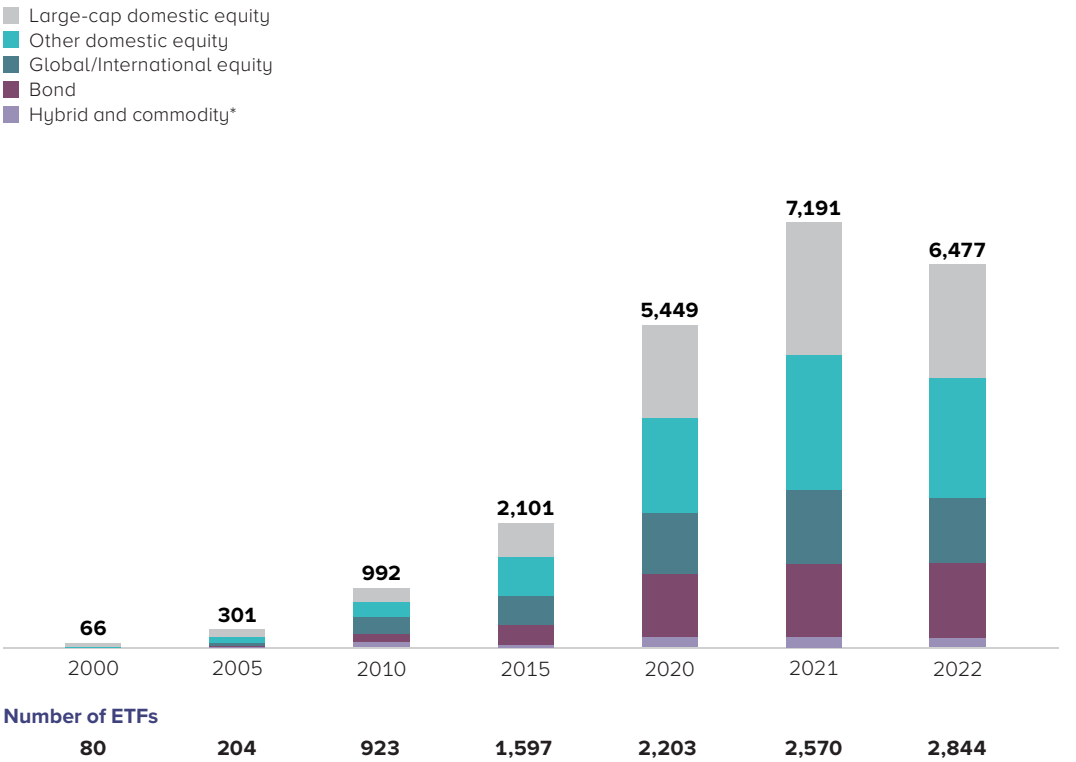
ETF Total Net Assets

At year-end 2022, the US ETF market—with 2,844 funds and $6.5 trillion in total net assets—remained the largest in the world, accounting for 72 percent of the $8.9 trillion in ETF net assets worldwide.* Within the United States, total net assets in ETFs accounted for 22 percent of assets managed by investment companies at year-end 2022 (see Figure 2.1). ETFs have been available for 30 years, and in that time, large-cap domestic equity ETFs have accounted for a substantial proportion of ETF net assets. At year-end 2022, net assets in large-cap domestic equity ETFs totaled $1.9 trillion, or 30 percent of ETF net assets. Bond ETFs, which have been fueled by strong investor demand over the past several years, accounted for $1.3 trillion (19 percent) of net assets.

FIGURE 4.1

Total Net Assets and Number of ETFs

Billions of dollars, year-end



* Commodity ETFs include funds—both registered and not registered under the Investment Company Act of 1940—that invest primarily in commodities, currencies, and futures.

Note: The first bond, hybrid, and commodity ETFs were opened in 2002, 2007, and 2004, respectively.

* Based on ICI calculations of data from the International Investment Funds Association (IIFA).

Secondary Market Trading in ETF Shares

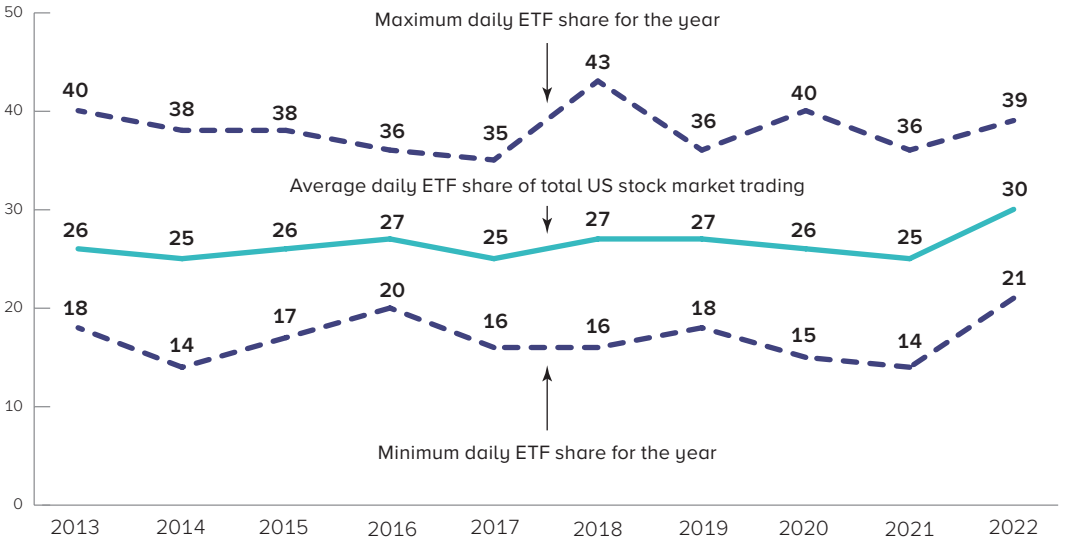
Many investors access ETFs through the secondary market (e.g., on an exchange). Although many large institutional investors can access ETFs in both the primary market (i.e., through creations and redemptions of ETF shares via an AP) and the secondary market, retail investors generally can access them only in the secondary market. ETF investors trading in the secondary market generally are not motivated by arbitrage. They are using ETFs to gain or reduce exposure to specific asset classes or investment strategies, diversify their portfolios, or hedge investment risks. Thus, these funds provide investors with an efficient means to transfer risk. Therefore, it is not surprising that ETF secondary market trading volumes (as measured by the value of shares traded) are a substantial share of total trading on US stock exchanges and other venues. But despite tremendous growth in ETFs in the past decade, their average daily share of total stock market trading has remained relatively flat—fluctuating in a narrow range. In 2022, ETFs' share of trading volume somewhat increased and accounted for 30 percent of average daily total stock market trading (Figure 4.2), which was likely related to elevated market volatility.

During periods of market turbulence, ETF secondary market trading volumes rise—both in absolute terms and as a share of total stock market trading—as investors, especially institutional investors, turn to ETFs to quickly and efficiently transfer and hedge risks. For example, in late 2018, stock market volatility jumped, largely reflecting market participants' concerns about slowing global growth and intensifying trade tensions. On December 24, 2018, when the S&P 500 index neared bear market territory following its September peak, ETF trading volume accounted for 43 percent of total stock market trading—its highest share in the past decade (Figure 4.2). More recently, in 2022, there was an abundance of concern over the increased volatility in equity and bond markets and the Federal Reserve's stance on monetary policy to combat rising inflation—with year-over-year inflation reaching a 40-year high in June. As such, ETF trading volume peaked at 39 percent of total stock market trading on June 13, 2022, one day before the Federal Reserve's June Federal Open Market Committee (FOMC) meeting.

FIGURE 4.2

ETF Secondary Market Trading Averaged 30 Percent of Daily US Stock Trading in 2022

Percentage of total US stock market trading volume, annual



Date of maximum									
Jun 20	Feb 3	Aug 24	Sep 13	Dec 1	Dec 24	Jan 2	Mar 3	Nov 26	Jun 13
Date of minimum									
Feb 12	Jun 27	Jun 26	Jul 28	Jun 23	Jun 22	Nov 26	Dec 18	Jun 25	Dec 16

Sources: Investment Company Institute, Bloomberg, Refinitiv, and Cboe Exchange, Inc.

Across all ETFs, most activity is conducted in the secondary market (trading ETF shares) rather than the primary market (creations and redemptions of ETF shares through an AP). On average, 86 percent of the total activity in ETFs occurred on the secondary market in 2022. Even for ETFs focused on narrower asset classes—such as emerging market equity, domestic high-yield bond, and emerging market bond—the bulk of the trading occurred on the secondary market (95 percent, 81 percent, and 88 percent, respectively).*

Most ETF secondary market trades represent investors exchanging shares of ETFs among themselves. Unlike primary market activity, these trades do not affect the ETF's underlying securities. In 2022, domestic equity ETFs had a total of $5.2 trillion in primary market activity, which represented only 5.2 percent of the $99.8 trillion traded in company stocks during the year (Figure 4.3). Even in years with significant market volatility, such as 2018, 2020, and 2022, creations and redemptions of domestic equity ETFs accounted for only a modest share of trading in company stocks.

* Based on ICI calculations of data from Refinitiv.

FIGURE 4.3

Domestic Equity ETFs Have Had Minimal Impact on Underlying US Stocks

Annual

	Domestic equity ETF primary market activity* Trillions of dollars	Value of company stock traded Trillions of dollars	Domestic equity ETF primary market activity as a share of company stock traded Percent
2013	$1.9	$41.2	4.6%
2014	2.3	48.7	4.6
2015	2.5	51.3	4.9
2016	2.2	49.7	4.4
2017	2.2	51.3	4.2
2018	3.5	65.1	5.4
2019	2.9	59.4	5.0
2020	4.2	88.9	4.7
2021	4.9	106.3	4.6
2022	5.2	99.8	5.2

* Primary market activity is measured as the total of gross issuance and gross redemptions.

Sources: Investment Company Institute, Bloomberg, Refinitiv, and Cboe Exchange, Inc.

Demand for ETFs

In recent years, demand for ETFs has grown as institutional investors have found ETFs to be a convenient vehicle for participating in, or hedging against, broad movements in the stock market, and financial advisers are investing more of their retail clients' assets in ETFs (see Figure 3.11). Although down from 2021's record high, net issuance of ETF shares (including reinvested dividends) in 2022 was a robust $609 billion, even with steep losses in stock and bond markets (Figure 4.4).

Net issuance of domestic equity ETFs was $317 billion in 2022, down from $519 billion in 2021, and net issuance of global/international equity ETFs fell from $211 billion to $100 billion. The drop-off in demand for these two categories likely reflected the poor performance of worldwide stock prices—US stocks were down 19 percent* and international stocks lost 16 percent.† Demand for global/international equity ETFs was also likely tamped down by an appreciation in the value of the US dollar, which generally decreases the attractiveness of international investments to US investors. Despite losses of 12 percent (including interest income) on US bonds,‡ demand for bond ETFs remained fairly steady, with net issuance totaling $197 billion in 2022 versus $203 billion in 2021. In 2022, net issuance of bond ETFs was more concentrated in low duration funds—an estimated 42 percent of the bond ETF net issuance went to funds with durations of two years or less.§

* As measured by the Wilshire 5000 Total Market Index.

† As measured by the MSCI ACWI Ex USA Index (expressed in US dollars).

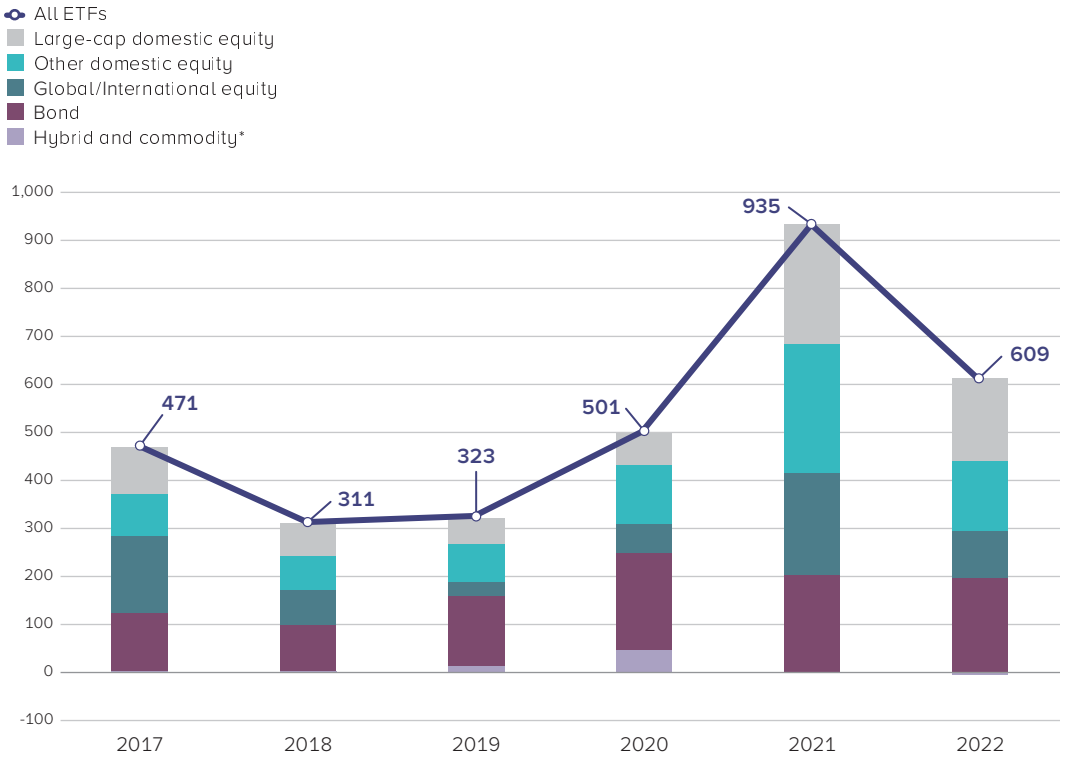
‡ As measured by the S&P US Aggregate Bond Index.

§ Based on ICI calculations of data from Morningstar Direct.

FIGURE 4.4

Net Share Issuance of ETFs Declined in 2022

Billions of dollars, annual



* Commodity ETFs include funds—both registered and not registered under the Investment Company Act of 1940—that invest primarily in commodities, currencies, and futures.

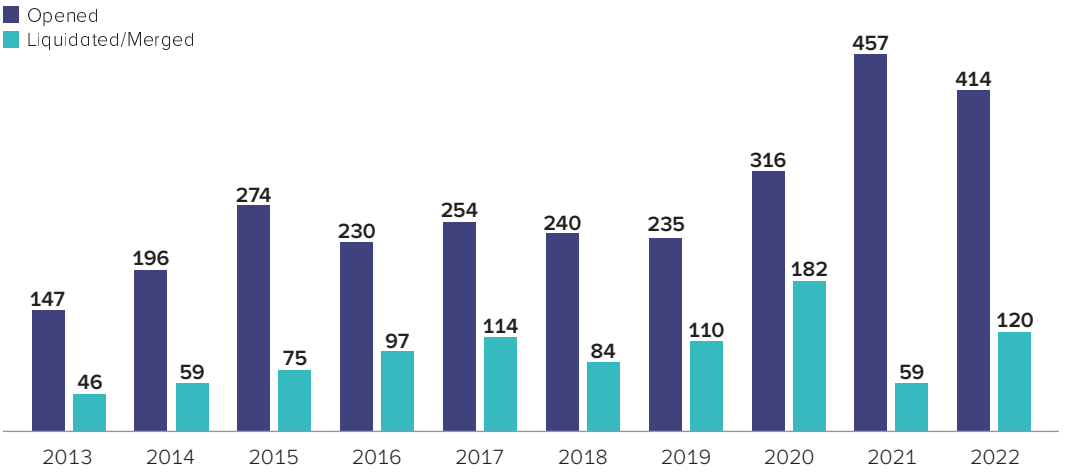
Note: Data for net share issuance include reinvested dividends.

Overall demand for ETFs in 2022 may have also been boosted due to tax loss harvesting—a strategy that allows investors to offset capital gains with capital losses to reduce or minimize their tax liability. Because tax loss harvesting involves selling a security at a loss, some investors tend to replace the security that was sold with a similar one to maintain the portfolio's allocation structure and its associated risk profile. These transactions, however, must comply with the wash-sale rule, which disallows claimed losses on the sale of a security if that same security or a substantially identical one is bought within 30 days. As a result, some investors may have chosen to buy ETFs with similar but not substantially identical investment exposure to replace the securities they sold to avoid violating the wash-sale rule.

Strong investor demand for ETFs has led to a substantial increase in the number of ETFs created by fund sponsors, with 2,763 new ETFs offered to investors in the past decade (Figure 4.5). Over the same period, 946 ETFs were liquidated or merged with another fund. In any given year, fund sponsors will liquidate or merge ETFs that have failed to attract sufficient demand. In 2022, 414 ETFs—mostly equity ETFs—were launched. Meanwhile, 120 ETFs were liquidated or merged as sponsors eliminated some sector equity ETFs and global/international equity ETFs from their lineups.

FIGURE 4.5

Number of ETFs Entering and Exiting the Industry



Note: Data include ETFs that invest primarily in other ETFs.

Characteristics of ETF-Owning Households

About 12 percent of US households (16.1 million) held ETFs in 2022 (see Figure 7.1). Of households that owned mutual funds, an estimated 19 percent also owned ETFs. ETF-owning households tended to include investors who owned a range of equity and fixed-income investments.

Some characteristics of ETF-owning households are similar to those of households that own mutual funds and those that own stocks directly. For instance, households that owned ETFs—like households owning mutual funds and those owning individual stocks—tended to have household incomes above the national median (Figure 4.6). ETF-owning households, however, also exhibit some characteristics that distinguish them from other households. For example, ETF-owning households tended to be younger and more likely to own individual retirement accounts (IRAs) than households that own mutual funds and those that own individual stocks.

ETF-owning households also exhibit more willingness to take investment risk (Figure 4.6). Fifty-two percent of ETF-owning households were willing to take substantial or above-average investment risk for substantial or above-average gain in 2022, compared with 24 percent of all US households and 34 percent of mutual fund–owning households. This result may be explained by the predominance of equity ETFs, which make up 78 percent of ETF total net assets. Investors who are more willing to take investment risk generally may be more likely to invest in equities.

FIGURE 4.6

Characteristics of ETF-Owning Households

2022

	All US households	Households owning ETFs	Households owning mutual funds	Households owning individual stocks
Median				
Age of head of household[1]	52	51	54	53
Household income[2]	$69,000	$125,000	$100,000	$125,000
Household financial assets[3]	$87,500	$465,000	$250,000	$375,000
Percentage of households				
Household primary or co-decisionmaker for saving and investing				
Married or living with a partner	64	72	71	72
College or postgraduate degree	39	66	54	61
Employed (full- or part-time)	56	65	64	64
Retired from lifetime occupation	32	33	34	33
Household owns				
IRA(s)	42	81	67	69
DC retirement plan account(s)	57	76	81	79
Household's willingness to take financial risk				
Substantial risk for substantial gain	5	10	6	7
Above-average risk for above-average gain	19	42	28	37
Average risk for average gain	39	38	47	44
Below-average risk for below-average gain	11	6	11	8
Unwilling to take any risk	26	4	8	4

[1] Age is based on the sole or co-decisionmaker for household saving and investing.

[2] Total reported is household income before taxes in 2021.

[3] Household financial assets include assets in employer-sponsored retirement plans but exclude the household's primary residence.

CERTIFICATE OF FILING/SERVICE

I do hereby certify that on date indicated below, I filed via electronic means (ESTTA) the foregoing document with the:

U. S. Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

with a copy via email to counsel of record, including:

david.kelly@kelly-ip.com
lauren.jancuska@kelly-ip.com
lit-docketing@kelly-ip.com

This the 13th day of June, 2023.

/ Katarina K. Wong /
Katarina K. Wong

Attorney for Applicant

CHAPTER

5

US Closed-End Funds

Closed-end funds are one of four types of investment companies, along with mutual (or open-end) funds, exchange-traded funds (ETFs), and unit investment trusts. Closed-end funds generally issue a fixed number of shares that are listed on a stock exchange or traded in the over-the-counter market. The assets of a closed-end fund are professionally managed in accordance with the fund's investment objectives and policies and may be invested in stocks, bonds, and other securities. Because a closed-end fund does not need to maintain cash reserves or sell securities to meet redemptions, the fund has the flexibility to invest in less-liquid portfolio securities. Total assets of closed-end funds were $252 billion at year-end 2022.

IN THIS CHAPTER

What Is a Closed-End Fund?

A closed-end fund is a type of investment company whose shares are listed on a stock exchange or traded in the over-the-counter market. The assets of a closed-end fund are professionally managed in accordance with the fund's investment objectives and policies and may be invested in stocks, bonds, and other securities. The market price of a closed-end fund share fluctuates like that of other publicly traded securities and is determined by supply and demand in the marketplace.

A closed-end fund is created by issuing a fixed number of common shares to investors during an initial public offering. Subsequent issuance of common shares can occur through secondary or follow-on offerings, at-the-market offerings, rights offerings, or dividend reinvestments. Closed-end funds are also permitted to issue one class of preferred shares in addition to common shares. Holders of preferred shares are paid dividends, but do not participate in the gains and losses on the fund's investments. Issuing preferred shares allows a closed-end fund to raise additional capital, which it can use to purchase more securities for its portfolio.

Once issued, shares of a closed-end fund are generally bought and sold by investors in the open market and are not purchased or redeemed directly by the fund—although some closed-end funds may adopt stock repurchase programs or periodically tender for shares. Because a closed-end fund does not need to maintain cash reserves or sell securities to meet redemptions, the fund has the flexibility to invest in less-liquid portfolio securities. For example, a closed-end fund may invest in securities of very small companies, municipal bonds that are not widely traded, or securities traded in countries that do not have fully developed securities markets.

LEARN MORE

Closed-End Fund Resource Center
www.ici.org/cef

Total Assets and Net Issuance of Closed-End Funds

At year-end 2022, 441 closed-end funds had total assets of $252 billion (Figure 5.1)—a decrease of 19 percent from year-end 2021. The decrease in closed-end fund assets in 2022 reflected market returns and negative net share issuance.

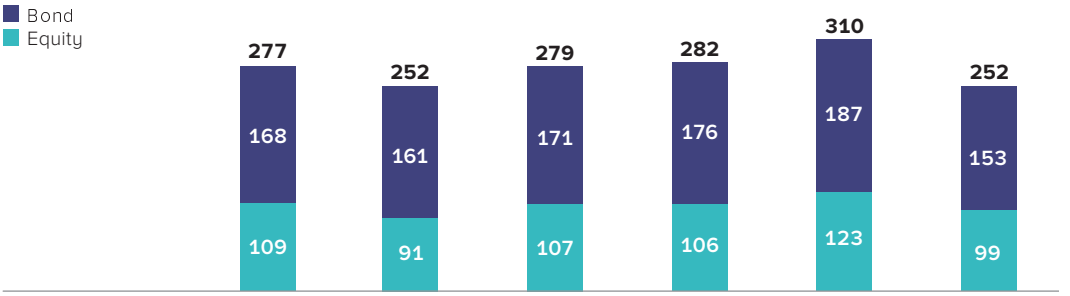
Historically, bond funds have accounted for the majority of assets in closed-end funds. At year-end 2022, bond closed-end funds accounted for 61 percent of all closed-end fund assets, the same as at year-end 2017 (Figure 5.1). These shares have remained relatively stable, in part, because of two offsetting factors. Cumulative net issuance of bond closed-end fund shares exceeded that of equity fund shares—offsetting the total returns on US stocks,* which exceeded those of US bonds† during this time.

The number of closed-end funds available to investors decreased again in 2022 (Figure 5.1). In recent years, more closed-end funds were liquidated, merged, or converted into open-end mutual funds or ETFs than were launched.

FIGURE 5.1

Total Assets of Closed-End Funds Declined in 2022

Billions of dollars, year-end



	2017	2018	2019	2020	2021	2022
Number of closed-end funds	**532**	**504**	**500**	**492**	**462**	**441**
Bond	335	325	320	316	293	278
Equity	197	179	180	176	169	163

Note: *Total assets* is the fair value of assets held in closed-end fund portfolios funded by common and preferred shares less any liabilities (not including liabilities attributed to preferred shares).

Source: *ICI Research Perspective*, "The Closed-End Fund Market, 2022"

* As measured by the Wilshire 5000 Total Market Index.

† As measured by the S&P US Aggregate Bond Index.

LEARN MORE

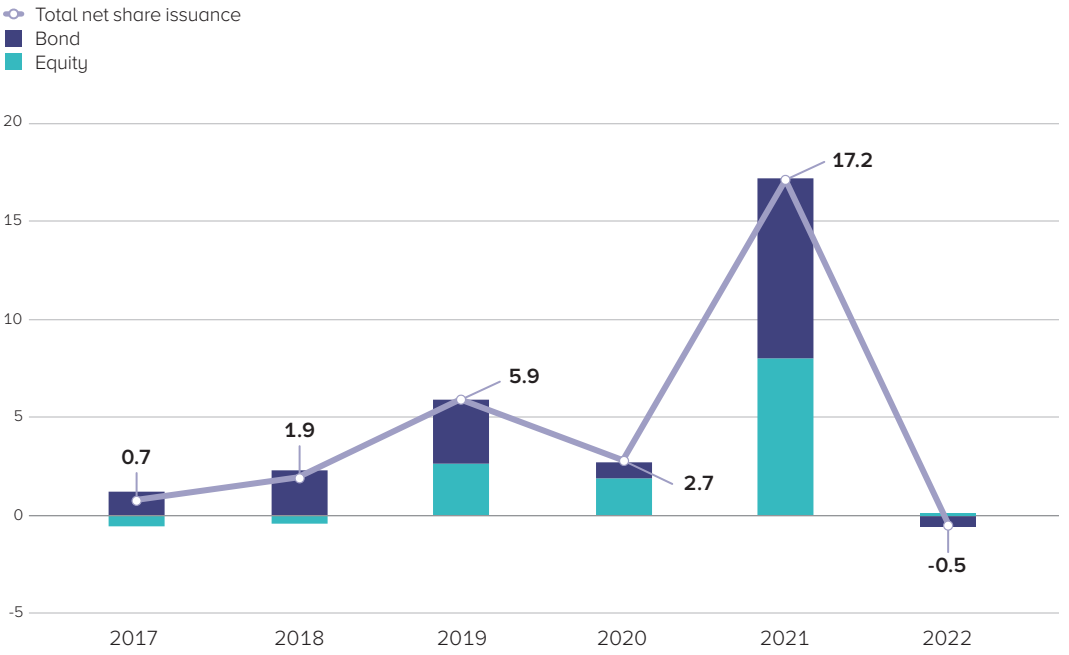
The Closed-End Fund Market, 2022
www.ici.org/files/2023/per29-05.pdf

Closed-end funds had negative net share issuance of $489 million in 2022, compared with positive net issuance of $17.2 billion in 2021 (Figure 5.2). In 2022, equity closed-end funds had positive net issuance of $135 million, while bond closed-end funds had negative net issuance of $623 million. Negative returns on stocks around the world and capital losses on bonds likely contributed to the weakened demand for closed-end funds in 2022.

FIGURE 5.2

Closed-End Fund Net Share Issuance Weakened Substantially in 2022

Billions of dollars, annual



Note: Net share issuance is the dollar value of gross issuance (proceeds from initial and additional public offerings of shares) minus gross redemptions of shares (share repurchases and fund liquidations).

Source: *ICI Research Perspective*, "The Closed-End Fund Market, 2022"

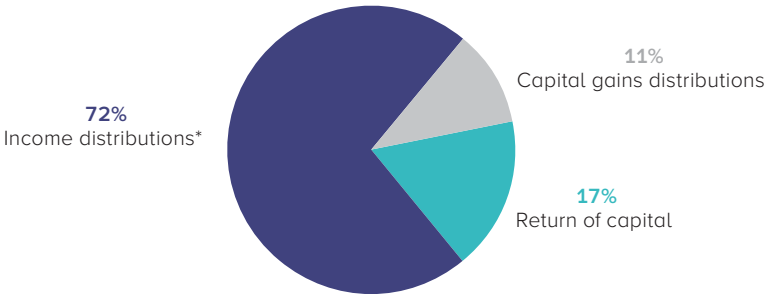
Closed-End Fund Distributions

In 2022, closed-end funds distributed an estimated $16.7 billion to shareholders (Figure 5.3). Closed-end funds may make distributions to shareholders from three possible sources: income distributions, which are payments from interest and dividends that the fund earns on its investments in securities; realized capital gains distributions; and return of capital. Income distributions accounted for the majority (72 percent) of closed-end fund distributions. Capital gains distributions accounted for 11 percent of closed-end fund distributions and return of capital for 17 percent.

FIGURE 5.3

Most Closed-End Fund Distributions Are from Income Distributions

Percentage of closed-end fund distributions, 2022



Total closed-end fund distributions: $16.7 billion

* Income distributions are paid from interest and dividends that the fund earns on its investments in securities.

Source: *ICI Research Perspective*, "The Closed-End Fund Market, 2022"

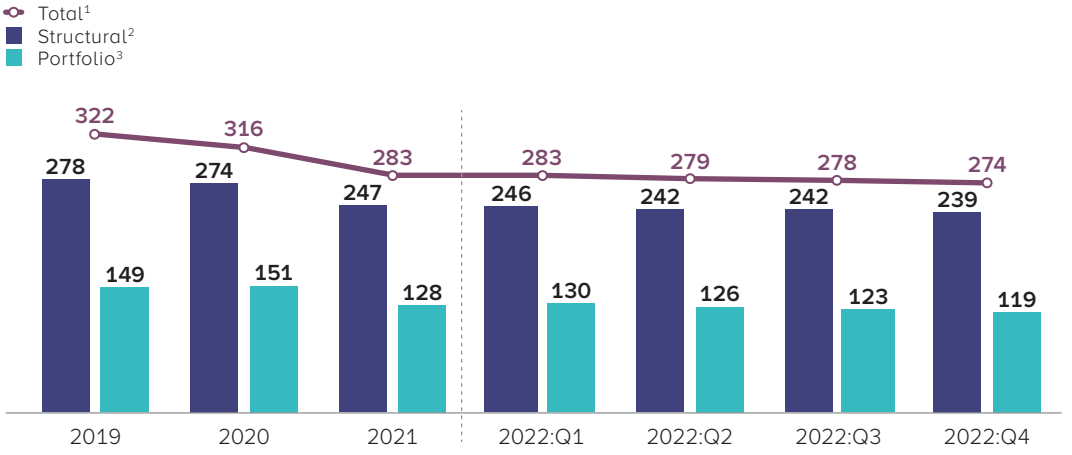
Closed-End Fund Leverage

Closed-end funds have the ability—subject to strict regulatory limits—to use leverage as part of their investment strategy. The use of leverage by a closed-end fund can allow it to achieve higher long-term returns, but also increases risk and the likelihood of share price volatility. Closed-end fund leverage can be classified as either structural leverage or portfolio leverage. At year-end 2022, 274 funds, accounting for 62 percent of closed-end funds, used structural leverage, some types of portfolio leverage (i.e., tender option bonds or reverse repurchase agreements), or both as a part of their investment strategy (Figure 5.4).

FIGURE 5.4

Closed-End Funds Are Employing Structural Leverage and Portfolio Leverage

Number of funds, end of period



[1] Components do not add to the total because funds may employ both structural and portfolio leverage.

[2] Structural leverage affects the closed-end fund's capital structure by increasing the fund's portfolio assets through borrowing and issuing debt and preferred shares.

[3] Portfolio leverage is leverage that results from particular types of portfolio investments, including certain types of derivatives, reverse repurchase agreements, tender option bonds, and other investments or types of transactions. Data are only available for reverse repurchase agreements and tender option bonds. Given data collection constraints, and the continuing development of types of investments/transactions with a leverage characteristic (and the use of different definitions of *leverage*), actual portfolio leverage may be materially different from what is reflected above.

Source: *ICI Research Perspective*, "The Closed-End Fund Market, 2022"

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Frequently Asked Questions About Closed-End Funds and Their Use of Leverage

www.ici.org/faqs/faq/other/faqs_closed_end

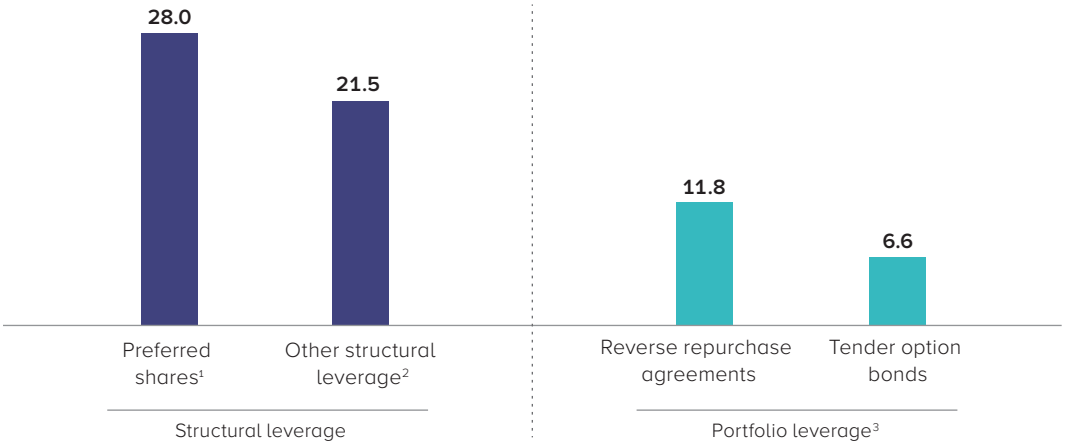
Structural leverage affects the closed-end fund's capital structure by increasing the fund's portfolio assets. Types of closed-end fund structural leverage include borrowing capital and issuing debt and preferred shares. At the end of 2022, 239 funds had a total of $49 billion in structural leverage, with $28 billion from preferred shares and $21 billion from other structural leverage, which includes bank borrowing and other forms of debt (Figures 5.4 and 5.5). The average leverage ratio* across those closed-end funds employing structural leverage was 30 percent at year-end 2022. Among closed-end funds employing structural leverage, the average leverage ratio for bond funds was somewhat higher (32 percent) than that of equity funds (26 percent).

Portfolio leverage is leverage that results from particular portfolio investments, such as certain types of derivatives, reverse repurchase agreements, and tender option bonds. At the end of 2022, 119 closed-end funds had $18 billion outstanding in reverse repurchase agreements and tender option bonds (Figures 5.4 and 5.5).

FIGURE 5.5

Closed-End Funds Use Leverage

Billions of dollars, year-end 2022



[1] A closed-end fund may issue preferred shares to raise additional capital, which can be used to purchase more securities for its portfolio. Holders of preferred shares are paid dividends, but do not participate in the gains and losses on the fund's investments.

[2] *Other structural leverage* includes bank borrowing and other forms of debt.

[3] Portfolio leverage is leverage that results from particular types of portfolio investments, including certain types of derivatives, reverse repurchase agreements, tender option bonds, and other investments or types of transactions. Data are only available for reverse repurchase agreements and tender option bonds. Given data collection constraints, and the continuing development of types of investments/transactions with a leverage characteristic (and the use of different definitions of *leverage*), actual portfolio leverage may be materially different from what is reflected above.

Source: *ICI Research Perspective*, "The Closed-End Fund Market, 2022"

* The *leverage ratio* is the ratio of the amount of structural leverage to the sum of the amount of common share assets and structural leverage.

Closed-End Fund Discounts

More than 95 percent of exchange-listed closed-end funds calculate the value of their portfolios every business day, while the rest calculate their portfolio values weekly or on some other basis. The net asset value (NAV) of a closed-end fund is calculated by subtracting the fund's liabilities (e.g., fund borrowing) from the current market value of its assets and dividing by the total number of shares outstanding. The NAV changes as the total value of the underlying portfolio securities rises or falls, or the fund's liabilities change.

Because an exchange-listed closed-end fund's shares trade based on investor demand, the fund may trade at a price higher or lower than its NAV. A closed-end fund trading at a share price higher than its NAV is said to be trading at a "premium" to the NAV, while a closed-end fund trading at a share price lower than its NAV is said to be trading at a "discount." Funds may trade at discounts or premiums to the NAV based on market perceptions or investor sentiment. For example, a closed-end fund that invests in securities that are anticipated to generate above-average future returns and are difficult for retail investors to obtain directly may trade at a premium because of a high level of market interest. In contrast, a closed-end fund with large unrealized capital gains may trade at a discount because investors will have priced in any perceived tax liability. Closed-end fund price deviations widened somewhat in 2022. Although discounts fluctuated over the course of the year, they averaged 5.7 percent for equity funds and 5.0 percent for bond funds in 2022.

FIGURE 5.6

Closed-End Fund Discounts Widened in 2022

Percent, month-end

Note: The premium/discount rate is the simple average of the percent difference between share price and NAV at month-end.

Source: Investment Company Institute calculations of Bloomberg and Refinitiv data

Characteristics of Households Owning Closed-End Funds

An estimated 3.8 million US households owned closed-end funds in 2022 (see Figure 7.1). These households tended to include investors who owned a range of equity and fixed-income investments (Figure 5.7). More than nine in 10 households owning closed-end funds also owned mutual funds, and more than six in 10 also owned ETFs. Six in 10 households owning closed-end funds also invested in individual stocks.

FIGURE 5.7

Closed-End Fund Investors Owned a Broad Range of Investments

Percentage of closed-end fund–owning households holding each type of investment, 2022

Equity mutual funds, individual stocks, or variable annuities (total)	**88**
Bond mutual funds, individual bonds, or fixed annuities (total)	**56**
Mutual funds (total)	**91**
Equity	79
Bond	40
Hybrid	39
Money market	59
Exchange-traded funds (ETFs)	**62**
Individual stocks	**60**
Individual bonds	**16**
Fixed or variable annuities	**23**
Investment real estate	**28**

Note: Multiple responses are included.
Source: *ICI Research Perspective*, "The Closed-End Fund Market, 2022"

Because households that owned closed-end funds often also owned individual stocks and mutual funds, the characteristics of each group were similar in many respects. For instance, households that owned closed-end funds (like households owning individual stocks and mutual funds) tended to have household incomes and financial assets above the national median or tended to own retirement accounts (Figure 5.8). Nonetheless, households that owned closed-end funds exhibited certain differences. For example, 39 percent of closed-end fund–owning households were retired from their lifetime occupations compared with about one-third of those owning individual stocks or mutual funds. Households owning closed-end funds also expressed more willingness to take financial risk, as 49 percent were willing to take above-average or substantial risk, compared with 34 percent of mutual fund–owning households.

FIGURE 5.8

Closed-End Fund Investors Had Above-Average Household Incomes and Financial Assets

2022

	All US households	Households owning closed-end funds	Households owning mutual funds	Households owning individual stocks
Median				
Age of head of household[1]	52	50	54	53
Household income[2]	$69,000	$100,000	$100,000	$125,000
Household financial assets[3]	$87,500	$323,000	$250,000	$375,000
Percentage of households				
Household primary or co-decisionmaker for saving and investing				
Married or living with a partner	64	69	71	72
College or postgraduate degree	39	50	54	61
Employed (full- or part-time)	56	59	64	64
Retired from lifetime occupation	32	39	34	33
Household owns				
IRA(s)	42	71	67	69
DC retirement plan account(s)	57	78	81	79
Household's willingness to take financial risk				
Substantial risk for substantial gain	5	12	6	7
Above-average risk for above-average gain	19	37	28	37
Average risk for average gain	39	33	47	44
Below-average risk for below-average gain	11	11	11	8
Unwilling to take any risk	26	7	8	4

[1] Age is based on the sole or co-decisionmaker for household saving and investing.

[2] Total reported is household income before taxes in 2021.

[3] Household financial assets include assets in employer-sponsored retirement plans but exclude the household's primary residence.

Source: *ICI Research Perspective*, "The Closed-End Fund Market, 2022"

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A Guide to Closed-End Funds

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CHAPTER

6

US Fund Expenses and Fees

Mutual funds provide investors with many investment-related services, and for those services, investors incur two primary types of expenses and fees: ongoing expenses and sales loads. Average expense ratios (i.e., ongoing expenses) paid by US mutual fund investors have fallen substantially over time. For example, on an asset-weighted basis, average expense ratios for equity mutual funds fell from 0.99 percent in 2000 to 0.44 percent in 2022, a 56 percent decline. Mutual fund share classes with sales loads are far less commonly sold today than they were a few decades ago. In 2022, the vast majority of gross sales to long-term mutual funds went to share classes that charge neither a sales load nor a 12b-1 fee.

IN THIS CHAPTER

Trends in Mutual Fund Expenses

Mutual fund investors incur two primary types of expenses and fees: ongoing expenses and sales loads. Ongoing expenses cover portfolio management, fund administration, daily fund accounting and pricing, shareholder services (such as call centers and websites), distribution charges (known as 12b-1 fees), and other operating costs. These expenses are included in a fund's expense ratio—the fund's annual expenses expressed as a percentage of its assets. Because expenses are paid from fund assets, investors pay these expenses indirectly. Sales loads are paid at the time of share purchase (front-end loads), when shares are redeemed (back-end loads), or over time (level loads). Mutual fund share classes with a sales load are far less commonly sold today than they were a few decades ago as investors have gravitated toward funds without them (see The Shift to No-Load Funds on page 76).

On an asset-weighted basis, average expense ratios* incurred by mutual fund investors have fallen substantially (Figure 6.1). In 2000, equity mutual fund investors incurred expense ratios of 0.99 percent, on average, or 99 cents for every $100 invested. By 2022, that average had fallen to 0.44 percent, a 56 percent decline. Hybrid and bond mutual fund expense ratios have also declined over this period, by 34 percent and 51 percent, respectively.

* In this chapter, unless otherwise noted, average expense ratios are calculated on an asset-weighted basis. ICI's fee research uses asset-weighted averages to summarize the expenses and fees that shareholders pay through funds. In this context, asset-weighted averages are preferable to simple averages, which would overstate the expenses and fees of funds in which investors hold few dollars. ICI weights the expense ratio of each fund's share class by its year-end assets.

  The fund investment categories used in this chapter are broad and encompass diverse investment styles (e.g., active and index), a range of general investment types (e.g., equity, bond, and hybrid funds), and a variety of arrangements for shareholder services, recordkeeping, or distribution charges (known as 12b-1 fees). This material is intended to provide general information on fees incurred by investors through funds as well as insight into average fees across the marketplace. It is not intended for benchmarking fees and expenses incurred by a particular investor, or charged by a particular fund or other investment product.

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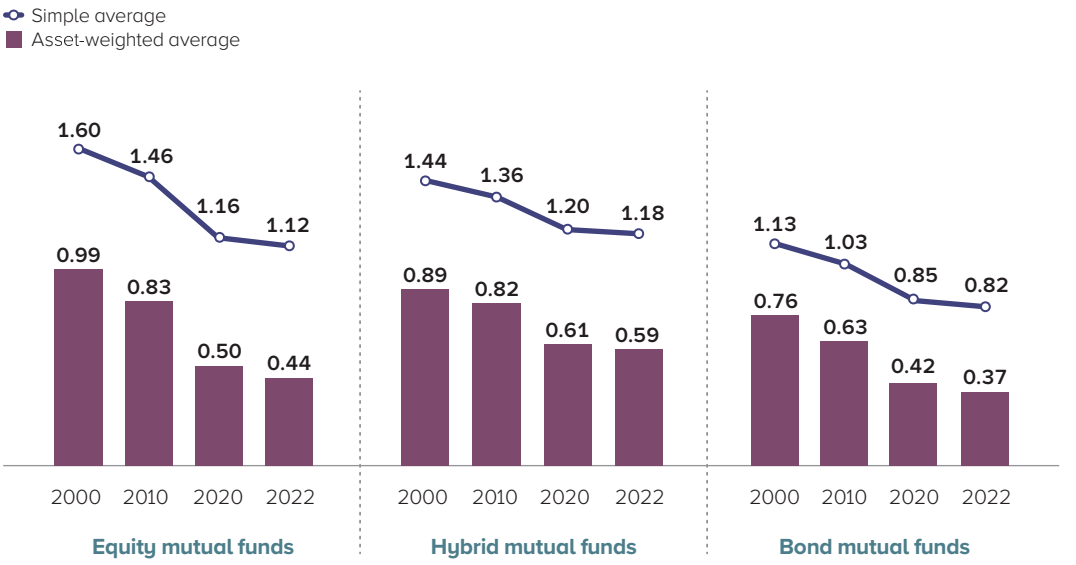
Trends in the Expenses and Fees of Funds, 2022
www.ici.org/files/2023/per29-03.pdf

FIGURE 6.1

Expense Ratios Incurred by Mutual Fund Investors Have Declined Substantially Since 2000

Percent



Note: Data exclude mutual funds available as investment choices in variable annuities.

Sources: Investment Company Institute, Lipper, and Morningstar. See *ICI Research Perspective*, "Trends in the Expenses and Fees of Funds, 2022."

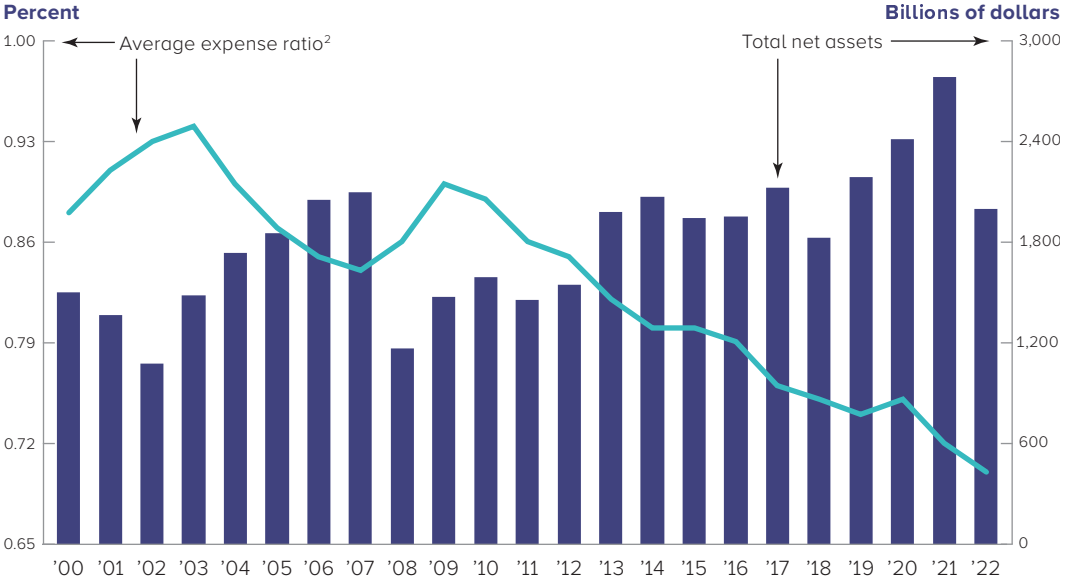
Understanding the Decline in Mutual Fund Expense Ratios

Several factors help account for the steep drop in mutual fund expense ratios. First, expense ratios often vary inversely with fund assets. Some fund costs included in expense ratios—such as transfer agency fees, accounting and audit fees, and directors' fees—are more or less fixed in dollar terms. This means that when a fund's assets rise, these costs contribute less to a fund's expense ratio. Thus, if the assets of a fixed sample of funds rise over time, the sample's average expense ratio tends to fall over the same period (Figure 6.2).

FIGURE 6.2

Mutual Fund Expense Ratios Tend to Fall as Fund Assets Rise

Share classes of actively managed domestic equity mutual funds continuously in existence since 2000[1]



[1] Calculations are based on a fixed sample of share classes. Data exclude mutual funds available as investment choices in variable annuities and index mutual funds.

[2] Expense ratios are measured as asset-weighted averages.

Sources: Investment Company Institute, Lipper, and Morningstar. See *ICI Research Perspective*, "Trends in the Expenses and Fees of Funds, 2022."

Another factor contributing to the decline of the average expense ratios of long-term mutual funds is the shift toward no-load share classes, particularly institutional no-load share classes, which tend to have below-average expense ratios. In part, this shift reflects a change in how investors pay for services from brokers and other financial professionals (see page 76).

The Shift to No-Load Funds

Many mutual fund investors engage an investment professional, such as a broker, an investment adviser, or a financial planner. Among households owning mutual fund shares outside employer-sponsored retirement plans, 67 percent own mutual fund shares through investment professionals (see Figure 7.6). These professionals can provide many benefits to investors, such as helping them identify financial goals, analyzing an existing financial portfolio, determining an appropriate asset allocation, and—depending on the type of financial professional—providing investment advice or recommendations to help investors achieve their financial goals. The investment professional also may provide ongoing services, such as responding to investors' inquiries or periodically reviewing and rebalancing their portfolios.

Over the past few decades, the way that fund shareholders compensate financial professionals has changed significantly, moving away from sales loads (e.g., front-end loads) and toward asset-based fees. An important element in the changing distribution structure of mutual funds has been this shift toward asset-based fees, which are assessed as a percentage of the assets that the financial professional helps an investor manage. Increasingly, these fees compensate brokers and other financial professionals who sell mutual funds. An investor may pay an asset-based fee indirectly through a fund's 12b-1 fee, which is included in the fund's expense ratio, or directly (out of pocket) to the financial professional, in which case it is not included in the fund's expense ratio.

The shift toward no-load share classes has been an important force in driving down the average expense ratio of mutual funds. Some movement toward no-load funds can be attributed to "do-it-yourself" investors who invest through discount brokers or directly with fund companies. Another factor is an ongoing shift to compensate financial professionals with asset-based fees outside of mutual funds (for example, through fee-based professionals and full-service brokerage platforms). Additionally, assets and flows to no-load share classes have been bolstered by 401(k) plans and other retirement accounts. Gross sales to no-load mutual funds without 12b-1 fees have grown substantially since 2000 and were 91 percent of total gross sales to long-term mutual funds in 2022 (Figure 6.3).

CONTINUED ON THE NEXT PAGE

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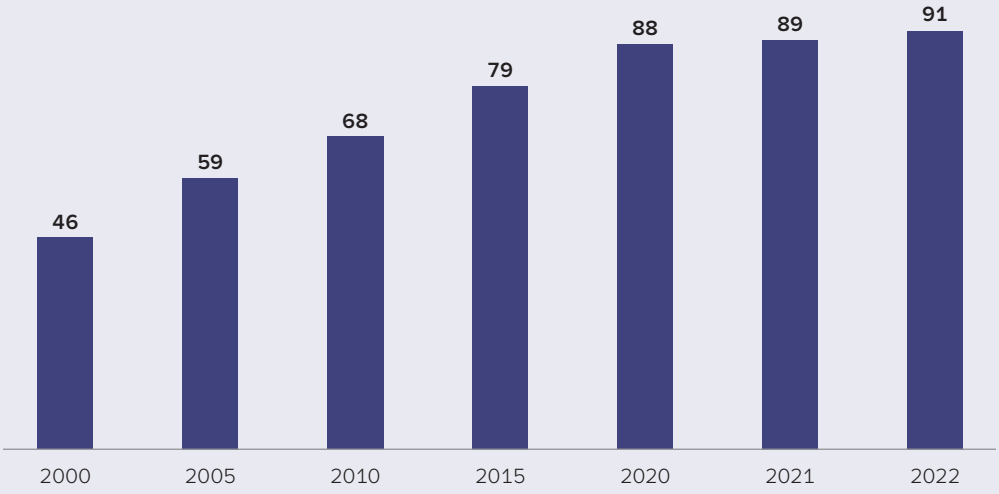
FIGURE 6.3

The Majority of Long-Term Mutual Fund Gross Sales Went to No-Load Mutual Funds Without 12b-1 Fees

Percentage of long-term mutual fund gross sales, annual



Sources: Investment Company Institute, Lipper, and Morningstar. See *ICI Research Perspective*, "Trends in the Expenses and Fees of Funds, 2022."

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The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2021

www.ici.org/files/2022/per28-06.pdf

Mutual fund expense ratios also have fallen because of economies of scale and competition. Investor demand for mutual fund services has increased dramatically in the past few decades. From 1990 to 2022, the number of households owning mutual funds nearly tripled—from 23.4 million to 68.6 million (see Figure 7.1). All else being equal, this sharp increase in demand would tend to boost mutual fund expense ratios. Any such tendency, however, was mitigated by downward pressure on expense ratios—from competition among existing mutual fund sponsors, new mutual fund sponsors entering the industry, competition from products such as exchange-traded funds (ETFs) (see chapter 4, Figure 3.10, and page 82 of this chapter), competition from collective investment trusts (CITs) in retirement plans (see Figure 3.12), and economies of scale resulting from the growth in fund assets.

Finally, shareholders indicate that they typically reviewed the fund's fees and expenses when selecting their mutual funds (see Figure 7.7) and tend to invest in mutual funds with below-average expense ratios (Figure 6.1). The simple average expense ratio of equity mutual funds (the average for all equity mutual funds offered for sale) was 1.12 percent in 2022. The asset-weighted average expense ratio for equity mutual funds (the average shareholders actually paid) was far lower, at 0.44 percent. Another way to illustrate the tendency for investors to gravitate to lower-cost funds is to examine how the allocation of their assets across funds varies by expense ratio. At year-end 2022, equity mutual funds with expense ratios in the lowest quartile held most (79 percent) of equity mutual funds' total net assets, and this pattern holds for both actively managed and index equity mutual funds.

Differences in Mutual Fund Expense Ratios

Like the prices of most goods and services, the expense ratios of individual mutual funds differ considerably across the array of available products. The expense ratios of individual funds depend on many factors, including investment objective, fund assets, whether the fund is actively managed or tracks an index, and payments to financial intermediaries.

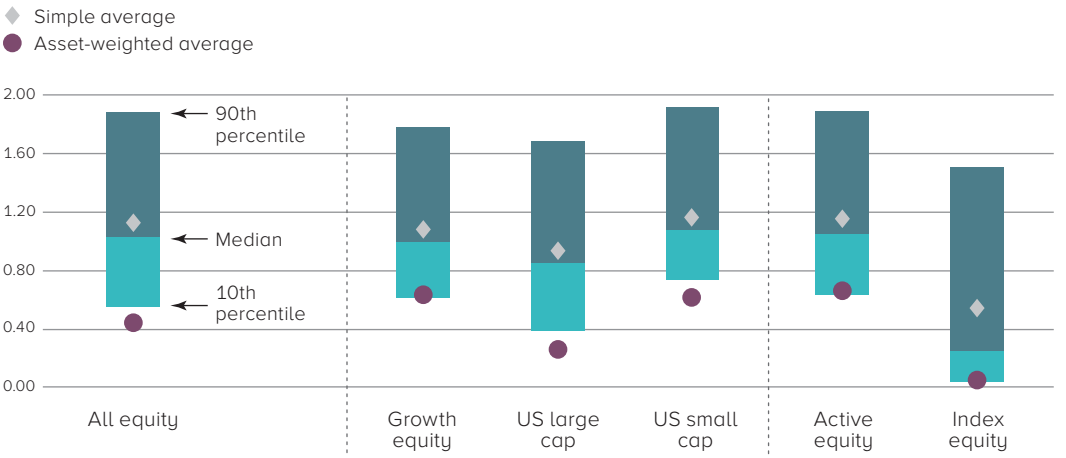
Mutual Fund Investment Objective

Mutual fund expense ratios vary by investment objective. For example, bond and money market mutual funds tend to have lower expense ratios than equity mutual funds. Among equity mutual funds, expense ratios tend to be higher for funds that specialize in a given sector—such as healthcare or real estate—or those that invest in equities around the world, because such funds tend to cost more to manage. Even within a particular investment objective, mutual fund expense ratios can vary considerably. For example, 10 percent of equity mutual funds that focus on growth stocks have expense ratios of 0.61 percent or less, while another 10 percent have expense ratios of 1.78 percent or more (Figure 6.4). Among other things, this variation reflects the fact that some growth funds focus more on small- or mid-cap stocks and others focus more on large-cap stocks. Portfolios of small- and mid-cap stocks tend to cost more to manage since information about these types of stocks is less readily available, which means that active portfolio managers must spend more time doing research.

FIGURE 6.4

Mutual Fund Expense Ratios Vary Across Investment Objectives

Percent, 2022



Note: Each fund's share class is weighted equally for the simple average and the median, 10th, and 90th percentiles. Data exclude mutual funds available as investment choices in variable annuities.

Sources: Investment Company Institute and Morningstar

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IRA Investors Are Concentrated in Lower-Cost Mutual Funds

www.ici.org/viewpoints/22-view-iras

Expense Ratios of Index Mutual Funds and Index ETFs

An index fund generally seeks to replicate the return on a specified index. Under this approach, often referred to as passive management, portfolio managers buy and hold all—or a representative sample of—the securities in their target indexes. This approach to portfolio management is a primary reason that both index mutual funds and index ETFs tend to have below-average expense ratios. By contrast, under an active management approach, managers have more discretion to increase or reduce exposure to sectors or securities within their funds' investment mandates. Active managers may also undertake significant research about stocks or bonds, market sectors, or geographic regions. This approach offers investors the chance to earn superior returns, or to meet other investment objectives such as limiting downside risk, managing volatility, underweighting or overweighting various sectors, and altering asset allocations in response to market conditions. These characteristics tend to make active management more costly than management of an index fund.

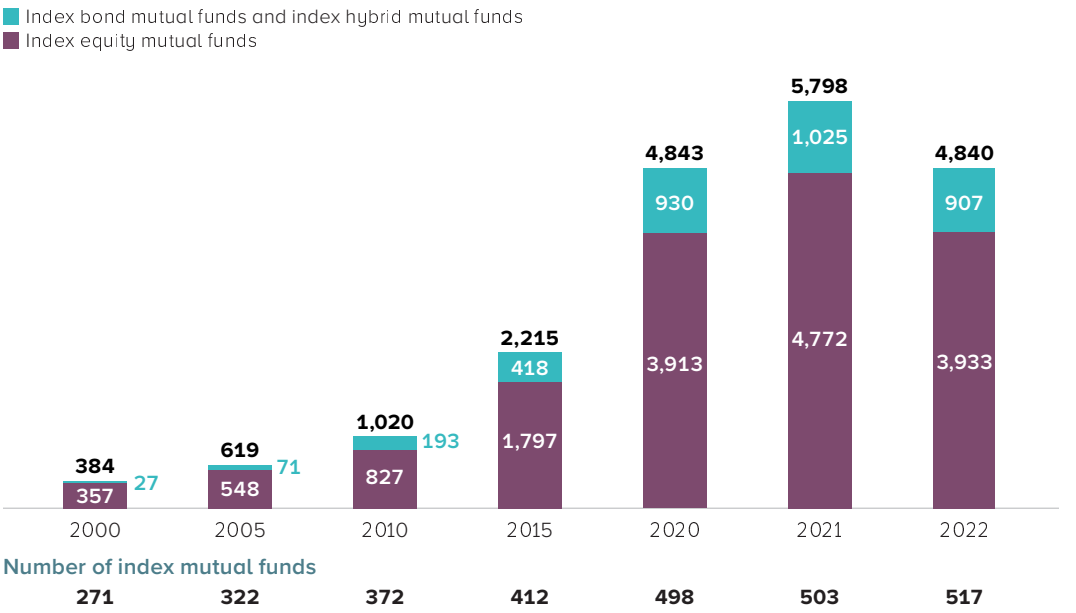
Index Mutual Funds

Growth in index mutual funds has contributed to the decline in asset-weighted average expense ratios of equity, hybrid, and bond mutual funds. From 2000 to 2022, index mutual fund total net assets grew significantly, from $384 billion to $4.8 trillion (Figure 6.5). Consequently, over the same period, index mutual funds' share of long-term mutual fund net assets more than tripled, from 7.5 percent at year-end 2000 to 27.9 percent at year-end 2022. Within index mutual funds, index equity mutual funds accounted for the bulk (81 percent) of index mutual fund total net assets at year-end 2022.

FIGURE 6.5

Total Net Assets of Index Mutual Funds Fell in 2022

Billions of dollars, year-end



Index mutual funds tend to have below-average expense ratios for several reasons. First, their approach to portfolio management lends itself to being less costly. This is because index funds' portfolios tend not to change frequently, and therefore, have low turnover rates.

Second, index mutual funds tend to have below-average expense ratios because of their investment focus. Net assets of index equity mutual funds are concentrated more heavily in large-cap blend funds that target US large-cap indexes, such as the S&P 500. Net assets of actively managed equity mutual funds, on the other hand, are more widely distributed across stocks of varying capitalizations, international regions, or specialized business sectors. Managing portfolios of small- or mid-cap, international, or sector stocks is generally acknowledged to be more expensive than managing portfolios of US large-cap stocks.

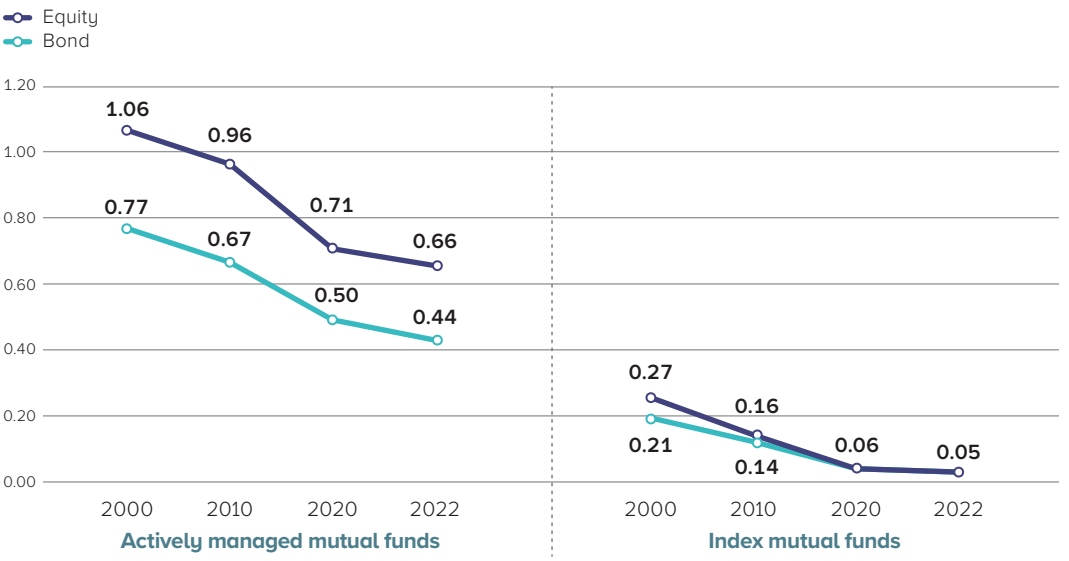
Finally, index mutual funds are larger on average than actively managed mutual funds, which, through economies of scale, helps reduce fund expense ratios. At year-end 2022, the average index equity mutual fund ($9.1 billion) was significantly larger than the average actively managed equity mutual fund ($1.9 billion).

These reasons, among others, help explain why index mutual funds generally have lower expense ratios than actively managed mutual funds. However, it is important to note that both index and actively managed mutual funds have contributed to the decline in the average expense ratios of mutual funds (Figure 6.6).

FIGURE 6.6

Expense Ratios of Actively Managed and Index Mutual Funds Have Fallen

Percent



Note: Expense ratios are measured as asset-weighted averages. Data exclude mutual funds available as investment choices in variable annuities.

Sources: Investment Company Institute, Lipper, and Morningstar. See *ICI Research Perspective*, "Trends in the Expenses and Fees of Funds, 2022."

The downward trend in the average expense ratios of both index and actively managed mutual funds reflects, in part, investors' increasing tendency to buy lower-cost funds. Investor demand for index mutual funds is disproportionately concentrated in funds with the lowest costs. Index equity mutual funds with expense ratios in the lowest quartile held 85 percent of index equity mutual funds' net assets at year-end 2022. This phenomenon is not unique to index mutual funds, however; the proportion of assets in the lowest-cost actively managed mutual funds is also high.

Index ETFs

ETF total net assets have grown rapidly in recent years, from $992 billion at year-end 2010 to $6.5 trillion at year-end 2022 (see Figure 4.1). During this time, ETFs have become a significant market participant, with net assets accounting for 22 percent of total net assets managed by investment companies at year-end 2022 (see Figure 2.1). ETFs are largely index-based and generally registered with the Securities and Exchange Commission (SEC) under the Investment Company Act of 1940. Actively managed ETFs registered under the 1940 Act represented 5.2 percent of ETF total net assets at year-end 2022, and ETFs not registered under the 1940 Act represented 1.8 percent. Like index mutual funds, most of the net assets in ETFs are in funds that focus on equities. Equity ETFs accounted for 78 percent of the total net assets of ETFs at year-end 2022.

Part of the strong growth in ETFs is attributable to their distribution structure, in which the ETF generally charges an expense ratio that provides no compensation to financial professionals. Compensation to financial professionals for distribution or account servicing and maintenance is typically paid directly by the investor.* And because ETFs are generally index funds, they typically have lower expense ratios.

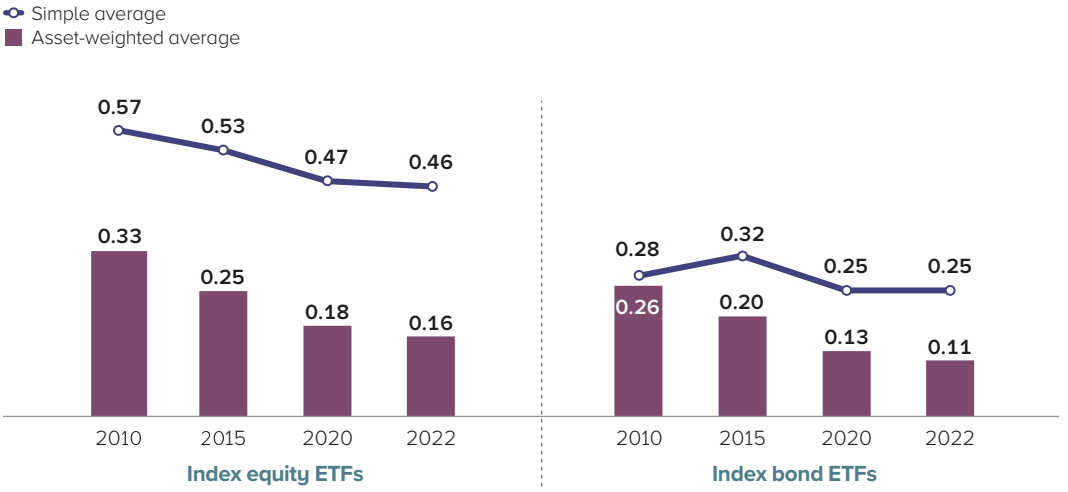
Like mutual fund investors, ETF shareholders tend to invest in funds with below-average expense ratios (Figure 6.7). For example, the simple average expense ratio of index equity ETFs (the average for all index equity ETFs offered for sale) was 0.46 percent in 2022. The asset-weighted average expense ratio for index equity ETFs (the average shareholders actually paid) was much less than that, 0.16 percent.

* Some ETFs bundle distribution fees in the expense ratio to cover marketing and distribution expenses. These fees are usually small, typically no more than 0.04 percent.

FIGURE 6.7

Expense Ratios Incurred by Index ETF Investors Have Generally Declined in Recent Years

Percent



Note: Data exclude ETFs not registered under the Investment Company Act of 1940.

Sources: Investment Company Institute and Morningstar. See *ICI Research Perspective*, "Trends in the Expenses and Fees of Funds, 2022."

Additionally, like mutual funds, index ETF expense ratios differ both across and within investment objectives. Within specific investment objectives, expense ratios vary between actively managed and index ETFs and even among index ETFs for a range of reasons. For example, expense ratios may differ because not all index ETFs in a given investment objective rely on the same index, and licensing fees that ETFs pay to index providers may vary.

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CHAPTER

7

Characteristics of US Mutual Fund Owners

A majority of US households rely on mutual funds to help them meet their financial goals. These mutual fund–owning households represent a broad range of the US population—coming from all age and income groups. For instance, Generation Z and Millennial households are well on their way to widespread mutual fund ownership. Mutual fund investors, who often are primarily saving for retirement, make informed purchasing decisions by researching their fund investment choices and often seeking the assistance of investment professionals.

IN THIS CHAPTER

Household Ownership of Mutual Funds Is Widespread

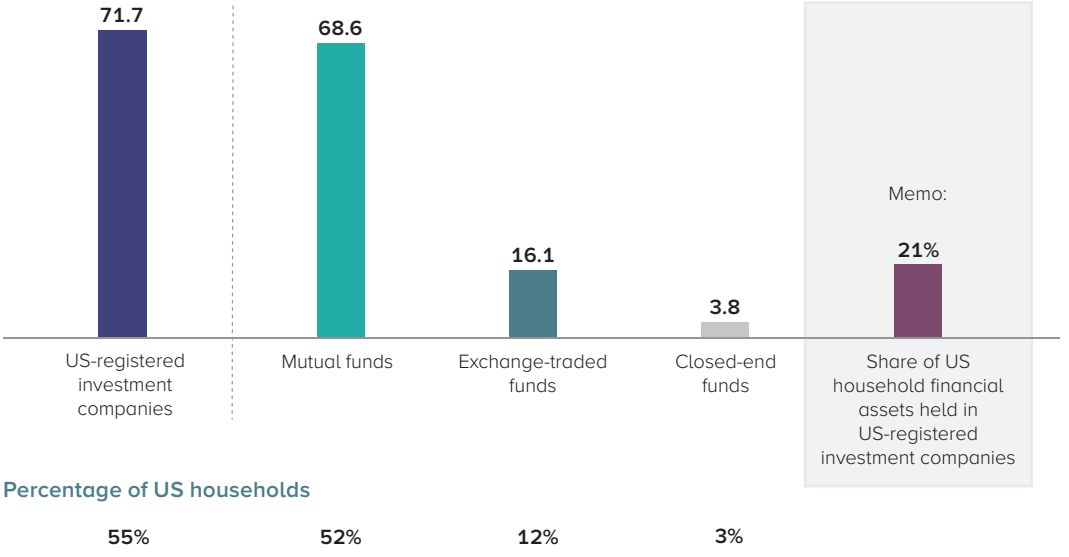
Mutual funds are an important way US households build their financial wealth. In 2022, about 55 percent of US households owned shares of mutual funds or other US-registered investment companies—including exchange-traded funds, closed-end funds, and unit investment trusts—representing an estimated 71.7 million households (Figure 7.1).

Mutual funds were the most common type of fund owned, with 68.6 million US households, or 52 percent, owning mutual funds in 2022 (Figure 7.1). All told, 115.3 million individual investors owned mutual funds in 2022. In aggregate, US households' investment in funds represents about one-fifth of their financial assets, a higher share than seen in other jurisdictions (see Figure 1.9).

FIGURE 7.1

Mutual Funds Are a Key Investment Product for US Households

Ownership of US-registered investment companies; millions of US households, 2022



Sources: Investment Company Institute, US Census Bureau, and Federal Reserve Board

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Ownership of Mutual Funds and Shareholder Sentiment, 2022
www.ici.org/files/2022/per28-09.pdf

Mutual Fund–Owning Households Reflect Everyday People

Households that own mutual funds come from all demographic groups and typically are working and saving for retirement (Figure 7.2). In 2022, the median mutual fund–owning head of household:

- was middle-aged, employed, and educated;
- owned mutual funds inside an employer-sponsored retirement plan;
- purchased their first mutual fund through an employer-sponsored retirement plan;
- owned mutual funds outside employer-sponsored retirement plans, primarily purchased through investment professionals (registered investment advisers, full-service brokers, independent financial planners, bank or savings institution representatives, insurance agents, or accountants);
- had more than half of the household's financial assets (excluding the primary residence) invested in mutual funds;
- owned an IRA;
- was using mutual funds to save for retirement; and
- was confident that mutual funds could help them reach their financial goals.

Many US mutual fund shareholders had moderate household incomes and were in their peak earning and saving years. More than two-thirds of US households owning mutual funds had incomes less than $150,000, and 54 percent were headed by individuals between the ages of 35 and 64 in 2022 (Figure 7.2). The median mutual fund–owning household had $100,000 in household income, $250,000 in household financial assets, and $125,000 invested in three mutual funds, including at least one equity mutual fund.

Members of the Baby Boom Generation and Generation X headed the largest shares of mutual fund–owning households in 2022, reflecting both their generation's sizes and their high rates of mutual fund ownership. Thirty-five percent of households owning mutual funds were headed by members of the Baby Boom Generation, and 28 percent were headed by members of Generation X (Figure 7.2).

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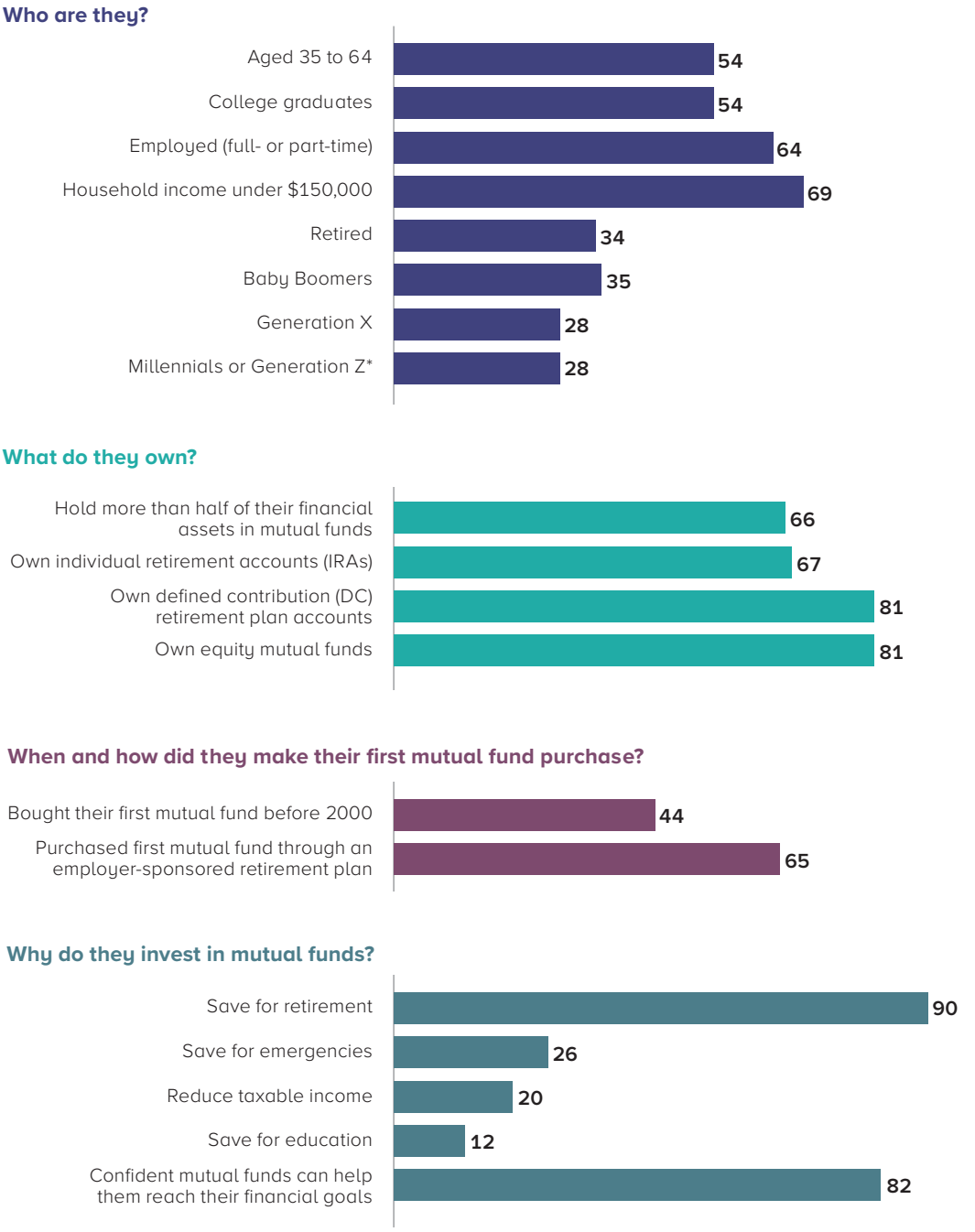
Characteristics of Mutual Fund Investors, 2022
www.ici.org/files/2022/per28-10.pdf

FIGURE 7.2

Mutual Fund–Owning Households Are from All Demographic Groups

Percentage of mutual fund–owning households, 2022



* Generation Z (born 1997 to 2012) are aged 10 to 25 in 2022; survey respondents, however, must be 18 or older.

Sources: *ICI Research Perspective*, "Ownership of Mutual Funds and Shareholder Sentiment, 2022"; *ICI Research Perspective*, "Characteristics of Mutual Fund Investors, 2022"; and *ICI Research Report*, "Profile of Mutual Fund Shareholders, 2022"

Mutual Fund Ownership Tends to Rise Across the Generations

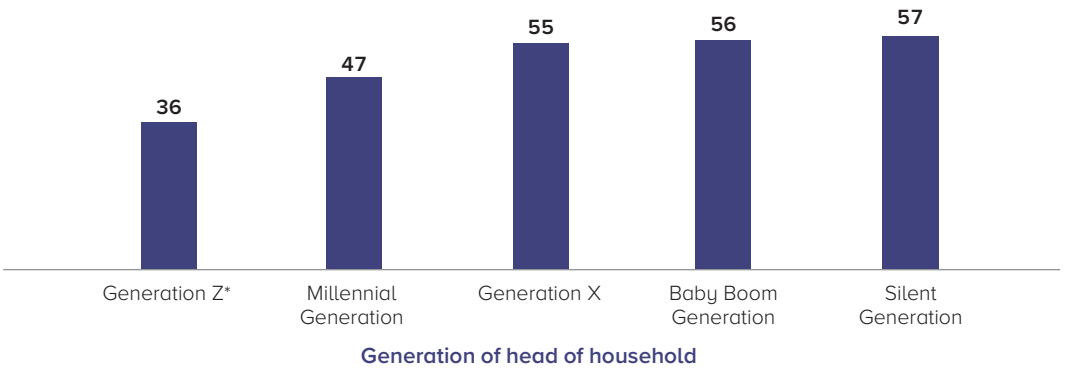
Mutual fund–owning households are headed by members of all generations, but members of the older generations, who have had more time to save, had the highest ownership rates in 2022. More than half of households headed by a member of Generation X, the Baby Boom Generation, or the Silent Generation owned mutual funds in 2022 (Figure 7.3). Younger households were well on their way to widespread mutual fund ownership: 47 percent of Millennial households and 36 percent of Generation Z households owned mutual funds in 2022.

The Baby Boom Generation held the majority (51 percent) of US households' mutual fund assets reflecting: (1) their immense size, (2) their high rate of mutual fund ownership, and (3) the decades they have had to save and invest. Generation X households held 24 percent of households' total mutual fund assets and Silent Generation households held another 14 percent. Generation Z and Millennial households—who are younger and have not had as much time to save as Baby Boom households (who have gone through or are in their peak earning and saving years)—held the remaining 11 percent of households' mutual fund assets.

FIGURE 7.3

Mutual Fund Ownership Is Higher Among Older Generations

Percentage of US households by generation, 2022



* Generation Z (born 1997 to 2012) are aged 10 to 25 in 2022; survey respondents, however, must be 18 or older.
Note: Generation is based on the age of the household sole or co-decisionmaker for saving and investing.
Source: *ICI Research Perspective*, "Characteristics of Mutual Fund Investors, 2022"

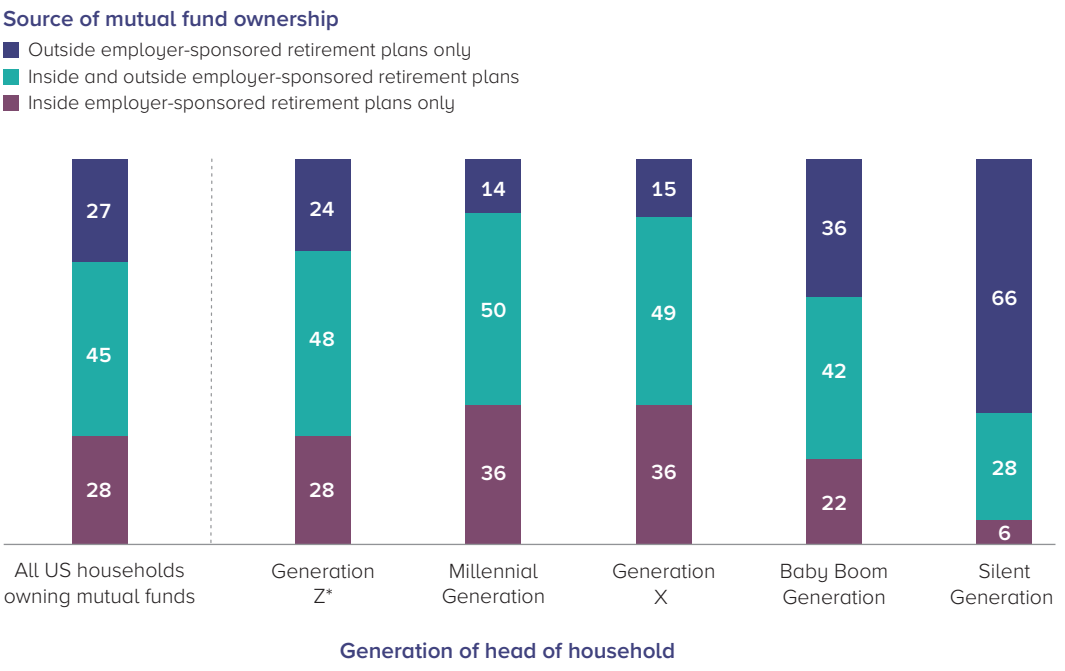
Mutual Fund Ownership Patterns Vary by Generation

How households own mutual funds often depends on where they are in the lifecycle of investing. Because younger generations are more likely to be early in their careers, they tend to own mutual funds only inside employer-sponsored retirement plans. As Americans change jobs over their careers, they may roll over retirement savings to IRAs, and older generations are more likely to own funds outside employer-sponsored retirement plans. In 2022, 36 percent of mutual fund–owning Millennial households held funds only inside employer-sponsored retirement plans, compared with 22 percent of mutual fund–owning Baby Boom households (Figure 7.4). Sixty-four percent of mutual fund–owning Millennial households owned funds outside of employer-sponsored retirement plans, compared with 78 percent of mutual fund–owning Baby Boom households. Younger generation households are more likely than older generations to own funds both inside and outside employer-sponsored retirement plans. At 66 percent, mutual fund–owning Silent Generation households are the most likely to hold them only outside employer-sponsored retirement plans, perhaps reflecting limited access to defined contribution (DC) plans early in their careers or consolidation of retirement savings into IRAs when they retired.

FIGURE 7.4

Mutual Fund Ownership Often Occurs Through Employer-Sponsored Retirement Plans

Percentage of mutual fund–owning households by generation, 2022



* Generation Z (born 1997 to 2012) are aged 10 to 25 in 2022; survey respondents, however, must be 18 or older.

Note: Generation is based on the age of the sole or co-decisionmaker for household saving and investing. Employer-sponsored retirement plans include DC plans (such as 401(k), 403(b), or 457 plans) and employer-sponsored IRAs (SEP IRAs, SAR-SEP IRAs, and SIMPLE IRAs).

Source: *ICI Research Perspective*, "Characteristics of Mutual Fund Investors, 2022"

Mutual Fund–Owning Households Primarily Save for Retirement

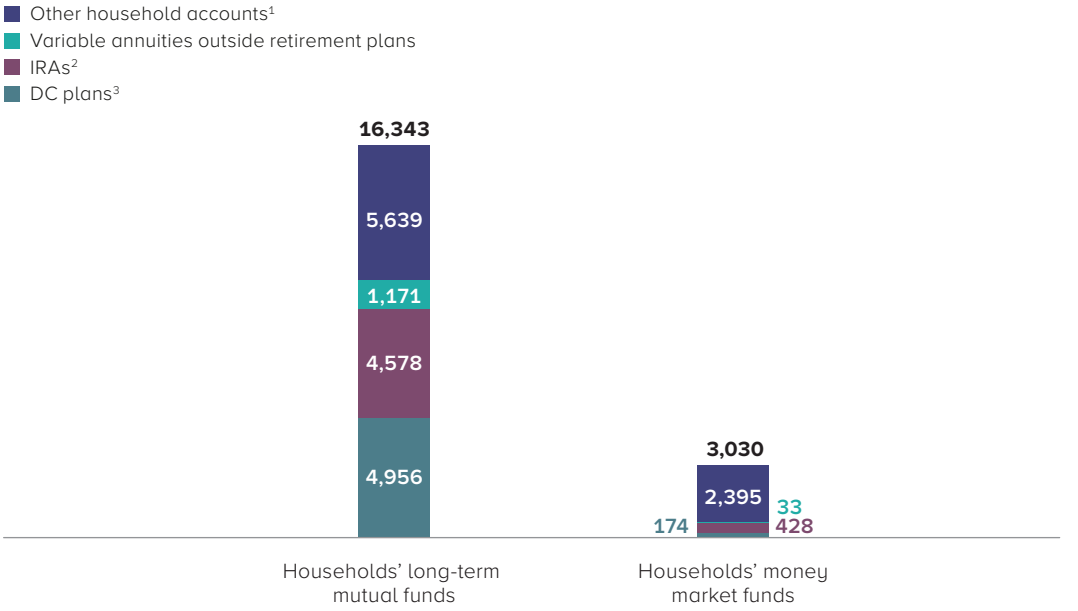
Mutual fund–owning households overwhelmingly report that saving for retirement is one of their financial goals (90 percent, with 80 percent indicating it is the household's primary goal) and that they are confident mutual funds help them reach their financial goals (82 percent) (Figure 7.2). The importance that mutual fund–owning households place on retirement saving is reflected in where they own their funds—in 2022, 94 percent held mutual fund shares inside employer-sponsored retirement plans, IRAs, or variable annuities.

Prompted by this long-term focus, with concentration on retirement saving, most of households' mutual funds were invested in long-term mutual funds (equity, hybrid, and bond funds), with more than half of their long-term mutual fund assets held in DC plans and IRAs (Figure 7.5). At year-end 2022, mutual fund assets held in DC plans and IRAs accounted for $9.5 trillion, or 58 percent of households' long-term mutual fund assets. Households had another $1.2 trillion in long-term variable annuity mutual fund assets outside retirement plans, which have similar tax advantages and restrictions as retirement plans and are counted as part of Americans' nest egg for retirement (see Figures 8.5 and 8.15). In addition, households held a relatively small amount of money market fund assets in DC plans, IRAs, and variable annuities outside retirement plans.

FIGURE 7.5

Households' Mutual Fund Assets Reflect a Long-Term Investment Focus

Billions of dollars, year-end 2022



[1] Mutual funds held as investments in 529 plans and Coverdell ESAs are counted in this category.

[2] IRAs include traditional IRAs, Roth IRAs, and employer-sponsored IRAs (SEP IRAs, SAR-SEP IRAs, and SIMPLE IRAs).

[3] DC plans include 401(k) plans, 403(b) plans, 457 plans, and other DC plans without 401(k) features.

Many Mutual Fund–Owning Households Rely on Investment Professionals

Households owning mutual funds outside employer-sponsored retirement plans often seek the assistance of investment professionals. In 2022, 67 percent of these households owned mutual funds purchased with the help of investment professionals (Figure 7.6). Of these households, 48 percent owned funds purchased solely with the help of an investment professional, and another 19 percent owned funds purchased from investment professionals and directly from fund companies or discount brokers.

Retirement saving is also important for households holding mutual funds only outside employer-sponsored retirement plans, with 72 percent holding funds in traditional or Roth IRAs. In many cases, these IRAs held assets rolled over from 401(k) plans or other employer-sponsored retirement plans (either defined benefit or DC plans).

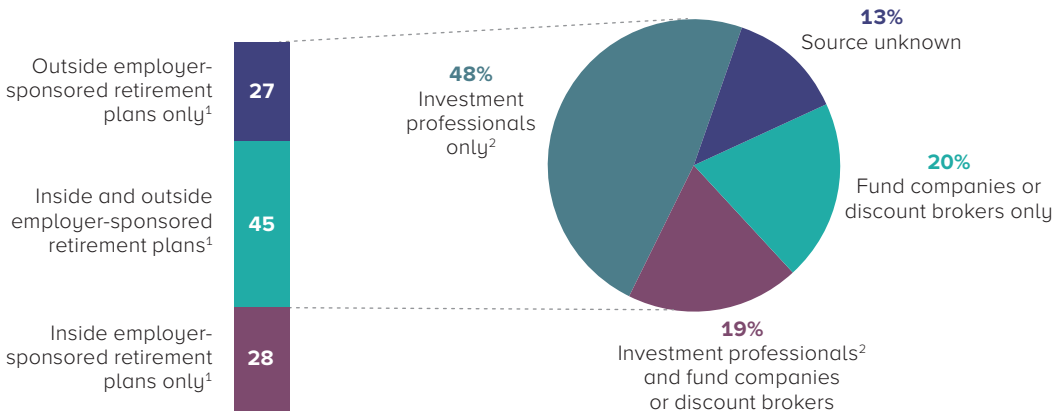
FIGURE 7.6

Mutual Fund Investments Outside Retirement Plans Are Often Guided by Investment Professionals

2022

Sources of mutual fund ownership
Percentage of US households owning mutual funds

Sources for households owning mutual funds outside employer-sponsored retirement plans
Percentage of US households owning mutual funds outside employer-sponsored retirement plans[1]



[1] Employer-sponsored retirement plans include DC plans (such as 401(k), 403(b), or 457 plans) and employer-sponsored IRAs (SEP IRAs, SAR-SEP IRAs, and SIMPLE IRAs).

[2] Investment professionals include registered investment advisers, full-service brokers, independent financial planners, bank and savings institution representatives, insurance agents, and accountants.

Source: *ICI Research Perspective*, "Characteristics of Mutual Fund Investors, 2022"

LEARN MORE

Profile of Mutual Fund Shareholders, 2022
www.ici.org/files/2022/22-rpt-profiles.pdf

Mutual Fund–Owning Households Make Informed Purchasing Decisions

ICI also surveyed mutual fund–owning households about the importance of a variety of factors when making their mutual fund purchase decisions.

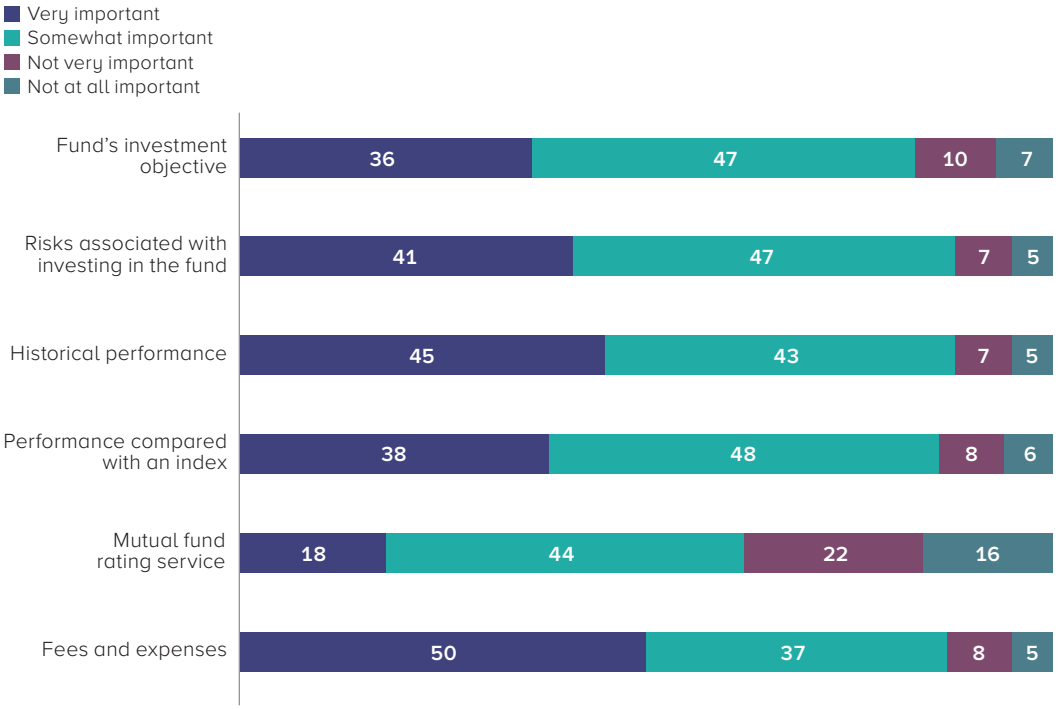
In 2022, 93 percent of mutual fund–owning households considered a fund's investment objective when making their purchase decision (Figure 7.7). Similarly, 95 percent of mutual fund–owning households reviewed the risk level of a fund's investments. The vast majority of mutual fund–owning households also reviewed the historical performance of a fund and considered a fund's performance compared with an index.

Mutual fund–owning households also typically reviewed the fund's fees and expenses when selecting their mutual funds. Indeed, mutual fund investors tend to concentrate their assets in lower-cost funds (see Chapter 6).

FIGURE 7.7

Most Mutual Fund–Owning Households Research Fund Investments

Percentage of mutual fund–owning households, 2022



Source: *ICI Research Perspective*, "What US Households Consider When They Select Mutual Funds, 2022"

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What US Households Consider When They Select Mutual Funds, 2022
www.ici.org/files/2023/per29-04.pdf

CHAPTER

8

US Retirement and Education Savings

National policies that have created or enhanced tax-advantaged savings accounts have proved integral to helping Americans save for retirement and other long-term goals. Assets earmarked for retirement represent close to one-third of US households' financial assets, and many Americans use mutual funds in tax-advantaged retirement accounts. ICI studies the US retirement market; the investors who use 401(k) plans, IRAs, 529 plans, and other tax-advantaged savings vehicles; and the role of mutual funds in the retirement and education savings markets. At year-end 2022, individual account-based retirement savings were 62 percent of the total US retirement market, and mutual funds managed about half of those account-based retirement assets.

IN THIS CHAPTER

The US Retirement System Has Many Components

American households rely on a combination of resources in retirement, and the role each type of resource plays has changed over time and varies across households. The traditional analogy compares retirement resources to a three-legged stool, with resources divided equally among the legs—Social Security, employer-sponsored pension plans, and private savings. A better analogy, however, is to think of Americans' retirement resources as a five-layer pyramid. Unlike the legs of a stool, pyramid layers need not be the same size.

Americans' Multi-Tiered Retirement Resources

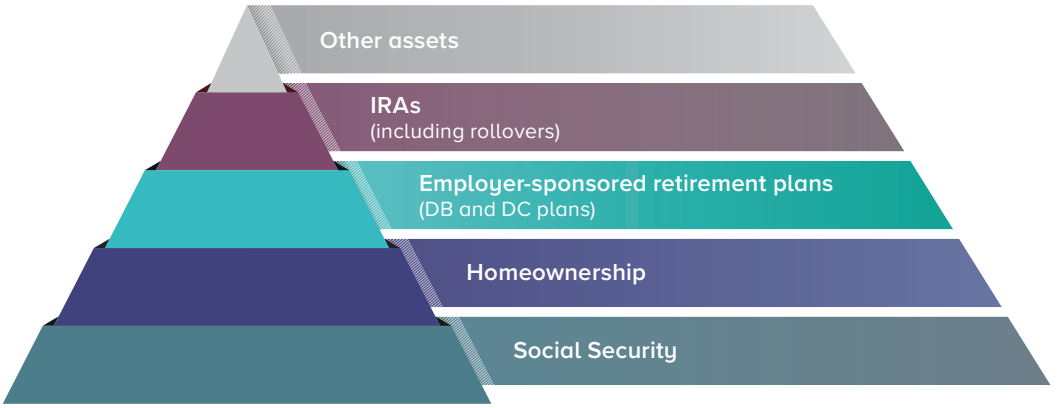
The retirement resource pyramid has five layers, which draw from government programs, compensation deferred until retirement, and other savings (Figure 8.1):

- Social Security
- Homeownership
- Employer-sponsored retirement plans (private-sector and government employer plans, including both defined benefit [DB] and defined contribution [DC] plans)
- Individual retirement accounts (IRAs), including rollovers
- Other assets

Together these resources have broadly enabled recent generations of retirees to maintain their standard of living in retirement, though the use of each layer differs by household. For example, the composition of households' retirement resources varies with income. Lower-income households tend to rely more on Social Security, reflecting the fact that Social Security benefits replace a higher share of pre-retirement earnings for workers with lower lifetime earnings.

FIGURE 8.1

US Households Rely on Multi-Tiered Retirement Resources



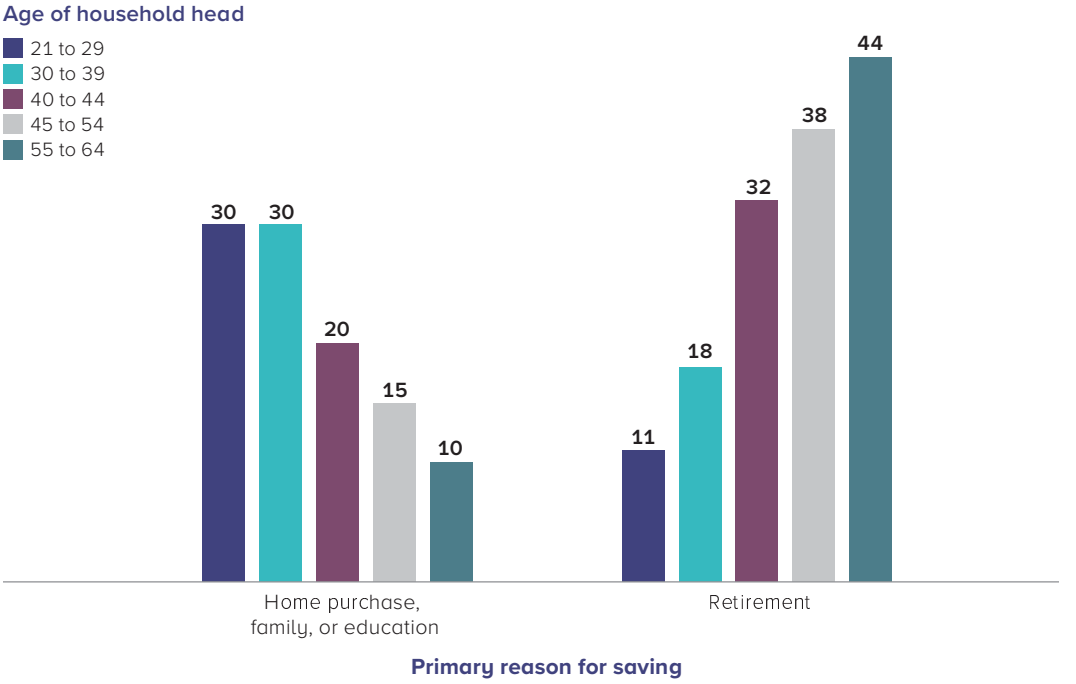
Source: Investment Company Institute, *The Success of the US Retirement System*

The amount and composition of retirement resources also change with age. Younger households are more likely to save primarily for reasons other than retirement, such as for a home purchase, family, or education (Figure 8.2). By contrast, older households are more likely to save primarily for retirement, as many have already reached their other savings goals. The tendency of younger workers to focus less on saving for retirement is consistent with economic models of life-cycle consumption, which predict that most workers delay saving for retirement until later in their careers when they typically have higher earnings.

FIGURE 8.2

Primary Reason for Household Saving Changes with Age

Percentage of households by age of household head, 2019



Source: Investment Company Institute tabulations of the 2019 Federal Reserve Board Survey of Consumer Finances

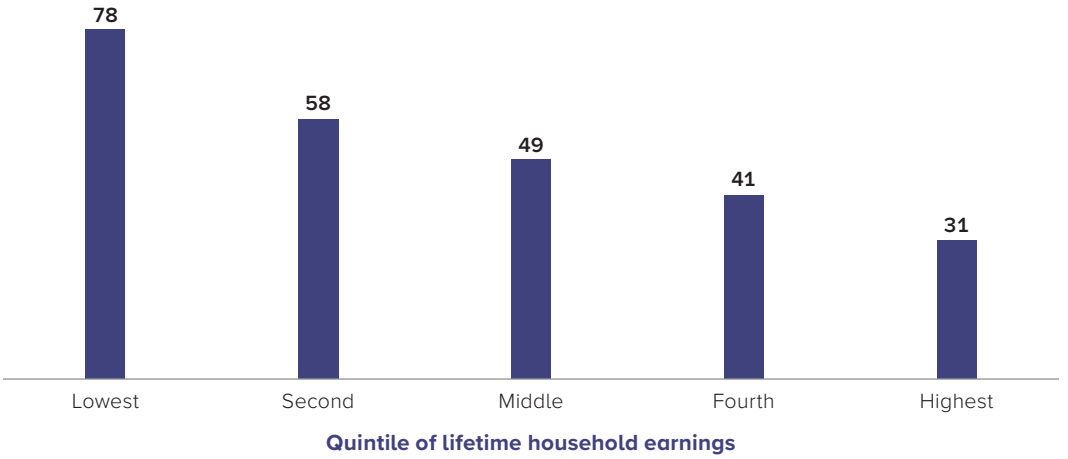
Social Security, the base of the US retirement resource pyramid, is a substantial component of retiree income and the primary source of income for lower-income retirees. Social Security benefits are funded through a payroll tax equal to 12.4 percent of earnings of covered workers (split equally between employers and employees) up to a maximum taxable earnings amount ($147,000 in 2022). The benefit formula is highly progressive, with benefits representing a much higher percentage of earnings for workers with lower lifetime earnings.

By design, Social Security is the primary means of support for retirees with low lifetime earnings, and a substantial source of income for all retired workers. The Congressional Budget Office estimates that, for those in the lowest quintile (20 percent) of households ranked by lifetime household earnings, first-year Social Security benefits will replace 78 percent of inflation-indexed lifetime earnings, on average, for workers born in the 1960s who claim benefits at age 65 (Figure 8.3). That replacement rate drops to 58 percent for workers in the second quintile of households, and then declines more slowly as lifetime household earnings increase. Even for workers in the top 20 percent of households, Social Security benefits are projected to replace a considerable portion (31 percent) of earnings.

FIGURE 8.3

Social Security Benefit Formula Is Highly Progressive

Average scheduled Social Security replacement rates for workers in the 1960s birth cohort by quintile of lifetime household earnings, percent



Note: The replacement rate is the ratio of Social Security benefits net of income tax to average inflation-indexed lifetime earnings. Replacement rates are for workers claiming benefits at age 65. For workers born in the 1960s, the Social Security full benefit retirement age is 67. If these workers claimed benefits at age 67, benefits would increase by about 15 percent.

Source: Congressional Budget Office, *CBO's 2021 Long-Term Projections for Social Security: Additional Information*

Homeownership is the second most important retirement resource after Social Security for many near-retiree households. Older households are more likely to own their homes; more likely to own their homes without mortgage debt; and, if they still have mortgages, more likely to have small mortgages relative to the value of their homes. Retired households typically benefit from this resource simply by living in their homes rent-free.

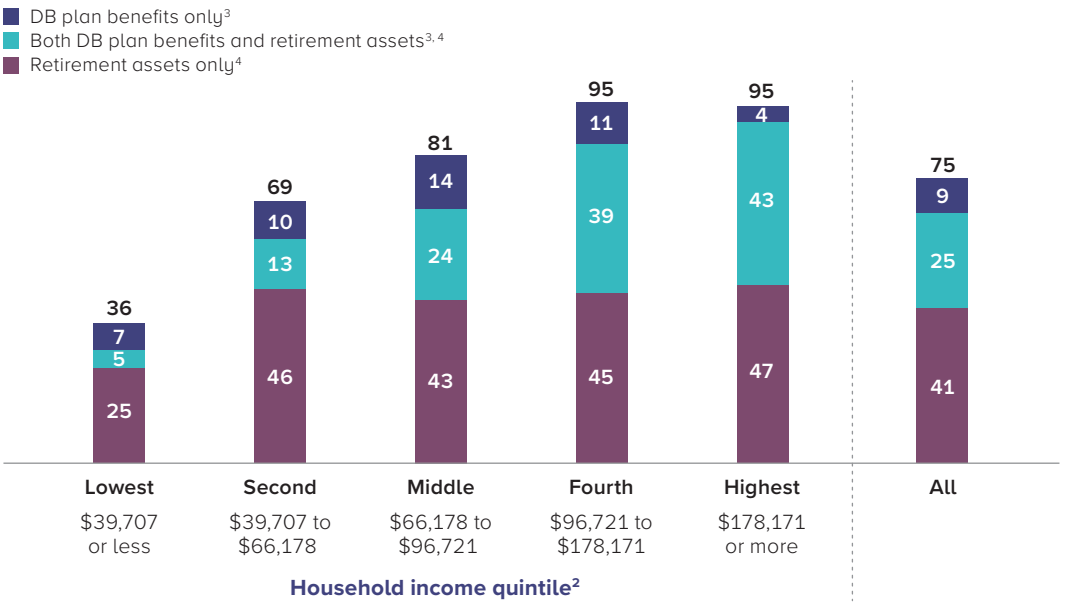
Employer-sponsored retirement plans and IRAs, which complement Social Security benefits and are important resources for households regardless of income or wealth, increase in importance for households for which Social Security replaces a smaller share of earnings. In 2019, three-quarters of near-retiree households had accrued benefits in employer-sponsored retirement plans—DB and DC plans sponsored by private-sector and government employers—or IRAs (Figure 8.4).

Finally, although less important on average, retirees also rely on ***other assets*** in retirement. These assets can be financial—including bank deposits, stocks, bonds, and mutual funds owned outside employer-sponsored retirement plans and IRAs. They also can be nonfinancial—including business equity, investment real estate, second homes, vehicles, and consumer durables (long-lived goods such as household appliances and furniture). Higher-income households are more likely to have large holdings of assets in this category.

FIGURE 8.4

Near-Retiree Households Across All Income Groups Have Retirement Assets, DB Plan Benefits, or Both

Percentage of near-retiree households[1] by income quintile,[2] 2019



[1] *Near-retiree households* are those with a head of household aged 55 to 64, and a working head of household or working spouse.

[2] Income is household income before taxes in 2018.

[3] Households currently receiving DB plan benefits and households with the promise of future DB plan benefits, whether from private-sector or government employers, are counted in this category.

[4] In this figure, retirement assets include DC plan assets (401(k), 403(b), 457, thrift, and other DC plans), whether from private-sector or government employers, and IRAs (traditional, Roth, SEP, SAR-SEP, and SIMPLE).

Source: Investment Company Institute tabulations of the 2019 Federal Reserve Board Survey of Consumer Finances

US Households Have Accumulated a Significant Retirement Nest Egg

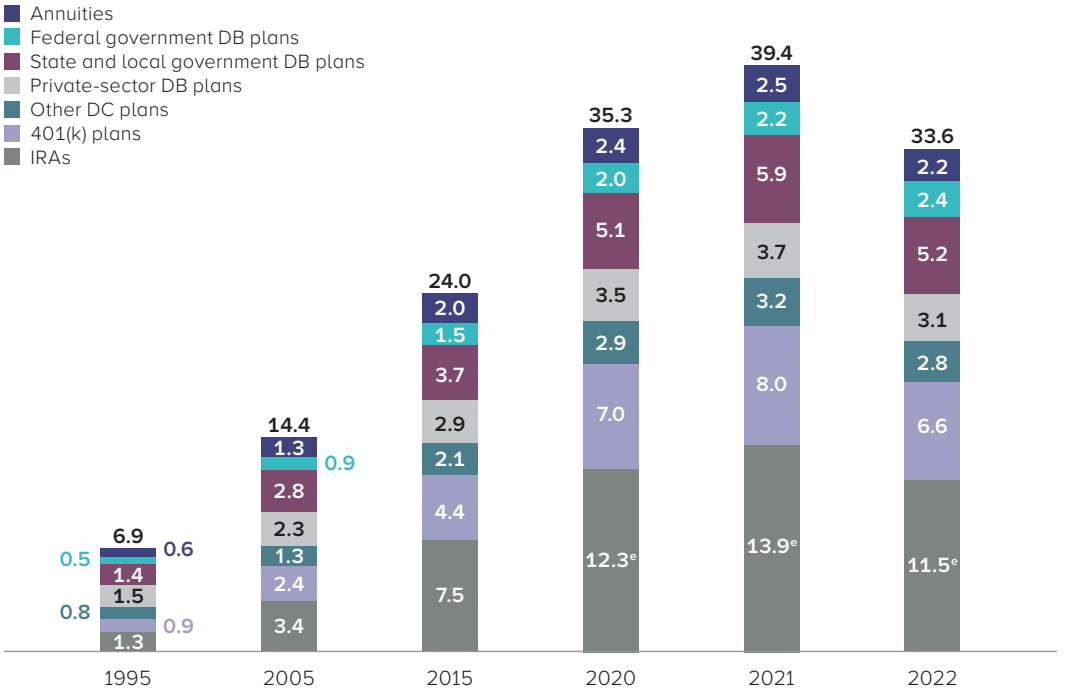
Employer-sponsored retirement plans, IRAs (including rollovers), and annuities play an important role in the US retirement system, with assets earmarked for retirement representing close to one-third of US households' total financial assets at year-end 2022.

Although household balance sheets were affected by the impact of a declining stock market over the year, assets earmarked for retirement amounted to $33.6 trillion at year-end 2022 (Figure 8.5). The largest components of retirement assets were IRAs and employer-sponsored DC plans (including 401(k) plans), which together represented 62 percent of all retirement market assets at year-end 2022. IRAs and DC plans had about half of their assets invested in mutual funds at year-end 2022 (Figure 8.15). In addition, US households had $1.2 trillion in variable annuity (VA) mutual fund assets held outside retirement accounts.

FIGURE 8.5

US Retirement Market Assets

Trillions of dollars, year-end



e Data are estimated.

Source: Investment Company Institute. For a complete list of sources, see Investment Company Institute, "The US Retirement Market, Fourth Quarter 2022."

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Retirement Market

www.ici.org/research/stats/retirement

While US households manage individual account-based savings (DC plans and IRAs), traditional DB plans promise to pay benefits in retirement typically based on salary and years of service. Some DB plans, however, do not have sufficient assets to cover promised benefits that households have a legal right to expect. Unfunded liabilities are a larger issue for government DB plans than for private-sector DB plans. As of year-end 2022, unfunded liabilities were 46 percent of benefit entitlements for state and local government DB plans, 37 percent of benefit entitlements for federal government DB plans, and 17 percent of benefit entitlements for private-sector DB plans.

US Retirement System Produces Robust Income Replacement in Retirement

In retirement, most Americans maintain spendable income that is a high percentage of the spendable income they had in their late 50s, according to a study by ICI economists analyzing tax data. The study, which followed Americans who were aged 55 in 2000 until they were aged 72 in 2017, also finds that most retirees get substantial amounts of both Social Security benefits and retirement income—that is, distributions from employer-sponsored retirement plans, annuities, and IRAs. Indeed, at every age through age 72, the typical individual maintained more than 90 percent of the inflation-adjusted spendable income they had, on average, from age 55 through age 59. Spendable income is the income available after paying taxes and contributing to retirement accounts.

Lower-income Americans typically had higher spendable income replacement rates. Individuals were ranked by their average total income from age 55 to age 59 and split into 20 groups, or ventiles. At age 72, the median replacement rate for lower-income individuals (third ventile) was 103 percent, for middle-income individuals (10th ventile) was 93 percent, and for higher-income individuals (18th ventile) was 84 percent (Figure 8.6). A similar pattern by ventile is seen throughout the replacement rate distribution. At the 75th percentile, replacement rates were well above 100 percent for lower-income ventiles. At the 25th percentile, the relationship between replacement rates and income was less pronounced, with ventiles 4 through 16 all around 70 percent.

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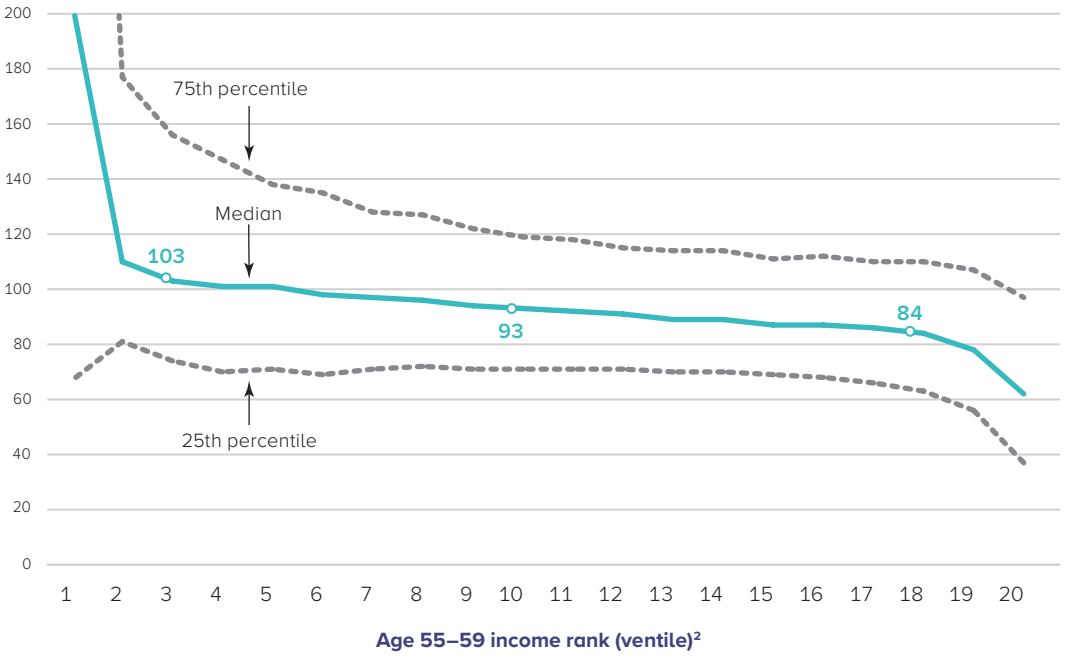
Income from Retirement Plans
www.ici.org/research/retirement/income

FIGURE 8.6

Lower-Income Individuals Tend to Replace Higher Percentages of Income in Retirement

Spendable income replacement rate[1] at age 72



[1] The replacement rate is spendable income at age 72 as a percentage of average inflation-adjusted spendable income between ages 55 and 59. Spendable income is the income available after paying taxes and contributing to retirement accounts. For married individuals, spendable income is per capita (that is, spendable income for the couple divided by two).

[2] Individuals were ranked by their average total income from age 55 to age 59 and split into 20 groups, or ventiles.

Note: The median replacement rate for individuals in the lowest income group was 204 percent at age 72, and the 75th percentile replacement rate was 604 percent. The sample consists of Americans aged 55 at year-end 2000 who were alive at year-end 2017 (when they were age 72).

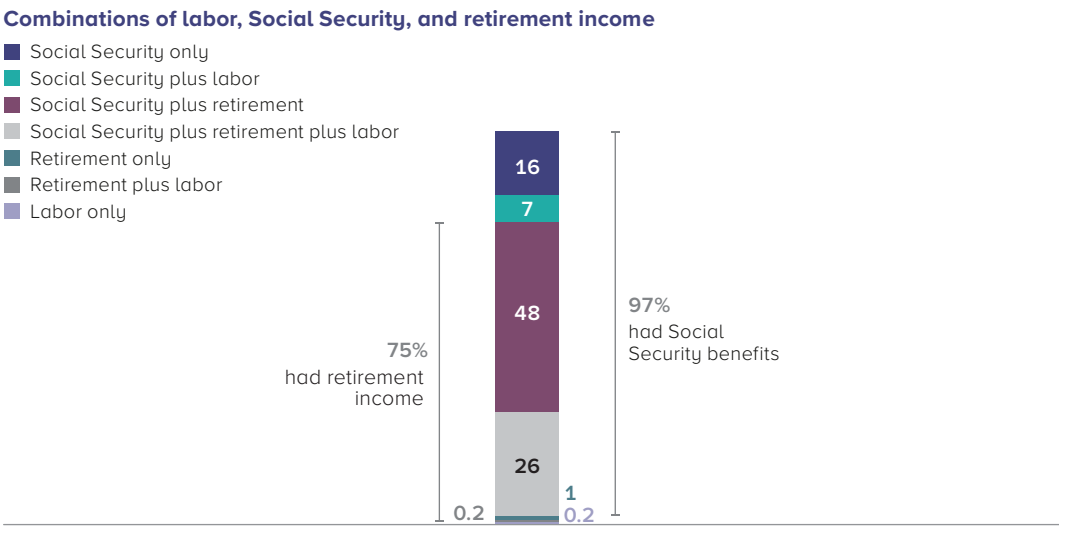
Source: *When I'm 64 (or Thereabouts): Changes in Income from Middle Age to Old Age*, available at **www.ici.org/research/retirement/income**

In addition to Social Security benefits, the study found that the vast majority of American retirees had income from employer-sponsored retirement plans, annuities, and IRAs. At age 72, either directly or through a spouse, 97 percent received Social Security benefits and 75 percent received retirement income (Figure 8.7). Nearly half (48 percent) had Social Security benefits and retirement income (but no labor income), and more than one-quarter had all three.

FIGURE 8.7

Most Americans Had Non–Social Security Retirement Income at Age 72

Percentage of Americans at age 72



Note: The sample consists of Americans aged 55 at year-end 2000 who were alive at year-end 2017 (when they were age 72). Retirement income is income from DB and DC pensions, annuities, and IRAs. Individuals are classified as having a given income type if they received it either directly or through a spouse. At age 72, 2 percent of Americans did not have labor, Social Security, or retirement income.

Source: *When I'm 64 (or Thereabouts): Changes in Income from Middle Age to Old Age*, available at **www.ici.org/research/retirement/income**

Defined Contribution Plans Play an Increasing Role in Retirement Saving

DC plans provide employees with a retirement account funded with employer contributions, employee contributions, or both, plus investment earnings or losses on those contributions, less withdrawals. Assets in employer-sponsored DC plans have grown faster than assets in DB plans over the past three decades, increasing from less than one-third of total DC and DB plan assets in 1992 to nearly half by year-end 2022.

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The BrightScope/ICI Defined Contribution Plan Profile
www.ici.org/research/retirement/dc-plan-profile

A Closer Look: 401(k) Plans Are the Most Common DC Plan

At the end of 2022, employer-sponsored DC plans—which include 401(k) plans, 403(b) plans, 457 plans, the federal Thrift Savings Plan (TSP), and other private-sector DC plans—held an estimated $9.3 trillion in assets (Figure 8.5). With $6.6 trillion in assets at year-end 2022, 401(k) plans held the largest share of employer-sponsored DC plan assets; 403(b) plans—which are similar to 401(k) plans and are offered by some education and nonprofit organizations—held another $1.1 trillion in assets.

With 91 percent of 401(k) plan participants in plans offering employer contributions, 401(k) plans are a powerful saving tool (Figure 8.8). DC-owning individuals agree that payroll deduction makes it easier to save and that the tax treatment of DC plans is a big incentive to contribute. The typical 401(k) plan offers a full assortment of investment options generally including domestic equity funds, international equity funds, domestic bond funds, and target date funds. Eighty-five percent of DC-owning individuals agree that their plan offers a good lineup of investment options.

FIGURE 8.8

401(k) Plans Offer Powerful and Convenient Saving and Investing

401(k) plans:	» 60 million active participants » $6.6 trillion in assets at year-end 2022 » 62 percent of 401(k) plan assets invested in mutual funds » 28 investment options, on average » Typically including domestic equity funds, international equity funds, domestic bond funds, and target date funds[1]
401(k) participants:	» 91 percent are offered employer contributions » 94 percent have investments in equities[2] » 59 percent have invested in target date funds[1] » 84 percent have access to plan loans
DC-owning individuals:	» 91 percent agree that payroll deduction makes it easier for them to save » 85 percent agree that the tax treatment of their retirement plan is a big incentive to contribute » 85 percent agree that their employer-sponsored retirement plan offers them a good lineup of investment options

[1] Funds include mutual funds, collective investment trusts, separate accounts, and other pooled investment products.

[2] Equities include equity funds, company stock, and the equity portion of balanced funds. The Investment Company Institute classifies balanced funds as *hybrid* in its data.

Sources: Investment Company Institute, The US Retirement Market (**www.ici.org/research/stats/retirement**); The BrightScope/ICI Defined Contribution Plan Profile (**www.ici.org/research/retirement/dc-plan-profile**); EBRI/ICI 401(k) Database (**www.ici.org/research/retirement/ebri-ici-401k**); US Household Views on Retirement Savings (**www.ici.org/research/retirement/us-views**)

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US Household Views on Retirement Savings
www.ici.org/research/retirement/us-views

401(k) Plan Participants' Asset Allocation Varies with Participant Age

The vast majority of 401(k) plan participants embrace investing in equities—whether through equity funds, balanced funds* (including target date funds), or company stock. According to research conducted by ICI and the Employee Benefit Research Institute (EBRI), 94 percent of 401(k) participants held at least some equities in their 401(k) accounts at year-end 2020 (Figure 8.8). Younger 401(k) plan participants were more likely to have high concentrations in equities in their accounts compared with older participants. At year-end 2020, more than three-quarters of 401(k) plan participants in their twenties or thirties had more than 80 percent of their account balances invested in equities, compared with less than one-fifth of those in their sixties.

The composition of the asset allocation of 401(k) participants' accounts also varies with participant age. At year-end 2020, 401(k) plan participants in their twenties had a much higher allocation to target date funds (50 percent of their 401(k) plan balances) than those in their sixties (28 percent) (Figure 8.9). Older 401(k) plan participants had much higher allocations to fixed-income investments (bond funds; GICs and other stable value funds; and money funds) compared with younger 401(k) plan participants. All told, younger participants allocate more of their portfolios to equities compared with older participants. At year-end 2020, participants in their twenties had 84 percent of their 401(k) assets invested in equities, on average, while those in their sixties had 56 percent of their 401(k) assets invested in equities.

* The Investment Company Institute classifies balanced funds as *hybrid* in its data.

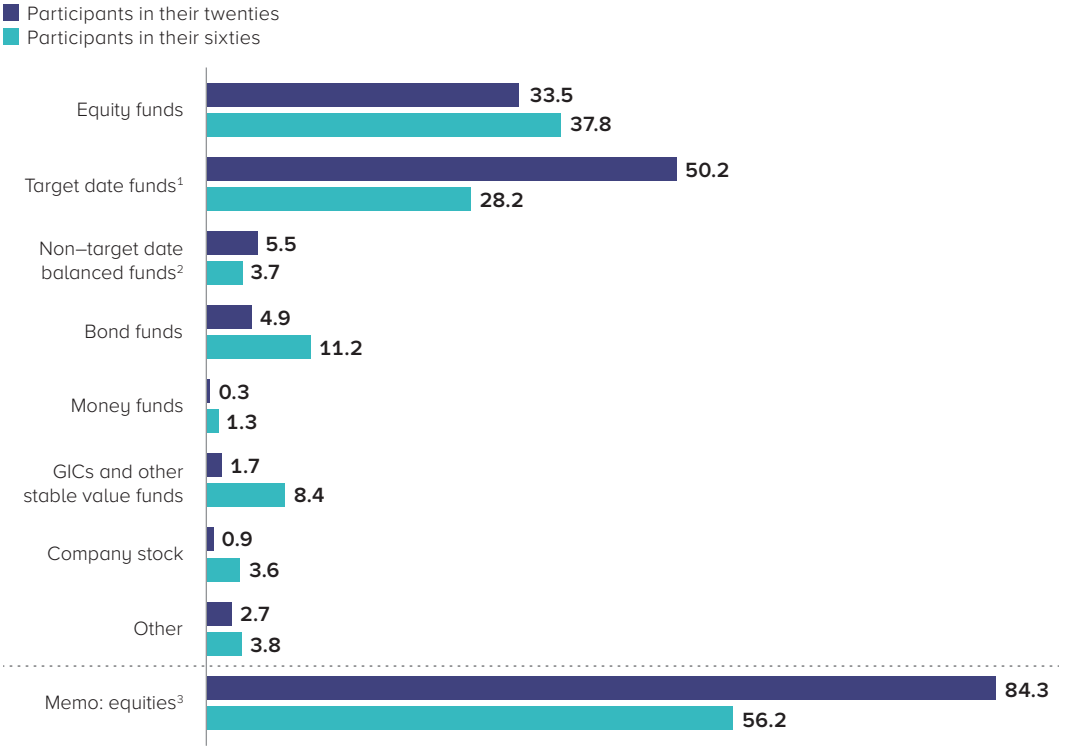
LEARN MORE

EBRI/ICI 401(k) Database
www.ici.org/research/retirement/ebri-ici-401k

FIGURE 8.9

Average 401(k) Asset Allocation Varies with Participant Age

Percentage of account balances, year-end 2020



[1] A target date fund typically rebalances its portfolio to become less focused on growth and more focused on income as it approaches and passes the target date of the fund, which is usually included in the fund's name.

[2] The Investment Company Institute classifies balanced funds as *hybrid* in its data.

[3] Equities include equity funds, company stock, and the equity portion of balanced funds.

Note: Funds include mutual funds, bank collective trusts, life insurance separate accounts, and any pooled investment product primarily invested in the security indicated. Percentages are dollar-weighted averages.

Source: Tabulations from EBRI/ICI Participant-Directed Retirement Plan Data Collection Project. See *ICI Research Perspective*, "401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2020."

Target Date Funds Enjoy Rising Popularity

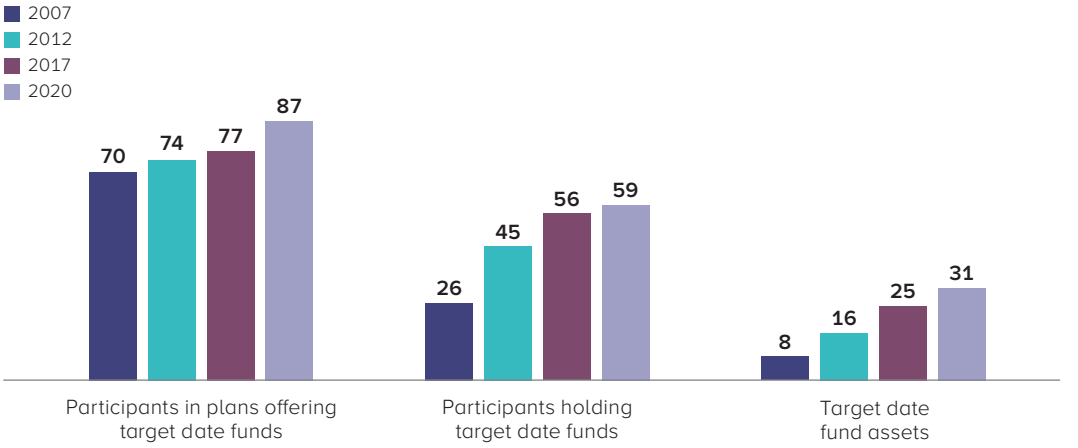
A target date fund follows a predetermined reallocation of assets over time based on a specified target retirement date. Typically, the fund rebalances its portfolio to become less focused on growth and more focused on income as it approaches and passes the target date, which is usually indicated in the fund's name.

The offering and use of target date funds in 401(k) plans have increased in recent years. Target date funds (including target date mutual funds, target date collective investment trusts, and other pooled target date investments) have risen from 8 percent of 401(k) plan assets at year-end 2007 to 31 percent at year-end 2020 (Figure 8.10). Participant use of target date funds also has increased—at year-end 2020 about six in 10 401(k) plan participants held target date funds.

FIGURE 8.10

Target Date Funds' Rising 401(k) Market Share

Percentage of total 401(k) market, year-end



Note: A target date fund typically rebalances its portfolio to become less focused on growth and more focused on income as it approaches and passes the target date of the fund, which is usually included in the fund's name. Funds include mutual funds, bank collective trusts, life insurance separate accounts, and other pooled investment products.

Source: Tabulations from EBRI/ICI Participant-Directed Retirement Plan Data Collection Project. See *ICI Research Perspective*, "401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2020."

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Defined Contribution Plan Participants' Activities

www.ici.org/research/retirement/dc-plan-activities

401(k) Plan Loans Can Offer a Safety Valve in Times of Need

Most 401(k) plan participants do not borrow from their plans, although the majority have access to plan loans. The percentage of 401(k) plan participants with loans outstanding has been trending down in the wake of changes to plan rules regarding hardship withdrawals since 2019 and special COVID-related access during 2020. According to the ICI Survey of DC Plan Recordkeepers, only 13 percent of DC plan participants had loans outstanding at year-end 2022. Analysis of EBRI/ICI 401(k) data finds that outstanding loan balances among participants with loans averaged 8 percent of the remaining 401(k) account balance at year-end 2020. And US Department of Labor data indicate that outstanding loan amounts were 1 percent of 401(k) plan assets in 2020.

IRAs Are a Significant Part of US Retirement Savings

IRA assets totaled $11.5 trillion at year-end 2022, accounting for 34 percent of US retirement market assets (Figure 8.5). Mutual funds were 44 percent of IRA assets at year-end 2022 (Figure 8.11). More than four in 10, or 55 million, US households owned IRAs in 2022.

The first type of IRA—known as a traditional IRA—was created under the Employee Retirement Income Security Act of 1974 (ERISA) and is the most common type of IRA (Figure 8.11). IRAs provide all workers with a contributory retirement savings vehicle, and, through rollovers, give workers leaving jobs a means to preserve the tax benefits and growth opportunities that employer-sponsored retirement plans provide. Roth IRAs, first available in 1998, were created to provide a contributory retirement savings vehicle on an after-tax basis, with qualified withdrawals distributed tax-free. In addition, policymakers have added employer-sponsored IRAs (SEP IRAs, SAR-SEP IRAs, and SIMPLE IRAs) to encourage small businesses to provide retirement plans by simplifying the rules applicable to tax-qualified plans.

Traditional IRA–owning households access a full array of investment options, with 72 percent reporting they held mutual funds and 30 percent indicating they held ETFs in their traditional IRAs (Figure 8.11). Two-thirds of traditional IRA–owning households have a strategy to manage income and assets in retirement. Typically, these strategies have many components, including reviewing asset allocations, determining their retirement expenses, developing a retirement income plan, setting aside emergency funds, and determining when to take Social Security benefits.

Roth IRA–owning households also access a full array of investment options, with 68 percent reporting they held mutual funds and 34 percent indicating they held ETFs in their Roth IRAs (Figure 8.11). Roth IRA–owning households skewed a bit younger than traditional IRA–owning households.

LEARN MORE

The Role of IRAs in US Households' Saving for Retirement
www.ici.org/research/retirement/role-of-iras

FIGURE 8.11

IRAs Play an Important Role in US Households' Retirement Saving

IRAs:	» 55 million US households own IRAs » $11.5 trillion in assets at year-end 2022 » 44 percent of IRA assets invested in mutual funds

Traditional IRA–owning households:	» $9.7 trillion in assets in traditional IRAs
	» 72 percent have mutual funds in their traditional IRAs
	» 30 percent have ETFs in their traditional IRAs
	» 60 percent have rollovers from employer-sponsored retirement plans in their traditional IRAs
	» The three most common primary reasons for rolling over were:
	  » 22 percent not wanting to leave assets behind at the former employer
	  » 22 percent wanting to consolidate assets
	  » 15 percent wanting to preserve the tax treatment of the savings
	» 67 percent have a strategy to manage income and assets in retirement
	» 61 years old is their median age

Roth IRA–owning households:	» $1.1 trillion in assets in Roth IRAs » 68 percent have mutual funds in their Roth IRAs » 34 percent have ETFs in their Roth IRAs » 63 percent have a strategy to manage income and assets in retirement » 51 years old is their median age

Sources: Investment Company Institute, The US Retirement Market (**www.ici.org/research/stats/retirement**); The Role of IRAs in US Households' Saving for Retirement (**www.ici.org/research/retirement/role-of-iras**)

LEARN MORE

The IRA Investor Database™

www.ici.org/research/retirement/ira-investor-database

Analysis of the IRA Investor Database—which contains information on millions of IRA investors—finds that contributions are more important for opening new Roth IRAs, while rollovers are important for opening new traditional IRAs. In 2020, 77 percent of new Roth IRAs were opened solely with contributions, while 74 percent of new traditional IRAs were opened only with rollovers (Figure 8.12).

FIGURE 8.12

New Roth IRAs Are Often Opened with Contributions; New Traditional IRAs Are Often Opened with Rollovers

Percentage of new IRAs opened in 2020 by type of IRA

Note: New IRAs are accounts that did not exist in The IRA Investor Database in 2019 and were opened by one of the paths indicated in 2020. The calculation excludes IRAs that changed financial services firms. The samples are 0.3 million new Roth IRA investors aged 18 or older at year-end 2020 and 0.3 million new traditional IRA investors aged 18 to 74 at year-end 2020. Data are preliminary.

Source: The IRA Investor Database™

Traditional IRA–owning households generally researched the decision to roll over money from their former employers' retirement plans into traditional IRAs. Traditional IRA–owning households with rollovers cite multiple reasons for rolling over their retirement plan assets into traditional IRAs. The three most common primary reasons for rolling over were not wanting to leave assets behind at the former employer, wanting to consolidate assets, and wanting to preserve the tax treatment of the savings (Figure 8.11).

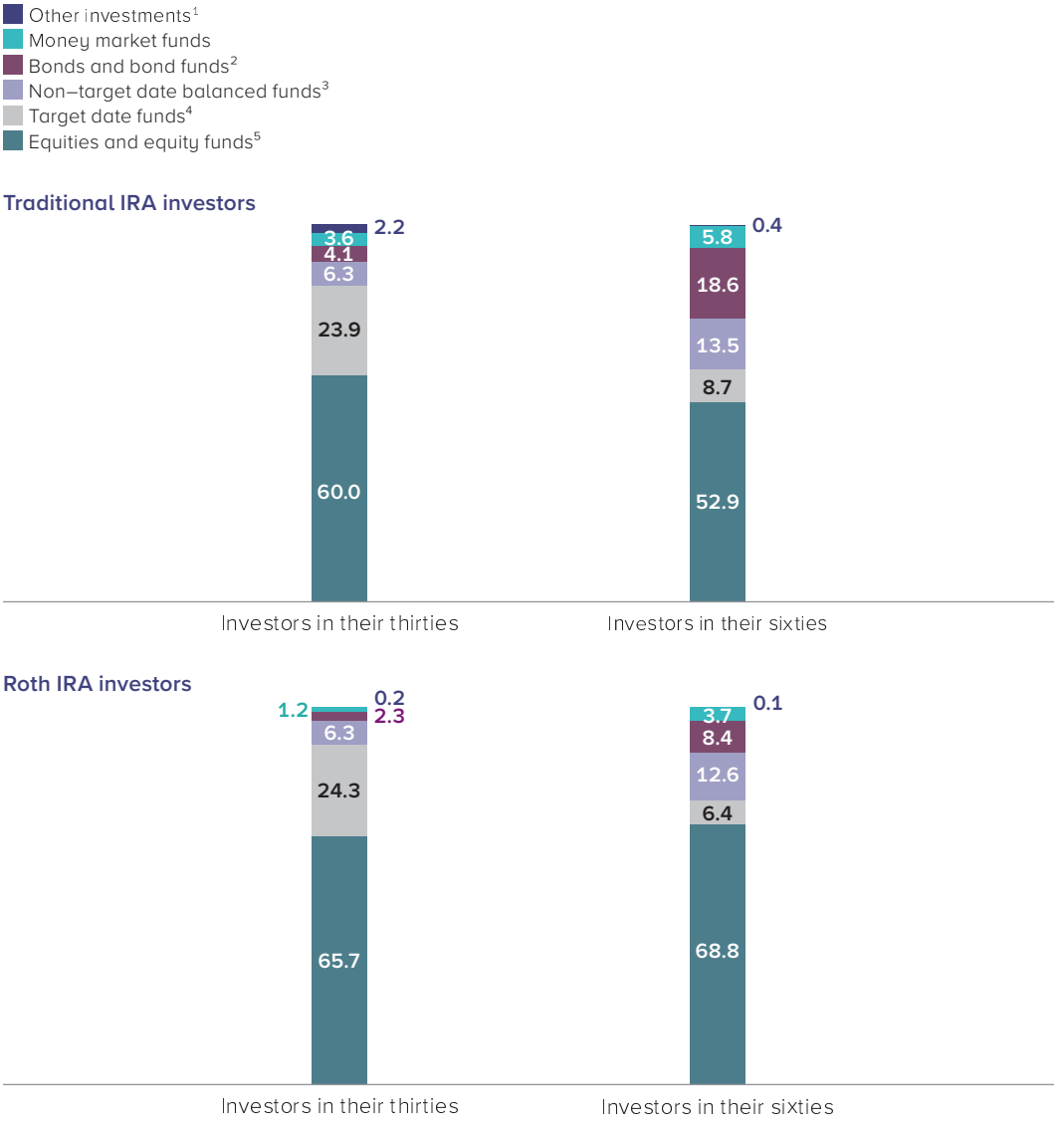
IRA Portfolios Often Reach Toward Equity Investments

As with 401(k) plan assets, a majority of IRA assets is invested in equities, and younger IRA investors tend to have a larger share of their assets invested in equities, equity funds, and target date funds than older investors. Older investors tend to be more invested in bonds, bond funds, and non–target date balanced funds. In 2020, traditional IRA investors in their thirties had, on average, a combined 84 percent of their assets in equities, equity funds, and target date funds (Figure 8.13). Traditional IRA investors in their sixties held a lower share of their assets (62 percent) in these combined categories, while holding much higher allocations across bonds, bond funds, and non–target date balanced funds. Roth IRA investors display a similar pattern of investing by age; although in all age groups, they tended to have higher allocations to equities and equity funds and lower allocations to bonds and bond funds compared with traditional IRA investors.

FIGURE 8.13

Average IRA Asset Allocation Varies with Investor Age

Percentage of assets, year-end 2020



[1] *Other investments* includes certificates of deposit and unidentifiable assets.

[2] Bond funds include bond mutual funds, bond closed-end funds, and bond ETFs.

[3] The Investment Company Institute classifies balanced funds as *hybrid* in its data.

[4] A target date fund typically rebalances its portfolio to become less focused on growth and more focused on income as it approaches and passes the target date of the fund, which is usually included in the fund's name.

[5] Equity funds include equity mutual funds, equity closed-end funds, and equity ETFs.

Note: Percentages are dollar-weighted averages. Data are preliminary.

Source: The IRA Investor Database™

IRA Withdrawals Are Rare Until Required by Law Later in Life

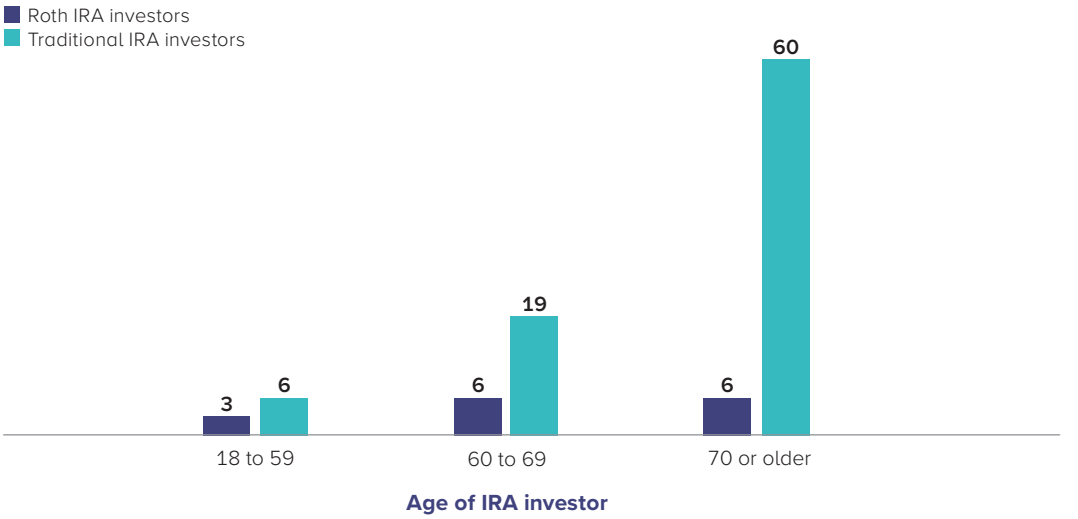
Withdrawals from IRAs tend to occur later in life, often to fulfill required minimum distributions (RMDs) under the law. An RMD is calculated as a percentage of the IRA balance, based on remaining life expectancy. Older traditional IRA owners generally must withdraw at least the minimum amount each year, or pay a penalty (historically, RMDs began at age 70½, but this age has since increased to 73). In addition, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) waived RMDs for 2020.

Withdrawal activity is lower among younger traditional and Roth IRA investors, likely related to early withdrawal penalties for distributions taken by individuals younger than 59½ (Figure 8.14). Withdrawal activity rises for investors in their sixties (where withdrawals are generally penalty free) and increases substantially for traditional IRA investors aged 70 or older, likely related to RMD rules. The 60 percent of traditional IRA investors aged 70 or older taking withdrawals in 2020 represents a reduced rate of withdrawal activity—compared with 81 percent in 2019—reflecting the CARES Act suspension of RMDs in that year. The withdrawal rate does not increase after age 70 for Roth IRA investors, who are not subject to RMDs during the owner's lifetime.

FIGURE 8.14

Roth IRA Investors Rarely Take Withdrawals; Traditional IRA Investors Are Heavily Affected by RMDs

Percentage of IRA investors with withdrawals by type of IRA and investor age, 2020



Note: The samples are 4.6 million Roth IRA investors aged 18 or older at year-end 2020 and 6.6 million traditional IRA investors aged 18 or older at year-end 2020. Data are preliminary.

Source: The IRA Investor Database™

The Role of Mutual Funds in Retirement Savings

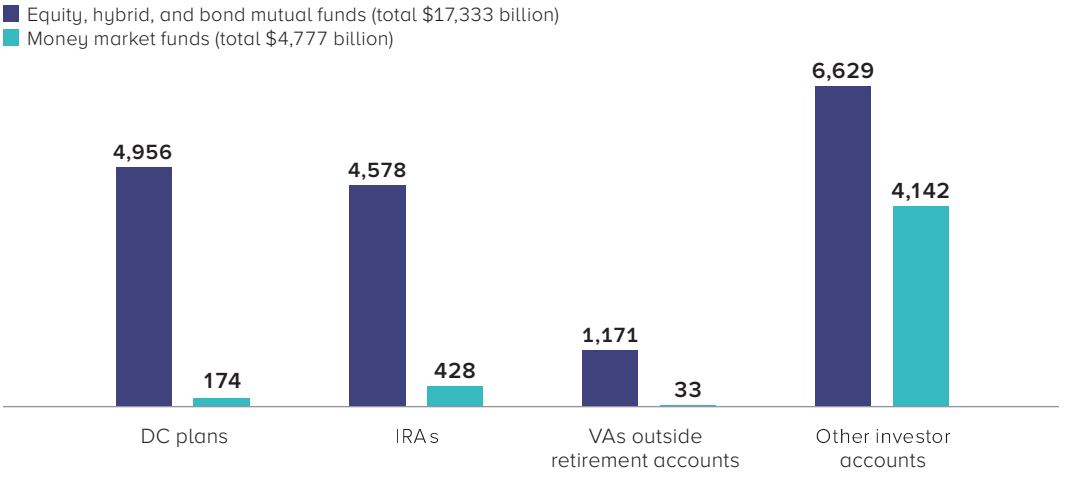
Mutual funds play a major role in employer-sponsored DC plans (such as 401(k) plans) and IRAs. At year-end 2022, mutual funds accounted for 55 percent of DC plan assets and 44 percent of IRA assets (Figures 8.5 and 8.15). Investors held slightly more mutual fund assets in DC plans ($5.1 trillion) than in IRAs ($5.0 trillion) (Figure 8.15).

Mutual fund assets held in DC plans and IRAs represent a large share of mutual fund assets overall, and long-term mutual fund assets in particular (Figure 8.15). The $10.1 trillion in mutual fund retirement assets made up 46 percent of all mutual fund assets at year-end 2022. DC plans and IRAs held 55 percent of equity, hybrid, and bond mutual fund assets, but only 13 percent of money market fund assets. Another $1.2 trillion held in VA mutual funds outside retirement accounts represented another 7 percent of long-term mutual fund assets.

FIGURE 8.15

Substantial Amounts of Retirement Market Assets Are Invested in Long-Term Mutual Funds

Assets, billions of dollars, year-end 2022



Source: Investment Company Institute. See Investment Company Institute, "The US Retirement Market, Fourth Quarter 2022."

Mutual Funds Also Play a Role in Education Savings

Twelve percent of households that owned mutual funds in 2022 cited education as a financial goal for their fund investments (see Figure 7.2), and 15 percent of mutual fund–owning households have 529 plans. Nevertheless, the demand for education savings vehicles has been moderate since their introduction in the 1990s, partly because of their limited availability and partly due to investors' lack of familiarity with them. The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) enhanced the attractiveness of two education savings vehicles—Section 529 plans and Coverdell education savings accounts (ESAs)—by making them more flexible and allowing larger contributions. The 2006 Pension Protection Act (PPA) made the EGTRRA enhancements permanent. The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 extended the EGTRRA enhancements to Coverdell ESAs for two years; the American Taxpayer Relief Act of 2012 made these enhancements permanent. The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) expanded the types of education costs that are covered by 529 plans. The SECURE 2.0 Act of 2022 will allow Roth IRA rollovers of a limited amount of 529 plan assets (starting in 2024).

Assets in Section 529 savings plans were $388.0 billion at year-end 2022, down 14 percent from year-end 2021. As of year-end 2022, there were 15.1 million 529 savings plan accounts, with an average account size of approximately $25,600.

Households Saving for College Tend to Be Younger

In 2022, as a group, households saving for college through 529 plans, Coverdell ESAs, or mutual funds or ETFs held outside these accounts tended to be headed by younger individuals—about half (51 percent) were younger than 45 (Figure 8.16). Heads of households saving for college had a range of educational attainment levels. Sixty-one percent had completed college, 22 percent had an associate's degree or some college experience, and 17 percent had a high school diploma or less. These households also represented a range of incomes, with 43 percent of households saving for college having household income of less than $100,000. Finally, these households typically had children (younger than 18) in the home.

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529 Plan Program Statistics
www.ici.org/research/stats/529s

FIGURE 8.16

Characteristics of Households Saving for College

Percentage of US households saving for college,[1] 2022

Age of head of household[2]	
Younger than 35	27
35 to 44	24
45 to 54	23
55 to 64	12
65 or older	14
Education level of head of household[2]	
High school diploma or less	17
Associate's degree or some college	22
Completed college	37
Completed graduate school	24
Household income[3]	
Less than $50,000	22
$50,000 to $99,999	21
$100,000 to $149,999	20
$150,000 to $199,999	13
$200,000 or more	24
Number of children in home[4]	
None	45
One	24
Two	21
Three or more	10

[1] Households saving for college are households that own education savings plans (Coverdell ESAs or 529 plans) or that said paying for education was one of their financial goals for their mutual funds or ETFs.

[2] Age and education level are based on the sole or co-decisionmaker for saving and investing.

[3] Total reported is household income before taxes in 2021.

[4] The number of children reported is children younger than 18 living in the home.

Source: Investment Company Institute Annual Mutual Fund Shareholder Tracking Survey

APPENDIX

A

How US-Registered Investment Companies Operate and the Core Principles Underlying Their Regulation

The Origins of Pooled Investing

The investment company concept dates to the late 1700s in Europe, according to K. Geert Rouwenhorst in *The Origins of Mutual Funds*, when "a Dutch merchant and broker…invited subscriptions from investors to form a trust…to provide an opportunity to diversify for small investors with limited means."

The emergence of "investment pooling" in England in the 1800s brought the concept closer to US shores. In 1868, the Foreign and Colonial Government Trust formed in London. This trust resembled the US fund model in basic structure, providing "the investor of moderate means the same advantages as the large capitalists…by spreading the investment over a number of different stocks."

Perhaps more importantly, the British fund model established a direct link with US securities markets, helping to finance the development of the post–Civil War US economy. The Scottish American Investment Trust, formed on February 1, 1873, by fund pioneer Robert Fleming, invested in the economic potential of the United States, chiefly through American railroad bonds. Many other trusts followed that not only targeted investment in America, but also led to the introduction of the fund investing concept on US shores in the late 1800s and early 1900s.

The first mutual, or open-end, fund was introduced in Boston in March 1924. The Massachusetts Investors Trust introduced important innovations to the investment company concept by establishing a simplified capital structure, continuous offering of shares, the ability to redeem shares rather than hold them until dissolution of the fund, and a set of clear investment restrictions and policies.

The stock market crash of 1929 and the Great Depression that followed hampered the growth of pooled investments until a succession of landmark securities laws—beginning with the Securities Act of 1933 and concluding with the Investment Company Act of 1940—reinvigorated investor confidence. Renewed investor confidence and many innovations led to relatively steady growth in industry assets and the number of accounts.

Four Principal Securities Laws Govern Investment Companies

The Investment Company Act of 1940	Regulates the structure and operations of investment companies through a combination of registration and disclosure requirements and restrictions on day-to-day operations. The Investment Company Act requires the registration of all investment companies with more than 100 investors. Among other things, the act addresses investment company capital structures, custody of assets, investment activities (particularly with respect to transactions with affiliates and other transactions involving potential conflicts of interest), and the duties of fund boards.
The Investment Advisers Act of 1940	Regulates investment advisers. The Advisers Act requires all advisers to registered investment companies and other large advisers to register with the Securities and Exchange Commission (SEC). The act also contains provisions requiring fund advisers to meet recordkeeping, custodial, reporting, and other regulatory responsibilities.
The Securities Exchange Act of 1934	Regulates the trading, purchase, and sale of securities, including investment company shares. The 1934 Act also regulates broker-dealers, including investment company principal underwriters and others that sell investment company shares, and requires them to register with the SEC. In 1938, the act was revised to add Section 15A, which authorized the SEC to create self-regulatory organizations. Pursuant to this authority, in 1939 a self-regulatory organization for broker-dealers—which is now known as the Financial Industry Regulatory Authority (FINRA)—was created. Through its rules, inspections, and enforcement activities, FINRA, with oversight by the SEC, continues to regulate the conduct of broker-dealers, thereby adding another layer of protection for investors.
The Securities Act of 1933	Requires the registration of public offerings of securities—including investment company shares—and regulates such offerings. The 1933 Act also requires that all investors receive a current prospectus describing the fund.

The Types of US Investment Companies

Fund sponsors in the United States offer four main types of registered investment companies: mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs).

The majority of investment companies are **mutual funds**, both in terms of number of funds and assets under management. Mutual funds can have actively managed portfolios, in which a professional investment adviser creates a unique mix of investments to meet a particular investment objective, or passively managed portfolios, in which the adviser seeks to track the performance of a selected benchmark or index. One hallmark of mutual funds is that they issue redeemable securities, meaning that the fund stands ready to buy back its shares at their next computed net asset value (NAV). The NAV is calculated by dividing the total market value of the fund's assets, minus its liabilities, by the number of mutual fund shares outstanding.

Money market funds are one type of mutual fund. They offer investors a variety of features, including liquidity, a market-based rate of return, and the goal of returning principal, all at a reasonable cost. These funds, which are typically publicly offered to all types of investors, are registered investment companies that are regulated by the Securities and Exchange Commission (SEC) under US federal securities laws, including Rule 2a-7 under the Investment Company Act. That rule contains numerous risk-limiting conditions concerning portfolio maturity, quality, diversification, and liquidity.* Since October 2016, institutional prime money market funds (funds that primarily invest in corporate debt securities) and institutional municipal money market funds maintain a floating NAV for transactions based on the current market value of the securities in their portfolios. Government money market funds and retail money market funds (funds designed to limit all beneficial owners of the funds to natural persons) are allowed to use the amortized cost method of pricing or penny rounding—or both—to seek to maintain a stable share price. Money market funds' boards of directors also have the ability to impose liquidity fees or to suspend redemptions temporarily if a fund's level of weekly liquid assets falls below a certain threshold.

Unlike mutual funds, **closed-end funds** do not issue redeemable shares. Instead, they issue a fixed number of shares that trade intraday on stock exchanges at market-determined prices. Investors in a closed-end fund buy or sell shares through a broker, just as they would trade the shares of any publicly traded company. For more information on closed-end funds, see chapter 5.

ETFs are a hybrid of investment companies. They are structured and legally classified as open-end management investment companies or UITs (discussed below) but trade intraday on stock exchanges like closed-end funds. ETFs only buy and sell fund shares directly with authorized participants in large blocks, often 50,000 shares or more. For more information on ETFs, see chapter 4.

* On December 15, 2021, the SEC proposed certain amendments to Rule 2a-7. As of the date of this publication, the proposed amendments have not been adopted.

UITs are also a hybrid, with some characteristics of mutual funds and some of closed-end funds. Like closed-end funds, UITs typically issue only a specific, fixed number of shares, called units. Like mutual funds, the units are redeemable; but unlike mutual funds, generally the UIT sponsor will maintain a secondary market in the units so that redemptions do not deplete the UIT's assets. A UIT does not actively trade its investment portfolio—instead it buys and holds a set of particular investments until a set termination date, at which time the trust is dissolved and proceeds are paid to shareholders. For more information, see chapter 2.

The Organization of a Mutual Fund

A mutual fund typically is organized under state law either as a corporation or a business trust (sometimes called a statutory trust). The three most popular forms of organization are Massachusetts business trusts, Maryland corporations, and Delaware statutory trusts (Figure A.1).*

Historically, Massachusetts business trusts were the most popular—in part because the very first mutual fund was formed as a Massachusetts business trust. This was a common form of organization at the time for pools that invested in real estate or public utilities, and it provided a model for others to follow. Developments in the late 1980s gave asset management companies other attractive choices, and since then, the percentage of funds organized as Massachusetts business trusts has declined as more and more funds have formed as Maryland corporations and Delaware statutory trusts. For example, in 1987, Maryland revised its law to align it with interpretations of the Investment Company Act concerning when funds are required to hold annual meetings. As a result, Maryland corporations became more competitive with the Massachusetts business trust as a form of organization for mutual funds. In 1988, Delaware—already a popular domicile for US corporations—adopted new statutory provisions devoted specifically to business trusts (since renamed statutory trusts). Benefits, such as management of the trust and limited liability afforded to the trust's beneficial owners, have led to Delaware statutory trusts being the most favored form of mutual fund organization.

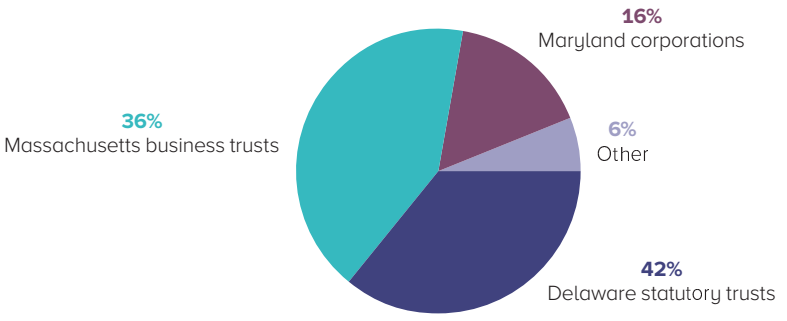
* At year-end 2022, 6 percent of mutual funds chose other forms of organization, such as limited liability partnerships, or other domiciles, such as Ohio or Wisconsin.

Mutual funds have officers and directors (if the fund is a corporation) or trustees (if the fund is a business trust).* The fund's board plays an important role in overseeing fund operations, described in more detail on page 135.

FIGURE A.1

The Most Popular Forms of Mutual Fund Organization

Percentage of funds, year-end 2022



Number of funds: 9,346

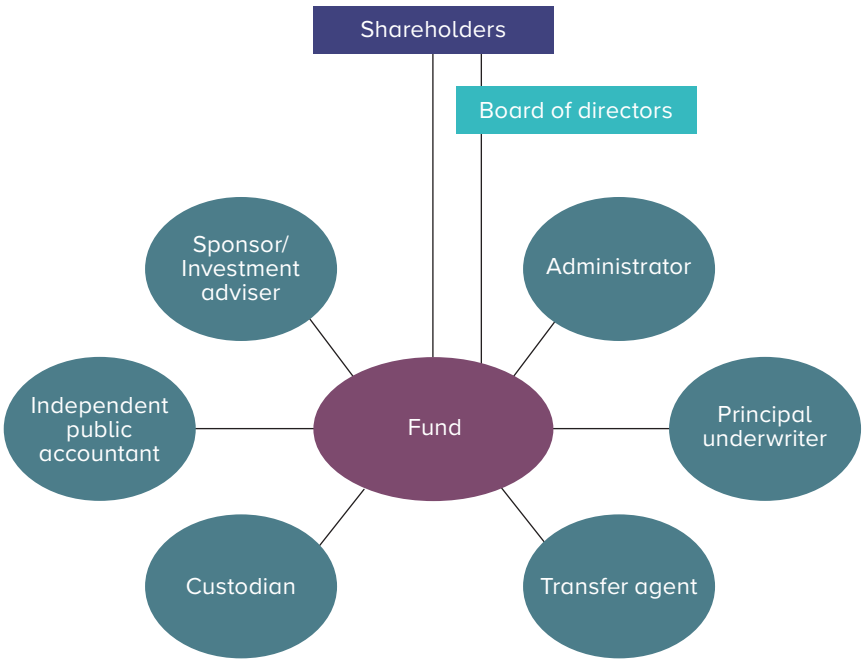
Note: Data include mutual funds that do not report statistical information to the Investment Company Institute and mutual funds that invest primarily in other mutual funds.

* For ease of reference, this appendix refers to all directors and trustees as *directors* and all boards as *boards of directors*.

Unlike other companies, a mutual fund is typically externally managed; it is not an operating company and has no employees in the traditional sense. Instead, a fund relies upon third parties or service providers—either affiliated organizations or independent contractors—to invest fund assets and carry out other business activities. Figure A.2 shows the primary types of service providers usually relied upon by a fund.

FIGURE A.2

Organization of a Mutual Fund



Although it typically has no employees, a fund is required by law to have written compliance policies and procedures that govern the operations of the fund and the fund's administrator, investment adviser, transfer agent, and principal underwriter, and that are reasonably designed to ensure the fund's compliance with the federal securities laws. All funds must also have a chief compliance officer (CCO), whose appointment must be approved by the fund's board and who must annually produce a report for the board regarding the adequacy of the fund's compliance policies and procedures, the effectiveness of their implementation, and any material compliance matters that have arisen.

Fund Boards

A fund board represents the interests of the fund's shareholders by overseeing the management and operations of the fund, including the fund's contractual arrangements with its service providers. For more information on fund boards, see page 135.

Shareholders

Like shareholders of other companies, mutual fund shareholders have specific voting rights. These include the right to elect directors at meetings called for that purpose and the right to approve material changes in the terms of a fund's contract with its investment adviser, the entity that manages the fund's assets. For example, a fund's management fee cannot be increased unless a majority of shareholders vote to approve the increase.

Sponsors

Setting up a mutual fund is a complicated process performed by the fund's sponsor, which is typically the fund's investment adviser. The fund sponsor has a variety of responsibilities. For example, it must assemble the group of third parties needed to launch the fund, including the persons or entities charged with managing and operating the fund. The sponsor provides officers and affiliated directors to oversee the fund and recruits unaffiliated persons to serve as independent directors.

Some of the major steps in the process of starting a mutual fund include organizing the fund under state law, registering the fund with the SEC as an investment company pursuant to the Investment Company Act, and registering the fund shares for sale to the public pursuant to the Securities Act of 1933.* Unless the sales of shares in a particular state qualify for an exemption, the fund also must make filings and pay fees to those states in which the fund's shares will be offered to the public. The Investment Company Act also requires that each new fund have at least $100,000 of seed capital before distributing its shares to the public; this capital is usually contributed by the sponsor or adviser in the form of an initial investment.

Advisers

Investment advisers have overall responsibility for directing the fund's investments and handling its business affairs. The investment advisers have their own employees, including investment professionals who work on behalf of the fund's shareholders and determine which securities to buy and sell in the fund's portfolio, consistent with the fund's investment objectives and policies. In addition to managing the fund's portfolio, the adviser often serves as administrator to the fund, providing various "back-office" services. As noted earlier, a fund's investment adviser is often the fund's initial sponsor and its initial shareholder through the seed money invested to create the fund.

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* For more information on the requirements for the initial registration of a mutual fund, see the SEC's Investment Company Registration and Regulation Package, available at **www.sec.gov/divisions/investment/invcoreg121504.htm**.

To protect investors, a fund's investment adviser and the adviser's employees are subject to numerous standards and legal restrictions, including restrictions on transactions that may pose conflicts of interest. Like a mutual fund, investment advisers are required to have their own written compliance programs that are overseen by CCOs and establish detailed procedures and internal controls designed to ensure compliance with all relevant laws and regulations.

Administrators

A fund's administrator handles the many back-office functions for a fund. For example, administrators often provide office space, clerical and fund accounting services, data processing, bookkeeping, and internal auditing; they also may prepare and file SEC, tax, shareholder, and other reports. Fund administrators also help maintain compliance procedures and internal controls, subject to oversight by the fund's board and CCO.

Principal Underwriters

Investors buy and redeem fund shares either directly through a fund's transfer agent or indirectly through a broker-dealer that is authorized to sell fund shares. In order to offer a particular fund's shares, however, a broker-dealer must have a sales agreement with the fund. The role of a fund's principal underwriter is to act as the agent for the fund in executing sales agreements that authorize broker-dealers to offer for sale and sell fund shares. Though principal underwriters must register under the Securities Exchange Act of 1934 as broker-dealers, they (1) do not operate as full-service broker-dealers, (2) typically are not involved in offering or selling fund shares to retail investors, and (3) do not establish or maintain accounts for retail investors.

Transfer Agents

Mutual funds and their shareholders rely on the services of transfer agents to maintain records of shareholder accounts; calculate and distribute dividends and capital gains; and prepare and mail shareholder account statements, federal income tax information, and other shareholder notices. Some transfer agents also prepare and mail statements confirming shareholder transactions and account balances. Additionally, they may maintain customer service departments, including call centers, to respond to shareholder inquiries.

Auditors

Auditors certify the fund's financial statements. The auditors' oversight role is described more fully on page 136.

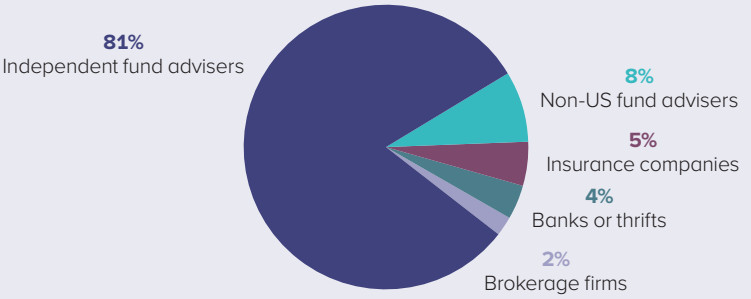
Types of Mutual Fund Complexes

A variety of financial services companies offer registered funds in the United States. At year-end 2022, 81 percent of investment company complexes were independent fund advisers (Figure A.3), managing 70 percent of investment company assets. Other types of investment company complexes in the US market include non-US fund advisers, insurance companies, banks, thrifts, and brokerage firms.

FIGURE A.3

81 Percent of Fund Complexes Were Independent Fund Advisers

Percentage of investment company complexes by type of intermediary, year-end 2022



Tax Features of Mutual Funds

Mutual funds are subject to special tax rules set forth in subchapter M of the Internal Revenue Code. Unlike most corporations, mutual funds are not subject to taxation on their income or capital gains at the entity level, provided that they meet certain gross income and asset requirements and distribute their income annually.

To qualify as a regulated investment company (RIC) under subchapter M, at least 90 percent of a mutual fund's gross income must be derived from certain sources, including dividends, interest, payments with respect to securities loans, and gains from the sale or other disposition of stock, securities, or foreign currencies. In addition, at the close of each quarter of the fund's taxable year, at least 50 percent of the value of the fund's total net assets must consist of cash, cash items, government securities, securities of other funds, and investments in other securities that, with respect to any one issuer, represent neither more than 5 percent of the assets of the fund nor more than 10 percent of the voting securities of the issuer. Further, no more than 25 percent of the fund's assets may be invested in the securities of any one issuer (other than government securities or the securities of other funds), the securities (other than the securities of other funds) of two or more issuers that the fund controls and that are engaged in similar trades or businesses, or the securities of one or more qualified publicly traded partnerships.

If a mutual fund satisfies the gross income and asset tests and thus qualifies as a RIC, the fund is eligible for the tax treatment provided by subchapter M, including the ability to deduct from its taxable income the dividends it pays to shareholders, provided that the RIC distributes at least 90 percent of its income (other than net capital gains) each year. A RIC may retain up to 10 percent of its income and all capital gains, but the retained income and capital gains are taxed at regular corporate tax rates. Therefore, mutual funds generally distribute all, or nearly all, of their income and capital gains each year.

The Internal Revenue Code also imposes an excise tax on RICs, unless a RIC distributes by December 31 at least 98 percent of its ordinary income earned during the calendar year, 98.2 percent of its net capital gains earned during the 12-month period ending on October 31 of the calendar year, and 100 percent of any previously undistributed amounts. Mutual funds typically seek to avoid this charge—imposed at a 4 percent rate on the under-distributed amount—by making the required minimum distribution each year.

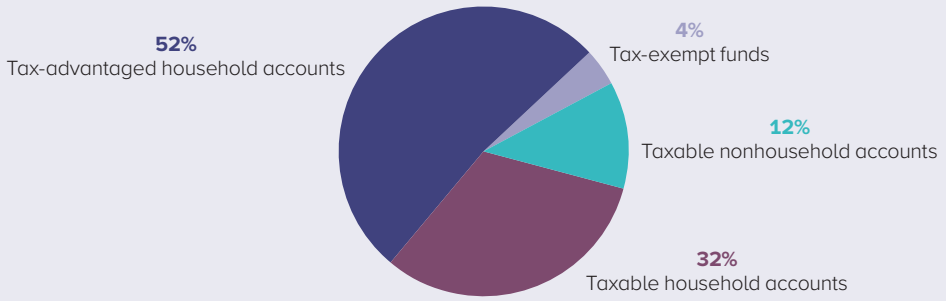
Mutual Fund Assets by Tax Status

Fund investors are responsible for paying tax on the amount of a fund's earnings and gains distributed to them, whether they receive the distributions in cash or reinvest them in additional fund shares. Investors often attempt to lessen the impact of taxes on their investments by investing in tax-exempt funds and tax-advantaged retirement accounts and variable annuities. As of year-end 2022, 4 percent of all mutual fund assets were held in tax-exempt funds and 52 percent were invested in tax-advantaged accounts held by households.

FIGURE A.4

The Majority of Mutual Fund Total Net Assets Were Held in Tax-Advantaged Accounts and Tax-Exempt Funds

Percentage of total net assets, year-end 2022



Mutual fund total net assets: $22.1 trillion

Types of Distributions

Mutual funds make two types of taxable distributions to shareholders: ordinary dividends and capital gains.

Ordinary dividend distributions come primarily from the interest and dividends earned by the securities in a fund's portfolio and net short-term gains, if any, after expenses are paid by the fund. These distributions must be reported as dividends on a US investor's tax return and are taxed at the investor's ordinary income tax rate, unless they are qualified dividends. Qualified dividend income is taxed at a maximum rate of 20 percent. Some dividends paid by mutual funds may qualify for these lower top tax rates.

Long-term capital gains distributions represent a fund's net gains, if any, from the sale of securities held in its portfolio for more than one year. Long-term capital gains are taxed at a maximum rate of 20 percent.

Certain high-income individuals also are subject to a 3.8 percent tax on net investment income (NII). The tax on NII applies to interest, dividends, and net capital gains, including those received from a mutual fund.

Non-US investors may be subject to US withholding and estate taxes and certain US tax reporting requirements on investments in US funds. Amounts distributed to non-US investors that are designated as interest-related dividends or dividends deriving from capital gains will generally be eligible for exemption from US withholding tax. Other distributions that are treated as ordinary dividends will generally be subject to US withholding tax (at a 30 percent rate or lower treaty rate).

To help mutual fund shareholders understand the impact of taxes on the returns generated by their investments, the SEC requires mutual funds to disclose standardized after-tax returns for one-, five-, and 10-year periods. After-tax returns, which accompany before-tax returns in fund prospectuses, are presented in two ways:

- After taxes on fund distributions only (preliquidation)
- After taxes on fund distributions and an assumed redemption of fund shares (postliquidation)

Types of Taxable Shareholder Transactions

An investor who sells mutual fund shares usually incurs a capital gain or loss in the year the shares are sold; an exchange of shares between funds in the same fund family also usually results in either a capital gain or loss.

Investors are liable for tax on any capital gain arising from the sale of fund shares, just as they would be if they sold a stock, bond, or other security. Capital losses from mutual fund share sales and exchanges, like capital losses from other investments, may be used to offset other capital gains in the current year and thereafter. In addition, up to $3,000 of capital losses in excess of capital gains ($1,500 for a married individual filing a separate return) may be used to offset ordinary income.

The amount of a shareholder's gain or loss on fund shares is determined by the difference between the cost basis of the shares (generally, the purchase price—including sales loads—of the shares, whether acquired with cash or reinvested dividends) and the sale price. Tax rules enacted in 2012 require all brokers and funds to provide cost basis information to shareholders, as well as to indicate whether any gains or losses are long-term or short-term, for fund shares acquired beginning in 2012. For shares acquired before 2012, many funds have voluntarily been providing cost basis information to shareholders or computing gains and losses for shares sold.

Tax-Exempt Funds

Tax-exempt bond funds distribute amounts attributable to municipal bond interest. These "exempt-interest dividends" are exempt from federal income tax and, in some cases, state and local taxes. Tax-exempt money market funds invest in short-term municipal securities or equivalent instruments and also pay exempt-interest dividends. Even though income from these funds generally is tax-exempt, investors must report it on their income tax returns. Tax-exempt funds provide investors with this information and typically explain how to handle exempt-interest dividends on a state-by-state basis. For some taxpayers, portions of income earned by tax-exempt funds also may be subject to the federal alternative minimum tax.

Mutual Fund Ordinary Dividend Distributions

Ordinary dividend distributions represent income—primarily from interest and dividends earned by securities in a fund's portfolio—after expenses are paid by the fund. Mutual funds distributed $379 billion in dividends to fund shareholders in 2022. Bond and money market funds accounted for 46 percent of all dividend distributions in 2022. Overall, 49 percent of dividend distributions were paid to tax-advantaged household accounts and tax-exempt fund shareholders. Another 43 percent were paid to taxable household accounts.

FIGURE A.5

Dividend Distributions

Billions of dollars

Year	Tax-advantaged household accounts and tax-exempt funds	Taxable household accounts	Taxable nonhousehold accounts	Total
2000	$75	$87	$25	$186
2001	68	71	23	162
2002	59	43	12	114
2003	57	37	9	103
2004	65	41	10	116
2005	84	61	21	166
2006	114	90	36	240
2007	143	118	47	309
2008	138	100	38	276
2009	109	63	15	187
2010	112	64	12	188
2011	122	74	12	208
2012	128	81	13	222
2013	123	81	14	217
2014	136	93	15	244
2015	140	93	17	250
2016	141	96	16	253
2017	153	115	22	290
2018	177	144	33	354
2019	193	168	40	401
2020	157	125	22	305
2021	163	135	19	316
2022	185	163	30	379

Mutual Fund Capital Gains Distributions

Capital gains distributions represent a fund's net gains, if any, from the sale of securities held in its portfolio. When gains from these sales exceed losses, they are distributed to fund shareholders. Mutual funds distributed $395 billion in capital gains to shareholders in 2022—68 percent of these distributions were paid to tax-advantaged household accounts, and 28 percent were paid to taxable household accounts and tax-exempt fund shareholders.* Equity mutual funds typically represent the bulk of capital gains distributions. In 2022, 59 percent of equity mutual fund share classes made a capital gains distribution, and 81 percent of these share classes distributed more than 2.0 percent of their assets as capital gains.

FIGURE A.6

Capital Gains Distributions

Billions of dollars

Year	Tax-advantaged household accounts	Taxable household accounts and tax-exempt funds	Taxable nonhousehold accounts	Total
2000	$194	$119	$13	$326
2001	50	16	2	69
2002	9	6	1	16
2003	7	6	1	14
2004	30	21	4	55
2005	78	44	8	129
2006	164	79	14	257
2007	260	131	22	414
2008	96	29	7	132
2009	10	4	1	15
2010	22	18	3	43
2011	40	30	4	73
2012	58	37	5	100
2013	147	82	11	239
2014	253	129	17	399
2015	250	114	15	379
2016	149	63	8	220
2017	237	116	17	370
2018	329	159	22	511
2019	236	105	14	355
2020	224	125	17	367
2021	502	280	39	821
2022*	268	112	15	395

* In 2022, tax-exempt funds distributed less than $500 million in capital gains.

Note: Capital gains distributions include long-term and short-term capital gains.

* Only the net gains from the sale of a fund's assets held for more than one year (long-term capital gain distributions) are taxed as capital gains. Net short-term gains are taxed as ordinary dividend distributions. Data presented here on capital gains distributions include both long-term and short-term capital gains.

Core Principles Underlying the Regulation of US Investment Companies

Embedded in the structure and regulation of mutual funds and other registered investment companies are several core principles that provide important protections for shareholders.

Transparency

Funds are subject to more extensive disclosure requirements than any other comparable financial product, such as hedge funds and other private pools. The cornerstone of the disclosure regime for mutual funds and ETFs is the prospectus.* Mutual funds and ETFs are required to maintain a current prospectus, which provides investors with information about the fund, including its investment objectives, investment strategies, risks, fees and expenses, and performance, as well as how to purchase, redeem, and exchange fund shares. Importantly, the key parts of this disclosure, with respect to performance information and fees and expenses, are standardized to facilitate comparisons by investors. Mutual funds and ETFs may provide investors with a summary prospectus containing key information about the fund, while making more information available online and by mail upon request.

Mutual funds and ETFs are also required to make statements of additional information (SAIs) available to investors upon request and without charge. The SAI conveys information about the fund that, though useful to some investors, is not necessarily needed to make an informed investment decision. For example, the SAI generally includes information about the history of the fund, offers detailed disclosures on certain investment policies (such as borrowing and concentration policies), and lists officers, directors, and other persons who control the fund.

The prospectus, SAI, and certain other required information are contained in the fund's registration statement, which is filed electronically with the SEC and is publicly available via the SEC's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system. Mutual fund and ETF registration statements are amended at least once a year to ensure that financial statements and other information do not become stale.† These funds also amend registration statements throughout the year as necessary to reflect material changes to their disclosures.

In addition to the registration statement disclosure, funds provide shareholders with several other disclosure documents. Funds must transmit annual and semiannual shareholder reports within 60 days after the end and the midpoint of the fund's fiscal year, respectively.‡ These reports contain performance and expense information, financial statements, and a list of the fund's portfolio

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* Closed-end funds and UITs also provide investors with extensive disclosures, but under a slightly different regime that reflects the way shares of these funds trade. Both closed-end funds and UITs file an initial registration statement with the SEC containing a prospectus and other information related to the initial offering of their shares to the public.

† Section 10(a)(3) of the Securities Act of 1933 prohibits investment companies that make a continuous offering of shares from using a registration statement with financial information that is more than 16 months old. This gives mutual funds and ETFs four months after the end of their fiscal year to amend their registration statements.

‡ Until July 2024, open-end funds may transmit a notice to shareholders indicating that a new shareholder report is available online and in print by request in lieu of transmitting a shareholder report. The notice must include a website address where the shareholder report can be accessed and a toll-free telephone number the shareholder can use to request a paper copy of the report at no charge.

securities.* An independent accountant must audit the financial statements included in the annual shareholder report. The annual shareholder report for non–money market mutual funds and most ETFs must also provide management's discussion of fund performance (MDFP), describing the factors that affected the fund's performance, including relevant market conditions and investment strategies and techniques used by the fund's investment adviser.†

Funds are also required to file Form N-PORT with the SEC. Form N-PORT must include a complete list of the fund's portfolio securities in a structured data format along with other information, including flows, returns, securities lending information, and—for funds investing more than a specified amount in fixed-income securities—portfolio-level risk metrics. Funds must file Form N-PORT for each month during the year; however, only the filing relating to the third month of each fiscal quarter is made publicly available. The Form N-PORT relating to the fund's third and ninth months of the fiscal year must include a list of the fund's investments, similar to that included in the fund's annual and semiannual shareholder reports. These requirements cause funds to publicly disclose their portfolio holdings at least four times each fiscal year.†

Funds must also file census-type information annually on Form N-CEN, and must annually disclose how they voted on specific proxy issues at portfolio companies on Form N-PX. Funds are the only shareholders required to publicly disclose each and every proxy vote they cast. They are not required to mail Form N-PORT, Form N-CEN, or Form N-PX to shareholders, but the forms are publicly available via the SEC's EDGAR database.§

The combination of prospectuses, SAIs, annual and semiannual shareholder reports, Form N-PORT, Form N-CEN, and Form N-PX provides the investing public, regulators, media, and other interested parties with far more information on funds than is available for other types of investments. This information is easily and readily available from most funds and the SEC. It is also available from private-sector vendors, such as Morningstar, that compile publicly available information on funds in ways that might benefit investors.

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* A fund is permitted to include a summary portfolio schedule in its shareholder reports in lieu of the complete schedule, provided that the complete portfolio schedule is filed with the SEC and provided to shareholders upon request, free of charge. The summary portfolio schedule includes each of the fund's 50 largest holdings in unaffiliated issuers and each investment that exceeds 1 percent of the fund's NAV.

† After August 2021, closed-end funds must also include an MDFP section in their annual shareholder reports. Beginning in July 2024, open-end funds must transmit to shareholders a condensed annual and semiannual shareholder report that highlights key information, including cost and performance information, a graphical presentation of holdings, and, for annual reports of non–money market funds and most ETFs, an MDFP. The full financial statements and a list of the fund's portfolio securities will move to an easily accessible online site that the fund operates.

† Money market funds, which already must file portfolio holdings with the SEC monthly on Form N-MFP and disclose those holdings on their websites, are not required to file Form N-PORT.

§ Again, only the Form N-PORT filing relating to the third month of the fiscal quarter is made publicly available.

Daily Valuation and Liquidity

Nearly all funds offer shareholders liquidity and market-based valuation of their investments at least daily. ETFs and most closed-end fund shares are traded intraday on stock exchanges at market-determined prices, giving shareholders real-time liquidity and pricing. Mutual fund shares are redeemable on a daily basis at a price that reflects the current market value of the fund's portfolio investments. The value of each portfolio investment is determined either by a market quotation, if one is readily available, or at fair value (i.e., an estimate of the amount for which the investment could be sold in a current transaction). Under the SEC's fair value rule, fair value for applicable portfolio investments may be determined by the fund's board or its investment adviser (subject to continued oversight by the fund's board).

The daily pricing process is a critically important core compliance function that involves numerous staff of the investment adviser and pricing vendors. The fair valuation process, a part of the overall pricing process, receives particular scrutiny from funds, their advisers, and their boards of directors, as well as regulators and independent auditors. Under SEC rules, all funds must adopt written fair valuation policies and procedures and establish methodologies for determining fair values in particular instances.* Those methodologies must be consistent with US generally accepted accounting principles (GAAP).

This daily valuation process results in a NAV for the fund. The NAV is the price used for all mutual fund share transactions occurring that day—new purchases, sales (redemptions), and exchanges from one fund to another within the same fund family.† It represents the current mark-to-market value of all the fund's assets, minus liabilities (e.g., accrued fund expenses payable), divided by the total number of outstanding shares. Mutual funds release their daily NAVs to investors and others after they complete the pricing process, generally around 6:00 p.m. eastern time. Daily fund prices are available through fund toll-free telephone services, websites, and other means.

The Investment Company Act requires mutual funds to process transactions based upon "forward pricing," meaning that shareholders receive the next computed NAV following the fund's receipt of their transaction orders. For example, for a fund that prices its shares as of 4:00 p.m.,‡ orders received before 4:00 p.m. receive the NAV determined that same day as of 4:00 p.m. Orders received after 4:00 p.m. receive the NAV determined as of 4:00 p.m. on the next business day. Forward pricing is an important protection for mutual fund shareholders. It is designed to minimize the ability of shareholders to take advantage of fluctuations in the prices of a fund's portfolio investments that occur after the fund has last calculated its NAV.

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* For more information on the valuation process, see ICI's *Fund Valuation Under the SEC's New Fair Value Rule* (December 2021), available at **www.ici.org/system/files/2021-12/21-ppr-fund-valuation-primer.pdf**.

† The pricing process is also critical for ETFs, although for slightly different reasons. ETFs operate like mutual funds with respect to transactions with authorized participants that trade with the ETF in large blocks, often of 50,000 shares or more. The NAV is the price used for these large transactions. Closed-end funds are not required to strike a daily NAV, but most do so to provide the market with the ability to calculate the difference between the fund's market price and its NAV. That difference is called the fund's *premium* (if the market price is greater than the NAV) or *discount* (if the market price is less than the NAV).

‡ Mutual funds and ETFs must price their shares at least once every business day as of a time determined by the fund's board. Many of these funds price as of 4:00 p.m. eastern time or when the New York Stock Exchange closes.

When a shareholder redeems shares in a mutual fund, he or she can expect to be paid promptly. Mutual funds may not suspend redemptions of their shares (subject to certain narrow exceptions)* or delay payments of redemption proceeds for more than seven days.

Under the SEC's liquidity rule, no more than 15 percent of a mutual fund's or ETF's portfolio may be invested in illiquid assets,† in part to ensure that the fund can make redemptions. This liquidity rule and its related reporting framework also impose other liquidity-related regulatory obligations on these funds.

Oversight and Accountability

All funds are subject to a strong system of oversight from both internal and external sources. Boards of directors, which include independent directors, and written compliance programs overseen by CCOs (see Compliance and Risk Management Programs on page 136), are examples of internal oversight mechanisms. External oversight is provided by the SEC, FINRA, and external service providers such as certified public accounting firms.

Fund Boards

Mutual funds, closed-end funds, and ETFs structured as open-end funds have boards. The role of a fund's board of directors is primarily one of oversight. The board of directors typically is not involved in the day-to-day management of the fund company. Instead, day-to-day management is handled by the fund's investment adviser or administrator pursuant to a contract with the fund.

Investment company directors review and approve major contracts with service providers (including, notably, the fund's investment adviser), approve policies and procedures to ensure the fund's compliance with federal securities laws, and undertake oversight and review of the performance of the fund's operations. Directors devote substantial time and consider large amounts of information in fulfilling these duties, in part, because they must perform all their duties in "an informed and deliberate manner."

Fund boards must maintain a particular level of independence. The Investment Company Act requires at least 40 percent of the members of a fund board to be independent from fund management. An independent director is a fund director who does not have any significant business relationship with a mutual fund's adviser or underwriter. In practice, most fund boards have far higher percentages of independent directors. As of year-end 2020, independent directors made up at least three-quarters of boards in 84 percent of fund complexes.‡

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* Section 22(e) of the Investment Company Act prohibits mutual funds and ETFs from suspending redemptions unless the SEC permits them to do so or declares an emergency, or the New York Stock Exchange closes or restricts trading. These occurrences are relatively rare, although funds have suspended redemptions on several occasions, such as during Hurricane Sandy in 2012. See also page 119.

† Money market funds are held to different liquidity standards. For more information on this topic, see The Types of US Investment Companies on page 119 and **www.ici.org/mmfs/current/16_mmf_reg_summ**.

‡ See *Overview of Fund Governance Practices, 1994–2020* for a description of the study that collects data on this and other governance practices. Available at **www.idc.org/system/files/2021-10/21_pub_fund_governance.pdf**.

Independent fund directors play a critical role in overseeing fund operations and are entrusted with the primary responsibility for safeguarding the interests of the fund's shareholders. They serve as watchdogs, furnishing an independent check on the management of funds. Like directors of operating companies, they have a fiduciary duty to represent the interests of shareholders. But independent fund directors also have specific statutory and regulatory responsibilities under the Investment Company Act beyond the duties required of other types of directors. Among other things, they oversee the performance of the fund, approve the fees paid to the investment adviser for its services, and oversee the fund's compliance program.

Compliance and Risk Management Programs

The board's oversight function has been greatly enhanced in recent years by the development of written compliance programs and a formal requirement that all funds have CCOs. Rules adopted in 2003 require every fund and adviser to have a CCO who administers a written compliance program reasonably designed to prevent, detect, and correct violations of the federal securities laws. Compliance programs must be reviewed at least annually for their adequacy and effectiveness, and fund CCOs are required to report directly to the independent directors.

Regulatory Oversight

Internal oversight is accompanied by a number of forms of external oversight and accountability. Funds are subject to inspections, examinations, and enforcement by their primary regulator, the SEC. Fund underwriters and distributors also are overseen by FINRA, a self-regulatory organization. Funds affiliated with a bank may also be overseen by banking regulators. All funds are subject to the antifraud jurisdiction of each state in which the fund's shares are offered for sale or sold.

Auditors

A fund's financial statement disclosure is also subject to several internal and external checks. For example, annual reports include audited financial statements certified by an independent public accounting firm subject to oversight by the Public Company Accounting Oversight Board (PCAOB). This practice ensures that the financial statements are prepared in conformity with GAAP and fairly present the fund's financial position and results of operations.

Sarbanes-Oxley Act

Like officers of public companies, fund officers must make certifications and disclosures required by the Sarbanes-Oxley Act. For example, they have to certify the accuracy of the financial statements.

Additional Regulation of Advisers

In addition to the system of oversight applicable directly to funds, investors enjoy protections through SEC regulation of the investment advisers that manage fund portfolios. All advisers to registered funds are required to register with the SEC and are subject to SEC oversight and disclosure requirements. Advisers also owe a fiduciary duty to each fund they advise, meaning that they have a fundamental legal obligation to act in the best interests of the fund pursuant to a duty of undivided loyalty and utmost good faith.

Limits on Leverage

The inherent nature of a fund—a professionally managed pool of assets owned pro rata by its investors—is straightforward and easily understood by investors. The Investment Company Act fosters simplicity by prohibiting complex capital structures and limiting funds' use of leverage.

The Investment Company Act imposes various requirements on the capital structure of mutual funds, closed-end funds, and ETFs, including limitations on the issuance of "senior securities" and borrowing. These limitations greatly minimize the possibility that a fund's liabilities will exceed the value of its assets.

Generally speaking, a senior security is any debt that takes priority over the fund's shares, such as a loan or preferred stock. The SEC historically has interpreted the definition of senior security broadly, finding that selling securities short, purchasing securities on margin, and investing in many types of derivative instruments, among other practices, may create senior securities.

The SEC recently modernized its framework governing funds' use of derivatives, permitting mutual funds, closed-end funds, and ETFs to invest in derivatives if they adopt a derivatives risk management program that a fund's board oversees and comply with an outer-bound limit on fund leverage risk. Funds that limit their derivatives exposure to less than 10 percent of their net assets will not need to comply with the new requirements but will need to adopt and implement written policies and procedures reasonably designed to manage the fund's derivatives risks. The Investment Company Act also limits borrowing. With the exception of certain privately arranged loans and temporary loans, any promissory note or other indebtedness would generally be considered a prohibited senior security.* Mutual funds and ETFs are permitted to borrow from a bank if, immediately after borrowing, the fund's total net assets are at least three times total aggregate borrowings. In other words, the fund must have at least 300 percent asset coverage.

Closed-end funds have a slightly different set of limitations. They are permitted to issue debt and preferred stock, subject to certain conditions, including asset coverage requirements of 300 percent for debt and 200 percent for preferred stock.

In addition, funds may invest in reverse repurchase agreements and other similar financing transactions if they treat those investments as borrowings subject to the relevant asset coverage requirements applicable to open-end funds (mutual funds or ETFs) or closed-end funds, or if they treat such transactions as derivatives investments.

Many funds voluntarily impose stricter limitations on their ability to issue senior securities or borrow than set forth under the Investment Company Act. Funds often, for example, adopt a policy stating that they will borrow only as a temporary measure for extraordinary or emergency purposes and not to finance investment in securities. In addition, they may disclose that, in any event, borrowings will be limited to a small percentage of fund assets (such as 5 percent). These are meaningful voluntary measures, because under the Investment Company Act, a fund's policies on borrowing money and issuing senior securities cannot be changed without the approval of fund shareholders.

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* Temporary loans cannot exceed 5 percent of the fund's total net assets and must be repaid within 60 days.

Custody

To protect fund assets, the Investment Company Act requires all funds to maintain strict custody of fund assets, separate from the assets of the adviser. Although the act permits other arrangements,* nearly all funds use a bank custodian for domestic securities. Foreign securities are required to be held in the custody of an international foreign bank or securities depository.

A fund's custody agreement with a bank is typically far more elaborate than the arrangements used for other bank clients. The custodian's services generally include safekeeping and accounting for the fund's assets, settling securities transactions, receiving dividends and interest, providing foreign exchange services, paying fund expenses, reporting failed trades, reporting cash transactions, monitoring corporate actions at portfolio companies, and tracing loaned securities.

The strict rules on the custody and reconciliation of fund assets are designed to prevent theft and other fraud-based losses. Shareholders are further insulated from these types of losses by a provision in the Investment Company Act that requires all mutual funds to have fidelity bonds designed to protect them against possible instances of employee larceny or embezzlement.

Prohibitions on Transactions with Affiliates

The Investment Company Act contains a number of strong and detailed prohibitions on transactions between the fund and fund insiders or affiliated organizations (such as the corporate parent of the fund's adviser). Many of these prohibitions were part of the original statutory text of the act, enacted in response to instances of overreaching and self-dealing by fund insiders during the 1920s in the purchase and sale of portfolio securities, loans by funds, and investments in related funds. The SEC's Division of Investment Management has said that "for more than 50 years, [the affiliated transaction prohibitions] have played a vital role in protecting the interests of shareholders and in preserving the industry's reputation for integrity; they continue to be among the most important of the act's many protections."†

Although a number of prohibitions in the Investment Company Act relate to affiliated transactions, three are particularly noteworthy:

- General prohibition on direct transactions between a fund and an affiliate
- General prohibition on "joint transactions," where the fund and affiliate are acting together vis-à-vis a third party
- Restrictions preventing investment banks from placing or "dumping" unmarketable securities with an affiliated fund by generally prohibiting the fund from buying securities in an offering syndicated by an affiliated investment bank

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* The Investment Company Act contains six separate custody rules for the possible types of custody arrangements for mutual funds, closed-end funds, and ETFs. UITs are subject to a separate rule that requires the use of a bank to maintain custody. See Section 17(f) of the Investment Company Act and SEC Rules 17f-1 through 17f-7.

† See *Protecting Investors: A Half Century of Investment Company Regulation, Report of the Division of Investment Management, Securities and Exchange Commission* (May 1992), available at **www.sec.gov/divisions/investment/guidance/icreg50-92.pdf**. The Division of Investment Management is the division within the SEC responsible for the regulation of funds.

Diversification

Both tax and securities laws provide diversification standards for funds registered under the Investment Company Act. To qualify as RICs under the tax laws, all mutual funds, closed-end funds, and ETFs, as well as most UITs, must meet a tax diversification test every quarter. The effect of this test is that a fund with a modest cash position and no government securities would hold securities from at least 12 different issuers. Another tax diversification restriction limits the amount of an issuer's outstanding voting securities that a fund may own.

The securities laws set higher standards for funds that elect to be diversified. If a fund elects to be diversified, the Investment Company Act requires that, with respect to at least 75 percent of the portfolio, no more than 5 percent may be invested in the securities of any one issuer and no investment may represent more than 10 percent of the outstanding voting securities of any issuer. Diversification is not mandatory, but all mutual funds, closed-end funds, and ETFs must disclose whether or not they are diversified under the act's standards.

In practice, most funds that elect to be diversified are much more highly diversified than they need to be to meet these two tests. As of December 2022, for example, the median number of stocks held by US equity mutual funds was 76.*

* This number—calculated using Morningstar data—is the median among domestic equity mutual funds, excluding sector funds and funds of funds.

APPENDIX

B

Significant Events in Fund History

1774	Dutch merchant and broker Adriaan van Ketwich invites subscriptions from investors to form a trust, the Eendragt Maakt Magt, with the aim of providing investment diversification opportunities to investors of limited means.
1868	The Foreign and Colonial Government Trust, the precursor to the US investment fund model, is formed in London. This trust provides "the investor of moderate means the same advantages as large capitalists."
1924	The first mutual funds are established in Boston.
1933	The Securities Act of 1933 regulates the registration and offering of new securities, including mutual fund and closed-end fund shares, to the public.
1934	The Securities Exchange Act of 1934 authorizes the Securities and Exchange Commission (SEC) to provide for fair and equitable securities markets.
1936	The Revenue Act of 1936 establishes the tax treatment of mutual funds and their shareholders. Closed-end funds were covered by the act in 1942.

1940	The Investment Company Act of 1940 is signed into law, setting the structure and regulatory framework for registered investment companies. The forerunner to the National Association of Investment Companies (NAIC) is formed. The NAIC will become the Investment Company Institute.
1944	The NAIC begins collecting investment company industry statistics.
1951	The total number of mutual funds surpasses 100, and the number of shareholder accounts exceeds one million for the first time. The first mutual fund focusing on non-US investments is made available to US investors.
1954	Households' net purchases of fund shares exceed those of corporate stock. NAIC initiates a nationwide public information program emphasizing the role of investors in the US economy and explaining the concept of investment companies.
1961	The first tax-free unit investment trust is offered. The NAIC changes its name to the Investment Company Institute (ICI) and welcomes fund advisers and underwriters as members.
1962	The Self-Employed Individuals Tax Retirement Act creates savings opportunities (Keogh plans) for self-employed individuals.
1971	Money market funds are introduced.
1974	The Employee Retirement Income Security Act of 1974 (ERISA) creates the individual retirement account (IRA).
1976	The Tax Reform Act of 1976 permits the creation of municipal bond funds. The first retail index fund is offered.
1978	The Revenue Act of 1978 creates new Section 401(k) retirement plans and simplified employee pensions (SEPs).
1981	The Economic Recovery Tax Act establishes "universal" IRAs for all workers. The IRS proposes regulations for Section 401(k).
1986	The Tax Reform Act of 1986 reduces IRA deductibility.
1987	ICI welcomes closed-end funds as members.
1990	Mutual fund assets top $1 trillion.
1993	The first exchange-traded fund (ETF) shares are issued.

1996	Enactment of the National Securities Markets Improvement Act of 1996 (NSMIA) provides a more rational system of state and federal regulation, giving the SEC exclusive jurisdiction for registering and regulating mutual funds, exchange-listed securities, and larger advisers. States retain their antifraud authority and responsibility for regulating non-exchange-listed offerings and smaller advisers. The Small Business Job Protection Act creates SIMPLE plans for employees of small businesses.
1997	The Taxpayer Relief Act of 1997 creates the Roth IRA and eliminates restrictions on portfolio management that disadvantage fund shareholders.
1998	The SEC approves the most significant disclosure reforms in the history of US mutual funds, encompassing "plain English," fund profiles, and improved risk disclosure.
1999	The Gramm-Leach-Bliley Act modernizes financial services regulation and enhances financial privacy.
2001	Enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) significantly expands retirement savings opportunities for millions of working Americans.
2003	The Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA) provides mutual fund shareholders with the full benefits of lower tax rates on dividends and capital gains.
2006	The Pension Protection Act (PPA) and the Tax Increase Prevention and Reconciliation Act provide incentives for investors of all ages to save more in tax deferred and taxable investment accounts.
2008	The SEC votes to adopt the Summary Prospectus rule. Reserve Primary Fund fails to maintain $1.00 NAV, becoming the second money market fund in 25 years to "break the dollar."
2009	The Money Market Working Group, a task force of senior industry executives, submits its report to the ICI board. The board endorses the working group's call for immediate implementation of new regulatory and oversight standards for money market funds.
2010	The SEC adopts new rules and amendments to regulations governing money market funds. In *Jones v. Harris*, the US Supreme Court unanimously upholds the Gartenberg standard under which courts have long considered claims of excessive fund advisory fees. Enactment of the RIC Modernization Act streamlines and updates technical tax rules, benefiting shareholders by making funds more efficient.

2011	In *Business Roundtable et al. v. SEC*, the United States Court of Appeals for the District of Columbia Circuit vacates the SEC's proxy access rule for failing to adequately evaluate the rule's costs and benefits. ICI launches ICI Global to carry out the Institute's international work by advancing the perspective of regulated investment funds globally.
2014	The SEC adopts sweeping changes to the rules that govern money market funds, building upon the changes to money market fund regulation adopted by the SEC in 2010.
2017	Congress passes the most significant tax bill in three decades. Reflecting congressional support for the voluntary, employer-based retirement system, lawmakers reject proposals to raise revenue by limiting retirement savings tax incentives.
2018	The SEC adopts Rule 30e-3, permitting US-registered funds to deliver shareholder reports online to satisfy their fund disclosure obligations.
2019	The SEC adopts Rule 6c-11, known as the ETF rule, finally enabling most ETFs to operate under the Investment Company Act of 1940 without having to apply for exemptive relief.
2020	The SEC provides relief measures to funds to navigate operational challenges during the COVID-19 pandemic. The SEC adopts Rule 18f-4 and related amendments modernizing regulations governing fund investments in derivatives.
2022	The SEC amends fund shareholder reports, dramatically condensing them to highlight key information for investors to assess and monitor their fund investments. The SEC adopts rules to modernize and enhance proxy voting disclosure by registered investment companies.

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I do hereby certify that on date indicated below, I filed via electronic means (ESTTA) the foregoing document with the:

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This the 13th day of June, 2023.

/ Katarina K. Wong /
Katarina K. Wong

Attorney for Applicant

EXHIBIT 301

INVESTMENT COMPANY ACT OF 1940

[References in brackets [] are to title 15, United States Code]

[Chapter 686 of the 76th Congress]

[As Amended Through P.L. 117–263, Enacted December 23, 2022]

[Currency: This publication is a compilation of the text of chapter 686 of the 76th Congress. It was last amended by the public law listed in the As Amended Through note above and below at the bottom of each page of the pdf version and reflects current law through the date of the enactment of the public law listed at https://www.govinfo.gov/app/collection/comps/]

[Note: While this publication does not represent an official version of any Federal statute, substantial efforts have been made to ensure the accuracy of its contents. The official version of Federal law is found in the United States Statutes at Large and in the United States Code. The legal effect to be given to the Statutes at Large and the United States Code is established by statute (1 U.S.C. 112, 204).]

AN ACT To provide for the registration and regulation of investment companies and investment advisers, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—INVESTMENT COMPANIES

FINDINGS AND DECLARATION OF POLICY

SEC. 1. [80a–1] (a) Upon the basis of facts disclosed by the record and reports of the Securities and Exchange Commission made pursuant to section 30 of the Public Utility Holding Company Act of 1935, and facts otherwise disclosed and ascertained, it is hereby found that investment companies are affected with a national public interest in that, among other things—

(1) the securities issued by such companies, which constitute a substantial part of all securities publicly offered, are distributed, purchased, paid for, exchanged, transferred, redeemed, and repurchased by use of the mails and means and instrumentalities of interstate commerce, and in the case of the numerous companies which issue redeemable securities this process of distribution and redemption is continuous;

(2) the principal activities of such companies—investing, reinvesting, and trading in securities—are conducted by use of the mails and means and instrumentalities of interstate commerce, including the facilities of national securities exchanges, and constitute a substantial part of all transactions effected in the securities markets of the Nation;

(3) such companies customarily invest and trade in securities issued by, and may dominate and control or otherwise af-

fect the policies and management of, companies engaged in business in interstate commerce;

(4) such companies are media for the investment in the national economy of a substantial part of the national savings and may have a vital effect upon the flow of such savings into the capital markets; and

(5) the activities of such companies, extending over many States, their use of the instrumentalities of interstate commerce and the wide geographic distribution of their security holders, make difficult, if not impossible, effective State regulation of such companies in the interest of investors.

(b) Upon the basis of facts disclosed by the record and reports of the Securities and Exchange Commission made pursuant to section 30 of the Public Utility Holding Company Act of 1935, and facts otherwise disclosed and ascertained, it is hereby declared that the national public interest and the interest of investors are adversely affected—

(1) when investors purchase, pay for, exchange, receive dividends upon, vote, refrain from voting, sell, or surrender securities issued by investment companies without adequate, accurate, and explicit information, fairly presented, concerning the character of such securities and the circumstances, policies, and financial responsibility of such companies and their management;

(2) when investment companies are organized, operated, managed, or their portfolio securities are selected, in the interest of directors, officers, investment advisers, depositors, or other affiliated persons thereof, in the interest of underwriters, brokers, or dealers, in the interest of special classes of their security holders, or in the interest of other investment companies or persons engaged in other lines of business, rather than in the interest of all classes of such companies' security holders;

(3) when investment companies issue securities containing inequitable or discriminatory provisions, or fail to protect the preferences and privileges of the holders of their outstanding securities;

(4) when the control of investment companies is unduly concentrated through pyramiding or inequitable methods of control, or is inequitably distributed, or when investment companies are managed by irresponsible persons;

(5) when investment companies, in keeping their accounts, in maintaining reserves, and in computing their earnings and the asset value of their outstanding securities, employ unsound or misleading methods, or are not subjected to adequate independent scrutiny;

(6) when investment companies are reorganized, become inactive, or change the character of their business, or when the control or management thereof is transferred, without the consent of their security holders;

(7) when investment companies by excessive borrowing and the issuance of excessive amounts of senior securities increase unduly the speculative character of their junior securities; or

(8) when investment companies operate without adequate assets or reserves.

It is hereby declared that the policy and purposes of this title, in accordance with which the provisions of this title shall be interpreted, are to mitigate and, so far as is feasible, to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors.

GENERAL DEFINITIONS

SEC. 2. [80a–2] (a) When used in this title, unless the context otherwise requires—

(1) "Advisory board" means a board, whether elected or appointed, which is distinct from the board of directors or board of trustees, of an investment company, and which is composed solely of persons who do not serve such company in any other capacity, whether or not the functions of such board are such as to render its members "directors" within the definition of that term, which board has advisory functions as to investments but has no power to determine that any security or other investment shall be purchased or sold by such company.

(2) "Affiliated company" means a company which is an affiliated person.

(3) "Affiliated person" of another person means (A) any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person; (B) any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; (C) any person directly or indirectly controlling, controlled by, or under common control with, such other person; (D) any officer, director, partner, copartner, or employee of such other person; (E) if such other person is an investment company, any investment adviser thereof or any member of an advisory board thereof; and (F) if such other person is an unincorporated investment company not having a board of directors, the depositor thereof.

(4) "Assignment" includes any direct or indirect transfer or hypothecation of a contract or chose in action by the assignor, or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor; but does not include an assignment of partnership interests incidental to the death or withdrawal of a minority of the members of the partnership having only a minority interest in the partnership business or to the admission to the partnership of one or more members who, after such admission, shall be only a minority of the members and shall have only a minority interest in the business.

(5) "Bank" means (A) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or a branch or agency of a foreign bank (as such terms are defined in section 1(b) of the International Banking Act of 1978), (B) a member bank of the Federal Reserve System, (C) any other banking institution or trust company, whether incorporated or not,

doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency, and which is supervised and examined by State or Federal authority having supervision over banks, and which is not operated for the purpose of evading the provisions of this title, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clause (A), (B), or (C) of this paragraph.

(6) The term "broker" has the same meaning as given in section 3 of the Securities Exchange Act of 1934, except that such term does not include any person solely by reason of the fact that such person is an underwriter for one or more investment companies.

(7) "Commission" means the Securities and Exchange Commission.

(8) "Company" means a corporation, a partnership, an association, a joint-stock company, a trust, a fund, or any organized group of persons whether incorporated or not; or any receiver, trustee in a case under title 11 of the United States Code or similar official or any liquidating agent for any of the foregoing, in his capacity as such.

(9) "Control" means the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company.

Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 per centum of the voting securities of a company shall be presumed to control such company. Any person who does not so own more than 25 per centum of the voting securities of any company shall be presumed not to control such company. A natural person shall be presumed not to be a controlled person within the meaning of this title. Any such presumption may be rebutted by evidence, but except as hereinafter provided, shall continue until a determination to the contrary made by the Commission by order either on its own motion or on application by an interested person. If an application filed hereunder is not granted or denied by the Commission within sixty days after filing thereof, the determination sought by the application shall be deemed to have been temporarily granted pending final determination of the Commission thereon. The Commission, upon its own motion or upon application, may by order revoke or modify any order issued under this paragraph whenever it shall find that the determination embraced in such original order is no longer consistent with the facts.

(10) "Convicted" includes a verdict, judgment, or plea of guilty, or a finding of guilt on a plea of nolo contendere, if such verdict, judgment, plea, or finding has not been reversed, set aside, or withdrawn, whether or not sentence has been imposed.

(11) The term "dealer" has the same meaning as given in the Securities Exchange Act of 1934, but does not include an insurance company or investment company.

(12) "Director" means any director of a corporation or any person performing similar functions with respect to any organization, whether incorporated or unincorporated, including any natural person who is a member of a board of trustees of a management company created as a common-law trust.

(13) "Employees' securities company" means any investment company or similar issuer all of the outstanding securities of which (other than short-term paper) are beneficially owned (A) by the employees or persons on retainer of a single employer or of two or more employers each of which is an affiliated company of the other, (B) by former employees of such employer or employers, (C) by members of the immediate family of such employees, persons on retainer, or former employees, (D) by any two or more of the foregoing classes of persons, or (E) by such employer or employers together with any one or more of the foregoing classes of persons.

(14) "Exchange" means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

(15) "Face-amount certificate" means any certificate, investment contract, or other security which represents an obligation on the part of its issuer to pay a stated or determinable sum or sums at a fixed or determinable date or dates more than twenty-four months after the date of issuance, in consideration of the payment of periodic installments of a stated or determinable amount (which security shall be known as a face-amount certificate of the "installment type"); or any security which represents a similar obligation on the part of a face-amount certificate company, the consideration for which is the payment of a single lump sum (which security shall be known as a "fully paid" face-amount certificate).

(16) "Government security" means any security issued or guaranteed as to principal or interest by the United States, or by a person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States; or any certificate of deposit for any of the foregoing.

(17) "Insurance company" means a company which is organized as an insurance company, whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies, and which is subject to supervision by the insurance commissioner or a similar official or agency of a State; or any receiver or similar official or any liquidating agent for such a company, in his capacity as such.

(18) "Interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof.

(19) "Interested person" of another person means—

(A) when used with respect to an investment company—

(i) any affiliated person of such company,

(ii) any member of the immediate family of any natural person who is an affiliated person of such company,

(iii) any interested person of any investment adviser of or principal underwriter for such company,

(iv) any person or partner or employee of any person who at any time since the beginning of the last two completed fiscal years of such company has acted as legal counsel for such company,

(v) any person or any affiliated person of a person (other than a registered investment company) that, at any time during the 6-month period preceding the date of the determination of whether that person or affiliated person is an interested person, has executed any portfolio transactions for, engaged in any principal transactions with, or distributed shares for—

(I) the investment company;

(II) any other investment company having the same investment adviser as such investment company or holding itself out to investors as a related company for purposes of investment or investor services; or

(III) any account over which the investment company's investment adviser has brokerage placement discretion,

(vi) any person or any affiliated person of a person (other than a registered investment company) that, at any time during the 6-month period preceding the date of the determination of whether that person or affiliated person is an interested person, has loaned money or other property to—

(I) the investment company;

(II) any other investment company having the same investment adviser as such investment company or holding itself out to investors as a related company for purposes of investment or investor services; or

(III) any account for which the investment company's investment adviser has borrowing authority, and

(vii) any natural person whom the Commission by order shall have determined to be an interested person by reason of having had, at any time since the beginning of the last two completed fiscal years of such company, a material business or professional relationship with such company or with the principal execu-

tive officer of such company or with any other investment company having the same investment adviser or principal underwriter or with the principal executive officer of such other investment company:

Provided, That no person shall be deemed to be an interested person of an investment company solely by reason of (aa) his being a member of its board of directors or advisory board or an owner of its securities, or (bb) his membership in the immediate family of any person specified in clause (aa) of this proviso; and

(B) when used with respect to an investment adviser of or principal underwriter for any investment company—

(i) any affiliated person of such investment adviser or principal underwriter,

(ii) any member of the immediate family of any natural person who is an affiliated person of such investment advisor or principal underwiter,

(iii) any person who knowingly has any direct or indirect beneficial interest in, or who is designated as trustee, executor, or guardian of any legal interest in, any security issued either by such investment adviser or principal underwriter or by a controlling person of such investment adviser or principal underwriter,

(iv) any person or partner or employee of any person who at any time since the beginning of the last two completed fiscal years of such investment company has acted as legal counsel for such investment adviser or principal underwriter,

(v) any person or any affiliated person of a person (other than a registered investment company) that, at any time during the 6-month period preceding the date of the determination of whether that person or affiliated person is an interested person, has executed any portfolio transactions for, engaged in any principal transactions with, or distributed shares for—

(I) any investment company for which the investment adviser or principal underwriter serves as such;

(II) any investment company holding itself out to investors, for purposes of investment or investor services, as a company related to any investment company for which the investment adviser or principal underwriter serves as such; or

(III) any account over which the investment adviser has brokerage placement discretion,

(vi) any person or any affiliated person of a person (other than a registered investment company) that, at any time during the 6-month period preceding the date of the determination of whether that person or affiliated person is an interested person, has loaned money or other property to—

(I) any investment company for which the investment adviser or principal underwriter serves as such;

(II) any investment company holding itself out to investors, for purposes of investment or investor services, as a company related to any investment company for which the investment adviser or principal underwriter serves as such; or

(III) any account for which the investment adviser has borrowing authority, and

(vii) any natural person whom the Commission by order shall have determined to be an interested person by reason of having had at any time since the beginning of the last two completed fiscal years of such investment company a material business or professional relationship with such investment adviser or principal underwriter or with the principal executive officer or any controlling person of such investment adviser or principal underwriter.

For the purposes of this paragraph (19), "member of the immediate family" means any parent, spouse of a parent, child, spouse of a child, spouse, brother, or sister, and includes step and adoptive relationships. The Commission may modify or revoke any order issued under clause (vii) of subparagaph (A) or (B) of this paragraph whenever it finds that such order is no longer consistent with the facts. No order issued pursuant to clause (vii) of subparagraph (A) or (B) of this paragraph shall become effective until at least sixty days after the entry thereof, and no such order shall affect the status of any person for the purposes of this title or for any other purpose for any period prior to the effective date of such order.

(20) "Investment adviser" of an investment company means (A) any person (other than a bona fide officer, director, trustee, member of an advisory board, or employee of such company, as such) who pursuant to contract with such company regularly furnishes advice to such company with respect to the desirability of investing in, purchasing or selling securities or other property, or is empowered to determine what securities or other property shall be purchased or sold by such company, and (B) any other person who pursuant to contract with a person described in clause (A) regularly performs substantially all of the duties undertaken by such person described in clause (A); but does not include (i) a person whose advice is furnished solely through uniform publications distributed to subscribers thereto, (ii) a person who furnishes only statistical and other factual information, advice regarding economic factors and trends, or advice as to occasional transactions in specific securities, but without generally furnishing advice or making recommendations regarding the purchase or sale of securities, (iii) a company furnishing such services at cost to one or more investment companies, insurance companies, or other financial institutions, (iv) any person the character and amount of whose compensation for such services must be approved by a court, or (v) such other persons as the Commission may by rules and regulations or order determine not to be within the intent of this definition.

(21) "Investment banker" means any person engaged in the business of underwriting securities issued by other persons, but does not include an investment company, any person who acts as an underwriter in isolated transactions but not as a part of a regular business, or any person solely by reason of the fact that such person is an underwriter for one or more investment companies.

(22) "Issuer" means every person who issues or proposes to issue any security, or has outstanding any security which it has issued.

(23) "Lend" includes a purchase coupled with an agreement by the vendor to repurchase; "borrow" includes a sale coupled with a similar agreement.

(24) "Majority-owned subsidiary" of a person means a company 50 per centum or more of the outstanding voting securities of which are owned by such person, or by a company which, within the meaning of this paragraph, is a majority-owned subsidiary of such person.

(25) "Means or instrumentality of interstate commerce" includes any facility of a national securities exchange.

(26) "National securities exchange" means an exchange registered under section 6 of the Securities Exchange Act of 1934.

(27) "Periodic payment plan certificate" means (A) any certificate, investment contract, or other security providing for a series of periodic payments by the holder, and representing an undivided interest in certain specified securities or in a unit or fund of securities purchased wholly or partly with the proceeds of such payments, and (B) any security the issuer of which is also issuing securities of the character described in clause (A) and the holder of which has substantially the same rights and privileges as those which holders of securities of the character described in clause (A) have upon completing the periodic payments for which such securities provide.

(28) "Person" means a natural person or a company.

(29) "Principal underwriter" of or for any investment company other than a closed-end company, or of any security issued by such a company, means any underwriter who as principal purchases from such company, or pursuant to contract has the right (whether absolute or conditional) from time to time to purchase from such company, any such security for distribution, or who as agent for such company sells or has the right to sell any such security to a dealer or to the public or both, but does not include a dealer who purchases from such company through a principal underwriter acting as agent for such company. "Principal underwriter" of or for a closed-end company or any issuer which is not an investment company, or of any security issued by such a company or issuer, means any underwriter who, in connection with a primary distribution of securities, (A) is in privity of contract with the issuer or an affiliated person of the issuer; (B) acting alone or in concert with one or more other persons, initiates or directs the formation of an underwriting syndicate; or (C) is allowed a rate of gross

commission, spread, or other profit greater than the rate allowed another underwriter participating in the distribution.

(30) "Promoter" of a company or a proposed company means a person who, acting alone or in concert with other persons, is initiating or directing, or has within one year initiated or directed, the organization of such company.

(31) "Prospectus", as used in section 22, means a written prospectus intended to meet the requirements of section 10(a) of the Securities Act of 1933 and currently in use. As used elsewhere, "prospectus" means a prospectus as defined in the Securities Act of 1933.

(32) "Redeemable security" means any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer or to a person designated by the issuer, is entitled (whether absolutely or only out of surplus) to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof.

(33) "Reorganization" means (A) a reorganization under the supervision of a court of competent jurisdiction; (B) a merger or consolidation; (C) a sale of 75 per centum or more in value of the assets of a company; (D) a restatement of the capital of a company, or an exchange of securities issued by a company for any of its own outstanding securities; (E) a voluntary dissolution or liquidation of a company; (F) a recapitalization or other procedure or transaction which has for its purpose the alteration, modification, or elimination of any of the rights, preferences, or privileges of any class of securities issued by a company, as provided in its charter or other instrument creating or defining such rights, preferences, and privileges; (G) an exchange of securities issued by a company for outstanding securities issued by another company or companies, preliminary to and for the purpose of effecting or consummating any of the foregoing; or (H) any exchange of securities by a company which is not an investment company for securities issued by a registered investment company.

(34) "Sale", "sell", "offer to sell", or "offer for sale" includes every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value.

(35) "Sales load" means the difference between the price of a security to the public and that portion of the proceeds from its sale which is received and invested or held for investment by the issuer (or in the case of a unit investment trust, by the depositor or trustee), less any portion of such difference deducted for trustee's or custodian's fee, insurance premiums, issue taxes, or administrative expenses or fees which are not properly chargeable to sales or promotional activities. In the case of a periodic payment plan certificate, "sales load" includes the sales load on any investment company securities in which the payments made on such certificate are invested, as well as the sales load on the certificate itself.

(36) "Security" means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subsciption, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

(37) "Separate account" means an account established and maintained by an insurance company pursuant to the laws of any State or territory of the United States, or of Canada or any province thereof, under which income, gains and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(38) "Short-term paper" means any note, draft, bill of exchange, or banker's acceptance payable on demand or having a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof payable on demand or having a maturity likewise limited; and such other classes of securities, of a commercial rather than an investment character, as the Commission may designate by rules and regulations.

(39) "State" means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States. [1]

(40) "Underwriter" means any person who has purchased from an issuer with a view to, 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; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributor's or seller's commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer. When the distribution of the securities in respect of which any person is an underwriter is

[1] The words "Philippine Islands" were deleted from the definition of the term "State" on the basis of Presidential Proclamation No. 2695, effective July 4, 1946 (11 F.R. 7517; 60 Stat. 1352), which granted independence to the Philippine Islands.

completed such person shall cease to be an underwriter in respect of such securities or the issuer thereof.

(41) "Value", with respect to assets of registered investment companies, except as provided in subsection (b) of section 28 of this title, means—

(A) as used in sections 3, 5, and 12 of this title, (i) with respect to securities owned at the end of the last preceding fiscal quarter for which market quotations are readily available, the market value at the end of such quarter; (ii) with respect to other securities and assets owned at the end of the last preceding fiscal quarter, fair value at the end of such quarter, as determined in good faith by the board of directors; and (iii) with respect to securities and other assets acquired after the end of the last preceding fiscal quarter, the cost thereof; and

(B) as used elsewhere in this title, (i) with respect to securities for which market quotations are readily available, the market value of such securities; and (ii) with respect to other securities and assets, fair value as determined in good faith by the board of directors;

in each case as of such time or times as determined pursuant to this title, and the rules and regulations issued by the Commission hereunder. Notwithstanding the fact that market quotations for securities issued by controlled companies are available, the board of directors may in good faith determine the value of such securities: *Provided,* That the value so determined is not in excess of the higher of market value or asset value of such securities in the case of majority-owned subsidiaries, and is not in excess of market value in the case of other controlled companies.

For purposes of the valuation of those assets of a registered diversified company which are not subject to the limitations provided for in section 5(b)(1), the Commission may, by rules and regulations or orders, permit any security to be carried at cost, if it shall determine that such procedure is consistent with the general intent and purposes of this title. For purposes of sections 5 and 12, in lieu of values determined as provided in clause (A) above, the Commission shall by rules and regulations permit valuation of securities at cost or other basis in cases where it may be more convenient for such company to make its computations on such basis by reason of the necessity or desirability of complying with the provisions of any United States revenue laws or rules and regulations issued thereunder, or the laws or the rules and regulations issued thereunder of any State in which the securities of such company may be qualified for sale.

The foregoing definition shall not derogate from the authority of the Commission with respect to the reports, information, and documents to be filed with the Commission by any registered company, or with respect to the accounting policies and principles to be following by any such company, as provided in sections 8, 30, and 31.

(42) "Voting security" means any security presently entitling the owner or holder thereof to vote for the election of di-

rectors of a company. A specified percentage of the outstanding voting securities of a company means such amount of its outstanding voting securities as entitles the holder or holders thereof to cast said specified percentage of the aggregate votes which the holders of all the outstanding voting securities of such company are entitled to cast. The vote of a majority of the outstanding voting securities of a company means the vote, at the annual or a special meeting of the security holders of such company duly called, (A) of 67 per centum or more of the voting securities present at such meeting, if the holders of more than 50 per centum of the outstanding voting securities of such company are present or represented by proxy; or (B) of more than 50 per centum of the outstanding voting securities of such company, whichever is the less.

(43) "Wholly-owned subsidiary" of a person means a company 95 per centum or more of the outstanding voting securities of which are owned by such person, or by a company which, within the meaning of this paragraph, is a wholly-owned subsidiary of such person.

(44) "Securities Act of 1933", "Securities Exchange Act of 1934", and "Trust Indenture Act of 1939" means those Acts, respectively, as heretofore or hereafter amended.

(45) "Savings and loan association" means a savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, which is supervised and examined by State or Federal authority having supervision over any such institution, and a receiver, conservator, or other liquidating agent of any such institution.

(46) "Eligible portfolio company" means any issuer which—

(A) is organized under the laws of, and has its principal place of business in, any State or States;

(B) is neither an investment company as defined in section 3 (other than a small business investment company which is licensed by the Small Business Administration to operate under the Small Business Investment Act of 1958 and which is a wholly-owned subsidiary of the business development company) nor a company which would be an investment company except for the exclusion from the definition of investment company in section 3(c); and

(C) satisfies one of the following:

(i) it does not have any class of securities with respect to which a member of a national securities exchange, broker, or dealer may extend or maintain credit to or for a customer pursuant to rules or regulations adopted by the Board of Governors of the Federal Reserve System under section 7 of the Securities Exchange Act of 1934;

(ii) it is controlled by a business development company, either alone or as part of a group acting together, and such business development company in fact exercises a controlling influence over the management or policies of such eligible portfolio company and, as a result of such control, has an affiliated person who is a director of such eligible portfolio company;

(iii) it has total assets of not more than $4,000,000, and capital and surplus (shareholders' equity less retained earnings) of not less than $2,000,000, except that the Commission may adjust such amounts by rule, regulation, or order to reflect changes in 1 or more generally accepted indices or other indicators for small businesses; or

(iv) it meets such other criteria as the Commission may, by rule, establish as consistent with the public interest, the protection of investors, and the purposes fairly intended by the policy and provisions of this title.

(47) "Making available significant managerial assistance" by a business development company means—

(A) any arrangement whereby a business development company, through its directors, officers, employees, or general partners, offers to provide, and, if accepted, does so provide, significant guidance and counsel concerning the management, operations, or business objectives and policies of a portfolio company;

(B) the exercise by a business development company of a controlling influence over the management or policies of a portfolio company by the business development company acting individually or as part of a group acting together which controls such portfolio company; or

(C) with respect to a small business investment company licensed by the Small Business Administration to operate under the Small Business Investment Act of 1958, the making of loans to a portfolio company.

For purposes of subparagraph (A), the requirement that a business development company make available significant managerial assistance shall be deemed to be satisfied with respect to any particular portfolio company where the business development company purchases securities of such portfolio company in conjunction with one or more other persons acting together, and at least one of the persons in the group makes available significant managerial assistance to such portfolio company, except that such requirement will not be deemed to be satisfied if the business development company, in all cases, makes available significant managerial assistance solely in the manner described in this sentence.

(48) "Business development company" means any closed-end company which—

(A) is organized under the laws of, and has its principal place of business in, any State or States;

(B) is operated for the purpose of making investments in securities described in paragraphs (1) through (3) of section 55(a), and makes available significant managerial assistance with respect to the issuers of such securities, provided that a business development company must make available significant managerial assistance only with respect to the companies which are treated by such business development company as satisfying the 70 per centum of the value of its total assets condition of section 55; and

provided further that a business development company need not make available significant managerial assistance with respect to any company described in paragraph (46)(C)(iii), or with respect to any other company that meets such criteria as the Commission may by rule, regulation, or order permit, as consistent with the public interest, the protection of investors, and the purposes of this title; and

(C) has elected pursuant to section 54(a) to be subject to the provisions of sections 55 through 65.

(49) "Foreign securities authority" means any foreign government or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters.

(50) "Foreign financial regulatory authority" means any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate the participation of its members in activities listed above.

(51)(A) "Qualified purchaser" means—

(i) any natural person (including any person who holds a joint, community property, or other similar shared ownership interest in an issuer that is excepted under section 3(c)(7) with that person's qualified purchaser spouse) who owns not less than $5,000,000 in investments, as defined by the Commission;

(ii) any company that owns not less than $5,000,000 in investments and that is owned directly or indirectly by or for 2 or more natural persons who are related as siblings or spouse (including former spouses), or direct lineal descendants by birth or adoption, spouses of such persons, the estates of such persons, or foundations, charitable organizations, or trusts established by or for the benefit of such persons;

(iii) any trust that is not covered by clause (ii) and that was not formed for the specific purpose of acquiring the securities offered, as to which the trustee or other person authorized to make decisions with respect to the trust, and each settlor or other person who has contributed assets to the trust, is a person described in clause (i), (ii), or (iv); or

(iv) any person, acting for its own account or the accounts of other qualified purchasers, who in the aggregate owns and invests on a discretionary basis, not less than $25,000,000 in investments.

(B) The Commission may adopt such rules and regulations applicable to the persons and trusts specified in clauses (i) through (iv) of subparagraph (A) as it determines are nec-

essary or appropriate in the public interest or for the protection of investors.

(C) The term "qualified purchaser" does not include a company that, but for the exceptions provided for in paragraph (1) or (7) of section 3(c), would be an investment company (hereafter in this paragraph referred to as an "excepted investment company"), unless all beneficial owners of its outstanding securities (other than short-term paper), determined in accordance with section 3(c)(1)(A), that acquired such securities on or before April 30, 1996 (hereafter in this paragraph referred to as "pre-amendment beneficial owners"), and all pre-amendment beneficial owners of the outstanding securities (other than short-term paper) of any excepted investment company that, directly or indirectly, owns any outstanding securities of such excepted investment company, have consented to its treatment as a qualified purchaser. Unanimous consent of all trustees, directors, or general partners of a company or trust referred to in clause (ii) or (iii) of subparagraph (A) shall constitute consent for purposes of this subparagraph.

(52) The terms "security future" and "narrow-based security index" have the same meanings as provided in section 3(a)(55) of the Securities Exchange Act of 1934.

(53) The term "credit rating agency" has the same meaning as in section 3 of the Securities Exchange Act of 1934.

(54) The terms "commodity pool", "commodity pool operator", "commodity trading advisor", "major swap participant", "swap", "swap dealer", and "swap execution facility" have the same meanings as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).".

(b) No provision in this title shall apply to, or be deemed to include, the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned directly or indirectly by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(c) CONSIDERATION OF PROMOTION OF EFFICIENCY, COMPETITION, AND CAPITAL FORMATION.—Whenever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is consistent with the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

DEFINITION OF INVESTMENT COMPANY [2]

SEC. 3. [80a–3] (a)(1) When used in this title, "investment company" means any issuer which—

(A) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities;

[2] See also 7 U.S.C. 2, 2a, 6m. [Printed in appendix to this volume.]

(B) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; or

(C) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

(2) As used in this section, "investment securities" includes all securities except (A) Government securities, (B) securities issued by employees' securities companies, and (C) securities issued by majority-owned subsidiaries of the owner which (i) are not investment companies, and (ii) are not relying on the exception from the definition of investment company in paragraph (1) or (7) of subsection (c).

(b) Notwithstanding paragraph (1)(C) of subsection (a), none of the following persons is an investment company within the meaning of this title:

(1) Any issuer primarily engaged, directly or through a wholly-owned subsidiary or subsidiaries, in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities.

(2) Any issuer which the Commission, upon application by such issuer, finds and by order declares to be primarily engaged in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities either directly or (A) through majority-owned subsidiaries or (B) through controlled companies conducting similar types of businesses. The filing of an application under this paragraph in good faith by an issuer other than a registered investment company shall exempt the applicant for a period of sixty days from all provisions of this title applicable to investment companies as such. For cause shown, the Commission by order may extend such period of exemption for an additional period or periods. Whenever the Commission, upon its own motion or upon application, finds that the circumstances which gave rise to the issuance of an order granting an application under this paragraph no longer exist, the Commission shall by order revoke such order.

(3) Any issuer all the outstanding securities of which (other than short-term paper and directors' qualifying shares) are directly or indirectly owned by a company excepted from the definition of investment company by paragraph (1) or (2) of this subsection.

(c) Notwithstanding subsection (a), none of the following persons is an investment company within the meaning of this title:

(1) Any issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons (or, in the case of a qualifying venture capital fund, 250 persons) and which is not making and does not presently propose to make a public offering of its securities. Such issuer shall be deemed to be an investment company for pur-

poses of the limitations set forth in subparagraphs (A)(i) and (B)(i) of section 12(d)(1) governing the purchase or other acquisition by such issuer of any security issued by any registered investment company and the sale of any security issued by any registered open-end investment company to any such issuer. For purposes of this paragraph:

(A) Beneficial ownership by a company shall be deemed to be beneficial ownership by one person, except that, if the company owns 10 per centum or more of the outstanding voting securities of the issuer, and is or, but for the exception provided for in this paragraph or paragraph (7), would be an investment company, the beneficial ownership shall be deemed to be that of the holders of such company's outstanding securities (other than short-term paper).

(B) Beneficial ownership by any person who acquires securities or interests in securities of an issuer described in the first sentence of this paragraph shall be deemed to be beneficial ownership by the person from whom such transfer was made, pursuant to such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title, where the transfer was caused by legal separation, divorce, death, or other involuntary event.

(C)(i) The term "qualifying venture capital fund" means a venture capital fund that has not more than $10,000,000 in aggregate capital contributions and uncalled committed capital, with such dollar amount to be indexed for inflation once every 5 years by the Commission, beginning from a measurement made by the Commission on a date selected by the Commission, rounded to the nearest $1,000,000.

(ii) The term "venture capital fund" has the meaning given the term in section 275.203(l)–1 of title 17, Code of Federal Regulations, or any successor regulation.

(2)[3](A) Any person primarily engaged in the business of underwriting and distributing securities issued by other persons, selling securities to customers, acting as broker, and acting as market intermediary, or any one or more of such activities, whose gross income normally is derived principally from such business and related activities.

(B) For purposes of this paragraph—

(i) the term "market intermediary" means any person that regularly holds itself out as being willing contemporaneously to engage in, and that is regularly engaged in, the business of entering into transactions on both sides of the market for a financial contract or one or more such financial contracts; and

(ii) the term "financial contract" means any arrangement that—

[3] See footnote on previous page.

(I) takes the form of an individually negotiated contract, agreement, or option to buy, sell, lend, swap, or repurchase, or other similar individually negotiated transaction commonly entered into by participants in the financial markets;

(II) is in respect of securities, commodities, currencies, interest or other rates, other measures of value, or any other financial or economic interest similar in purpose or function to any of the foregoing; and

(III) is entered into in response to a request from a counter party for a quotation, or is otherwise entered into and structured to accommodate the objectives of the counter party to such arrangement.

(3) Any bank or insurance company; any savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, or any receiver, conservator, liquidator, liquidating agent, or similar official or person thereof or therefor; or any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of moneys contributed thereto by the bank in its capacity as a trustee, executor, administrator, or guardian, if—

(A) such fund is employed by the bank solely as an aid to the administration of trusts, estates, or other accounts created and maintained for a fiduciary purpose;

(B) except in connection with the ordinary advertising of the bank's fiduciary services, interests in such fund are not—

(i) advertised; or

(ii) offered for sale to the general public; and

(C) fees and expenses charged by such fund are not in contravention of fiduciary principles established under applicable Federal or State law.

(4) Any person substantially all of whose business is confined to making small loans, industrial banking, or similar businesses.

(5) Any person who is not engaged in the business of issuing redeemable securities, face-amount certificates of the installment type or periodic payment plan certificates, and who is primarily engaged in one or more of the following businesses: (A) Purchasing or otherwise acquiring notes, drafts, acceptances, open accounts receivable, and other obligations representing part or all of the sales price of merchandise, insurance, and services; (B) making loans to manufacturers, wholesalers, and retailers of, and to prospective purchasers of, specified merchandise, insurance, and services; and (C) purchasing or otherwise acquiring mortgages and other liens on and interests in real estate.

(6) Any company primarily engaged, directly or through majority-owned subsidiaries, in one or more of the businesses described in paragraphs (3), (4), and (5), or in one or more of such businesses (from which not less than 25 centum of such company's gross income during its last fiscal year was derived)

together with an additional business or businesses other than investing, reinvesting, owning, holding, or trading in securities.

(7)(A) Any issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are qualified purchasers, and which is not making and does not at that time propose to make a public offering of such securities. Securities that are owned by persons who received the securities from a qualified purchaser as a gift or bequest, or in a case in which the transfer was caused by legal separation, divorce, death, or other involuntary event, shall be deemed to be owned by a qualified purchaser, subject to such rules, regulations, and orders as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(B) Notwithstanding subparagraph (A), an issuer is within the exception provided by this paragraph if—

(i) in addition to qualified purchasers, outstanding securities of that issuer are beneficially owned by not more than 100 persons who are not qualified purchasers, if—

(I) such persons acquired any portion of the securities of such issuer on or before September 1, 1996; and

(II) at the time at which such persons initially acquired the securities of such issuer, the issuer was excepted by paragraph (1); and

(ii) prior to availing itself of the exception provided by this paragraph—

(I) such issuer has disclosed to each beneficial owner, as determined under paragraph (1), that future investors will be limited to qualified purchasers, and that ownership in such issuer is no longer limited to not more than 100 persons; and

(II) concurrently with or after such disclosure, such issuer has provided each beneficial owner, as determined under paragraph (1), with a reasonable opportunity to redeem any part or all of their interests in the issuer, notwithstanding any agreement to the contrary between the issuer and such persons, for that person's proportionate share of the issuer's net assets.

(C) Each person that elects to redeem under subparagraph (B)(ii)(II) shall receive an amount in cash equal to that person's proportionate share of the issuer's net assets, unless the issuer elects to provide such person with the option of receiving, and such person agrees to receive, all or a portion of such person's share in assets of the issuer. If the issuer elects to provide such persons with such an opportunity, disclosure concerning such opportunity shall be made in the disclosure required by subparagraph (B)(ii)(I).

(D) An issuer that is excepted under this paragraph shall nonetheless be deemed to be an investment company for purposes of the limitations set forth in subparagraphs (A)(i) and (B)(i) of section 12(d)(1) relating to the purchase or other acquisition by such issuer of any security issued by any registered

investment company and the sale of any security issued by any registered open-end investment company to any such issuer.

(E) For purposes of determining compliance with this paragraph and paragraph (1), an issuer that is otherwise excepted under this paragraph and an issuer that is otherwise excepted under paragraph (1) shall not be treated by the Commission as being a single issuer for purposes of determining whether the outstanding securities of the issuer excepted under paragraph (1) are beneficially owned by not more than 100 persons or whether the outstanding securities of the issuer excepted under this paragraph are owned by persons that are not qualified purchasers. Nothing in this subparagraph shall be construed to establish that a person is a bona fide qualified purchaser for purposes of this paragraph or a bona fide beneficial owner for purposes of paragraph (1).

(8) [Repealed]

(9) Any person substantially all of whose business consists of owning or holding oil, gas, or other mineral royalties or leases, or fractional interests therein, or certificates of interest or participation in or investment contracts relative to such royalties, leases, or fractional interests.

(10)(A) Any company organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes—

(i) no part of the net earnings of which inures to the benefit of any private shareholder or individual; or

(ii) which is or maintains a fund described in subparagraph (B).

(B) For the purposes of subparagraph (A)(ii), a fund is described in this subparagraph if such fund is a pooled income fund, collective trust fund, collective investment fund, or similar fund maintained by a charitable organization exclusively for the collective investment and reinvestment of one or more of the following:

(i) assets of the general endowment fund or other funds of one or more charitable organizations;

(ii) assets of a pooled income fund;

(iii) assets contributed to a charitable organization in exchange for the issuance of charitable gift annuities;

(iv) assets of a charitable remainder trust or of any other trust, the remainder interests of which are irrevocably dedicated to any charitable organization;

(v) assets of a charitable lead trust;

(vi) assets of a trust, the remainder interests of which are revocably dedicated to or for the benefit of 1 or more charitable organizations, if the ability to revoke the dedication is limited to circumstances involving—

(I) an adverse change in the financial circumstances of a settlor or an income beneficiary of the trust;

(II) a change in the identity of the charitable organization or organizations having the remainder interest, provided that the new beneficiary is also a charitable organization; or

(III) both the changes described in subclauses (I) and (II);

(vii) assets of a trust not described in clauses (i) through (v), the remainder interests of which are revocably dedicated to a charitable organization, subject to subparagraph (C); or

(viii) such assets as the Commission may prescribe by rule, regulation, or order in accordance with section 6(c).

(C) A fund that contains assets described in clause (vii) of subparagraph (B) shall be excluded from the definition of an investment company for a period of 3 years after the date of enactment of this subparagraph, but only if—

(i) such assets were contributed before the date which is 60 days after the date of enactment of this subparagraph; and

(ii) such assets are commingled in the fund with assets described in one or more of clauses (i) through (vi) and (viii) of subparagraph (B).

(D) For purposes of this paragraph—

(i) a trust or fund is "maintained" by a charitable organization if the organization serves as a trustee or administrator of the trust or fund or has the power to remove the trustees or administrators of the trust or fund and to designate new trustees or administrators;

(ii) the term "pooled income fund" has the same meaning as in section 642(c)(5) of the Internal Revenue Code of 1986;

(iii) the term "charitable organization" means an organization described in paragraphs (1) through (5) of section 170(c) or section 501(c)(3) of the Internal Revenue Code of 1986;

(iv) the term "charitable lead trust" means a trust described in section 170(f)(2)(B), 2055(e)(2)(B), or 2522(c)(2)(B) of the Internal Revenue Code of 1986;

(v) the term "charitable remainder trust" means a charitable remainder annuity trust or a charitable remainder unitrust, as those terms are defined in section 664(d) of the Internal Revenue Code of 1986; and

(vi) the term "charitable gift annuity" means an annuity issued by a charitable organization that is described in section 501(m)(5) of the Internal Revenue Code of 1986.

(11) Any employee's stock bonus, pension, or profit-sharing trust which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1986; or any governmental plan described in section 3(a)(2)(C) of the Securities Act of 1933; or any collective trust fund maintained by a bank consisting solely of assets of one or more of such trusts, government plans, or church plans, companies or accounts that are excluded from the definition of an investment company under paragraph (14) of this subsection; or any separate account the assets of which are derived solely from (A) contributions under pension or profit-sharing plans which meet the requirements of

section 401 of the Internal Revenue Code of 1986[4] or the requirements for deduction of the employer's contribution under section 404(a)(2) of such Code,[5] (B) contributions under governmental plans in connection with which interests, participations, or securities are exempted from the registration provisions of section 5 of the Securities Act of 1933 by section 3(a)(2)(C) of such Act, and (C) advances made by an insurance company in connection with the operation of such separate account.

(12) Any voting trust the assets of which consist exclusively of securities of a single issuer which is not an investment company.

(13) Any security holders' protective committee or similar issuer having outstanding and issuing no securities other than certificates of deposit and short-term paper.

(14) Any church plan described in section 414(e) of the Internal Revenue Code of 1986, if, under any such plan, no part of the assets may be used for, or diverted to, purposes other than the exclusive benefit of plan participants or beneficiaries, or any company or account that is—

(A) established by a person that is eligible to establish and maintain such a plan under section 414(e) of the Internal Revenue Code of 1986; and

(B) substantially all of the activities of which consist of—

(i) managing or holding assets contributed to such church plans or other assets which are permitted to be commingled with the assets of church plans under the Internal Revenue Code of 1986; or

(ii) administering or providing benefits pursuant to church plans.

CLASSIFICATION OF INVESTMENT COMPANIES

SEC. 4. [80a–4] For the purposes of this title, investment companies are divided into three principal classes, defined as follows:

(1) "Face-amount certificate company" means an investment company which is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or which has been engaged in such business and has any such certificate outstanding.

(2) "Unit investment trust" means an investment company which (A) is organized under a trust indenture, contract of custodianship or agency, or similar instrument, (B) does not have a board of directors, and (C) issues only redeemable securities, each of which represents an undivided interest in a unit of specified securities; but does not include a voting trust.

(3) "Management company" means any investment company other than a face-amount certificate company or a unit investment trust.

[4] 26 U.S.C. 401.
[5] 26 U.S.C. 404(a)(2).

SUBCLASSIFICATION OF MANAGEMENT COMPANIES

SEC. 5. [80a–5] (a) For the purposes of this title, management companies are divided into open-end and closed-end companies, defined as follows:

(1) "Open-end company" means a management company which is offering for sale or has outstanding any redeemable security of which it is the issuer.

(2) "Closed-end company" means any management company other than an open-end company.

(b) Management companies are further divided into diversified companies and non-diversified companies, defined as follows:

(1) "Diversified company" means a management company which meets the following requirements: At least 75 per centum of the value of its total assets is represented by cash and cash items (including receivables), Government securities, securities of other investment companies, and other securities for the purposes of this calculation limited in respect of any one issuer to an amount not greater in value than 5 per centum of the value of the total assets of such management company and to not more than 10 per centum of the outstanding voting securities of such issuer.

(2) "Non-diversified company" means any management company other than a diversified company.

(c) A registered diversified company which at the time of its qualification as such meets the requirements of paragraph (1) of subsection (b) shall not lose its status as a diversified company because of any subsequent discrepancy between the value of its various investments and the requirements of said paragraph, so long as any such discrepancy existing immediately after its acquisition of any security or other property is neither wholly nor partly the result of such acquisition.

EXEMPTIONS [6]

SEC. 6. [80a–6] (a) The following investment companies are exempt from the provisions of this title:

(1)[7] Any company organized or otherwise created under the laws of and having its principal office and place of business in Puerto Rico,[8] the Virgin Islands, or any other possession of

[6] For additional exemptions, see 15 U.S.C. 77c note; 43 U.S.C. 1625.

[7] Section 506(a) of Public Law 115–174 (enacted on May 24, 2018) provides for amendments to strike paragraph (1) of subsection (a) and redesignate paragraph (2) through (5) as paragraphs (1) through (4), respectively. Subsection (b) of such section 506 provides as follows:

(b) EFFECTIVE DATE AND SAFE HARBOR.—

(1) EFFECTIVE DATE.—Except as provided in paragraph (2), the amendment made by subsection (a) shall take effect on the date of enactment of this Act.

(2) SAFE HARBOR.—With respect to a company that is exempt under section 6(a)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a–6(a)(1)) on the day before the date of enactment of this Act, the amendment made by subsection (a) shall take effect on the date that is 3 years after the date of enactment of this Act.

(3) EXTENSION OF SAFE HARBOR.—The Securities and Exchange Commission, by rule or regulation upon its own motion, or by order upon application, may conditionally or unconditionally, under section 6(c) of the Investment Company Act of 1940 (15 U.S.C. 80a–6(c)), further delay the effective date for a company described in paragraph (2) for a maximum of 3 years following the initial 3-year period if, before the end of the initial 3-year period, the Commission determines that such a rule, regulation, motion, or order is necessary or appropriate in the public interest and for the protection of investors.

[8] The words "Philippine Islands" have been deleted under the authority of Presidential Proclamation No. 2695 (60 Stat. 1352), which granted independence to the Philippine Islands.

the United States; but such exemption shall terminate if any security of which such company is the issuer is offered for sale or sold after the effective date of this title, by such company or an underwriter therefor, to a resident of any State other than the State in which such company is organized.

(2)[7] Any company which since the effective date of this title or within five years prior to such date has been reorganized under the supervision of a court of competent jurisdiction, if (A) such company was not an investment company at the commencement of such reorganization proceedings, (B) at the conclusion of such proceedings all outstanding securities of such company were owned by creditors of such company or by persons to whom such securities were issued on account of creditors' claims, and (C) more than 50 per centum of the voting securities of such company, and securities representing more than 50 per centum of the net asset value of such company, are currently owned beneficially by not more than twenty-five persons; but such exemption shall terminate if any security of which such company is the issuer is offered for sale or sold to the public after the conclusion of such proceedings by the issuer or by or through any underwriter. For the purposes of this paragraph, any new company organized as part of the reorganization shall be deemed the same company as its predecessor; and beneficial ownership shall be determined in the manner provided in section 3(c)(1).

(3)[7] Any issuer as to which there is outstanding a writing filed with the Commission by the Federal Savings and Loan Insurance Corporation stating that exemption of such issuer from the provisions of this title is consistent with the public interest and the protection of investors and is necessary or appropriate by reason of the fact that such issuer holds or proposes to acquire any assets or any product of any assets which have been segregated (A) from assets of any company which at the filing of such writing is an insured institution within the meaning of section 401(a) of the National Housing Act, as heretofore or hereafter amended, or (B) as a part of or in connection with any plan for or condition to the insurance of accounts of any company by said corporation or the conversion of any company into a Federal savings and loan association. Any such writing shall expire when canceled by a writing similarly filed or at the expiration of two years after the date of its filing, whichever first occurs; but said corporation may, nevertheless, before, at, or after the expiration of any such writing file another writing or writings with respect to such issuer.

(4)[7] Any company which prior to March 15, 1940, was and now is a wholly-owned subsidiary of a registered face-amount certificate company and was prior to said date and now is organized and operating under the insurance laws of any State and subject to supervision and examination by the insurance commissioner thereof, and which prior to March 15, 1940, was and now is engaged, subject to such laws, in business substantially all of which consists of issuing and selling only to residents of such State and investing the proceeds from, securities providing for or representing participations or interests in intan-

gible assets consisting of mortgages or other liens on real estate or notes or bonds secured thereby or in a fund or deposit of mortgages or other liens on real estate or notes or bonds secured thereby or having outstanding such securities so issued and sold.

(5) [7](A) Any company that is not engaged in the business of issuing redeemable securities, the operations of which are subject to regulation by the State in which the company is organized under a statute governing entities that provide financial or managerial assistance to enterprises doing business, or proposing to do business, in that State if—

(i) the organizational documents of the company state that the activities of the company are limited to the promotion of economic, business, or industrial development in the State through the provision of financial or managerial assistance to enterprises doing business, or proposing to do business, in that State, and such other activities that are incidental or necessary to carry out that purpose;

(ii) immediately following each sale of the securities of the company by the company or any underwriter for the company, not less than 80 percent of the securities of the company being offered in such sale, on a class-by-class basis, are held by persons who reside or who have a substantial business presence in that State;

(iii) the securities of the company are sold, or proposed to be sold, by the company or by any underwriter for the company, solely to accredited investors, as that term is defined in section 2(a)(15) of the Securities Act of 1933, or to such other persons that the Commission, as necessary or appropriate in the public interest and consistent with the protection of investors, may permit by rule, regulation, or order; and

(iv) the company does not purchase any security issued by an investment company or by any company that would be an investment company except for the exclusions from the definition of the term "investment company" under paragraph (1) or (7) of section 3(c), other than—

(I) any debt security that meets such standards of credit-worthiness as the Commission shall adopt; or

(II) any security issued by a registered open-end investment company that is required by its investment policies to invest not less than 65 percent of its total assets in securities described in subclause (I) or securities that are determined by such registered open-end investment company to be comparable in quality to securities described in subclause (I).

(B) Notwithstanding the exemption provided by this paragraph, section 9 (and, to the extent necessary to enforce section 9, sections 38 through 51) shall apply to a company described in this paragraph as if the company were an investment company registered under this title.

(C) Any company proposing to rely on the exemption provided by this paragraph shall file with the Commission a noti-

fication stating that the company intends to do so, in such form and manner as the Commission may prescribe by rule.

(D) Any company meeting the requirements of this paragraph may rely on the exemption provided by this paragraph upon filing with the Commission the notification required by subparagraph (C), until such time as the Commission determines by order that such reliance is not in the public interest or is not consistent with the protection of investors.

(E) The exemption provided by this paragraph may be subject to such additional terms and conditions as the Commission may by rule, regulation, or order determine are necessary or appropriate in the public interest or for the protection of investors.

(b) Upon application by any employees' security company, the Commission shall by order exempt such company from the provisions of this title and of the rules and regulations hereunder, if and to the extent that such exemption is consistent with the protection of investors. In determining the provisions to which such an order of exemption shall apply, the Commission shall give due weight, among other things, to the form of organization and the capital structure of such company, the persons by whom its voting securities, evidences of indebtedness, and other securities are owned and controlled, the prices at which securities issued by such company are sold and the sales load thereon, the disposition of the proceeds of such sales, the character of the securities in which such proceeds are invested, and any relationship between such company and the issuer of any such security.

(c) The Commission, by rules and regulations upon its own motion, or by order upon application, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title.

(d) The Commission, by rules and regulations or order, shall exempt a closed-end investment company from any or all provisions of this title, but subject to such terms and conditions as may be necessary or appropriate in the public interest or for the protection of investors, if—

(1) the aggregate sums received by such company from the sale of all its outstanding securities, plus the aggregate offering price of all securities of which such company is the issuer and which it proposes to offer for sale, do not exceed $10,000,000, or such other amount as the Commission may set by rule, regulation, or order;

(2) no security of which such company is the issuer has been or is proposed to be sold by such company or any underwriter therefor, in connection with a public offering, to any person who is not a resident of the State under the laws of which such company is organized or otherwise created; and

(3) such exemption is not contrary to the public interest or inconsistent with the protection of investors.

(e) If, in connection with any rule, regulation, or order under this section exempting any investment company from any provision of section 7, the Commission deems it necessary or appropriate in the public interest or for the protection of investors that certain specified provisions of this title pertaining to registered investment companies shall be applicable in respect of such company, the provisions so specified shall apply to such company, and to other persons in their transactions and relations with such company, as though such company were a registered investment company.

(f) Any closed-end company which—

(1) elects to be treated as a business development company pursuant to section 54; or

(2) would be excluded from the definition of an investment company by section 3(c)(1), except that it presently proposes to make a public offering of its securities as a business development company, and has notified the Commission, in a form and manner which the Commission may, by rule, prescribe, that it intends in good faith to file, within 90 days, a notification of election to become subject to the provisions of sections 55 through 65,

shall be exempt from sections 1 through 53, except to the extent provided in sections 59 through 65.

TRANSACTIONS BY UNREGISTERED INVESTMENT COMPANIES

SEC. 7. [80a–7] (a) No investment company organized or otherwise created under the laws of the United States or of a State and having a board of directors, unless registered under section 8, shall directly or indirectly—

(1) offer for sale, sell, or deliver after sale, by the use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person; or offer for sale, sell, or deliver after sale any such security or interest, having reason to believe that such security or interest will be made the subject of a public offering by use of the mails or any means or instrumentality of interstate commerce;

(2) purchase, redeem, retire, or otherwise acquire or attempt to acquire, by use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person;

(3) control any investment company which does any of the acts enumerated in paragraphs (1) and (2);

(4) engage in any business in interstate commerce; or

(5) control any company which is engaged in any business in interstate commerce.

The provisions of this subsection (a) shall not apply to transactions of an investment company which are merely incidental to its dissolution.

(b) No depositor or trustee of or underwriter for any investment company, organized or otherwise created under the laws of the United States or of a State and not having a board of directors,

unless such company is registered under section 8 or exempt under section 6, shall directly or indirectly—

(1) offer for sale, sell, or deliver after sale, by use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security of which such company is the issuer; or offer for sale, sell, or deliver after sale any such security or interest, having reason to believe that such security or interest will be made the subject of a public offering by use of the mails or any means or instrumentality of interstate commerce;

(2) purchase, redeem, or otherwise acquire or attempt to acquire, by use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security of which such company is the issuer; or

(3) sell or purchase for the account of such company, by use of the mails or any means or instrumentality of interstate commerce, any security or interest in a security, by whomever issued.

The provisions of this subsection (b) shall not apply to transactions which are merely incidental to the dissolution of an investment company.

(c) No promoter of a proposed investment company, and no underwriter for such a promoter, shall make use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, to offer for sale, sell, or deliver after sale, in connection with a public offering, any preorganization certificate or subscription for such a company.

(d) No investment company, unless organized or otherwise created under the laws of the United States or of a State, and no depositor or trustee of or underwriter for such a company not so organized or created, shall make use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, to offer for sale, sell, or deliver after sale, in connection with a public offering, any security of which such company is the issuer. Notwithstanding the provisions of this subsection and of section 8(a), the Commission is authorized, upon application by an investment company organized or otherwise created under the laws of a foreign country, to issue a conditional or unconditional order permitting such company to register under this title and to make a public offering of its securities by use of the mails and means or instrumentalities of interstate commerce, if the Commission finds that, by reason of special circumstances or arrangements, it is both legally and practically feasible effectively to enforce the provisions of this title against such company and that the issuance of such order is otherwise consistent with the public interest and the protection of investors.

(e) DISCLOSURE BY EXEMPT CHARITABLE ORGANIZATIONS.—Each fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of this Act shall provide, to each donor to such fund, at the time of the donation or within 90 days after the date of enactment of this subsection, whichever is later, written information describing the material terms of the operation of such fund.

REGISTRATION OF INVESTMENT COMPANIES

SEC. 8. [80a–8] (a) Any investment company organized or otherwise created under the laws of the United States or of a State may register for the purposes of this title by filing with the Commission a notification of registration, in such form as the Commission shall by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. An investment company shall be deemed to be registered upon receipt by the Commission of such notification of registration.

(b) Every registered investment company shall file with the Commission, within such reasonable time after registration as the Commission shall fix by rules and regulations, an original and such copies of a registration statement, in such form and containing such of the following information and documents as the Commission shall by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors:

(1) a recital of the policy of the registrant in respect of each of the following types of activities, such recital consisting in each case of a statement whether the registrant reserves freedom of action to engage in activities of such type, and if such freedom of action is reserved, a statement briefly indicating, insofar as is practicable, the extent to which the registrant intends to engage therein: (A) the classification and subclassifications, as defined in sections 4 and 5, within which the registrant proposes to operate; (B) borrowing money; (C) the issuance of senior securities; (D) engaging in the business of underwriting securities issued by other persons; (E) concentrating investments in a particular industry or group of industries; (F) the purchase and sale of real estate and commodities, or either of them; (G) making loans to other persons; and (H) portfolio turn-over (including a statement showing the aggregate dollar amount of purchases and sales of portfolio securities, other than Government securities, in each of the last three full fiscal years preceding the filing of such registration statement);

(2) a recital of all investment policies of the registrant, not enumerated in paragraph (1), which are changeable only if authorized by shareholder vote;

(3) a recital of all policies of the registrant, not enumerated in paragraphs (1) and (2), in respect of matters which the registrant deems matters of fundamental policy;

(4) the name and address of each affiliated person of the registrant; the name and principal address of every company, other than the registrant, of which each such person is an officer, director, or partner; a brief statement of the business experience for the preceding five years of each officer and director of the registrant; and

(5) the information and documents which would be required to be filed in order to register under the Securities Act of 1933 and the Securities Exchange Act of 1934 all securities (other than short-term paper) which the registrant has outstanding or proposes to issue.

(c) The Commission shall make provision, by permissive rules and regulations or order, for the filing of the following, or so much of the following as the Commission may designate, in lieu of the information and documents required pursuant to subsection (b):

(1) copies of the most recent registration statement filed by the registrant under the Securities Act of 1933 and currently effective under such Act, or if the registrant has not filed such a statement, copies of a registration statement filed by the registrant under the Securities Exchange Act of 1934 and currently effective under such Act;

(2) copies of any reports filed by the registrant pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934; and

(3) a report containing reasonably current information regarding the matters included in copies filed pursuant to paragraphs (1) and (2), and such further information regarding matters not included in such copies as the Commission is authorized to require under subsection (b).

(d) If the registrant is a unit investment trust substantially all of the assets of which are securities issued by another registered investment company, the Commission is authorized to prescribe for the registrant, by rules and regulations or order, a registration statement which eliminates inappropriate duplication of information contained in the registration statement filed under this section by such other investment company.

(e) If it appears to the Commission that a registered investment company has failed to file the registration statement required by this section or a report required pursuant to section 30 (a) or (b), or has filed such a registration statement or report but omitted therefrom material facts required to be stated therein, or has filed such a registration statement or report in violation of section 34(b), the Commission shall notify such company by registered mail or by certified mail of the failure to file such registration statement or report, or of the respects in which such registration statement or report appears to be materially incomplete or misleading, as the case may be, and shall fix a date (in no event earlier than thirty days after the mailing of such notice) prior to which such company may file such registration statement or report or correct the same. If such registration statement or report is not filed or corrected within the time so fixed by the Commission or any extension thereof, the Commission, after appropriate notice and opportunity for hearing, and upon such conditions and with such exemptions as it deems appropriate for the protection of investors, may by order suspend the registration of such company until such statement or report is filed or corrected, or may by order revoke such registration, if the evidence establishes—

(1) that such company has failed to file a registration statement required by this section or a report required pursuant to section 30 (a) or (b), or has filed such a registration statement or report but omitted therefrom material facts required to be stated therein, or has filed such a registration statement or report in violation of section 34(b); and

(2) that such suspension or revocation is in the public interest.

(f) Whenever the Commission, on its own motion or upon application, finds that a registered investment company has ceased to be an investment company, it shall so declare by order and upon the taking effect of such order the registration of such company shall cease to be in effect. If necessary for the protection of investors, an order under this subsection may be made upon appropriate conditions. The Commission's denial of any application under this subsection shall be by order.

(g) DATA STANDARDS FOR REGISTRATION STATEMENTS.—

(1) REQUIREMENT.—The Commission shall, by rule, adopt data standards for all registration statements required to be filed with the Commission under this section, except that the Commission may exempt exhibits, signatures, and certifications from those data standards.

(2) CONSISTENCY.—The data standards required under paragraph (1) shall incorporate, and ensure compatibility with (to the extent feasible), all applicable data standards established in the rules promulgated under section 124 of the Financial Stability Act of 2010, including, to the extent practicable, by having the characteristics described in clauses (i) through (vi) of subsection (c)(1)(B) of such section 124.

INELIGIBILITY OF CERTAIN AFFILIATED PERSONS AND UNDERWRITERS

SEC. 9. [80a–9] (a) It shall be unlawful for any of the following persons to serve or act in the capacity of employee, officer, director, member of an advisory board, investment adviser, or depositor of any registered investment company, or principal underwriter for any registered open-end company, registered unit investment trust, or registered face-amount certificate company:

(1) any person who within 10 years has been convicted of any felony or misdemeanor involving the purchase or sale of any security or arising out of such person's conduct as an underwriter, broker, dealer, investment adviser, municipal securities dealer, government securities broker, government securities dealer, bank, transfer agent, credit rating agency, or entity or person required to be registered under the Commodity Exchange Act, or as an affiliated person, salesman, or employee of any investment company, bank, insurance company, or entity or person required to be registered under the Commodity Exchange Act;

(2) any person who, by reason of any misconduct, is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an underwriter, broker, dealer, investment adviser, municipal securities dealer, government securities broker, government securities dealer, bank, transfer agent, credit rating agency, or entity or person required to be registered under the Commodity Exchange Act, or as an affiliated person, salesman, or employee of any investment company, bank, insurance company, or entity or person required to be registered under the Commodity Exchange Act, or from engaging in or continuing any conduct or practice in connection with any such activity or in connection with the purchase or sale of any security; or

(3) a company any affiliated person of which is ineligible, by reason of paragraph (1) or (2), to serve or act in the foregoing capacities.

For the purposes of paragraphs (1), (2), and (3) of this subsection, the term "investment adviser" shall include an investment adviser as defined in title II of this Act.

(b) The Commission may, after notice and opportunity for hearing, by order prohibit, conditionally or unconditionally, either permanently or for such period of time as it in its discretion shall deem appropriate in the public interest, any person 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, if such person—

(1) has willfully made or caused to be made in any registration statement, application or report filed with the Commission under this title any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such registration statement, application, or report any material fact which was required to be stated therein;

(2) has willfully violated any provision of the Securities Act of 1933, or of the Securities Exchange Act of 1934, or of title II of this Act, or of this title, or of the Commodity Exchange Act, or of any rule or regulation under any of such statutes;

(3) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of the Securities Act of 1933, or of the Securities Exchange Act of 1934, or of title II of this Act, or of this title, or of the Commodity Exchange Act, or of any rule or regulation under any of such statutes;

(4) has been found by a foreign financial regulatory authority to have—

(A) made or caused to be made in any application for registration or report required to be filed with a foreign securities authority, or in any proceeding before a foreign securities authority with respect to registration, any statement that was at the time and in light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any application or report to a foreign securities authority any material fact that is required to be stated therein;

(B) violated any foreign statute or regulation regarding transactions in securities or contracts of sale of a commodity for future delivery traded on or subject to the rules of a contract market or any board of trade; or

(C) aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any foreign statute or regulation regarding transactions in securities or contracts of sale of a commodity for future delivery traded on or subject to the rules of a contract market or any board of trade;

(5) within 10 years has been convicted by a foreign court of competent jurisdiction of a crime, however denominated by the laws of the relevant foreign government, that is substantially equivalent to an offense set forth in paragraph (1) of subsection (a); or

(6) by reason of any misconduct, is temporarily or permanently enjoined by any foreign court of competent jurisdiction from acting in any of the capacities, set forth in paragraph (2) of subsection (a), or a substantially equivalent foreign capacity, or from engaging in or continuing any conduct or practice in connection with any such activity or in connection with the purchase or sale of any security.

(c) Any person who is ineligible, by reason of subsection (a), to serve or act in the capacities enumerated in that subsection, may file with the Commission an application for an exemption from the provisions of that subsection. The Commission shall by order grant such application, either unconditionally or on an appropriate temporary or other conditional basis, if it is established that the prohibitions of subsection (a), as applied to such person, are unduly or disproportionately severe or that the conduct of such person has been such as not to make it against the public interest or protection of investors to grant such application.

(d) MONEY PENALTIES IN ADMINISTRATIVE PROCEEDINGS.—

(1) AUTHORITY OF COMMISSION.—

(A) IN GENERAL.—In any proceeding instituted pursuant to subsection (b) against any person, the Commission may impose a civil penalty if it finds, on the record after notice and opportunity for hearing, that such penalty is in the public interest, and that such person—

(i) has willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, or this title, or the rules or regulations thereunder;

(ii) has willfully aided, abetted, counseled, commanded, induced, or procured such a violation by any other person; or

(iii) has willfully made or caused to be made in any registration statement, application, or report required to be filed with the Commission under this title, any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such registration statement, application, or report any material fact which was required to be stated therein;[9]

(B) CEASE-AND-DESIST PROCEEDINGS.—In any proceeding instituted pursuant to subsection (f) against any person, the Commission may impose a civil penalty if the Commission finds, on the record, after notice and opportunity for hearing, that such person—

[9] So in law. The semicolon at the end of clause (iii) probably should be a period.

(i) is violating or has violated any provision of this title, or any rule or regulation issued under this title; or

(ii) is or was a cause of the violation of any provision of this title, or any rule or regulation issued under this title.

(2) MAXIMUM AMOUNT OF PENALTY.—

(A) FIRST TIER.—The maximum amount of penalty for each act or omission described in paragraph (1) shall be $5,000 for a natural person or $50,000 for any other person.

(B) SECOND TIER.—Notwithstanding subparagraph (A), the maximum amount of penalty for each such act or omission shall be $50,000 for a natural person or $250,000 for any other person if the act or omission described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(C) THIRD TIER.—Notwithstanding subparagraphs (A) and (B), the maximum amount of penalty for each such act or omission shall be $100,000 for a natural person or $500,000 for any other person if—

(i) the act or omission described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(ii) such act or omission directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission.

(3) DETERMINATION OF PUBLIC INTEREST.—In considering under this section whether a penalty is in the public interest, the Commission may consider—

(A) whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement;

(B) the harm to other persons resulting either directly or indirectly from such act or omission;

(C) the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior;

(D) whether such person previously has been found by the Commission, another appropriate regulatory agency, or a self-regulatory organization to have violated the Federal securities laws, State securities laws, or the rules of a self-regulatory organization, has been enjoined by a court of competent jurisdiction from violations of such laws or rules, or has been convicted by a court of competent jurisdiction of violations of such laws or of any felony or misdemeanor described in section 203(e)(2) of the Investment Advisers Act of 1940;

(E) the need to deter such person and other persons from committing such acts or omissions; and

(F) such other matters as justice may require.

(4) EVIDENCE CONCERNING ABILITY TO PAY.—In any proceeding in which the Commission may impose a penalty under this section, a respondent may present evidence of the respondent's ability to pay such penalty. The Commission may, in its discretion, consider such evidence in determining whether such penalty is in the public interest. Such evidence may relate to the extent of such person's ability to continue in business and the collectability of a penalty, taking into account any other claims of the United States or third parties upon such person's assets and the amount of such person's assets.

(e) AUTHORITY TO ENTER AN ORDER REQUIRING AN ACCOUNTING AND DISGORGEMENT.—In any proceeding in which the Commission may impose a penalty under this section, the Commission may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.

(f) CEASE-AND-DESIST PROCEEDINGS.—

(1) AUTHORITY OF THE COMMISSION.—If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this title, or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and 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 violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation. Such order may, in addition to requiring a person to cease and desist from committing or causing a violation, require such person to comply, or to take steps to effect compliance, with such provision, rule, or regulation, upon such terms and conditions and within such time as the Commission may specify in such order. Any such order may, as the Commission deems appropriate, require future compliance or steps to effect future compliance, either permanently or for such period of time as the Commission may specify, with such provision, rule, or regulation with respect to any security, any issuer, or any other person.

(2) HEARING.—The notice instituting proceedings pursuant to paragraph (1) shall fix a hearing date not earlier than 30 days nor later than 60 days after service of the notice unless an earlier or a later date is set by the Commission with the consent of any respondent so served.

(3) TEMPORARY ORDER.—

(A) IN GENERAL.—Whenever the Commission determines that the alleged violation or threatened violation specified in the notice instituting proceedings pursuant to paragraph (1), or the continuation thereof, is likely to result in significant dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest, including, but not limited to, losses to the Securities Investor Protection Corporation, prior to the com-

pletion of the proceeding, the Commission may enter a temporary order requiring the respondent to cease and desist from the violation or threatened violation and to take such action to prevent the violation or threatened violation and to prevent dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest as the Commission deems appropriate pending completion of such proceedings. Such an order shall be entered only after notice and opportunity for a hearing, unless the Commission, notwithstanding section 40(a) of this title, determines that notice and hearing prior to entry would be impracticable or contrary to the public interest. A temporary order shall become effective upon service upon the respondent and, unless set aside, limited, or suspended by the Commission or a court of competent jurisdiction, shall remain effective and enforceable pending the completion of the proceedings.

(B) APPLICABILITY.—This paragraph shall apply only to a respondent that acts, or, at the time of the alleged misconduct acted, as a broker, dealer, investment adviser, investment company, municipal securities dealer, government securities broker, government securities dealer, or transfer agent, or is, or was at the time of the alleged misconduct, an associated person of, or a person seeking to become associated with, any of the foregoing.

(4) REVIEW OF TEMPORARY ORDERS.—

(A) COMMISSION REVIEW.—At any time after the respondent has been served with a temporary cease-and-desist order pursuant to paragraph (3), the respondent may apply to the Commission to have the order set aside, limited, or suspended. If the respondent has been served with a temporary cease-and-desist order entered without a prior Commission hearing, the respondent may, within 10 days after the date on which the order was served, request a hearing on such application and the Commission shall hold a hearing and render a decision on such application at the earliest possible time.

(B) JUDICIAL REVIEW.—Within—

(i) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or

(ii) 10 days after the Commission renders a decision on an application and hearing under subparagraph (A), with respect to any temporary cease-and-desist order entered without a prior Commission hearing,

the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply

to the court except after hearing and decision by the Commission on the respondent's application under subparagraph (A) of this paragraph.

(C) NO AUTOMATIC STAY OF TEMPORARY ORDER.—The commencement of proceedings under subparagraph (B) of this paragraph shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(D) EXCLUSIVE REVIEW.—Section 43 of this title shall not apply to a temporary order entered pursuant to this section.

(5) AUTHORITY TO ENTER AN ORDER REQUIRING AN ACCOUNTING AND DISGORGEMENT.—In any cease-and-desist proceeding under subsection (f)(1), the Commission may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.

(g) For the purposes of this section, the term "investment adviser" includes a corporate or other trustee performing the functions of an investment adviser.

AFFILIATIONS OF DIRECTORS

SEC. 10. [80a–10] (a) No registered investment company shall have a board of directors more than 60 per centum of the members of which are persons who are interested persons of such registered company.

(b) No registered investment company shall—

(1) employ as regular broker any director, officer, or employee of such registered company, or any person of which any such director, officer, or employee is an affiliated person, unless a majority of the board of directors of such registered company shall be persons who are not such brokers or affiliated persons of any of such brokers;

(2) use as a principal underwriter of securities issued by it any director, officer, or employee of such registered company or any person of which any such director, officer, or employee is an interested person, unless a majority of the board of directors of such registered company shall be persons who are not such principal underwriters or interested persons of any of such principal underwriters; or

(3) have as director, officer, or employee any investment banker, or any affiliated person of any investment banker, unless a majority of the board of directors of such registered company shall be persons who are not investment bankers or affiliated persons of any investment banker. For the purposes of this paragraph, a person shall not be deemed an affiliated person of an investment banker solely by reason of the fact that he is an affiliated person of a company of the character described in section 12(d)(3) (A) and (B).

(c) No registered investment company shall have a majority of its board of directors consisting of persons who are officers, directors, or employees of any one bank (together with its affiliates and

subsidiaries) or any one bank holding company (together with its affiliates and subsidiaries) (as such terms are defined in section 2 of the Bank Holding Company Act of 1956) or any one savings and loan holding company, together with its affiliates and subsidiaries (as such terms are defined in section 10 of the Home Owners' Loan Act),,[10] except that, if on March 15, 1940, any registered investment company had a majority of its directors consisting of persons who are directors, officers, or employees of any one bank, such company may continue to have the same percentage of its board of directors consisting of persons who are directors, officers, or employees of such bank.

(d) Notwithstanding subsections (a) and (b)(2) of this section, a registered investment company may have a board of directors all the members of which, except one, are interested persons of the investment adviser of such company, or are officers or employees of such company, if—

(1) such investment company is an open-end company;

(2) such investment adviser is registered under title II of this Act and is engaged principally in the business of rendering investment supervisory services as defined in title II;

(3) no sales load is charged on securities issued by such investment company;

(4) any premium over net asset value charged by such company upon the issuance of any such security, plus any discount from net asset value charged on redemption thereof, shall not in the aggregate exceed 2 per centum;

(5) no sales or promotion expenses are incurred by such registered company; but expenses incurred in complying with laws regulating the issue or sale of securities shall not be deemed sales or promotion expenses;

(6) such investment adviser is the only investment adviser to such investment company, and such investment adviser does not receive a management fee exceeding 1 per centum per annum of the value of such company's net assets averaged over the year or taken as of a definite date or dates within the year;

(7) all executive salaries and executive expenses and office rent of such investment company are paid by such investment adviser; and

(8) such investment company has only one class of securities outstanding, each unit of which has equal voting rights with every other unit.

(e) If by reason of the death, disqualification, or bona fide resignation of any director or directors, the requirements of the foregoing provisions of this section or of section 15(f)(1) in respect of directors shall not be met by a registered investment company, the operation of such provision shall be suspended as to such registered company—

(1) for a period of thirty days if the vacancy or vacancies may be filled by action of the board of directors;

(2) for a period of sixty days if a vote of stockholders is required to fill the vacancy or vacancies; or

[10] Two consecutive commas so in law. See section 401(c) of Public Law 109–351 (120 Stat. 1973).

(3) for such longer period as the Commission may prescribe, by rules and regulations upon its own motion or by order upon application, as not inconsistent with the protection of investors.

(f) No registered investment company shall knowingly purchase or otherwise acquire, during the existence of any underwriting or selling syndicate, any security (except a security of which such company is the issuer) a principal underwriter of which is an officer, director, member of an advisory board, investment adviser, or employee of such registered company, or is a person (other than a company of the character described in section 12(d)(3) (A) and (B)) of which any such officer, director, member of an advisory board, investment adviser, or employee is an affiliated person, unless in acquiring such security such registered company is itself acting as a principal underwriter for the issuer. The Commission, by rules and regulations upon its own motion or by order upon application, may conditionally or unconditionally exempt any transaction or classes of transactions from any of the provisions of this subsection, if and to the extent that such exemption is consistent with the protection of investors.

(g) In the case of a registered investment company which has an advisory board, such board, as a distinct entity, shall be subject to the same restrictions as to its membership as are imposed upon a board of directors by this section.

(h) In the case of a registered management company which is an unincorporated company not having a board of directors, the provisions of this section shall apply as follows:

(1) the provisions of subsection (a), as modified by subsection (e), shall apply to the board of directors of the depositor of such company;

(2) the provisions of subsections (b) and (c), as modified by subsection (e), shall apply to the board of directors of the depositor and of every investment adviser of such company; and

(3) the provisions of subsection (f) shall apply to purchases and other acquisitions for the account of such company of securities a principal underwriter of which is the depositor or an investment adviser of such company, or an affiliated person of such depositor or investment adviser.

OFFERS OF EXCHANGE

SEC. 11. [80a–11] (a) It shall be unlawful for any registered open-end company or any principal underwriter for such a company to make or cause to be made an offer to the holder of a security of such company or of any other open-end investment company to exchange his security for a security in the same or another such company on any basis other than the relative net asset values of the respective securities to be exchanged, unless the terms of the offer have first been submitted to and approved by the Commission or are in accordance with such rules and regulations as the Commission may have prescribed in respect of such offers which are in effect at the time such offer is made. For the purposes of this section, (A) an offer by a principal underwriter means an offer communicated to holders of securities of a class or series but does not in-

clude an offer made by such principal underwriter to an individual investor in the course of a retail business conducted by such principal underwriter, and (B) the net asset value means the net asset value which is in effect for the purpose of determining the price at which the securities, or class or series of securities involved, are offered for sale to the public either (1) at the time of the receipt by the offeror of the acceptance of the offer or (2) at such later times as is specified in the offer.

(b) The provisions of this section shall not apply to any offer made pursuant to any plan of reorganization, which is submitted to and requires the approval of the holders of at least a majority of the outstanding shares of the class or series to which the security owned by the offeree belongs.

(c) The provisions of subsection (a) shall be applicable, irrespective of the basis of exchange, (1) to any offer of exchange of any security of a registered open-end company for a security of a registered unit investment trust or registered face-amount certificate company; and (2) to any type of offer of exchange of the securities of registered unit investment trusts or registered face-amount certificate companies for the securities of any other investment company.

FUNCTIONS AND ACTIVITIES OF INVESTMENT COMPANIES

SEC. 12. [80a–12] (a) It shall be unlawful for any registered investment company, in contravention of such rules and regulations or orders as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors—

(1) to purchase any security on margin, except such short-term credits as are necessary for the clearance of transactions;

(2) to participate on a joint or a joint and several basis in any trading account in securities, except in connection with an underwriting in which such registered company is a participant; or

(3) to effect a short sale of any security, except in connection with an underwriting in which such registered company is a participant.

(b) It shall be unlawful for any registered open-end company (other than a company complying with the provisions of section 10 (d)) to act as a distributor of securities of which it is the issuer, except through an underwriter, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(c) It shall be unlawful for any registered diversified company to make any commitment as underwriter, if immediately thereafter the amount of its outstanding underwriting commitments, plus the value of its investments in securities of issuers (other than investment companies) of which it owns more than 10 per centum of the outstanding voting securities, exceeds 25 per centum of the value of its total assets.

(d)(1)(A) It shall be unlawful for any registered investment company (the "acquiring company") and any company or companies controlled by such acquiring company to purchase or otherwise ac-

quire any security issued by any other investment company (the "acquired company"), and for any investment company (the "acquiring company") and any company or companies controlled by such acquiring company to purchase or otherwise acquire any security issued by any registered investment company (the "acquired company"), if the acquiring company and any company or companies controlled by it immediately after such purchase or acquisition own in the aggregate—

(i) more than 3 per centum of the total outstanding voting stock of the acquired company;

(ii) securities issued by the acquired company having an aggregate value in excess of 5 per centum of the value of the total assets of the acquiring company; or

(iii) securities issued by the acquired company and all other investment companies (other than treasury stock of the acquiring company) having an aggregate value in excess of 10 per centum of the value of the total assets of the acquiring company.

(B) It shall be unlawful for any registered open-end investment company (the "acquired company"), any principal underwriter therefor, or any broker or dealer registered under the Securities Exchange Act of 1934, knowingly to sell or otherwise dispose of any security issued by the acquired company to any other investment company (the "acquiring company") or any company or companies controlled by the acquiring company, if immediately after such sale or disposition—

(i) more than 3 per centum of the total outstanding voting stock of the acquired company is owned by the acquiring company and any company or companies controlled by it; or

(ii) more than 10 per centum of the total outstanding voting stock of the acquired company is owned by the acquiring company and other investment companies and companies controlled by them.

(C) It shall be unlawful for any investment company (the "acquiring company") and any company or companies controlled by the acquiring company to purchase or otherwise acquire any security issued by a registered closed-end investment company, if immediately after such purchase or acquisition the acquiring company, other investment companies having the same investment adviser, and companies controlled by such investment companies, own more than 10 per centum of the total outstanding voting stock of such closed-end company.

(D) The provisions of this paragraph shall not apply to a security received as a dividend or as a result of an offer of exchange approved pursuant to section 11 or of a plan of reorganization of any company (other than a plan devised for the purpose of evading the foregoing provisions).

(E) The provisions of this paragraph shall not apply to a security (or securities) purchased or acquired by an investment company if—

(i) the depositor of, or principal underwriter for, such investment company is a broker or dealer registered under the Securities Exchange Act of 1934, or a person controlled by such a broker or dealer;

(ii) such security is the only investment security held by such investment company (or such securities are the only investment securities held by such investment company, if such investment company is a registered unit investment trust that issues two or more classes or series of securities, each of which provides for the accumulation of shares of a different investment company); and

(iii) the purchase or acquisition is made pursuant to an arrangement with the issuer of, or principal underwriter for the issuer of, the security whereby such investment company is obligated—

(aa) either to seek instructions from its security holders with regard to the voting of all proxies with respect to such security and to vote such proxies only in accordance with such instructions, or to vote the shares held by it in the same proportion as the vote of all other holders of such security, and

(bb) in the event that such investment company is not a registered investment company, to refrain from substituting such security unless the Commission shall have approved such substitution in the manner provided in section 26 of this Act.

(F) The provisions of this paragraph shall not apply to securities purchased or otherwise acquired by a registered investment company if—

(i) immediately after such purchase or acquisition not more than 3 per centum of the total outstanding stock of such issuer is owned by such registered investment company and all affiliated persons of such registered investment company; and

(ii) such registered investment company has not offered or sold after January 1, 1971, and is not proposing to offer or sell any security issued by it through a principal underwriter or otherwise at a public offering price which includes a sales load of more than 1½ per centum.

No issuer of any security purchased or acquired by a registered investment company pursuant to this subparagraph shall be obligated to redeem such security in an amount exceeding 1 per centum of such issuer's total outstanding securities during any period of less than thirty days. Such investment company shall exercise voting rights by proxy or otherwise with respect to any security purchased or acquired pursuant to this subparagraph in the manner prescribed by subparagraph (E) of this subsection.

(G)(i) This paragraph does not apply to securities of a registered open-end investment company or a registered unit investment trust (hereafter in this subparagraph referred to as the "acquired company") purchased or otherwise acquired by a registered open-end investment company or a registered unit investment trust (hereafter in this subparagraph referred to as the "acquiring company") if—

(I) the acquired company and the acquiring company are part of the same group of investment companies;

(II) the securities of the acquired company, securities of other registered open-end investment companies and registered

unit investment trusts that are part of the same group of investment companies, Government securities, and short-term paper are the only investments held by the acquiring company;

(III) with respect to—

(aa) securities of the acquired company, the acquiring company does not pay and is not assessed any charges or fees for distribution-related activities, unless the acquiring company does not charge a sales load or other fees or charges for distribution-related activities; or

(bb) securities of the acquiring company, any sales loads and other distribution-related fees charged, when aggregated with any sales load and distribution-related fees paid by the acquiring company with respect to securities of the acquired company, are not excessive under rules adopted pursuant to section 22(b) or section 22(c) by a securities association registered under section 15A of the Securities Exchange Act of 1934, or the Commission;

(IV) the acquired company has a policy that prohibits it from acquiring any securities of registered open-end investment companies or registered unit investment trusts in reliance on this subparagraph or subparagraph (F); and

(V) such acquisition is not in contravention of such rules and regulations as the Commission may from time to time prescribe with respect to acquisitions in accordance with this subparagraph, as necessary and appropriate for the protection of investors.

(ii) For purposes of this subparagraph, the term "group of investment companies" means any 2 or more registered investment companies that hold themselves out to investors as related companies for purposes of investment and investor services.

(H) For the purposes of this paragraph, the value of an investment company's total assets shall be computed as of the time of a purchase or acquisition or as closely thereto as is reasonably possible.

(I) In any action brought to enforce the provisions of this paragraph, the Commission may join as a party the issuer of any security purchased or otherwise acquired in violation of this paragraph, and the court may issue any order with respect to such issuer as may be necessary or appropriate for the enforcement of the provisions of this paragraph.

(J) The Commission, by rule or regulation, upon its own motion or by order upon application, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions from any provision of this paragraph, if and to the extent that such exemption is consistent with the public interest and the protection of investors.

(2) It shall be unlawful for any registered investment company and any company or companies controlled by such registered investment company to purchase or otherwise acquire any security (except a security received as a dividend or as a result of a plan of reorganization of any company, other than a plan devised for the purpose of evading the provisions of this paragraph) issued by any insurance company of which such registered investment company and any company or companies controlled by such registered com-

pany do not, at the time of such purchase or acquisition, own in the aggregate at least 25 per centum of the total outstanding voting stock, if such registered company and any company or companies controlled by it own in the aggregate, or as a result of such purchase or acquisition will own in the aggregate, more than 10 per centum of the total outstanding voting stock of such insurance company.

(3) It shall be unlawful for any registered investment company and any company or companies controlled by such registered investment company to purchase or otherwise acquire any security issued by or any other interest in the business of any person who is a broker, a dealer, is engaged in the business of underwriting, or is either an investment adviser of an investment company or an investment adviser registered under title II of this Act, unless (A) such person is a corporation all the outstanding securities of which (other than short-term paper, securities representing bank loans, and directors' qualifying shares) are, or after such acquisition will be, owned by one or more registered investment companies; and (B) such person is primarily engaged in the business of underwriting and distributing securities issued by other persons, selling securities to customers, or any one or more of such or related activities, and the gross income of such person normally is derived principally from such business or related activities.

(e) Notwithstanding any provisions of this title, any registered investment company may hereafter purchase or otherwise acquire any security issued by any one corporation engaged or proposing to engage in the business of underwriting, furnishing capital to industry, financing promotional enterprises, purchasing securities of issuers for which no ready market is in existence, and reorganizing companies or similar activities; provided—

(1) That the securities issued by such corporation (other than short-term paper and securities representing bank loans) shall consist solely of one class of common stock and shall have been originally issued or sold for investment to registered investment companies only;

(2) That the aggregate cost of the securities of such corporation purchased by such registered investment company does not exceed 5 per centum of the value of the total assets of such registered company at the time of any purchase or acquisition of such securities; and

(3) That the aggregate paid-in capital and surplus of such corporation does not exceed $100,000,000.

For the purpose of paragraph (1) of section 5(b) any investment in any such corporation shall be deemed to be an investment in an investment company.

(f) Notwithstanding any provisions of this Act, any registered face-amount certificate company may organize not more than two face-amount certificate companies and acquire and own all or any part of the capital stock thereof only if such stock is acquired and held for investment: *Provided,* That the aggregate cost to such registered company of all such stock so acquired shall not exceed six times the amount of the minimum capital stock requirement provided in subdivision (1) of subsection (a) of section 28 for a face-amount company organized on or after March 15, 1940: *And pro-*

vided further, That the aggregate cost to such registered company of all such capital stock issued by face-amount certificate companies organized or otherwise created under laws other than the laws of the United States or any State thereof shall not exceed twice the amount of the minimum capital stock requirement provided in subdivision (1) of subsection (a) of section 28 for a company organized on or after March 15, 1940. Nothing contained in this subsection shall be deemed to prevent the sale of any such stock to any other person if the original purchase was made by such registered face-amount certificate company in good faith for investment and not for resale.

(g) Notwithstanding the provisions of this section any registered investment company and any company or companies controlled by such registered company may purchase or otherwise acquire from another investment company or any company or companies controlled by such registered company more than 10 per centum of the total outstanding voting stock of any insurance company owned by any such company or companies, or may acquire the securities of any insurance company if the Commission by order determines that such acquisition is in the public interest because the financial condition of such insurance company will be improved as a result of such acquisition or any plan contemplated as a result thereof. This section shall not be deemed to prohibit the promotion of a new insurance company or the acquisition of the securities of any newly created insurance company by a registered investment company, alone or with other persons. Nothing contained in this section shall in any way affect or derogate from the powers of any insurance commissioner or similar official or agency of the United States or any State, or to affect the right under State law of any insurance company to acquire securities of any other insurance company or insurance companies.

CHANGES IN INVESTMENT POLICY

SEC. 13. [80a–13] (a) No registered investment company shall, unless authorized by the vote of a majority of its outstanding voting securities—

(1) change its subclassification as defined in section 5(a)(1) and (2) of this title or its subclassification from a diversified to a non-diversified company;

(2) borrow money, issue senior securities, underwrite securities issued by other persons, purchase or sell real estate or commodities or make loans to other persons, except in each case in accordance with the recitals of policy contained in its registration statement in respect thereto;

(3) deviate from its policy in respect of concentration of investments in any particular industry or group of industries as recited in its registration statement, deviate from any investment policy which is changeable only if authorized by shareholder vote, or deviate from any policy recited in its registration statement pursuant to section 8(b)(3); [11]

(4) change the nature of its business so as to cease to be an investment company.

[11] So in law. Probably should include "or" after the semicolon at the end.

(b) In the case of a common-law trust of the character described in section 16(c), either written approval by holders of a majority of the outstanding shares of beneficial interest or the vote of a majority of such outstanding shares cast in person or by proxy at a meeting called for the purpose shall for the purposes of subsection (a) be deemed the equivalent of the vote of a majority of the outstanding voting securities, and the provisions of paragraph (42) of section 2(a) as to a majority shall be applicable to the vote cast at such a meeting.

(c) LIMITATION ON ACTIONS.—

(1) IN GENERAL.—Notwithstanding any other provision of Federal or State law, no person may bring any civil, criminal, or administrative action against any registered investment company, or any employee, officer, director, or investment adviser thereof, based solely upon the investment company divesting from, or avoiding investing in, securities issued by persons that the investment company determines, using credible information available to the public—

(A) conduct or have direct investments in business operations in Sudan described in section 3(d) of the Sudan Accountability and Divestment Act of 2007 (50 U.S.C. 1701 note); or

(B)[12] engage in investment activities in Iran described in section 202(c) of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010.

(2) APPLICABILITY.—

(A) RULE OF CONSTRUCTION.—Nothing in paragraph (1) shall be construed to create, imply, diminish, change, or affect in any way whether or not a private right of action exists under subsection (a) or any other provision of this Act.

(B) DISCLOSURES.—Paragraph (1) shall not apply to a registered investment company, or any employee, officer, director, or investment adviser thereof, unless the investment company makes disclosures in accordance with regulations prescribed by the Commission.

(3) PERSON DEFINED.—For purposes of this subsection the term "person" includes the Federal Government and any State or political subdivision of a State.

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[12] Section 401(a) of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Public Law 111–195) provides as follows:

SEC. 401. GENERAL PROVISIONS.

(a) SUNSET.—The provisions of this Act (other than sections 105 and 305 and the amendments made by sections 102, 107, 109, and 205) shall terminate, and section 13(c)(1)(B) of the Investment Company Act of 1940, as added by section 203(a), shall cease to be effective, on the date that is 30 days after the date on which the President certifies to Congress that—

(1) the Government of Iran has ceased providing support for acts of international terrorism and no longer satisfies the requirements for designation as a state sponsor of terrorism (as defined in section 301) under—

(A) section 6(j)(1)(A) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)(1)(A)) (or any successor thereto);

(B) section 40(d) of the Arms Export Control Act (22 U.S.C. 2780(d)); or

(C) section 620A(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2371(a)); and

(2) Iran has ceased the pursuit, acquisition, and development of nuclear, biological, and chemical weapons and ballistic missiles and ballistic missile launch technology.

SIZE OF INVESTMENT COMPANIES

SEC. 14. [80a–14] (a) No registered investment company organized after the date of enactment of this title, and no principal underwriter for such a company, shall make a public offering of securities of which such company is the issuer, unless—

(1) such company has a net worth of at least $100,000;

(2) such company has previously made a public offering of its securities, and at the time of such offering had a net worth of at least $100,000; or

(3) provision is made in connection with and as a condition of the registration of such securities under the Securities Act of 1933 which in the opinion of the Commission adequately insures (A) that after the effective date of such registration statement such company will not issue any security or receive any proceeds of any subscription for any security until firm agreements have been made with such company by not more than twenty-five responsible persons to purchase from it securities to be issued by it for an aggregate net amount which plus the then net worth of the company, if any, will equal at least $100,000; (B) that said aggregate net amount will be paid in to such company before any subscriptions for such securities will be accepted from any persons in excess of twenty-five; (C) that arrangements will be made whereby any proceeds so paid in, as well as any sales load, will be refunded to any subscriber on demand without any deduction, in the event that the net proceeds so received by the company do not result in the company having a net worth of at least $100,000 within ninety days after such registration statement becomes effective.

At any time after occurrence of the event specified in clause (C) of paragraph (3) of this subsection the Commission may issue a stop order suspending the effectiveness of the registration statement of such securities under the Securities Act of 1933 and may suspend or revoke the registration of such company under this title.

(b) The Commission is authorized, at such times as it deems that any substantial further increase in size of investment companies creates any problem involving the protection of investors or the public interest, to make a study and investigation of the effects of size on the investment policy of investment companies and on security markets, on concentration of control of wealth and industry, and on companies in which investment companies are interested, and from time to time to report the results of its studies and investigations and its recommendations to the Congress.

INVESTMENT ADVISORY AND UNDERWRITING CONTRACTS

SEC. 15. [80a–15] (a) It shall be unlawful for any person to serve or act as investment adviser of a registered investment company, except pursuant to a written contract, which contract, whether with such registered company or with an investment adviser of such registered company, has been approved by the vote of a majority of the outstanding voting securities of such registered company, and—

(1) precisely describes all compensation to be paid thereunder;

(2) shall continue in effect for a period more than two years from the date of its execution, only so long as such continuance is specifically approved at least annually by the board of directors or by vote of a majority of the outstanding voting securities of such company;

(3) provides, in substance, that it may be terminated at any time, without the payment of any penalty, by the board of directors of such registered company or by vote of a majority of the outstanding voting securities of such company on not more than sixty days' written notice to the investment adviser; and

(4) provides, in substance, for its automatic termination in the event of its assignment.

(b) It shall be unlawful for any principal underwriter for a registered open-end company to offer for sale, sell, or deliver after sale any security of which such company is the issuer, except pursuant to a written contract with such company, which contract—

(1) shall continue in effect for a period more than two years from the date of its execution, only so long as such continuance is specifically approved at least annually by the board of directors or by vote of a majority of the outstanding voting securities of such company; and

(2) provides, in substance, for its automatic termination in the event of its assignment.

(c) In addition to the requirements of subsections (a) and (b) of this section, it shall be unlawful for any registered investment company having a board of directors to enter into, renew, or perform any contract or agreement, written or oral, whereby a person undertakes regularly to serve or act as investment adviser of or principal underwriter for such company, unless the terms of such contract or agreement and any renewal thereof have been approved by the vote of a majority of directors, who are not parties to such contract or agreement or interested persons of any such party, cast in person at a meeting called for the purpose of voting on such approval. It shall be the duty of the directors of a registered investment company to request and evaluate, and the duty of an investment adviser to such company to furnish, such information as may reasonably be necessary to evaluate the terms of any contract whereby a person undertakes regularly to serve or act as investment adviser of such company. It shall be unlawful for the directors of a registered investment company, in connection with their evaluation of the terms of any contract whereby a person undertakes regularly to serve or act as investment adviser of such company, to take into account the purchase price or other consideration any person may have paid in connection with a transaction of the type referred to in paragraph (1), (3), or (4) of subsection (f).

(d) In the case of a common-law trust of the character described in section 16(c), either written approval by holders of a majority of the outstanding shares of beneficial interest or the vote of a majority of such outstanding shares cast in person or by proxy at a meeting called for the purpose shall for the purposes of this section be deemed the equivalent of the vote of a majority of the outstanding voting securities, and the provisions of paragraph (42)

of section 2(a) as to a majority shall be applicable to the vote cast at such a meeting.

(e) Nothing contained in this section shall be deemed to require or contemplate any action by an advisory board of any registered company or by any of the members of such a board.

(f)(1) An investment adviser, or a corporate trustee performing the functions of an investment adviser, of a registered investment company or an affiliated person of such investment adviser or corporate trustee may receive any amount or benefit in connection with a sale of securities of, or a sale of any other interest in, such investment adviser or corporate trustee which results in an assignment of an investment advisory contract with such company or the change in control of or identity of such corporate trustee, if—

(A) for a period of three years after the time of such action, at least 75 per centum of the members of the board of directors of such registered company or such corporate trustee (or successor thereto, by reorganization or otherwise) are not (i) interested persons of the investment adviser of such company or such corporate trustee, or (ii) interested persons of the predecessor investment adviser or such corporate trustee; and

(B) there is not imposed an unfair burden on such company as a result of such transaction or any express or implied terms, conditions, or understandings applicable thereto.

(2)(A) For the purpose of paragraph (1)(A) of this subsection, interested persons of a corporate trustee shall be determined in accordance with section 2(a)(19)(B): *Provided,* That no person shall be deemed to be an interested person of a corporate trustee solely by reason of (i) his being a member of its board of directors or advisory board or (ii) his membership in the immediate family of any person specified in clause (i) of this subparagraph.

(B) For the purpose of paragraph (1)(B) of this subsection, an unfair burden on a registered investment company includes any arrangement, during the two-year period after the date on which any such transaction occurs, whereby the investment adviser or corporate trustee or predecessor or successor investment advisers or corporate trustee or any interested person of any such adviser or any such corporate trustee receives or is entitled to receive any compensation directly or indirectly (i) from any person in connection with the purchase or sale of securities or other property to, from, or on behalf of such company, other than bona fide ordinary compensation as principal underwriter for such company, or (ii) from such company or its security holders for other than bona fide investment advisory or other services.

(3) If—

(A) an assignment of an investment advisory contract with a registered investment company results in a successor investment adviser to such company, or if there is a change in control of or identity of a corporate trustee of a registered investment company, and such adviser or trustee is then an investment adviser or corporate trustee with respect to other assets substantially greater in amount than the amount of assets of such company, or

(B) as a result of a merger of, or a sale of substantially all the assets by, a registered investment company with or to an-

other registered investment company with assets substantially greater in amount, a transaction occurs which would be subject to paragraph (1)(A) of this subsection,

such discrepancy in size of assets shall be considered by the Commission in determining whether or to what extent an application under section 6(c) for exemption from the provisions of paragraph (1)(A) should be granted.

(4) Paragraph (1)(A) of this subsection shall not apply to a transaction in which a controlling block of outstanding voting securities of an investment adviser to a registered investment company or of a corporate trustee performing the functions of an investment adviser to a registered investment company is—

(A) distributed to the public and in which there is, in fact, no change in the identity of the persons who control such investment adviser or corporate trustee, or

(B) transferred to the investment adviser or the corporate trustee, or an affiliated person or persons of such investment adviser or corporate trustee, or is transferred from the investment adviser or corporate trustee to an affiliated person or persons of the investment adviser, or corporate trustee: *Provided,* That (i) each transferee (other than such adviser or trustee) is a natural person and (ii) the transferees (other than such adviser or trustee) owned in the aggregate more than 25 per centum of such voting securities for a period of at least six months prior to such transfer.

CHANGES IN BOARD OF DIRECTORS; PROVISIONS RELATIVE TO STRICT TRUSTS

SEC. 16. [80a–16] (a) No person shall serve as a director of a registered investment company unless elected to that office by the holders of the outstanding voting securities of such company, at an annual or a special meeting duly called for that purpose; except that vacancies occurring between such meetings may be filled in any otherwise legal manner if immediately after filling any such vacancy at least two-thirds of the directors then holding office shall have been elected to such office by the holders of the outstanding voting securities of the company at such an annual or special meeting. In the event that at any time less than a majority of the directors of such company holding office at that time were so elected by the holders of the outstanding voting securities, the board of directors or proper officer of such company shall forthwith cause to be held as promptly as possible and in any event within sixty days a meeting of such holders for the purpose of electing directors to fill any existing vacancies in the board of directors unless the Commission shall by order extend such period. The foregoing provisions of this subsection shall not apply to members of an advisory board.

Nothing herein shall, however, preclude a registered investment company from dividing its directors into classes if its charter, certificate of incorporation, articles of association, by-laws, trust indenture, or other instrument or the law under which it is organized, so provides and prescribes the tenure of office of the several classes: *Provided,* That no class shall be elected for a shorter period

than one year or for a longer period than five years and the term of office of at least one class shall expire each year.

(b) Any vacancy on the board of directors of a registered investment company which occurs in connection with compliance with section 15(f)(1)(A) and which must be filled by a person who is not an interested person of either party to a transaction subject to section 15(f)(1)(A) shall be filled only by a person (1) who has been selected and proposed for election by a majority of the directors of such company who are not such interested persons, and (2) who has been elected by the holders of the outstanding voting securities of such company, except that in the case of the death, disqualification, or bona fide resignation of a director selected and elected pursuant to clauses (1) and (2) of this subsection (b), the vacancy created thereby may be filled as provided in subsection (a).

(c) The foregoing provisions of this section shall not apply to a common-law trust existing on the date of enactment of this title under an indenture of trust which does not provide for the election of trustees by the shareholders. No natural person shall serve as trustee of such a trust, which is registered as an investment company, after the holders of record of not less than two-thirds of the outstanding shares of beneficial interest in such trust have declared that he be removed from that office either by declaration in writing filed with the custodian of the securities of the trust or by votes cast in person or by proxy at a meeting called for the purpose. Solicitation of such a declaration shall be deemed a solicitation of a proxy within the meaning of section 20(a).

The trustees of such a trust shall promptly call a meeting of shareholders for the purpose of voting upon the question of removal of any such trustee or trustees when requested in writing so to do by the record holders of not less than 10 per centum of the outstanding shares.

Whenever ten or more shareholders of record who have been such for at least six months preceding the date of application, and who hold in the aggregate either shares having a net asset value of at least $25,000 or at least 1 per centum of the outstanding shares, whichever is less, shall apply to the trustees in writing, stating that they wish to communicate with other shareholders with a view to obtaining signatures to a request for a meeting pursuant to this subsection (c) and accompanied by a form of communication and request which they wish to transmit, the trustees shall within five business days after receipt of such application either—

(1) afford to such applicants access to a list of the names and addresses of all shareholders as recorded on the books of the trust; or

(2) inform such applicants as to the approximate number of shareholders of record, and the approximate cost of mailing to them the proposed communication and form of request.

If the trustees elect to follow the course specified in paragraph (2) of this subsection (c) the trustees, upon the written request of such applicants, accompanied by a tender of the material to be mailed and of the reasonable expenses of mailing, shall, with reasonable promptness, mail such material to all shareholders of record at their addresses as recorded on the books, unless within

five business days after such tender the trustees shall mail to such applicants and file with the Commission, together with a copy of the material to be mailed, a written statement signed by at least a majority of the trustees to the effect that in their opinion either such material contains untrue statement of fact or omits to state facts necessary to make the statements contained therein not misleading, or would be in violation of applicable law, and specifying the basis of such opinion.

After opportunity for hearing upon the objections specified in the written statement so filed, the Commission may, and if demanded by the trustees or by such applicants shall, enter an order either sustaining one or more of such objections or refusing to sustain any of them. If the Commission shall enter an order refusing to sustain any of such objections, or if, after the entry of an order sustaining one or more of such objections, the Commission shall find, after notice and opportunity for hearing, that all objections so sustained have been met, and shall enter an order so declaring, the trustees shall mail copies of such material to all shareholders with reasonable promptness after the entry of such order and the renewal of such tender.

TRANSACTIONS OF CERTAIN AFFILIATED PERSONS AND UNDERWRITERS

SEC. 17. [80a–17] (a) It shall be unlawful for any affiliated person or promoter of or principal underwriter for a registered investment company (other than a company of the character described in section 12(d)(3) (A) and (B)), or any affiliated person of such a person, promoter, or principal underwriter, acting as principal—

(1) knowingly to sell any security or other property to such registered company or to any company controlled by such registered company, unless such sale involves solely (A) securities of which the buyer is the issuer, (B) securities of which the seller is the issuer and which are part of a general offering to the holders of a class of its securities, or (C) securities deposited with the trustee of a unit investment trust or periodic payment plan by the depositor thereof;

(2) knowingly to purchase from such registered company, or from any company controlled by such registered company, any security or other property (except securities of which the seller is the issuer);

(3) to borrow money or other property from such registered company or from any company controlled by such registered company (unless the borrower is controlled by the lender) except as permitted in section 21(b); or

(4) to loan money or other property to such registered company, or to any company controlled by such registered company, in contravention of such rules, regulations, or orders as the Commission may, after consultation with and taking into consideration the views of the Federal banking agencies (as defined in section 3 of the Federal Deposit Insurance Act), prescribe or issue consistent with the protection of investors.

(b) Notwithstanding subsection (a), any person may file with the Commission an application for an order exempting a proposed

transaction of the applicant from one or more provisions of that subsection. The Commission shall grant such application and issue such order of exemption if evidence establishes that—

(1) the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned;

(2) the proposed transaction is consistent with the policy of each registered investment company concerned, as recited in its registration statement and reports filed under this title; and

(3) the proposed transaction is consistent with the general purposes of this title.

(c) Notwithstanding subsection (a), a person may, in the ordinary course of business, sell to or purchase from any company merchandise or may enter into a lessor-lessee relationship with any person and furnish the services incident thereto.

(d) It shall be unlawful for any affiliated person of or principal underwriter for a registered investment company (other than a company of the character described in section 12(d)(3) (A) and (B)), or any affiliated person of such a person or principal underwriter, acting as principal to effect any transaction in which such registered company, or a company controlled by such registered company, is a joint or a joint and several participant with such person, principal underwriter, or affiliated person, in contravention of such rules and regulations as the Commission may prescribe for the purpose of limiting or preventing participation by such registered or controlled company on a basis different from or less advantageous than that of such other participant. Nothing contained in this subsection shall be deemed to preclude any affiliated person from acting as manager of any underwriting syndicate or other group in which such registered or controlled company is a participant and receiving compensation therefor.

(e) It shall be unlawful for any affiliated person of a registered investment company, or any affiliated person of such person—

(1) acting as agent, to accept from any source any compensation (other than a regular salary or wages from such registered company) for the purchase or sale of any property to or for such registered company or any controlled company thereof, except in the course of such person's business as an underwriter or broker; or

(2) acting as broker, in connection with the sale of securities to or by such registered company or any controlled company thereof, to receive from any source a commission, fee, or other remuneration for effecting such transaction which exceeds (A) the usual and customary broker's commission if the sale is effected on a securities exchange, or (B) 2 per centum of the sales price if the sale is effected in connection with a secondary distribution of such securities, or (C) 1 per centum of the purchase or sale price of such securities if the sale is otherwise effected unless the Commission shall, by rules and regulations or order in the public interest and consistent with the protection of investors, permit a larger commission.

(f) CUSTODY OF SECURITIES.—

(1) Every registered management company shall place and maintain its securities and similar investments in the custody of (A) a bank or banks having the qualifications prescribed in paragraph (1) of section 26(a) of this title for the trustees of unit investment trusts; or (B) a company which is a member of a national securities exchange as defined in the Securities Exchange Act of 1934, subject to such rules and regulations as the Commission may from time to time prescribe for the protection of investors; or (C) such registered company, but only in accordance with such rules and regulations or orders as the Commission may from time to time prescribe for the protection of investors.

(2) Subject to such rules, regulations, and orders as the Commission may adopt as necessary or appropriate for the protection of investors, a registered management company or any such custodian, with the consent of the registered management company for which it acts as custodian, may deposit all or any part of the securities owned by such registered management company in a system for the central handling of securities established by a national securities exchange or national securities association registered with the Commission under the Securities Exchange Act of 1934, or such other person as may be permitted by the Commission, pursuant to which system all securities of any particular class or series of any issuer deposited within the system are treated as fungible and may be transferred or pledged by bookkeeping entry without physical delivery of such securities.

(3) Rules, regulations, and orders of the Commission under this subsection, among other things, may make appropriate provision with respect to such matters as the earmarking, segregation, and hypothecation of such securities and investments, and may provide for or require periodic or other inspections by any or all of the following: Independent public accountants, employees and agents of the Commission, and such other persons as the Commission may designate.

(4) No member of a national securities exchange which trades in securities for its own account may act as custodian except in accordance with rules and regulations prescribed by the Commission for the protection of investors.

(5) If a registered company maintains its securities and similar investments in the custody of a qualified bank or banks, the cash proceeds from the sale of such securities and similar investments and other cash assets of the company shall likewise be kept in the custody of such a bank or banks, or in accordance with such rules and regulations or orders as the Commission may from time to time prescribe for the protection of investors, except that such a registered company may maintain a checking account in a bank or banks having the qualifications prescribed in paragraph (1) of section 26(a) of this title for the trustees of unit investment trusts with the balance of such account or the aggregate balances of such accounts at no time in excess of the amount of the fidelity bond, maintained pursuant to section 17(g) of this title, covering the offi-

cers or employees authorized to draw on such account or accounts.

(6) The Commission may, after consultation with and taking into consideration the views of the Federal banking agencies (as defined in section 3 of the Federal Deposit Insurance Act), adopt rules and regulations, and issue orders, consistent with the protection of investors, prescribing the conditions under which a bank, or an affiliated person of a bank, either of which is an affiliated person, promoter, organizer, or sponsor of, or principal underwriter for, a registered management company, may serve as custodian of that registered management company.

(g) The Commission is authorized to require by rules and regulations or orders for the protection of investors that any officer or employee of a registered management investment company who may singly, or jointly with others, have access to securities or funds of any registered company, either directly or through authority to draw upon such funds or to direct generally the disposition of such securities (unless the officer or employee has such access solely through his position as an officer or employee of a bank) be bonded by a reputable fidelity insurance company against larceny and embezzlement in such reasonable minimum amounts as the Commission may prescribe.

(h) After one year from the effective date of this title, neither the charter, certificate of incorporation, articles of association, indenture of trust, nor the by-laws of any registered investment company, nor any other instrument pursuant to which such a company is organized or administered, shall contain any provision which protects or purports to protect any director or officer of such company against any liability to the company or to its security holders to which he would otherwise be subject by reason of willful misfeasance, bad faith, gross negligence or reckless disregard of the duties involved in the conduct of his office.

(i) After one year from the effective date of this title no contract or agreement under which any person undertakes to act as investment adviser of, or principal underwriter for, a registered investment company shall contain any provision which protects or purports to protect such person against any liability to such company or its security holders to which he would otherwise be subject by reason of willful misfeasance, bad faith, or gross negligence, in the performance of his duties, or by reason of his reckless disregard of his obligations and duties under such contract or agreement.

(j) It shall be unlawful for any affiliated person of or principal underwriter for a registered investment company or any affiliated person of an investment adviser of or principal underwriter for a registered investment company, to engage in any act, practice, or course of business in connection with the purchase or sale, directly or indirectly, by such person of any security held or to be acquired by such registered investment company in contravention of such rules and regulations as the Commission may adopt to define, and prescribe means reasonably necessary to prevent, such acts, practices, or courses of business as are fraudulent, deceptive or manipulative. Such rules and regulations may include requirements for the adoption of codes of ethics by registered investment companies

and investment advisers of, and principal underwriters for, such investment companies establishing such standards as are reasonably necessary to prevent such acts, practices, or courses of business.

CAPITAL STRUCTURE

SEC. 18. [80a–18] (a) It shall be unlawful for any registered closed-end company to issue any class of senior security, or to sell any such security of which it is the issuer, unless—

(1) if such class of senior security represents an indebtedness—

(A) immediately after such issuance or sale, it will have an asset coverage of at least 300 per centum;

(B) provision is made to prohibit the declaration of any dividend (except a dividend payable in stock of the issuer), or the declaration of any other distribution, upon any class of the capital stock of such investment company, or the purchase of any such capital stock, unless, in every such case, such class of senior securities has at the time of the declaration of any such dividend or distribution or at the time of any such purchase an asset coverage of at least 300 per centum after deducting the amount of such dividend, distribution, or purchase price, as the case may be, except that dividends may be declared upon any preferred stock if such senior security representing indebtedness has an asset coverage of at least 200 per centum at the time of declaration thereof after deducting the amount of such dividend; and

(C) provision is made either—

(i) that, if on the last business day of each of twelve consecutive calendar months such class of senior securities shall have an asset coverage of less than 100 per centum, the holders of such securities voting as a class shall be entitled to elect at least a majority of the members of the board of directors of such registered company, such voting right to continue until such class of senior security shall have an asset coverage of 110 per centum or more on the last business day of each of three consecutive calendar months, or

(ii) that, if on the last business day of each of twenty-four consecutive calendar months such class of senior securities shall have an asset coverage of less than 100 per centum, an event of default shall be deemed to have occurred;

(2) if such class of senior security is a stock—

(A) immediately after such issuance or sale it will have an asset coverage of at least 200 per centum;

(B) provision is made to prohibit the declaration of any dividend (except a dividend payable in common stock of the issuer), or the declaration of any other distribution, upon the common stock of such investment company, or the purchase of any such common stock, unless in every such case such class of senior security has at the time of the declaration of any such dividend or distribution or at

the time of any such purchase an asset coverage of at least 200 per centum after deducting the amount of such dividend, distribution or purchase price, as the case may be;

(C) provision is made to entitle the holders of such senior securities, voting as a class, to elect at least two directors at all times, and, subject to the prior rights, if any, of the holders of any other class of senior securities outstanding, to elect a majority of the directors if at any time dividends on such class of securities shall be unpaid in an amount equal to two full years' dividends on such securities, and to continue to be so represented until all dividends in arrears shall have been paid or otherwise provided for;

(D) provision is made requiring approval by the vote of a majority of such securities, voting as a class, of any plan of reorganization adversely affecting such securities or of any action requiring a vote of security holders as in section 13(a) provided; and

(E) such class of stock shall have complete priority over any other class as to distribution of assets and payment of dividends, which dividends shall be cumulative.

(b) The asset coverage in respect of a senior security provided for in subsection (a) may be determined on the basis of values calculated as of a time within forty-eight hours (not including Sundays or holidays) next preceding the time of such determination. The time of issue or sale shall, in the case of an offering of such securities to existing stockholders of the issuer, be deemed to be the first date on which such offering is made, and in all other cases shall be deemed to be the time as of which a firm commitment to issue or sell and to take or purchase such securities shall be made.

(c) Notwithstanding the provisions of subsection (a) it shall be unlawful for any registered closed-end investment company to issue or sell any senior security representing indebtedness if immediately thereafter such company will have outstanding more than one class of senior security representing indebtedness, or to issue or sell any senior security which is a stock if immediately thereafter such company will have outstanding more than one class of senior security which is a stock, except that (1) any such class of indebtedness or stock may be issued in one or more series: *Provided,* That no such series shall have a preference or priority over any other series upon the distribution of the assets of such registered closed-end company or in respect of the payment of interest or dividends, and (2) promissory notes or other evidences of indebtedness issued in consideration of any loan, extension, or renewal thereof, made by a bank or other person and privately arranged, and not intended to be publicly distributed, shall not be deemed to be a separate class of senior securities representing indebtedness within the meaning of this subsection (c).

(d) It shall be unlawful for any registered management company to issue any warrant or right to subscribe to or purchase a security of which such company is the issuer, except in the form of warrants or rights to subscribe expiring not later than one hundred and twenty days after their issuance and issued exclusively and ratably to a class or classes of such company's security holders;

except that any warrant may be issued in exchange for outstanding warrants in connection with a plan of reorganization.

(e) The provisions of this section 18 shall not apply to any senior securities issued or sold by any registered closed-end company—

(1) for the purpose of refunding through payment, purchase, redemption, retirement, or exchange, any senior security of such registered investment company except that no senior security representing indebtedness shall be so issued or sold for the purpose of refunding any senior security which is a stock; or

(2) pursuant to any plan of reorganization (other than for refunding as referred to in paragraph (1) of this subsection, provided—

(A) that such senior securities are issued or sold for the purpose of substituting or exchanging such senior securities for outstanding senior securities, and if such senior securities represent indebtedness they are issued or sold for the purpose of substituting or exchanging such senior securities for outstanding senior securities representing indebtedness, of any registered investment company which is a party to such plan of reorganization; or

(B) that the total amount of such senior securities so issued or sold pursuant to such plan does not exceed the total amount of senior securities of all the companies which are parties to such plan, and the total amount of senior securities representing indebtedness so issued or sold pursuant to such plan does not exceed the total amount of senior securities representing indebtedness of all such companies, or, alternatively, the total amount of such senior securities so issued or sold pursuant to such plan does not have the effect of increasing the ratio of senior securities representing indebtedness to the securities representing stock or the ratio of senior securities representing stock to securities junior thereto when compared with such ratios as they existed before such reorganization.

(f)(1) It shall be unlawful for any registered open-end company to issue any class of senior security or to sell any senior security of which it is the issuer, except that any such registered company shall be permitted to borrow from any bank: *Provided,* That immediately after any such borrowing there is an asset coverage of at least 300 per centum for all borrowings of such registered company: *And provided further,* That in the event that such asset coverage shall at any time fall below 300 per centum such registered company shall, within three days thereafter (not including Sundays and holidays) or such longer period as the Commission may prescribe by rules and regulations, reduce the amount of its borrowings to an extent that the asset coverage of such borrowings shall be at least 300 per centum.

(2) "Senior security" shall not, in the case of a registered open-end company, include a class or classes or a number of series of preferred or special stock each of which is preferred over all other classes or series in respect of assets specifically allocated to that class or series: *Provided,* That (A) such company has outstanding

no class or series of stock which is not so preferred over all other classes or series, or (B) the only other outstanding class of the issuer's stock consists of a common stock upon which no dividend (other than a liquidating dividend) is permitted to be paid and which in the aggregate represents not more than one-half of 1 per centum of the issuer's outstanding voting securities. For the purpose of insuring fair and equitable treatment of the holders of the outstanding voting securities of each class or series of stock of such company, the Commission may by rule, regulation, or order direct that any matter required to be submitted to the holders of the outstanding voting securities of such company shall not be deemed to have been effectively acted upon unless approved by the holders of such percentage (not exceeding a majority) of the outstanding voting securities of each class or series of stock affected by such matter as shall be prescribed in such rule, regulation, or order.

(g) Unless otherwise provided: "Senior security" means any bond, debenture, note, or similar obligation or instrument constituting a security and evidencing indebtedness, and any stock of a class having priority over any other class as to distribution of assets or payment of dividends; and "senior security representing indebtedness" means any senior security other than stock.

The term "senior security", when used in subparagraphs (B) and (C) of paragraph (1) of subsection (a), shall not include any promissory note or other evidence of indebtedness issued in consideration of any loan, extension, or renewal thereof, made by a bank or other person and privately arranged, and not intended to be publicly distributed; nor shall such term, when used in this section 18, include any such promissory note or other evidence of indebtedness in any case where such a loan is for temporary purposes only and in an amount not exceeding 5 per centum of the value of the total assets of the issuer at the time when the loan is made. A loan shall be presumed to be for temporary purposes if it is repaid within sixty days and is not extended or renewed; otherwise it shall be presumed not to be for temporary purposes. Any such presumption may be rebutted by evidence.

(h) "Asset coverage" of a class of senior security representing an indebtedness of an issuer means the ratio which the value of the total assets of such issuer, less all liabilities and indebtedness not represented by senior securities, bears to the aggregate amount of senior securities representing indebtedness of such issuer. "Asset coverage" of a class of senior security of an issuer which is a stock means the ratio which the value of the total assets of such issuer, less all liabilities and indebtedness not represented by senior securities, bears to the aggregate amount of senior securities representing indebtedness of such issuer plus the aggregate of the involuntary liquidation preference of such class of senior security which is a stock. The involuntary liquidation preference of a class of senior security which is a stock shall be deemed to mean the amount to which such class of senior security would be entitled on involuntary liquidation of the issuer in preference to a security junior to it.

(i) Except as provided in subsection (a) of this section, or as otherwise required by law, every share of stock hereafter issued by a registered management company (except a common-law trust of

the character described in section 16(c)) shall be a voting stock and have equal voting rights with every other outstanding voting stock: *Provided,* That this subsection shall not apply to shares issued pursuant to the terms of any warrant or subscription right outstanding on March 15, 1940, or any firm contract entered into before March 15, 1940, to purchase such securities from such company nor to shares issued in accordance with any rules, regulations, or orders which the Commission may make permitting such issue.

(j) Notwithstanding any provision of this title, it shall be unlawful, after the date of enactment of this title, for any registered face-amount certificate company—

(1) to issue, except in accordance with such rules, regulations, or orders as the Commission may prescribe in the public interest or as necessary or appropriate for the protection of investors, any security other than (A) a face-amount certificate; (B) a common stock having a par value and being without preference as to dividends or distributions and having at least equal voting rights with any outstanding security of such company; or (C) short-term payment or promissory notes or other indebtedness issued in consideration of any loan, extension, or renewal thereof, made by a bank or other person and privately arranged and not intended to be publicly offered;

(2) if such company has outstanding any security, other than such face-amount certificates, common stock, promissory notes, or other evidence of indebtedness, to make any distribution or declare or pay any dividend on any capital security in contravention of such rules and regulations or orders as the Commission may prescribe in the public interest or as necessary or appropriate for the protection of investors or to insure the financial integrity of such company, to prevent the impairment of the company's ability to meet its obligations upon its face-amount certificates; or

(3) to issue any of its securities except for cash or securities including securities of which such company is the issuer.

(k) The provisions of subparagraphs (A) and (B) of paragraph (1) of subsection (a) of this section shall not apply to investment companies operating under the Small Business Investment Act of 1958, and the provisions of paragraph (2) of said subsection shall not apply to such companies so long as such class of senior security shall be held or guaranteed by the Small Business Administration.

DIVIDENDS

SEC. 19. [80a–19] (a) It shall be unlawful for any registered investment company to pay any dividend, or to make any distribution in the nature of a dividend payment, wholly or partly from any source other than—

(1) such company's accumulated undistributed net income, determined in accordance with good accounting practice and not including profits or losses realized upon the sale of securities or other properties; or

(2) such company's net income so determined for the current or preceding fiscal year;

unless such payment is accompanied by a written statement which adequately discloses the source or sources of such payment. The Commission may prescribe the form of such statement by rules and regulations in the public interest and for the protection of investors.

(b) It shall be unlawful in contravention of such rules, regulations, or orders as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors for any registered investment company to distribute long-term capital gains, as defined in the Internal Revenue Code of 1954, more often than once every twelve months.

PROXIES; VOTING TRUSTS; CIRCULAR OWNERSHIP

SEC. 20. [80a–20] (a) It shall be unlawful for any person, by use of the mails or any means or instrumentality of interstate commerce or otherwise, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security of which a registered investment company is the issuer in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) It shall be unlawful for any registered investment company or affiliated person thereof, any issuer of a voting-trust certificate relating to any security of a registered investment company, or any underwriter of such a certificate, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to offer for sale, sell, or deliver after sale, in connection with a public offering, any such voting-trust certificate.

(c) No registered investment company shall purchase any voting security if, to the knowledge of such registered company, cross-ownership or circular ownership exists, or after such acquisition will exist, between such registered company and the issuer of such security. Cross-ownership shall be deemed to exist between two companies when each of such companies beneficially owns more than 3 per centum of the outstanding voting securities of the other company. Circular ownership shall be deemed to exist between two companies if such companies are included within a group of three or more companies, each of which—

(1) beneficially owns more than 3 per centum of the outstanding voting securities of one or more other companies of the group; and

(2) has more than 3 per centum of its own outstanding voting securities beneficially owned by another company, or by each of two or more other companies, of the group.

(d) If cross-ownership or circular ownership between a registered investment company and any other company or companies comes into existence upon the purchase by a registered investment company of the securities of another company, it shall be the duty of such registered company, within one year after it first knows of the existence of such cross-ownership or circular ownership, to eliminate the same.

LOANS

SEC. 21. [80a–21] It shall be unlawful for any registered management company to lend money or property to any person, directly or indirectly, if—

(a) the investment policies of such registered company, as recited in its registration statement and reports filed under this title, do not permit such a loan; or

(b) such person controls or is under common control with such registered company; except that the provisions of this paragraph shall not apply to any loan from a registered company to a company which owns all of the outstanding securities of such registered company, except directors' qualifying shares.

DISTRIBUTION, REDEMPTION, AND REPURCHASE OF REDEEMABLE SECURITIES

SEC. 22. [80a–22] (a) A securities association registered under section 15A of the Securities Exchange Act of 1934 may prescribe, by rules adopted and in effect in accordance with said section and subject to all provisions of said section applicable to the rules of such an association—

(1) a method or methods for computing the minimum price at which a member thereof may purchase from any investment company, any redeemable security issued by such company and the maximum price at which a member may sell to such company any redeemable security issued by it or which he may receive for such security upon redemption, so that the price in each case will bear such relation to the current net asset value of such security computed as of such time as the rules may prescribe; and

(2) a minimum period of time which must elapse after the sale or issue of such security before any resale to such company by a member or its redemption upon surrender by a member;

in each case for the purpose of eliminating or reducing so far as reasonably practicable any dilution of the value of other outstanding securities of such company or any other result of such purchase, redemption, or sale which is unfair to holders of such other outstanding securities; and said rules may prohibit the members of the association from purchasing, selling, or surrendering for redemption any such redeemable securities in contravention of said rules.

(b)(1) Such a securities association may also, by rules adopted and in effect in accordance with said section 15A, and notwithstanding the provisions of subsection (b)(6) thereof but subject to all other provisions of said section applicable to the rules of such an association, prohibit its members from purchasing, in connection with a primary distribution of redeemable securities of which any registered investment company is the issuer, any such security from the issuer or from any principal underwriter except at a price equal to the price at which such security is then offered to the public less a commission, discount, or spread which is computed in conformity with a method or methods, and within such limitations as to the relation thereof to said public offering price, as such rules

may prescribe in order that the price at which such security is offered or sold to the public shall not include an excessive sales load but shall allow for reasonable compensation for sales personnel, broker-dealers, and underwriters, and for reasonable sales loads to investors. The Commission shall on application or otherwise, if it appears that smaller companies are subject to relatively higher operating costs, make due allowance therefor by granting any such company or class of companies appropriate qualified exemptions from the provisions of this section.

(2) At any time after the expiration of eighteen months from the date of enactment of the Investment Company Amendments Act of 1970 (or, if earlier, after a securities association has adopted for purposes of paragraph (1) any rule respecting excessive sales loads), the Commission may alter or supplement the rules of any securities association as may be necessary to effectuate the purposes of this subsection in the manner provided by section 19(c) of the Securities Exchange Act of 1934.

(3) If any provision of this subsection is in conflict with any provision of any law of the United States in effect on the date this subsection takes effect, the provisions of this subsection shall prevail.

(c) The Commission may make rules and regulations applicable to registered investment companies and to principal underwriters of, and dealers in, the redeemable securities of any registered investment company, whether or not members of any securities association, to the same extent, covering the same subject matter, and for the accomplishment of the same ends as are prescribed in subsection (a) of this section in respect of the rules which may be made by a registered securities association governing its members. Any rules and regulations so made by the Commission, to the extent that they may be inconsistent with the rules of any such association, shall so long as they remain in force supersede the rules of the association and be binding upon its members as well as all other underwriters and dealers to whom they may be applicable.

(d) No registered investment company shall sell any redeemable security issued by it to any person except either to or through a principal underwriter for distribution or at a current public offering price described in the prospectus, and, if such class of security is being currently offered to the public by or through an underwriter, no principal underwriter of such security and no dealer shall sell any such security to any person except a dealer, a principal underwriter, or the issuer, except at a current public offering price described in the prospectus. Nothing in this subsection shall prevent a sale made (i) pursuant to an offer of exchange permitted by section 11 including any offer made pursuant to section 11(b); (ii) pursuant to an offer made solely to all registered holders of the securities, or of a particular class or series of securities issued by the company proportionate to their holdings or proportionate to any cash distribution made to them by the company (subject to appropriate qualifications designed solely to avoid issuance of fractional securities); or (iii) in accordance with rules and regulations of the Commission made pursuant to subsection (b) of section 12.

(e) No registered investment company shall suspend the right of redemption, or postpone the date of payment or satisfaction upon

redemption of any redeemable security in accordance with its terms for more than seven days after the tender of such security to the company or its agent designated for that purpose for redemption, except—

(1) for any period (A) during which the New York Stock Exchange is closed other than customary week-end and holiday closings or (B) during which trading on the New York Stock Exchange is restricted;

(2) for any period during which an emergency exists as a result of which (A) disposal by the company of securities owned by it is not reasonably practicable or (B) it is not reasonably practicable for such company fairly to determine the value of its net assets; or

(3) for such other periods as the Commission may by order permit for the protection of security holders of the company.

The Commission shall by rules and regulations determine the conditions under which (i) trading shall be deemed to be restricted and (ii) an emergency shall be deemed to exist within the meaning of this subsection.

(f) No registered open-end company shall restrict the transferability or negotiability of any security of which it is the issuer except in conformity with the statements with respect thereto contained in its registration statement nor in contravention of such rules and regulations as the Commission may prescribe in the interests of the holders of all of the outstanding securities of such investment company.

(g) No registered open-end company shall issue any of its securities (1) for services; or (2) for property other than cash or securities (including securities of which such registered company is the issuer), except as a dividend or distribution to its security holders or in connection with a reorganization.

DISTRIBUTION AND REPURCHASE OF SECURITIES: CLOSED-END COMPANIES

SEC. 23. [80a–23] (a) No registered closed-end company shall issue any of its securities (1) for services; or (2) for property other than cash or securities (including securities of which such registered company is the issuer), except as a dividend or distribution to its security holders or in connection with a reorganization.

(b) No registered closed-end company shall sell any common stock of which it is the issuer at a price below the current net asset value of such stock, exclusive of any distributing commission or discount (which net asset value shall be determined as of a time within forty-eight hours, excluding Sundays and holidays, next preceding the time of such determination), except (1) in connection with an offering to the holders of one or more classes of its capital stock; (2) with the consent of a majority of its common stockholders; (3) upon conversion of a convertible security in accordance with its terms; (4) upon the exercise of any warrant outstanding on the date of enactment of this Act or issued in accordance with the provisions of section 18(d); or (5) under such other circumstances as the Commission may permit by rules and regulations or orders for the protection of investors.

(c) No registered closed-end company shall purchase any securities of any class of which it is the issuer except—

(1) on a securities exchange or such other open market as the Commission may designate by rules and regulations or orders: *Provided,* That if such securities are stock, such registered company shall, within the preceding six months, have informed stockholders of its intention to purchase stock of such class by letter or report addressed to stockholders of such class; or

(2) pursuant to tenders, after reasonable opportunity to submit tenders given to all holders of securities of the class to be purchased; or

(3) under such other circumstances as the Commission may permit by rules and regulations or orders for the protection of investors in order to insure that such purchases are made in a manner or on a basis which does not unfairly discriminate against any holders of the class or classes of securities to be purchased.

REGISTRATION OF SECURITIES UNDER SECURITIES ACT OF 1933

SEC. 24. [80a–24] (a) In registering under the Securities Act of 1933 any security of which it is the issuer, a registered investment company, in lieu of furnishing a registration statement containing the information and documents specified in schedule A of said Act, may file a registration statement containing the following information and documents:

(1) such copies of the registration statement filed by such company under this title, and of such reports filed by such company pursuant to section 30 or such copies of portions of such registration statement and reports, as the Commission shall designate by rules and regulations; and

(2) such additional information and documents (including a prospectus) as the Commission shall prescribe by rules and regulations as necessary or appropriate in the public interest or for the protection of investors.

(b) It shall be unlawful for any of the following companies, or for any underwriter for such a company, in connection with a public offering of any security of which such company is the issuer, to make use of the mails or any means or instrumentalities of interstate commerce, to transmit any advertisement, pamphlet, circular, form letter, or other sales literature addressed to or intended for distribution to prospective investors unless three copies of the full text thereof have been filed with the Commission or are filed with the Commission within ten days thereafter:

(1) any registered open-end company;

(2) any registered unit investment trust; or

(3) any registered face-amount certificate company.

(c) In addition to the powers relative to prospectuses granted the Commission by section 10 of the Securities Act of 1933, the Commission is authorized to require, by rules and regulations or order, that the information contained in any prospectus relating to any periodic payment plan certificate or face-amount certificate registered under the Securities Act of 1933 on or after the effective date of this title be presented in such form and order of items, and

such prospectus contain such summaries of any portion of such information, as are necessary or appropriate in the public interest or for the protection of investors.

(d) The exemption provided by paragraph (8) of section 3(a) of the Securities Act of 1933 shall not apply to any security of which an investment company is the issuer. The exemption provided by paragraph (11) of said section 3(a) shall not apply to any security of which a registered investment company is the issuer. The exemption provided by section 4(3) of the Securities Act of 1933 shall not apply to any transaction in a security issued by a face-amount certificate company or in a redeemable security issued by an open-end management company or unit investment trust if any other security of the same class is currently being offered or sold by the issuer or by or through an underwriter in a distribution which is not exempted from section 5 of said Act, except to such extent and subject to such terms and conditions as the Commission, having due regard for the public interest and the protection of investors, may prescribe by rules or regulations with respect to any class of persons, securities, or transactions.

(e) For the purposes of section 11 of the Securities Act of 1933, as amended, the effective date of the latest amendment filed shall be deemed the effective date of the registration statement with respect to securities sold after such amendment shall have become effective. For the purposes of section 13 of the Securities Act of 1933, as amended, no such security shall be deemed to have been bona fide offered to the public prior to the effective date of the latest amendment filed pursuant to this subsection. Except to the extent the Commission otherwise provides by rules or regulations as appropriate in the public interest or for the protection of investors, no prospectus relating to a security issued by a face-amount certificate company or a redeemable security issued by an open-end management company or unit investment trust which varies for the purposes of subsection (a)(3) of section 10 of the Securities Act of 1933 from the latest prospectus filed as a part of the registration statement shall be deemed to meet the requirements of said section 10 unless filed as part of an amendment to the registration statement under said Act and such amendment has become effective.

(f) REGISTRATION OF INDEFINITE AMOUNT OF SECURITIES.—

(1) REGISTRATION OF SECURITIES.—Upon the effective date of its registration statement, as provided by section 8 of the Securities Act of 1933, a face-amount certificate company, open-end management company, or unit investment trust, shall be deemed to have registered an indefinite amount of securities.

(2) PAYMENT OF REGISTRATION FEES.—Not later than 90 days after the end of the fiscal year of a company or trust referred to in paragraph (1), the company or trust, as applicable, shall pay a registration fee to the Commission, calculated in the manner specified in section 6(b) of the Securities Act of 1933, based on the aggregate sales price for which its securities (including, for purposes of this paragraph, all securities issued pursuant to a dividend reinvestment plan) were sold pursuant to a registration of an indefinite amount of securities under this subsection during the previous fiscal year of the company or trust, reduced by—

(A) the aggregate redemption or repurchase price of the securities of the company or trust during that year; and

(B) the aggregate redemption or repurchase price of the securities of the company or trust during any prior fiscal year ending not more than 1 year before the date of enactment of the Investment Company Act Amendments of 1996, that were not used previously by the company or trust to reduce fees payable under this section.

(3) INTEREST DUE ON LATE PAYMENT.—A company or trust paying the fee required by this subsection or any portion thereof more than 90 days after the end of the fiscal year of the company or trust shall pay to the Commission interest on unpaid amounts, at the average investment rate for Treasury tax and loan accounts published by the Secretary of the Treasury pursuant to section 3717(a) of title 31, United States Code. The payment of interest pursuant to this paragraph shall not preclude the Commission from bringing an action to enforce the requirements of paragraph (2).

(4) RULEMAKING AUTHORITY.—The Commission may adopt rules and regulations to implement this subsection.

(g) ADDITIONAL PROSPECTUSES.—In addition to any prospectus permitted or required by section 10(a) of the Securities Act of 1933, the Commission shall permit, by rules or regulations deemed necessary or appropriate in the public interest or for the protection of investors, the use of a prospectus for purposes of section 5(b)(1) of that Act with respect to securities issued by a registered investment company. Such a prospectus, which may include information the substance of which is not included in the prospectus specified in section 10(a) of the Securities Act of 1933, shall be deemed to be permitted by section 10(b) of that Act.

PLANS OF REORGANIZATION

SEC. 25. [80a–25] (a) Any person who, by use of the mails or any means or instrumentality of interstate commerce or otherwise, solicits or permits the use of his name to solicit any proxy, consent, authorization, power of attorney, ratification, deposit, or dissent in respect of any plan of reorganization of any registered investment company shall file with, or mail to, the Commission for its information, within twenty-four hours after the commencement of any such solicitation, a copy of such plan and any deposit agreement relating thereto and of any proxy, consent, authorization, power of attorney, ratification, instrument of deposit, or instrument of dissent in respect thereto, if or to the extent that such documents shall not already have been filed with the Commission.

(b) The Commission is authorized, if so requested, prior to any solicitation of security holders with respect to any plan of reorganization, by any registered investment company which is, or any of the securities of which are, the subject of or is a participant in any such plan, or if so requested by the holders of 25 per centum of any class of its outstanding securities, to render an advisory report in respect of the fairness of any such plan and its effect upon any class or classes of security holders. In such event any registered in-

vestment company, in respect of which the Commission shall have rendered any such advisory report, shall mail promptly a copy of such advisory report to all its security holders affected by any such plan: *Provided,* That such advisory report shall have been received by it at least forty-eight hours (not including Sundays and holidays) before final action is taken in relation to such plan at any meeting of security holders called to act in relation thereto, or any adjournment of any such meeting, or if no meeting be called, then prior to the final date of acceptance of such plan by security holders. In respect of securities not registered as to ownership, in lieu of mailing a copy of such advisory report, such registered company shall publish promptly a statement of the existence of such advisory report in a newspaper of general circulation in its principal place of business and shall make available copies of such advisory report upon request. Notwithstanding the provision of this section the Commission shall not render such advisory report although so requested by any such investment company or such security holders if the fairness or feasibility of said plan is in issue in any proceeding pending in any court of competent jurisdiction unless such plan is submitted to the Commission for that purpose by such court.

(c) Any district court of the United States in the State of incorporation of a registered investment company, or any such court for the district in which such company maintains its principal place of business, is authorized to enjoin the consummation of any plan of reorganization of such registered investment company upon proceedings instituted by the Commission (which is authorized so to proceed upon behalf of security holders of such registered company, or any class thereof), if such court shall determine that any such plan is not fair and equitable to all security holders.

(d) Nothing contained in this section shall in any way affect or derogate from the powers of the courts of the United States and the Commission with reference to reorganizations contained in title 11 of the United States Code.

UNIT INVESTMENT TRUSTS

SEC. 26. [80a–26] (a) No principal underwriter for or depositor of a registered unit investment trust shall sell, except by surrender to the trustee for redemption, any security of which such trust is the issuer (other than short-term paper), unless the trust indenture, agreement of custodianship, or other instrument pursuant to which such security is issued—

(1) designates one or more trustees or custodians, each of which is a bank, and provides that each such trustee or custodian shall have at all times an aggregate capital, surplus, and undivided profits of a specified minimum amount, which shall not be less than $500,000 (but may also provide, if such trustee or custodian publishes reports of condition at least annually, pursuant to law or to the requirements of its supervising or examining authority, that for the purposes of this paragraph the aggregate capital, surplus, and undivided profits of such trustee or custodian shall be deemed to be its aggregate capital,

surplus, and undivided profits as set forth in its most recent report of condition so published);

(2) provides, in substance, (A) that during the life of the trust the trustee or custodian, if not otherwise remunerated, may charge against and collect from the income of the trust, and from the corpus thereof if no income is available, such fees for its services and such reimbursement for its expenses as are provided for in such instrument; (B) that no such charge or collection shall be made except for services theretofore performed or expenses theretofore incurred; (C) that no payment to the depositor of or a principal underwriter for such trust, or to any affiliated person or agent of such depositor or underwriter, shall be allowed the trustee or custodian as an expense (except that provision may be made for the payment to any such person of a fee, not exceeding such reasonable amount as the Commission may prescribe as compensation for performing bookkeeping and other administrative services, of a character normally performed by the trustee or custodian itself); and (D) that the trustee or custodian shall have possession of all securities and other property in which the funds of the trust are invested, all funds held for such investment, all equalization, redemption, and other special funds of the trust, and all income upon, accretions to, and proceeds of such property and funds, and shall segregate and hold the same in trust (subject only to the charges and collections allowed under clauses (A), (B), and (C)) until distribution thereof to the security holders of the trust;

(3) provides, in substance, that the trustee or custodian shall not resign until either (A) the trust has been completely liquidated and the proceeds of the liquidation distributed to the security holders of the trust, or (B) a successor trustee or custodian, having the qualifications prescribed in paragraph (1), has been designated and has accepted such trusteeship or custodianship; and

(4) provides, in substance, (A) that a record will be kept by the depositor or an agent of the depositor of the name and address of, and the shares issued by the trust and held by, every holder of any security issued pursuant to such instrument, insofar as such information is known to the depositor or agent; and (B) that whenever a security is deposited with the trustee in substitution for any security in which such security holder has an undivided interest, the depositor or the agent of the depositor will, within five days after such substitution, either deliver or mail to such security holder a notice of substitution, including an identification of the securities eliminated and the securities substituted, and a specification of the shares of such security holder affected by the substitution.

(b) The Commission may, after consultation with and taking into consideration the views of the Federal banking agencies (as defined in section 3 of the Federal Deposit Insurance Act), adopt rules and regulations, and issue orders, consistent with the protection of investors, prescribing the conditions under which a bank, or an affiliated person of a bank, either of which is an affiliated person of a principal underwriter for, or depositor of, a registered unit

investment trust, may serve as trustee or custodian under subsection (a)(1).

(c) It shall be unlawful for any depositor or trustee of a registered unit investment trust holding the security of a single issuer to substitute another security for such security unless the Commission shall have approved such substitution. The Commission shall issue an order approving such substitution if the evidence establishes that it is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title.

(d) In the event that a trust indenture, agreement of custodianship, or other instrument pursuant to which securities of a registered unit investment trust are issued does not comply with the requirements of subsection (a) of this section, such instrument will be deemed to meet such requirements if a written contract or agreement binding on the parties and embodying such requirements has been executed by the depositor on the one part and the trustee or custodian on the other part, and three copies of such contract or agreement have been filed with the Commission.

(e) Whenever the Commission has reason to believe that a unit investment trust is inactive and that its liquidation is in the interest of the security holders of such trust, the Commission may file a complaint seeking the liquidation of such trust in the district court of the United States in any district wherein any trustee of such trust resides or has its principal place of business. A copy of such complaint shall be served on every trustee of such trust, and notice of the proceeding shall be given such other interested persons in such manner and at such times as the court may direct. If the court determines that such liquidation is in the interest of the security holders of such trust, the court shall order such liquidation and, after payment of necessary expenses, the distribution of the proceeds to the security holders of the trust in such manner and on such terms as may to the court appear equitable.

(f) EXEMPTION.—

(1) IN GENERAL.—Subsection (a) does not apply to any registered separate account funding variable insurance contracts, or to the sponsoring insurance company and principal underwriter of such account.

(2) LIMITATION ON SALES.—It shall be unlawful for any registered separate account funding variable insurance contracts, or for the sponsoring insurance company of such account, to sell any such contract—

(A) unless the fees and charges deducted under the contract, in the aggregate, are reasonable in relation to the services rendered, the expenses expected to be incurred, and the risks assumed by the insurance company, and, beginning on the earlier of August 1, 1997, or the earliest effective date of any registration statement or amendment thereto for such contract following the date of enactment of this subsection, the insurance company so represents in the registration statement for the contract; and

(B) unless the insurance company—

(i) complies with all other applicable provisions of this section, as if it were a trustee or custodian of the registered separate account;

(ii) files with the insurance regulatory authority of the State which is the domiciliary State of the insurance company, an annual statement of its financial condition, which most recent statement indicates that the insurance company has a combined capital and surplus, if a stock company, or an unassigned surplus, if a mutual company, of not less than $1,000,000, or such other amount as the Commission may from time to time prescribe by rule, as necessary or appropriate in the public interest or for the protection of investors; and

(iii) together with its registered separate accounts, is supervised and examined periodically by the insurance authority of such State.

(3) FEES AND CHARGES.—For purposes of paragraph (2), the fees and charges deducted under the contract shall include all fees and charges imposed for any purpose and in any manner.

(4) REGULATORY AUTHORITY.—The Commission may issue such rules and regulations to carry out paragraph (2)(A) as it determines are necessary or appropriate in the public interest or for the protection of investors.

PERIODIC PAYMENT PLANS

SEC. 27. [80a–27] (a) It shall be unlawful for any registered investment company issuing periodic payment plan certificates, or for any depositor of or underwriter for such company, to sell any such certificate, if—

(1) the sales load on such certificate exceeds 9 per centum of the total payments to be made thereon;

(2) more than one-half of any of the first twelve monthly payments thereon, or their equivalent, is deducted for sales load;

(3) the amount of sales load deducted from any one of such first payments exceeds proportionately the amount deducted from any other such payment, or the amount deducted from any subsequent payment exceeds proportionately the amount deducted from any other subsequent payment;

(4) the first payment on such certificate is less than $20, or any subsequent payment is less than $10;

(5) if such registered company is a management company, the proceeds of such certificate or the securities in which such proceeds are invested are subject to management fees (other than fees for administrative services of the character described in clause (C), paragraph (2), of section 26(a)) exceeding such reasonable amount as the Commission may prescribe, whether such fees are payable to such company or to investment advisers thereof; or

(6) if such registered company is a unit investment trust the assets of which are securities issued by a management company, the depositor of or principal underwriter for such trust, or any affiliated person of such depositor or underwriter, is to receive from such management company or any affiliated

person thereof any fee or payment on account of payments on such certificate exceeding such reasonable amount as the Commission may prescribe.

(b) If it appears to the Commission, upon application or otherwise, that smaller companies are subjected to relatively higher operating costs and that in order to make due allowance therefor it is necessary or appropriate in the public interest and consistent with the protection of investors that a provision or provisions of paragraph (1), (2), or (3) of subsection (a) relative to sales load be relaxed in the case of certain registered investment companies issuing periodic payment plan certificates, or certain specified classes of such companies, the Commission is authorized by rules and regulations or order to grant any such company or class of companies appropriate qualified exemptions from the provisions of said paragraphs.

(c) It shall be unlawful for any registered investment company issuing periodic payment plan certificates, or for any depositor of or underwriter for such company, to sell any such certificate, unless—

(1) such certificate is a redeemable security; and

(2) the proceeds of all payments on such certificate (except such amounts as are deducted for sales load) are deposited with a trustee or custodian having the qualifications prescribed in paragraph (1) of section 26(a) for the trustees of unit investment trusts, and are held by such trustee or custodian under an indenture or agreement containing, in substance, the provisions required by paragraphs (2) and (3) of section 26(a) for the trust indentures of unit investment trusts.

(d) Notwithstanding subsection (a) of this section, it shall be unlawful for any registered investment company issuing periodic payment plan certificates, or for any depositor of or underwriter for such company, to sell any such certificate unless the certificate provides that the holder thereof may surrender the certificate at any time within the first eighteen months after the issuance of the certificate and receive in payment thereof, in cash, the sum of (1) the value of his account, and (2) an amount, from such underwriter or depositor, equal to that part of the excess paid for sales loading which is over 15 per centum of the gross payments made by the certificate holder. The Commission may make rules and regulations applicable to such underwriters and depositors specifying such reserve requirements as it deems necessary or appropriate in order for such underwriters and depositors to carry out the obligations to refund sales charges required by this subsection.

(e) With respect to any periodic payment plan certificate sold subject to the provisions of subsection (d) of this section, the registered investment company issuing such periodic payment plan certificate, or any depositor of or underwriter for such company, shall in writing (1) inform each certificate holder who has missed three payments or more, within thirty days following the expiration of fifteen months after the issuance of the certificate, or, if any such holder has missed one payment or more after such period of fifteen months but prior to the expiration of eighteen months after the issuance of the certificate, at any time prior to the expiration of such eighteen-month period, of his right to surrender his certifi-

cate as specified in subsection (d) of this section, and (2) inform the certificate holder of (A) the value of the holder's account as of the time the written notice was given to such holder, and (B) the amount to which he is entitled as specified in subsection (d) of this section. The Commission may make rules specifying the method, form, and contents of the notice required by this subsection.

(f) With respect to any periodic payment plan (other than a plan under which the amount of sales load deducted from any payment thereon does not exceed 9 per centum of such payment), the custodian bank for such plan shall mail to each certificate holder, within sixty days after the issuance of the certificate, a statement of charges to be deducted from the projected payments on the certificate and a notice of his right of withdrawal as specified in this section. The Commission may make rules specifying the method, form, and contents of the notice required by this subsection. The certificate holder may within forty-five days of the mailing of the notice specified in this subsection surrender his certificate and receive in payment thereof, in cash, the sum of (1) the value of his account, and (2) an amount, from the underwriter or depositor, equal to the difference between the gross payments made and the net amount invested. The Commission may make rules and regulations applicable to underwriters and depositors of companies issuing any such certificate specifying such reserve requirements as it deems necessary or appropriate in order for such underwriters and depositors to carry out the obligations to refund sales charges required by this subsection.

(g) Notwithstanding the provisions of subsections (a) and (d), a registered investment company issuing periodic payment plan certificates may elect, by written notice to the Commission, to be governed by the provisions of subsection (h) rather than the provisions of subsections (a) and (d) of this section.

(h) Upon making the election specified in subsection (g), it shall be unlawful for any such electing registered investment company issuing periodic payment plan certificates, or for any depositor of or underwriter for such company, to sell any such certificate, if—

(1) the sales load on such certificate exceeds 9 per centum of the total payments to be made thereon;

(2) more than 20 per centum of any payment thereon is deducted for sales load, or an average of more than 16 per centum is deducted for sales load from the first forty-eight monthly payments thereon, or their equivalent;

(3) the amount of sales load deducted from any one of the first twelve monthly payments, the thirteenth through twenty-fourth monthly payments, the twenty-fifth through thirty-sixth monthly payments, or the thirty-seventh through forty-eighth monthly payments, or their equivalents, respectively, exceeds proportionately the amount deducted from any other such payment, or the amount deducted from any subsequent payment exceeds proportionately the amount deducted from any other subsequent payment;

(4) the deduction for sales load on the excess of the payment or payments in any month over the minimum monthly payment, or its equivalent, to be made on the certificate ex-

ceeds the sales load applicable to payments subsequent to the first forty-eight monthly payments or their equivalent;

(5) the first payment on such certificate is less than $20, or any subsequent payment is less than $10;

(6) if such registered company is a management company, the proceeds of such certificate or the securities in which such proceeds are invested are subject to management fees (other than fees for administrative services of the character described in clause (C) of paragraph (2) of section 26(a)) exceeding such reasonable amount as the Commission may prescribe, whether such fees are payable to such company or to investment advisers thereof; or

(7) if such registered company is a unit investment trust the assets of which are securities issued by a management company, the depositor of or principal underwriter for such trust, or any affiliated person of such depositor or underwriter, is to receive from such management company or any affiliated person thereof any fee or payment on account of payments on such certificate exceeding such reasonable amount as the Commission may prescribe.

(i)(1) This section does not apply to any registered separate account funding variable insurance contracts, or to the sponsoring insurance company and principal underwriter of such account, except as provided in paragraph (2).

(2) It shall be unlawful for any registered separate account funding variable insurance contracts, or for the sponsoring insurance company of such account, to sell any such contract unless—

(A) such contract is a redeemable security; and

(B) the insurance company complies with section 26(f) and any rules or regulations issued by the Commission under section 26(f).

(j) TERMINATION OF SALES.—

(1) TERMINATION.—Effective 30 days after the date of enactment of the Military Personnel Financial Services Protection Act, it shall be unlawful, subject to subsection (i)—

(A) for any registered investment company to issue any periodic payment plan certificate; or

(B) for such company, or any depositor of or underwriter for any such company, or any other person, to sell such a certificate.

(2) NO INVALIDATION OF EXISTING CERTIFICATES.—Paragraph (1) shall not be construed to alter, invalidate, or otherwise affect any rights or obligations, including rights of redemption, under any periodic payment plan certificate issued and sold before 30 days after such date of enactment.

FACE-AMOUNT CERTIFICATE COMPANIES

SEC. 28. [80a–28] (a) It shall be unlawful for any registered face-amount certificate company to issue or sell any face-amount certificate, or to collect or accept any payment on any such certificate issued by such company on or after the effective date of this title, unless—

(1) such company, if organized before March 15, 1940, was actively and continuously engaged in selling face-amount certificates on and before that date, and has outstanding capital stock worth upon a fair valuation of assets not less than $50,000; or if organized on or after March 15, 1940, has capital stock in an amount not less than $250,000 which has been bona fide subscribed and paid for in cash; and

(2) such company maintains at all times minimum certificate reserves on all its outstanding face-amount certificates in an aggregate amount calculated and adjusted as follows:

(A) the reserves for each certificate of the installment type shall be based on assumed annual, semi-annual, quarterly, or monthly reserve payments according to the manner in which gross payments for any certificate year are made by the holder, which reserve payments shall be sufficient in amount, as and when accumulated at a rate not to exceed 3½ per centum per annum compounded annually, to provide the minimum maturity or face amount of the certificate when due. Such reserve payments may be graduated according to certificate years so that the reserve payment or payments for the first certificate year shall amount to at least 50 per centum of the required gross annual payment for such year and the reserve payment or payments for each of the second to fifth certificate years inclusive shall amount to at least 93 per centum of each such year's required gross annual payment and for the sixth and each subsequent certificate year the reserve payment or payments shall amount to at least 96 per centum of each such year's required gross annual payment: *Provided,* That such aggregate reserve payments shall amount to at least 93 per centum of the aggregate gross annual payments required to be made by the holder to obtain the maturity of the certificate. The company may at its option take as loading from the gross payment or payments for a certificate year, as and when made by the certificate holder, an amount or amounts equal in the aggregate for such year to not more than the excess, if any, of the gross payment or payments required to be made by the holder for such year, over and above the percentage of the gross annual payment required herein for such year for reserve purposes. Such loading may be taken by the company prior to or after the setting up of the reserve payment or payments for such year and the reserve payment or payments for such year may be graduated and adjusted to correspond with the amount of the gross payment or payments made by the certificate holder for such year less the loading so taken;

(B) if the foregoing minimum percentages of the gross annual payments required under the provisions of such certificate should produce reserve payments larger than are necessary at 3½ per centum per annum compounded annually to provide the minimum maturity or face amount of the certificate when due, the reserve shall be based upon reserve payments accumulated as provided under

preceding subparagraph (A) of this paragraph except that in lieu of the 3½ per centum rate specified therein, such rate shall be lowered to the minimum rate, expressed in multiples of one-eighth of 1 per centum, which will accumulate such reserve payments to the maturity value when due;

(C) if the actual annual gross payment to be made by the certificate holder on any certificate issued prior to or after the effective date of this Act is less than the amount of any assumed reserve payment or payments for a certificate year, such company shall maintain as a part of such minimum certificate reserves a deficiency reserve equal to the total present value of future deficiencies in the gross payments, calculated at a rate not to exceed 3½ per centum per annum compounded annually;

(D) for each certificate of the installment type the amount of the reserve shall at any time be at least equal to (1) the then amount of the reserve payments set up under section 28(a)(2) (A) or (B); (2) the accumulations on such reserve payments as computed under subparagraphs (A) or (B) of this paragraph (2); (3) the amount of any deficiency reserve required under subparagraph (C) hereof; and (4) such amount as shall have been credited to the account of each certificate holder in the form of any credit, or any dividend, or any interest in addition to the minimum maturity amount specified in such certificate, plus any accumulations on any amount or amounts so credited, at a rate not exceeding 3½ per centum per annum compounded annually;

(E) for each certificate which is fully paid, including any fully paid obligations resulting from or effected upon the maturity of the previously issued certificate, and for each paid-up certificate issued as provided in subsection (f) of this section prior to maturity, the amount of the reserve shall at any time be at least equal to (1) such amount as and when accumulated at a rate not to exceed 3½ per centum per annum compounded annually, will provide the amount or amounts payable when due and (2) such amount as shall have been credited to the account of each such certificate holder in the form of any credit, or any dividend, or any interest in addition to the minimum maturity amount specified in the certificate, plus any accumulations on any amount or amounts so credited, at a rate not exceeding 3½ per centum per annum compounded annually;

(F) for each certificate of the installment type under which gross payments have been made by or credited to the holder thereof covering a payment period or periods or any part thereof beyond the then current payment period as defined by the terms of such certificate, and for which period or periods no reserve has been set up under subparagraph (A) or (B) hereof, an advance payment reserve shall be set up and maintained in the amount of the present value of any such unapplied advance gross pay-

ments, computed at a rate not to exceed 3½ per centum per annum compounded annually;

(G) such appropriate contingency reserves for death and disability benefits and for reinstatement rights on any such certificate providing for such benefits or rights as the Commission shall prescribe by rule, regulation, or order based upon the experience of face-amount companies in relation to such contingencies.

At no time shall the aggregate certificate reserves herein required by subparagraphs (A) to (F), inclusive, be less than the aggregate surrender values and other amounts to which all certificate holders may be then entitled.

For the purpose of this subsection (a), no certificate of the installment type shall be deemed to be outstanding if before a surrender value has been attained the holder thereof has been in continuous default in making his payments thereon for a period of one year.

(b) It shall be unlawful for any registered face-amount certificate company to issue or sell any face-amount certificate, or to collect or accept any payment on any such certificate issued by such company on or after the effective date of this title, unless such company has, in cash or qualified investments, assets having a value not less than the aggregate amount of the capital stock requirement and certificate reserves as computed under the provisions of subsection (a) hereof. As used in this subsection, "qualified investments" means investments of a kind which life-insurance companies are permitted to invest in or hold under the provisions of the Code of the District of Columbia as heretofore or hereafter amended, and such other investments as the Commission shall by rule, regulation, or order authorize as qualified investments. Such investments shall be valued in accordance with the provisions of said Code where such provisions are applicable. Investments to which such provisions do not apply shall be valued in accordance with such rules, regulations, or orders as the Commission shall prescribe for the protection of investors.

(c) The Commission shall by rule, regulation, or order, in the public interest or for the protection of investors, require a registered face-amount certificate company to deposit and maintain, upon such terms and conditions as the Commission shall prescribe and as are appropriate for the protection of investors, with one or more institutions having the qualifications required by paragraph (1) of section 26(a) for a trustee of a unit investment trust, all or any part of the investments maintained by such company as certificate reserve requirements under the provisions of subsection (b) hereof: *Provided, however,* That where qualified investments are maintained on deposit by such company in respect of its liabilities under certificates issued to or held by residents of any State as required by the statute of such State or by any order, regulation, or requirement of such State or any official or agency thereof, the amount so on deposit, but not to exceed the amount of reserves required by subsection (a) hereof for the certificates so issued or held,

shall be deducted from the amount of qualified investments that may be required to be deposited hereunder.

Assets which are qualified investments under subsection (b) and which are deposited under or as permitted by this subsection (c), may be used and shall be considered as a part of the assets required to be maintained under the provisions of said subsection (b).

(d) It shall be unlawful for any registered face-amount certificate company to issue or sell any face-amount certificate, or to collect or accept any payment on any such certificate issued by such company on or after the effective date of this title, unless such certificate contains a provision or provisions to the effect—

(1) that, in respect of any certificate of the installment type, during the first certificate year the holder of the certificate, upon surrender thereof, shall be entitled to a value payable in cash not less than the reserve payments as specified in subparagraph (A) or (B) of paragraph (2) of subsection (a) and at the end of such certificate year, a value payable in cash at least equal to 50 per centum of the amount of the gross annual payment required thereby for such year;

(2) that, in respect of any certificate of the installment type, at any time after the expiration of the first certificate year and prior to maturity, the holder of the certificate, upon surrender thereof, shall be entitled to a value payable in cash not less than the then amount of the reserve for such certificate required by numbered items (1) and (2) of subparagraph (D) of paragraph (2) of subsection (a) hereof, less a surrender charge that shall not exceed 2 per centum of the face or maturity amount of the certificate, or 15 per centum of the amount of such reserve, whichever is the lesser, but in no event shall such value be less than 50 per centum of the amount of such reserve. The amount of the surrender value for the end of each certificate year shall be set out in the certificate;

(3) that, in respect of any certificate of the installment type, the holder of the certificate, upon surrender thereof for cash or upon receipt of a paid-up certificate as provided in subsection (f) hereof, shall be entitled to a value payable in cash equal to the then amount of any advance payment reserve under such certificate required by subparagraph (F) of paragraph (2) of subsection (a) hereof in addition to any other amounts due the holder hereunder;

(4) that at any time prior to maturity, in respect of any certificate which is fully paid, the holder of the certificate, upon surrender thereof, shall be entitled to a value payable in cash not less than the then amount of the reserve for such certificate required by item (1) of subparagraph (E) of paragraph (2) of subsection (a) hereof, less a surrender charge that shall not exceed 2 per centum of the face or maturity amount of the certificate, or 15 per centum of the amount of such reserve, whichever is the lesser: *Provided, however,* That such surrender charge shall not apply as to any obligations of a fully paid type resulting from the maturity of a previously issued certificate. The amount of the surrender value for the end of each certificate year shall be set out in the certificate;

(5) that in respect of any certificate, the holder of the certificate, upon maturity, upon surrender thereof for cash or upon receipt of a paid-up certificate as provided in subsection (f) hereof, shall be entitled to a value payable in cash equal to the then amount of the reserve, if any, for such certificate required by item (4) of subparagraph (D) of paragraph (2) of subsection (a) hereof or item (2) of subparagraph (E) of paragraph (2) of subsection (a) hereof in addition to any other amounts due the holder hereunder.

The term "certificate year" as used in this section in respect of any certificate of the installment type means a period or periods for which one year's payment or payments as provided by the certificate have been made thereon by the holder and the certificate maintained in force by such payments for the time for which the same have been made, and in respect of any certificate which is fully paid or paid-up means any year ending on the anniversary of the date of issuance of the certificate.

Any certificate may provide for loans or advances by the company to the certificate holder on the security of such certificate upon terms prescribed therein but at an interest rate not exceeding 6 per centum per annum. The amount of the required reserves, deposits, and the surrender values thereof available to the holder may be adjusted to take into account any unpaid balance on such loans or advances and interest thereon, for the purposes of this subsection and subsections (b) and (c) hereof.

Any certificate may provide that the company at its option may, prior to the maturity thereof, defer any payment or payments to the certificate holder to which he may be entitled under this subsection (d), for a period of not more than thirty days: *Provided,* That in the event such option is exercised by the company, interest shall accrue on any payment or payments due to the holder, for the period of such deferment at a rate equal to that used in accumulating the reserves for such certificate: *And provided further,* That the Commission may, by rules and regulations or orders in the public interest or for the protection of investors, make provision for any other deferment upon such terms and conditions as it shall prescribe.

(e) It shall be unlawful for any registered face-amount certificate company to issue or sell any face-amount certificate, or to collect or accept any payment on any such certificate issued by such company on or after the effective date of this title, which certificate makes the holder liable to any legal action or proceeding for any unpaid amount on such certificate.

(f) It shall be unlawful for any registered face-amount certificate company to issue or sell any face-amount certificate, or to collect or accept any payment on any such certificate issued by such company on or after the effective date of this title, (1) unless such face-amount certificate contains a provision or provisions to the effect that the holder shall have an optional right to receive a paid-up certificate in lieu of the then attained cash surrender value provided therein and in the amount of such value plus accumulations thereon at a rate to be specified in the paid-up certificate equal to that used in computing the reserve on the original certificate under subparagraph (A) or (B) of paragraph (2) of subsection (a) of this

section, such paid-up certificate to become due and payable at the end of a period equal to the balance of the term of such original certificate before maturity; and during the period prior to maturity such paid-up certificate shall have a cash value upon surrender thereof equal to the then amount of the reserve therefor; and (2) unless such face-amount certificate contains a further provision or provisions to the effect that if the holder be in continuous default in his payments on such certificate for a period of six months without having exercised his option to receive a paid-up certificate, as herein provided, the company at the expiration of such six months shall pay the surrender value in cash if such value is less than $100 or if such value is $100 or more shall issue such paid-up certificate to such holder and such payment or issuance, plus the payment of all other amounts to which he may be then entitled under the original certificate, shall operate to cancel his original certificate: *Provided,* That in lieu of the issuance of a new paid-up certificate the original certificate may be converted into a paid-up certificate with the same effect; and (3) unless, where such certificate provides, in the event of default, for the deferment of payments thereon by the holder or of the due dates of such payments or of the maturity date of the certificate, it shall also provide in effect for the right of reinstatement by the holder of the certificate after default and for an option in the holder, at the time of reinstatement, to make up the payment or payments for the default period next preceding such reinstatement with interest thereon not exceeding 6 per centum per annum, with the same effect as if no such default in making such payments had occurred.

The term "default" as used in this subsection (f) shall, without restricting its usual meaning, include a failure to make a payment or payments as and when provided by the certificate.

(g) The foregoing provisions of this section shall not apply to a face-amount certificate company which on or before the effective date of this Act has discontinued the offering of face-amount certificates to the public and issues face-amount certificates only to the holders of certificates previously issued pursuant to an obligation expressed or implied in such certificates.

(h) It shall be unlawful for any registered face-amount certificate company which does not maintain the minimum certificate reserve on all its outstanding face-amount certificates issued prior to the effective date of this Act, in an aggregate amount calculated and adjusted as provided in section 28, to declare or pay any dividends on the shares of such company for or during any calendar year which shall exceed one-third of the net earnings for the next preceding calendar year or which shall exceed 10 per centum of the aggregate net earnings for the next preceding five calendar years, whichever is the lesser amount, or any dividend which shall have been forbidden by the Commission pursuant to the provision of the next sentence of this paragraph. At least thirty days before such company shall declare, pay, or distribute any dividend, it shall give the Commission written notice of its intention to declare, pay, or distribute the same; and if at any time it shall appear to the Commission that the declaration, payment or distribution of any dividend for or during any calendar year might impair the financial integrity of such company or its ability to meet its liabilities under

its outstanding face-amount certificates, it may by order forbid the declaration, distribution, or payment of any such dividend.

(i) The foregoing provisions of this section shall apply to all face-amount certificates issued prior to the effective date of this subsection; to the collection or acceptance of any payment on such certificates; to the issuance of face-amount certificates to the holders of such certificates pursuant to an obligation expressed or implied in such certificates; to the provisions of such certificates; to the minimum certificate reserves and deposits maintained with respect thereto; and to the assets that the issuer of such certificate was and is required to have with respect to such certificates. With respect to all face-amount certificates issued after the effective date of this subsection, the provisions of this section shall apply except as hereinafter provided.

(1) Notwithstanding subparagraph (A) of paragraph (2) of subsection (a), the reserves for each certificate of the installment type shall be based on assumed annual, semiannual, quarterly, or monthly reserve payments according to the manner in which gross payments for any certificate year are made by the holder, which reserve payments shall be sufficient in amount, as and when accumulated at a rate not to exceed 3½ per centum per annum compounded annually, to provide the minimum maturity or face amount of the certificate when due. Such reserve payments may be graduated according to certificate years so that the reserve payment or payments for the first three certificate years shall amount to at least 80 per centum of the required gross annual payment for such years; the reserve payment or payments for the fourth certificate year shall amount to at least 90 per centum of such year's required gross annual payment; the reserve payment or payments for the fifth certificate year shall amount to at least 93 per centum of such year's gross annual payment; and for the sixth and each subsequent certificate year the reserve payment or payments shall amount to at least 96 per centum of each such year's required gross annual payment: *Provided,* That such aggregate reserve payments shall amount to at least 93 per centum of the aggregate gross annual payments required to be made by the holder to obtain the maturity of the certificate. The company may at its option take as loading from the gross payment or payments for a certificate year, as and when made by the certificate holder, an amount or amounts equal in the aggregate for such year to not more than the excess, if any, of the gross payment or payments required to be made by the holder for such year, over and above the percentage of the gross annual payment required herein for such year for reserve purposes. Such loading may be taken by the company prior to or after the setting up of the reserve payment or payments for such year and the reserve payment or payments for such year may be graduated and adjusted to correspond with the amount of the gross payment or payments made by the certificate holder for such year less the loading so taken.

(2) Notwithstanding paragraphs (1) and (2) of subsection (d), (A) in respect of any certificate of the installment type, during the first certificate year, the holder of the certificate, upon surrender thereof, shall be entitled to a value payable in cash not less than 80 per centum of the amount of the gross payments made on the

certificate; and (B) in respect of any certificate of the installment type, at any time after the expiration of the first certificate year and prior to maturity, the holder of the certificate, upon surrender thereof, shall be entitled to a value payable in cash not less than the then amount of the reserve for such certificate required by clauses (1) and (2) of subparagraph (D) of paragraph (2) of subsection (a), less a surrender charge that shall not exceed 2 per centum of the face or maturity amount of the certificate, or 15 per centum of the amount of such reserve, whichever is the lesser, but in no event shall such value be less than 80 per centum of the gross payments made on the certificate. The amount of the surrender value for the end of each certificate year shall be set out in the certificate.

BANKRUPTCY OF FACE-AMOUNT CERTIFICATE COMPANIES

SEC. 29. [Section 29 amended section 67 and section 44 of the Bankruptcy Act, with respect to the bankruptcy of face-amount certificate companies, as defined in section 4(1) of the Investment Company Act of 1940.]

PERIODIC AND OTHER REPORTS; REPORTS OF AFFILIATED PERSONS

SEC. 30. [80a–29] (a) Every registered investment company shall file annually with the Commission such information, documents, and reports as investment companies having securities registered on a national securities exchange are required to file annually pursuant to section 13(a) of the Securities Exchange Act of 1934 and the rules and regulations issued thereunder.

(b) Every registered investment company shall file with the Commission—

(1) such information, documents, and reports (other than financial statements), as the Commission may require to keep reasonably current the information and documents contained in the registration statement of such company filed under this title; and

(2) copies of every periodic or interim report or similar communication containing financial statements and transmitted to any class of such company's security holders, such copies to be filed not later than ten days after such transmission.

Any information or documents contained in a report or other communication to security holders filed pursuant to paragraph (2) may be incorporated by reference in any report subsequently or concurrently filed pursuant to paragraph (1).

(c)(1) The Commission shall take such action as it deems necessary or appropriate, consistent with the public interest and the protection of investors, to avoid unnecessary reporting by, and minimize the compliance burdens on, registered investment companies and their affiliated persons in exercising its authority—

(A) under subsection (f); and

(B) under subsection (b)(1), if the Commission requires the filing of information, documents, and reports under that subsection on a basis more frequently than semiannually.

(2) Action taken by the Commission under paragraph (1) shall include considering, and requesting public comment on—

(A) feasible alternatives that minimize the reporting burdens on registered investment companies; and

(B) the utility of such information, documents, and reports to the Commission in relation to the costs to registered investment companies and their affiliated persons of providing such information, documents, and reports.

(d) The Commission shall issue rules and regulations permitting the filing with the Commission, and with any national securities exchange concerned, of copies of periodic reports, or of extracts therefrom, filed by any registered investment company pursuant to subsections (a) and (b), in lieu of any reports and documents required of such company under section 13 or 15(d) of the Securities Exchange Act of 1934.

(e) Every registered investment company shall transmit to its stockholders, at least semiannually, reports containing such of the following information and financial statements or their equivalent, as of a reasonably current date, as the Commission may prescribe by rules and regulations for the protection of investors, which reports shall not be misleading in any material respect in the light of the reports required to be filed pursuant to subsections (a) and (b):

(1) a balance sheet accompanied by a statement of the aggregate value of investments on the date of such balance sheet;

(2) a list showing the amounts and values of securities owned on the date of such balance sheet;

(3) a statement of income, for the period covered by the report, which shall be itemized at least with respect to each category of income and expense representing more than 5 per centum of total income or expense;

(4) a statement of surplus, which shall be itemized at least with respect to each charge or credit to the surplus account which represents more than 5 per centum of the total charges or credits during the period covered by the report;

(5) a statement of the aggregate remuneration paid by the company during the period covered by the report (A) to all directors and to all members of any advisory board for regular compensation; (B) to each director and to each member of an advisory board for special compensation; (C) to all officers; and (D) to each person of whom any officer or director of the company is an affiliated person; and

(6) a statement of the aggregate dollar amounts of purchases and sales of investment securities, other than Government securities, made during the period covered by the report: *Provided,* That if in the judgment of the Commission any item required under this subsection is inapplicable or inappropriate to any specified type or types of investment company, the Commission may by rules and regulations permit in lieu thereof the inclusion of such item of a comparable character as it may deem applicable or appropriate to such type or types of investment company.

(f) The Commission may, by rule, require that semiannual reports containing the information set forth in subsection (e) include

such other information as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

(g) Financial statements contained in annual reports required pursuant to subsections (a) and (e), if required by the rules and regulations of the Commission, shall be accompanied by a certificate of independent public accountants. The certificate of such independent public accountants shall be based upon an audit not less in scope or procedures followed than that which independent public accountants would ordinarily make for the purpose of presenting comprehensive and dependable financial statements, and shall contain such information as the Commission may prescribe, by rules and regulations in the public interest or for the protection of investors, as to the nature and scope of the audit and the findings and opinion of the accountants. Each such report shall state that such independent public accountants have verified securities owned, either by actual examination, or by receipt of a certificate from the custodian, as the Commission may prescribe by rules and regulations.

(h) Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of outstanding securities (other than short-term paper) of which a registered closed-end company is the issuer or who is an officer, director, member of an advisory board, investment adviser, or affiliated person of an investment adviser of such a company shall in respect of his transactions in any securities of such company (other than short-term paper) be subject to the same duties and liabilities as those imposed by section 16 of the Securities Exchange Act of 1934 upon certain beneficial owners, directors, and officers in respect of their transactions in certain equity securities.

(i) DISCLOSURE TO CHURCH PLAN PARTICIPANTS.—A person that maintains a church plan that is excluded from the definition of an investment company solely by reason of section 3(c)(14) shall provide disclosure to plan participants, in writing, and not less frequently than annually, and for new participants joining such a plan after May 31, 1996, as soon as is practicable after joining such plan, that—

(1) the plan, or any company or account maintained to manage or hold plan assets and interests in such plan, company, or account, are not subject to registration, regulation, or reporting under this title, the Securities Act of 1933, the Securities Exchange Act of 1934, or State securities laws; and

(2) plan participants and beneficiaries therefore will not be afforded the protections of those provisions.

(j) NOTICE TO COMMISSION.—The Commission may issue rules and regulations to require any person that maintains a church plan that is excluded from the definition of an investment company solely by reason of section 3(c)(14) to file a notice with the Commission containing such information and in such form as the Commission may prescribe as necessary or appropriate in the public interest or consistent with the protection of investors.

(k) DATA STANDARDS FOR REPORTS.—

(1) REQUIREMENT.—The Commission shall, by rule, adopt data standards for all reports required to be filed with the Commission under this section, except that the Commission

may exempt exhibits, signatures, and certifications from those data standards.

(2) CONSISTENCY.—The data standards required under paragraph (1) shall incorporate, and ensure compatibility with (to the extent feasible), all applicable data standards established in the rules promulgated under section 124 of the Financial Stability Act of 2010, including, to the extent practicable, by having the characteristics described in clauses (i) through (vi) of subsection (c)(1)(B) of such section 124.

ACCOUNTS AND RECORDS

SEC. 31. [80a–30] (a) MAINTENANCE OF RECORDS.—

(1) IN GENERAL.—Each registered investment company, and each underwriter, broker, dealer, or investment adviser that is a majority-owned subsidiary of such a company, shall maintain and preserve such records (as defined in section 3(a)(37) of the Securities Exchange Act of 1934) for such period or periods as the Commission, by rules and regulations, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Each investment adviser that is not a majority-owned subsidiary of, and each depositor of any registered investment company, and each principal underwriter for any registered investment company other than a closed-end company, shall maintain and preserve for such period or periods as the Commission shall prescribe by rules and regulations, such records as are necessary or appropriate to record such person's transactions with such registered company. Each person having custody or use of the securities, deposits, or credits of a registered investment company shall maintain and preserve all records that relate to the custody or use by such person of the securities, deposits, or credits of the registered investment company for such period or periods as the Commission, by rule or regulation, may prescribe, as necessary or appropriate in the public interest or for the protection of investors.

(2) MINIMIZING COMPLIANCE BURDEN.—In exercising its authority under this subsection, the Commission shall take such steps as it deems necessary or appropriate, consistent with the public interest and for the protection of investors, to avoid unnecessary recordkeeping by, and minimize the compliance burden on, persons required to maintain records under this subsection (hereafter in this section referred to as "subject persons"). Such steps shall include considering, and requesting public comment on—

(A) feasible alternatives that minimize the recordkeeping burdens on subject persons;

(B) the necessity of such records in view of the public benefits derived from the independent scrutiny of such records through Commission examination;

(C) the costs associated with maintaining the information that would be required to be reflected in such records; and

(D) the effects that a proposed recordkeeping requirement would have on internal compliance policies and procedures.

(b) EXAMINATIONS OF RECORDS.—

(1) IN GENERAL.—All records required to be maintained and preserved in accordance with subsection (a) shall be subject at any time and from time to time to such reasonable periodic, special, and other examinations by the Commission, or any member or representative thereof, as the Commission may prescribe.

(2) AVAILABILITY.—For purposes of examinations referred to in paragraph (1), any subject person shall make available to the Commission or its representatives any copies or extracts from such records as may be prepared without undue effort, expense, or delay as the Commission or its representatives may reasonably request.

(3) COMMISSION ACTION.—The Commission shall exercise its authority under this subsection with due regard for the benefits of internal compliance policies and procedures and the effective implementation and operation thereof.

(4) RECORDS OF PERSONS WITH CUSTODY OR USE.—

(A) IN GENERAL.—Records of persons having custody or use of the securities, deposits, or credits of a registered investment company that relate to such custody or use, are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations and other information and document requests by representatives of the Commission, as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

(B) CERTAIN PERSONS SUBJECT TO OTHER REGULATION.—Any person that is subject to regulation and examination by a Federal financial institution regulatory agency (as such term is defined under section 212(c)(2) of title 18, United States Code) may satisfy any examination request, information request, or document request described under subparagraph (A), by providing to the Commission a detailed listing, in writing, of the securities, deposits, or credits of the registered investment company within the custody or use of such person.

(c) REGULATORY AUTHORITY.—The Commission may, in the public interest or for the protection of investors, issue rules and regulations providing for a reasonable degree of uniformity in the accounting policies and principles to be followed by registered investment companies in maintaining their accounting records and in preparing financial statements required pursuant to this title.

(d) EXEMPTION AUTHORITY.—The Commission, upon application made by any registered investment company, may by order exempt a specific transaction or transactions from the provisions of any rule or regulation made pursuant to subsection (e), if the Commission finds that such rule or regulation should not reasonably be applied to such transaction.

ACCOUNTANTS AND AUDITORS

SEC. 32. [80a–31] (a) It shall be unlawful for any registered management company or registered face-amount certificate company to file with the Commission any financial statement signed or certified by an independent public accountant, unless—

(1) such accountant shall have been selected at a meeting held within thirty days before or after the beginning of the fiscal year or before the annual meeting of stockholders in that year by the vote, cast in person, of a majority of those members of the board of directors who are not interested persons of such registered company;

(2) such selection shall have been submitted for ratification or rejection at the next succeeding annual meeting of stockholders if such meeting be held, except that any vacancy occurring between annual meetings, due to the death or resignation of the accountant, may be filled by the vote of a majority of those members of the board of directors who are not interested persons of such registered company, cast in person at a meeting called for the purpose of voting on such action;

(3) the employment of such accountant shall have been conditioned upon the right of the company by vote of a majority of the outstanding voting securities at any meeting called for the purpose to terminate such employment forthwith without any penalty; and

(4) such certificate or report of such accountant shall be addressed both to the board of directors of such registered company and to the security holders thereof.

If the selection of an accountant has been rejected pursuant to paragraph (2) or his employment terminated pursuant to paragraph (3), the vacancy so occurring may be filled by a vote of a majority of the outstanding voting securities, either at the meeting at which the rejection or termination occurred or, if not so filled, at a subsequent meeting which shall be called for the purpose. In the case of a common-law trust of the character described in section 16(c), no ratification of the employment of such accountant shall be required but such employment may be terminated and such accountant removed by action of the holders of record of a majority of the outstanding shares of beneficial interest in such trust in the same manner as is provided in section 16(c) in respect of the removal of a trustee, and all the provisions therein contained as to the calling of a meeting shall be applicable. In the event of such termination and removal, the vacancy so occurring may be filled by action of the holders of record of a majority of the shares of beneficial interest either at the meeting, if any, at which such termination and removal occurs, or by instruments in writing filed with the custodian, or if not so filed within a reasonable time then at a subsequent meeting which shall be called by the trustees for the purpose. The provisions of paragraph (42) of section 2(a) as to a majority shall be applicable to the vote cast at any meeting of the shareholders of such a trust held pursuant to this subsection.

(b) No registered management company or registered face-amount certificate company shall file with the Commission any financial statement in the preparation of which the controller or

other principal accounting officer or employee of such company participated, unless such controller, officer or employee was selected, either by vote of the holders of such company's voting securities at the last annual meeting of such security holders, or by the board of directors of such company.

(c) The Commission is authorized, by rules and regulations or order in the public interest or for the protection of investors, to require accountants and auditors to keep reports, work sheets, and other documents and papers relating to registered investment companies for such period or periods as the Commission may prescribe, and to make the same available for inspection by the Commission or any member or representative thereof.

FILING OF DOCUMENTS WITH COMMISSION IN CIVIL ACTIONS

SEC. 33. [80a–32] Every registered investment company which is a party and every affiliated person of such company who is a party defendant to any action or claim by a registered investment company or a security holder thereof in a derivative or representative capacity against an officer, director, investment adviser, trustee, or depositor of such company, shall file with the Commission, unless already so filed, (1) a copy of all pleadings, verdicts, or judgments filed with the court or served in connection with such action or claim, (2) a copy of any proposed settlement, compromise, or discontinuance of such action, and (3) a copy of such motions, transcripts, or other documents filed in or issued by the court or served in connection with such action or claim as may be requested in writing by the Commission. If any document referred to in clause (1) or (2)—

(A) is delivered to such company or party defendant, such document shall be filed with the Commission not later than ten days after the receipt thereof; or

(B) is filed in such court or delivered by such company or party defendant, such document shall be filed with the Commission not later than five days after such filing or delivery.

DESTRUCTION AND FALSIFICATION OF REPORTS AND RECORDS

SEC. 34. [80a–33] (a) It shall be unlawful for any person, except as permitted by rule, regulation, or order of the Commission, willfully to destroy, mutilate, or alter any account, book, or other document the preservation of which has been required pursuant to section 31(a) or 32(c).

(b) It shall be unlawful for any person to make any untrue statement of a material fact in any registration statement, application, report, account, record, or other document filed or transmitted pursuant to this title or the keeping of which is required pursuant to section 31(a). It shall be unlawful for any person so filing, transmitting, or keeping any such document to omit to state therein any fact necessary in order to prevent the statements made therein, in the light of the circumstances under which they were made, from being materially misleading. For the purposes of this subsection, any part of any such document which is signed or certified by an accountant or auditor in his capacity as such shall be deemed to

be made, filed, transmitted, or kept by such accountant or auditor, as well as by the person filing, transmitting, or keeping the complete document.

UNLAWFUL REPRESENTATIONS AND NAMES

SEC. 35. [80a–34] (a) MISREPRESENTATION OF GUARANTEES.—

(1) IN GENERAL.—It shall be unlawful for any person, issuing or selling any security of which a registered investment company is the issuer, to represent or imply in any manner whatsoever that such security or company—

(A) has been guaranteed, sponsored, recommended, or approved by the United States, or any agency, instrumentality or officer of the United States;

(B) has been insured by the Federal Deposit Insurance Corporation; or

(C) is guaranteed by or is otherwise an obligation of any bank or insured depository institution.

(2) DISCLOSURES.—Any person issuing or selling the securities of a registered investment company that is advised by, or sold through, a bank shall prominently disclose that an investment in the company is not insured by the Federal Deposit Insurance Corporation or any other government agency. The Commission may, after consultation with and taking into consideration the views of the Federal banking agencies (as defined in section 3 of the Federal Deposit Insurance Act), adopt rules and regulations, and issue orders, consistent with the protection of investors, prescribing the manner in which the disclosure under this paragraph shall be provided.

(3) DEFINITIONS.—The terms "insured depository institution" and "appropriate Federal banking agency" have the same meanings as given in section 3 of the Federal Deposit Insurance Act.

(b) It shall be unlawful for any person registered under any section of this title to represent or imply in any manner whatsoever that such person has been sponsored, recommended, or approved, or that his abilities or qualifications have in any respect been passed upon by the United States or any agency or officer thereof.

(c) No provision of subsection (a) or (b) shall be construed to prohibit a statement that a person or security is registered under this Act, the Securities Act of 1933, or the Securities Exchange Act of 1934, if such statement is true in fact and if the effect of such registration is not misrepresented.

(d) DECEPTIVE OR MISLEADING NAMES.—It shall be unlawful for any registered investment company to adopt as a part of the name or title of such company, or of any securities of which it is the issuer, any word or words that the Commission finds are materially deceptive or misleading. The Commission is authorized, by rule, regulation, or order, to define such names or titles as are materially deceptive or misleading.

BREACH OF FIDUCIARY DUTY

SEC. 36. [80a–35] (a) The Commission is authorized to bring an action in the proper district court of the United States, or in the

United States court of any territory or other place subject to the jurisdiction of the United States, alleging that a person who is, or at the time of the alleged misconduct was, serving or acting in one or more of the following capacities has engaged within five years of the commencement of the action or is about to engage in any act or practice constituting a breach of fiduciary duty involving personal misconduct in respect of any registered investment company for which such person so serves or acts, or at the time of the alleged misconduct, so served or acted—

(1) as officer, director, member of any advisory board, investment adviser, or depositor; or

(2) as principal underwriter, if such registered company is an open-end company, unit investment trust, or face-amount certificate company.

If such allegations are established, the court may enjoin such persons from acting in any or all such capacities either permanently or temporarily and award such injunctive or other relief against such person as may be reasonable and appropriate in the circumstances, having due regard to the protection of investors and to the effectuation of the policies declared in section 1(b) of this title.

(b) For the purposes of this subsection, the investment adviser of a registered investment company shall be deemed to have a fiduciary duty with respect to the receipt of compensation for services, or of payments of a material nature, paid by such registered investment company, or by the security holders thereof, to such investment adviser or any affiliated person of such investment adviser. An action may be brought under this subsection by the Commission, or by a security holder of such registered investment company on behalf of such company, against such investment adviser, or any affiliated person of such investment adviser, or any other person enumerated in subsection (a) of this section who has a fiduciary duty concerning such compensation or payments, for breach of fiduciary duty in respect of such compensation or payments paid by such registered investment company or by the security holders thereof to such investment adviser or person. With respect to any such action the following provisions shall apply:

(1) It shall not be necessary to allege or prove that any defendant engaged in personal misconduct, and the plaintiff shall have the burden of proving a breach of fiduciary duty.

(2) In any such action approval by the board of directors of such investment company of such compensation or payments, or of contracts or other arrangements providing for such compensation or payments, and ratification or approval of such compensation or payments, or of contracts or other arrangements providing for such compensation or payments, by the shareholders of such investment company, shall be given such consideration by the court as is deemed appropriate under all the circumstances.

(3) No such action shall be brought or maintained against any person other than the recipient of such compensation or payments, and no damages or other relief shall be granted against any person other than the recipient of such compensation or payments. No award of damages shall be recoverable

for any period prior to one year before the action was instituted. Any award of damages against such recipient shall be limited to the actual damages resulting from the breach of fiduciary duty and shall in no event exceed the amount of compensation or payments received from such investment company, or the security holders thereof, by such recipient.

(4) This subsection shall not apply to compensation or payments made in connection with transactions subject to section 17 of this title, or rules, regulations, or orders thereunder, or to sales loads for the acquisition of any security issued by a registered investment company.

(5) Any action pursuant to this subsection may be brought only in an appropriate district court of the United States.

(6) No finding by a court with respect to a breach of fiduciary duty under this subsection shall be made a basis (A) for a finding of a violation of this title for the purposes of sections 9 and 49 of this title, section 15 of the Securities Exchange Act of 1934, or section 203 of title II of this Act, or (B) for an injunction to prohibit any person from serving in any of the capacities enumerated in subsection (a) of this section.

(c) For the purposes of subsections (a) and (b) of this section, the term "investment adviser" includes a corporate or other trustee performing the functions of an investment adviser.

LARCENY AND EMBEZZLEMENT

SEC. 37. [80a–36] Whoever steals, unlawfully abstracts, unlawfully and willfully converts to his own use or to the use of another, or embezzles any of the moneys, funds, securities, credits, property, or assets of any registered investment company shall be deemed guilty of a crime, and upon conviction thereof shall be subject to the penalties provided in section 49. A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts.

RULES, REGULATIONS, AND ORDERS; GENERAL POWERS OF COMMISSION

SEC. 38. [80a–37] (a) The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the powers conferred upon the Commission elsewhere in this title, including rules and regulations defining accounting, technical, and trade terms used in this title, and prescribing the form or forms in which information required in registration statements, applications, and reports to the Commission shall be set forth. For the purposes of its rules or regulations the Commission may classify persons, securities, and other matters within its jurisdiction and prescribe different requirements for different classes of persons, securities, or matters.

(b) The Commission, by such rules and regulations or order as it deems necessary or appropriate in the public interest or for the protection of investors, may authorize the filing of any information or documents required to be filed with the Commission under this

title, title II of this Act, the Securities Act of 1933, the Securities Exchange Act of 1934, or the Trust Indenture Act of 1939, by incorporating by reference any information or documents theretofore or concurrently filed with the Commission under this title or any of such Acts.

(c) No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

RULES AND REGULATIONS; PROCEDURE FOR ISSUANCE

SEC. 39. [80a–38] Subject to the provisions of the Federal Register Act and regulations prescribed under the authority thereof, the rules and regulations of the Commission under this title, and amendments thereof, shall be effective upon publication in the manner which the Commission shall prescribe, or upon such later date as may be provided in such rules and regulations.

ORDERS; PROCEDURE FOR ISSUANCE

SEC. 40. [80a–39] (a) Orders of the Commission under this title shall be issued only after appropriate notice and opportunity for hearing. Notice to the parties to a proceeding before the Commission shall be given by personal service upon each party or by registered mail or certified mail or confirmed telegraphic notice to the party's last known business address. Notice to interested persons, if any, other than parties may be given in the same manner or by publication in the Federal Register.

(b) The Commission may provide, by appropriate rules or regulations, that an application verified under oath may be admissible in evidence in a proceeding before the Commission and that the record in such a proceeding may consist, in whole or in part, of such application.

(c) In any proceeding before the Commission, the Commission, in accordance with such rules and regulations as it may prescribe, shall admit as a party any interested State or State agency, and may admit as a party any representative of interested security holders, or any other person whose participation in the proceeding may be in the public interest or for the protection of investors.

HEARINGS BY COMMISSION

SEC. 41. [80a–40] Hearings may be public and may be held before the Commission, any member or members thereof, or any officer or officers of the Commission designated by it, and appropriate records thereof shall be kept.

ENFORCEMENT OF TITLE

SEC. 42. [80a–41] (a) The Commission may make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this title or of any rule, regulation, or order hereunder, or to determine whether

any action in any court or any proceeding before the Commission shall be instituted under this title against a particular person or persons, or with respect to a particular transaction or transactions. The Commission shall permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated.

(b) For the purpose of any investigation or any other proceeding under this title, any member of the Commission, or any officer thereof designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which are relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in any State or in any Territory or other place subject to the jurisdiction of the United States at any designated place of hearing.

(c) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who without just cause shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor, and upon conviction shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) Whenever it shall appear to the Commission that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this title, or of any rule, regulation, or order hereunder, it may in its discretion bring an action in the proper district court of the United States, or the proper United States court of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this title or any rule, regulation, or order hereunder. Upon a showing that such person has engaged or is about to engage in any such act or practice, a permanent or temporary injunction or decree or restraining order shall be granted without bond. In any proceeding under this subsection to enforce compliance with section 7, the court as a court of equity may, to the extent it deems necessary or appropriate, take exclusive juris-

diction and possession of the investment company or companies involved and the books, records, and assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, who with the approval of the court shall have power to dispose of any or all of such assets, subject to such terms and conditions as the court may prescribe. The Commission may transmit such evidence as may be available concerning any violation of the provisions of this title, or of any rule, regulation, or order thereunder, to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this title.

(e) MONEY PENALTIES IN CIVIL ACTIONS.—

(1) AUTHORITY OF COMMISSION.—Whenever it shall appear to the Commission that any person has violated any provision of this title, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 9(f) of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

(2) AMOUNT OF PENALTY.—

(A) FIRST TIER.—The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (i) $5,000 for a natural person or $50,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation.

(B) SECOND TIER.—Notwithstanding subparagraph (A), the amount of penalty for each such violation shall not exceed the greater of (i) $50,000 for a natural person or $250,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(C) THIRD TIER.—Notwithstanding subparagraphs (A) and (B), the amount of penalty for each such violation shall not exceed the greater of (i) $100,000 for a natural person or $500,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

(I) the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(II) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

(3) PROCEDURES FOR COLLECTION.—

(A) PAYMENT OF PENALTY TO TREASURY.—A penalty imposed under this section shall be payable into the Treasury of the United States, except as otherwise provided in section 308 of the Sarbanes-Oxley Act of 2002 and section 21F of the Securities Exchange Act of 1934.

(B) COLLECTION OF PENALTIES.—If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(C) REMEDY NOT EXCLUSIVE.—The actions authorized by this subsection may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring.

(D) JURISDICTION AND VENUE.—For purposes of section 44 of this title, actions under this paragraph shall be actions to enforce a liability or a duty created by this title.

(4) SPECIAL PROVISIONS RELATING TO A VIOLATION OF A CEASE-AND-DESIST ORDER.—In an action to enforce a cease-and-desist order entered by the Commission pursuant to section 9(f), each separate violation of such order shall be a separate offense, except that in the case of a violation through a continuing failure to comply with the order, each day of the failure to comply shall be deemed a separate offense.

COURT REVIEW OF ORDERS

SEC. 43. [80a–42] (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission or any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported

by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(b) The commencement of proceedings under subsection (a) to review an order of the Commission issued under section 8(e) shall operate as a stay of the Commission's order unless the court otherwise orders. The commencement of proceedings under subsection (a) to review an order of the Commission issued under any provision of this title other than section 8(e) shall not operate as a stay of the Commission's order unless the court specifically so orders.

JURISDICTION OF OFFENSES AND SUITS

SEC. 44. [80a–43] The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. A criminal proceeding based upon a violation of section 34, or upon a failure to file a report or other document required to be filed under this title, may be brought in the district wherein the defendant is an inhabitant or maintains his principal office or place of business. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. In any action or proceeding instituted by the Commission under this title in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of title 28, United States Code. No costs shall be assesssed for or against the Commission in any proceeding under this title brought by or against the Commission in any court. The Commission may intervene as a party in any action or suit to enforce any liability or duty created by, or to enjoin any noncompliance with, section 36(b) of this title at any stage of such action or suit prior to final judgment therein.

INFORMATION FILED WITH COMMISSION

SEC. 45. [80a–44] (a) The information contained in any registration statement, application, report, or other document filed with the Commission pursuant to any provision of this title or of any rule or regulation thereunder (as distinguished from any information or document transmitted to the Commission) shall be made available to the public, unless and except insofar as the Commission, by rules and regulations upon its own motion, or by order upon application, finds that public disclosure is neither necessary nor appropriate in the public interest or for the protection of investors. Except as provided in section 24(c) of the Securities Exchange Act of 1934, it shall be unlawful for any member, officer, or employee of the Commission to use for personal benefit, or to disclose to any person other than an official or employee of the United States or of a State, for official use, or for any such official or employee to use for personal benefit, any information contained in any document so filed or transmitted, if such information is not available to the public.

(b) Photostatic or other copies of information contained in documents filed with the Commission under this title and made available to the public shall be furnished any person at such reasonable charge and under such reasonable limitations as the Commission shall prescribe.

ANNUAL REPORTS OF COMMISSION; EMPLOYEES OF THE COMMISSION

SEC. 46. [80a–45] (a) The Commission shall submit annually a report to the Congress covering the work of the Commission for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this title as it may find advisable.

(b) The provisions of section 4(b) of the Securities Exchange Act of 1934 shall be applicable with respect to the power of the Commission—

(1) to appoint and fix the compensation of such employees as may be necessary for carrying out its functions under this title, and

(2) to lease and allocate such real property as may be necessary for carrying out its functions under this title.

VALIDITY OF CONTRACTS

SEC. 47. [80a–46] (a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or with any rule, regulation, or order thereunder shall be void.

(b)(1) A contract that is made, or whose performance involves, a violation of this title, or of any rule, regulation, or order thereunder, is unenforceable by either party (or by a nonparty to the contract who acquired a right under the contract with knowledge of the facts by reason of which the making or performance violated or would violate any provision of this title or of any rule, regulation, or order thereunder) unless a court finds that under the circumstances enforcement would produce a more equitable result

than nonenforcement and would not be inconsistent with the purposes of this title.

(2) To the extent that a contract described in paragraph (1) has been performed, a court may not deny rescission at the instance of any party unless such court finds that under the circumstances the denial of rescission would produce a more equitable result than its grant and would not be inconsistent with the purposes of this title.

(3) This subsection shall not apply (A) to the lawful portion of a contract to the extent that it may be severed from the unlawful portion of the contract, or (B) to preclude recovery against any person for unjust enrichment.

LIABILITY OF CONTROLLING PERSONS; PREVENTING COMPLIANCE WITH TITLE

SEC. 48. [80a–47] (a) It shall be unlawful for any person, directly or indirectly, to cause to be done any act or thing through or by means of any other person which it would be unlawful for such person to do under the provisions of this title or any rule, regulation, or order thereunder.

(b) For purposes of any action brought by the Commission under subsection (d) or (e) of section 42, any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this Act, or of any rule or regulation issued under this Act, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.

(c) It shall be unlawful for any person without just cause to hinder, delay, or obstruct the making, filing, or keeping of any information, document, report, record, or account required to be made, filed, or kept under any provision of this title or any rule, regulation, or order thereunder.

PENALTIES [13]

SEC. 49. [80a–48] Any person who willfully violates any provision of this title or of any rule, regulation, or order hereunder, or any person who willfully in any registration statement, application, report, account, record, or other document filed or transmitted pursuant to this title or the keeping of which is required pursuant to section 31(a) makes any untrue statement of a material fact or omits to state any material fact necessary in order to prevent the statements made therein from being materially misleading in the light of the circumstances under which they were made, shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both; but no person shall be convicted under this section for the violation of any rule, regulation, or order if he proves that he had no actual knowledge of such rule, regulation, or order.

EFFECT ON EXISTING LAW

SEC. 50. [80a–49] Except where specific provision is made to the contrary, nothing in this title shall affect (1) the jurisdiction of

[13] See also 18 U.S.C. 3571. [Printed in appendix to this volume.]

the Commission under the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, or title II of this Act, over any person, security, or transaction, or (2) the rights, obligations, duties, or liabilities of any person under such Acts; nor shall anything in this title affect the jurisdiction of any other commission, board, agency, or officer of the United States or of any State or political subdivision of any State, over any person, security, or transaction, insofar as such jurisdiction does not conflict with any provision of this title or of any rule, regulation, or order hereunder.

SEPARABILITY OF PROVISIONS

SEC. 51. [80a–50] If any provision of this title or any provision incorporated in this title by reference, or the application of any such provision to any person or circumstances, shall be held invalid, the remainder of this title and the application of any such provision to person or circumstances other than those as to which it is held invalid shall not be affected thereby.

SHORT TITLE

SEC. 52. [80a–51] This title may be cited as the "Investment Company Act of 1940".

EFFECTIVE DATE

SEC. 53. [80a–52] The effective date of the provisions of this title, so far as the same relate to face-amount certificates or to face-amount certificate companies, is January 1, 1941. The effective date of provisions hereof, insofar as the same do not apply to face-amount certificates or face-amount certificate companies, is November 1, 1940. Except as herein otherwise provided, every provision of this title shall take effect on November 1, 1940.

ELECTION TO BE REGULATED AS A BUSINESS DEVELOPMENT COMPANY

SEC. 54. [80a–53] (a) Any company defined in section 2(a)(48) (A) and (B) may elect to be subject to the provisions of sections 55 through 65 by filing with the Commission a notification of election, if such company—

(1) has a class of its equity securities registered under section 12 of the Securities Exchange Act of 1934; or

(2) has filed a registration statement pursuant to section 12 of the Securities Exchange Act of 1934 for a class of its equity securities.

(b) The Commission may, by rule, prescribe the form and manner in which notification of election under this section shall be given. A business development company shall be deemed to be subject to sections 55 through 65 upon receipt by the Commission of such notification of election.

(c) Whenever the Commission finds, on its own motion or upon application, that a business development company which has filed a notification of election pursuant to subsection (a) of this section has ceased to engage in business, the Commission shall so declare by order revoking such company's election. Any business develop-

ment company may voluntarily withdraw its election under subsection (a) by filing a notice of withdrawal of election with the Commission, in a form and manner which the Commission may, by rule, prescribe. Such withdrawal shall be effective immediately upon receipt by the Commission.

FUNCTIONS AND ACTIVITIES OF BUSINESS DEVELOPMENT COMPANIES

SEC. 55. [80a–54] (a) It shall be unlawful for a business development company to acquire any assets (other than those described in paragraphs (1) through (7) of this subsection) unless, at the time the acquisition is made, assets described in paragraphs (1) through (6) below represent at least 70 per centum of the value of its total assets (other than assets described in paragraph (7) below):

(1) securities purchased, in transactions not involving any public offering or in such other transactions as the Commission may, by rule, prescribe if it finds that enforcement of this title and of the Securities Act of 1933 with respect to such transactions is not necessary in the public interest or for the protection of investors by reason of the small amount, or the limited nature of the public offering, involved in such transactions—

(A) from the issuer of such securities, which issuer is an eligible portfolio company, from any person who is, or who within the preceding thirteen months has been, an affiliated person of such eligible portfolio company, or from any other person, subject to such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors; or

(B) from the issuer of such securities, which issuer is described in section 2(a)(46) (A) and (B) but is not an eligible portfolio company because it has issued a class of securities with respect to which a member of a national securities exchange, broker, or dealer may extend or maintain credit to or for a customer pursuant to rules or regulations adopted by the Board of Governors of the Federal Reserve System under section 7 of the Securities Exchange Act of 1934, or from any person who is an officer or employee of such issuer, if—

(i) at the time of the purchase, the business development company owns at least 50 per centum of—

(I) the greatest number of equity securities of such issuer and securities convertible into or exchangeable for such securities; and

(II) the greatest amount of debt securities of such issuer,

held by such business development company at any point in time during the period when such issuer was an eligible portfolio company, except that options, warrants, and similar securities which have by their terms expired and debt securities which have been converted, or repaid or prepaid in the ordinary course of business or incident to a public offering of securities of such issuer, shall not be considered to have been

held by such business development company for purposes of this requirement; and

(ii) the business development company is one of the 20 largest holders of record of such issuer's outstanding voting securities;

(2) securities of any eligible portfolio company with respect to which the business development company satisfies the requirements of section 2(a)(46)(C)(ii);

(3) securities purchased in transactions not involving any public offering from an issuer described in sections 2(a)(46) (A) and (B) or from a person who is, or who within the preceding thirteen months has been, an affiliated person of such issuer, or from any person in transactions incident thereto, if such securities were—

(A) issued by an issuer that is, or was immediately prior to the purchase of its securities by the business development company, in bankruptcy proceedings, subject to reorganization under the supervision of a court of competent jurisdiction, or subject to a plan or arrangement resulting from such bankruptcy proceedings or reorganization;

(B) issued by an issuer pursuant to or in consummation of such a plan or arrangement; or

(C) issued by an issuer that, immediately prior to the purchase of such issuer's securities by the business development company, was not in bankruptcy proceedings but was unable to meet its obligations as they came due without material assistance other than conventional lending or financing arrangements;

(4) securities of eligible portfolio companies purchased from any person in transactions not involving any public offering, if there is no ready market for such securities and if immediately prior to such purchase the business development company owns at least 60 per centum of the outstanding equity securities of such issuer (giving effect to all securities presently convertible into or exchangeable for equity securities of such issuer as if such securities were so converted or exchanged);

(5) securities received in exchange for or distributed on or with respect to securities described in paragraphs (1) through (4) of this subsection, or pursuant to the exercise of options, warrants, or rights relating to securities described in such paragraphs;

(6) cash, cash items, Government securities, or high quality debt securities maturing in one year or less from the time of investment in such high quality debt securities; and

(7) office furniture and equipment, interests in real estate and leasehold improvements and facilities maintained to conduct the business operations of the business development company, deferred organization and operating expenses, and other noninvestment assets necessary and appropriate to its operations as a business development company, including notes of indebtedness of directors, officers, employees, and general partners held by a business development company as payment for

securities of such company issued in connection with an executive compensation plan described in section 57(j).

(b) For purposes of this section, the value of a business development company's assets shall be determined as of the date of the most recent financial statements filed by such company with the Commission pursuant to section 13 of the Securities Exchange Act of 1934, and shall be determined no less frequently than annually.

QUALIFICATIONS OF DIRECTORS

SEC. 56. [80a–55] (a) A majority of a business development company's directors or general partners shall be persons who are not interested persons of such company.

(b) If, by reason of the death, disqualification, or bona fide resignation of any director or general partner, a business development company does not meet the requirements of subsection (a) of this section, or the requirements of section 15(f)(1) of this title with respect to directors, the operation of such provisions shall be suspended for a period of 90 days or for such longer period as the Commission may prescribe, upon its own motion or by order upon application, as not inconsistent with the protection of investors.

TRANSACTIONS WITH CERTAIN AFFILIATES

SEC. 57. [80a–56] (a) It shall be unlawful for any person who is related to a business development company in a manner described in subsection (b) of this section, acting as principal—

(1) knowingly to sell any security or other property to such business development company or to any company controlled by such business development company, unless such sale involves solely (A) securities of which the buyer is the issuer, or (B) securities of which the seller is the issuer and which are part of a general offering to the holders of a class of its securities;

(2) knowingly to purchase from such business development company or from any company controlled by such business development company, any security or other property (except securities of which the seller is the issuer);

(3) knowingly to borrow money or other property from such business development company or from any company controlled by such business development company (unless the borrower is controlled by the lender), except as permitted in section 21(b) or section 62; or

(4) knowingly to effect any transaction in which such business development company or a company controlled by such business development company is a joint or a joint and several participant with such person in contravention of such rules and regulations as the Commission may prescribe for the purpose of limiting or preventing participation by such business development company or controlled company on a basis less advantageous than that of such person, except that nothing contained in this paragraph shall be deemed to preclude any person from acting as manager of any underwriting syndicate or other group in which such business development company or

controlled company is a participant and receiving compensation therefor.

(b) The provisions of subsection (a) of this section shall apply to the following persons:

(1) Any director, officer, employee, or member of an advisory board of a business development company or any person (other than the business development company itself) who is, within the meaning of section 2(a)(3)(C) of this title, an affiliated person of any such person specified in this paragraph.

(2) Any investment adviser or promoter of, general partner in, principal underwriter for, or person directly or indirectly either controlling, controlled by, or under common control with, a business development company (except the business development company itself and any person who, if it were not directly or indirectly controlled by the business development company, would not be directly or indirectly under the control of a person who controls the business development company), or any person who is, within the meaning of section 2(a)(3) (C) or (D), an affiliated person of any such person specified in this paragraph.

(c) Notwithstanding paragraphs (1), (2), and (3) of subsection (a), any person may file with the Commission an application for an order exempting a proposed transaction of the applicant from one or more provisions of such paragraphs. The Commission shall grant such application and issue such order of exemption if evidence establishes that—

(1) the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching of the business development company or its shareholders or partners on the part of any person concerned;

(2) the proposed transaction is consistent with the policy of the business development company as recited in the filings made by such company with the Commission under the Securities Act of 1933, its registration statement and reports filed under the Securities Exchange Act of 1934, and its reports to shareholders or partners; and

(3) the proposed transaction is consistent with the general purposes of this title.

(d) It shall be unlawful for any person who is related to a business development company in the manner described in subsection (e) of this section and who is not subject to the prohibitions of subsection (a) of this section, acting as principal—

(1) knowingly to sell any security or other property to such business development company or to any company controlled by such business development company, unless such sale involves solely (A) securities of which the buyer is the issuer, or (B) securities of which the seller is the issuer and which are part of a general offering to the holders of a class of its securities;

(2) knowingly to purchase from such business development company or from any company controlled by such business development company, any security or other property (except securities of which the seller is the issuer);

(3) knowingly to borrow money or other property from such business development company or from any company controlled by such business development company (unless the borrower is controlled by the lender), except as permitted in section 21(b); or

(4) knowingly to effect any transaction in which such business development company or a company controlled by such business development company is a joint or a joint and several participant with such affiliated person in contravention of such rules and regulations as the Commission may prescribe for the purpose of limiting or preventing participation by such business development company or controlled company on a basis less advantageous than that of such affiliated person, except that nothing contained in this paragraph shall be deemed to preclude any person from acting as manager of any underwriting syndicate or other group in which such business development company or controlled company is a participant and receiving compensation therefor.

(e) The provisions of subsection (d) of this section shall apply to the following persons:

(1) Any person (A) who is, within the meaning of section 2(a)(3)(A), an affiliated person of a business development company, (B) who is an executive officer or a director of, or general partner in, any such affiliated person, or (C) who directly or indirectly either controls, is controlled by, or is under common control with, such affiliated person.

(2) Any person who is an affiliated person of a director, officer, employee, investment adviser, member of an advisory board or promoter of, principal underwriter for, general partner in, or an affiliated person of any person directly or indirectly either controlling or under common control with a business development company (except the business development company itself and any person who, if it were not directly or indirectly controlled by the business development company, would not be directly or indirectly under the control of a person who controls the business development company).

For purposes of this subsection, the term "executive officer" means the president, secretary, treasurer, any vice president in charge of a principal business function, and any other person who performs similar policymaking functions.

(f) Notwithstanding subsection (d) of this section, a person described in subsection (e) may engage in a proposed transaction described in subsection (d) if such proposed transaction is approved by the required majority (as defined in subsection (o)) of the directors of or general partners in the business development company on the basis that—

(1) the terms thereof, including the consideration to be paid or received, are reasonable and fair to the shareholders or partners of the business development company and do not involve overreaching of such company or its shareholders or partners on the part of any person concerned;

(2) the proposed transaction is consistent with the interests of the shareholders or partners of the business development company and is consistent with the policy of such com-

pany as recited in filings made by such company with the Commission under the Securities Act of 1933, its registration statement and reports filed under the Securities Exchange Act of 1934, and its reports to shareholders or partners; and

(3) the directors or general partners record in their minutes and preserve in their records, for such periods as if such records were required to be maintained pursuant to section 31(a), a description of such transaction, their findings, the information or materials upon which their findings were based, and the basis therefor.

(g) Notwithstanding subsection (a) or (d), a person may, in the ordinary course of business, sell to or purchase from any company merchandise or may enter into a lessor-lessee relationship with any person and furnish the services incident thereto.

(h) The directors of or general partners in any business development company shall adopt, and periodically review and update as appropriate, procedures reasonably designed to ensure that reasonable inquiry is made, prior to the consummation of any transaction in which such business development company or a company controlled by such business development company proposes to participate, with respect to the possible involvement in the transaction of persons described in subsections (b) and (e) of this section.

(i) Until the adoption by the Commission of rules or regulations under subsections (a) and (d) of this section, the rules and regulations of the Commission under subsections (a) and (d) of section 17 applicable to registered closed-end investment companies shall be deemed to apply to transactions subject to subsections (a) and (d) of this section. Any rules or regulations adopted by the Commission to implement this section shall be no more restrictive than the rules or regulations adopted by the Commission under subsections (a) and (d) of section 17 that are applicable to all registered closed-end investment companies.

(j) Notwithstanding subsections (a) and (d) of this section, any director, officer, or employee of, or general partner in, a business development company may—

(1) acquire warrants, options, and rights to purchase voting securities of such business development company, and securities issued upon the exercise or conversion thereof, pursuant to an executive compensation plan offered by such company which meets the requirements of section 61(a)(4)(B); and

(2) borrow money from such business development company for the purpose of purchasing securities issued by such company pursuant to an executive compensation plan, if each such loan—

(A) has a term of not more than ten years;

(B) becomes due within a reasonable time, not to exceed sixty days, after the termination of such person's employment or service;

(C) bears interest at no less than the prevailing rate applicable to 90-day United States Treasury bills at the time the loan is made;

(D) at all times is fully collateralized (such collateral may include any securities issued by such business development company); and

(E)(i) in the case of a loan to any officer or employee of such business development company (including any officer or employee who is also a director of such company), is approved by the required majority (as defined in subsection (o)) of the directors of or general partners in such company on the basis that the loan is in the best interests of such company and its shareholders or partners; or

(ii) in the case of a loan to any director of such business development company who is not also an officer or employee of such company, or to any general partner in such company, is approved by order of the Commission, upon application, on the basis that the terms of the loan are fair and reasonable and do not involve overreaching of such company or its shareholders or partners.

(k) It shall be unlawful for any person described in subsection (l)—

(1) acting as agent, to accept from any source any compensation (other than a regular salary or wages from the business development company) for the purchase or sale of any property to or for such business development company or any controlled company thereof, except in the course of such person's business as an underwriter or broker; or

(2) acting as broker, in connection with the sale of securities to or by the business development company or any controlled company thereof, to receive from any source a commission, fee, or other remuneration for effecting such transaction which exceeds—

(A) the usual and customary broker's commission if the sale is effected on a securities exchange;

(B) 2 per centum of the sales price if the sale is effected in connection with a secondary distribution of such securities; or

(C) 1 per centum of the purchase or sale price of such securities if the sale is otherwise effected,

unless the Commission, by rules and regulations or order in the public interest and consistent with the protection of investors, permits a larger commission.

(l) The provisions of subsection (k) of this section shall apply to the following persons:

(1) Any affiliated person of a business development company.

(2)(A) Any person who is, within the meaning of section 2(a)(3) (B), (C), or (D), an affiliated person of any director, officer, employee, or member of an advisory board of the business development company.

(B) Any person who is, within the meaning of section 2(a)(3) (A), (B), (C), or (D), an affiliated person of any investment adviser of, general partner in, or person directly or indirectly either controlling, controlled by, or under common control with, the business development company.

(C) Any person who is, within the meaning of section 2(a)(3)(C), an affiliated person of any person who is an affiliated person of the business development company within the meaning of section 2(a)(3)(A).

(m) For purposes of subsections (a) and (d), a person who is a director, officer, or employee of a party to a transaction and who receives his usual and ordinary fee or salary for usual and customary services as a director, officer, or employee from such party shall not be deemed to have a financial interest or to participate in the transaction solely by reason of his receipt of such fee or salary.

(n)(1) Notwithstanding subsection (a)(4) of this section, a business development company may establish and maintain a profit-sharing plan for its directors, officers, employees, and general partners and such directors, officers, employees, and general partners may participate in such profit-sharing plan, if—

(A)(i) in the case of a profit-sharing plan for officers and employees of the business development company (including any officer or employee who is also a director of such company), such profit-sharing plan is approved by the required majority (as defined in subsection (o)) of the directors of or general partners in such company on the basis that such plan is reasonable and fair to the shareholders or partners of such company, does not involve overreaching of such company or its shareholders or partners on the part of any person concerned, and is consistent with the interests of the shareholders or partners of such company; or

(ii) in the case of a profit-sharing plan which includes one or more directors of the business development company who are not also officers or employees of such company, or one or more general partners in such company, such profit-sharing plan is approved by order of the Commission, upon application, on the basis that such plan is reasonable and fair to the shareholders or partners of such company, does not involve overreaching of such company or its shareholders or partners on the part of any person concerned, and is consistent with the interests of the shareholders or partners of such company; and

(B) the aggregate amount of benefits which would be paid or accrued under such plan shall not exceed 20 per centum of the business development company's net income after taxes in any fiscal year.

(2) This subsection may not be used where the business development company has outstanding any stock option, warrant, or right issued as part of an executive compensation plan, including a plan pursuant to section 61(a)(4)(B), or has an investment adviser registered or required to be registered under title II of this Act.

(o) The term "required majority", when used with respect to the approval of a proposed transaction, plan, or arrangement, means both a majority of a business development company's directors or general partners who have no financial interest in such transaction, plan, or arrangement and a majority of such directors or general partners who are not interested persons of such company.

CHANGES IN INVESTMENT POLICY

SEC. 58. [80a–57] No business development company shall, unless authorized by the vote of a majority of its outstanding voting securities or partnership interests, change the nature of its business so as to cease to be, or to withdraw its election as, a business development company.

INCORPORATION OF PROVISIONS

SEC. 59. [80a–58] Notwithstanding the exemption set forth in section 6(f), sections 1, 2, 3, 4, 5, 6, 9, 10(f), 15 (a), (c), and (f), 16(b), 17 (f) through (j), 19(a), 20(b), 32 (a) and (c), 33 through 47, and 49 through 53 of this title shall apply to a business development company to the same extent as if it were a registered closed-end investment company.

FUNCTIONS AND ACTIVITIES OF BUSINESS DEVELOPMENT COMPANIES

SEC. 60. [80a–59] Notwithstanding the exemption set forth in section 6(f), section 12 shall apply to a business development company to the same extent as if it were a registered closed-end investment company, except that the Commission shall not prescribe any rule, regulation, or order pursuant to section 12(a)(1) governing the circumstances in which a business development company may borrow from a bank in order to purchase any security.

CAPITAL STRUCTURE

SEC. 61. [80a–60] (a) Notwithstanding the exemption set forth in section 6(f), section 18 shall apply to a business development company to the same extent as if it were a registered closed-end investment company, except as follows:

(1) Except as provided in paragraph (2), the asset coverage requirements of subparagraphs (A) and (B) of section 18(a)(1) (and any related rule promulgated under this Act) applicable to business development companies shall be 200 percent.

(2) The asset coverage requirements of subparagraphs (A) and (B) of section 18(a)(1) and of subparagraphs (A) and (B) of section 18(a)(2) (and any related rule promulgated under this Act) applicable to a business development company shall be 150 percent if—

(A) not later than 5 business days after the date on which those asset coverage requirements are approved under subparagraph (D) of this paragraph, the business development company discloses that the requirements were approved, and the effective date of the approval, in—

(i) any filing submitted to the Commission under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a); 78o(d)); and

(ii) a notice on the website of the business development company;

(B) the business development company discloses, in each periodic filing required under section 13(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a))—

(i) the aggregate outstanding principal amount or liquidation preference, as applicable, of the senior securities issued by the business development company and the asset coverage percentage as of the date of the business development company's most recent financial statements included in that filing;

(ii) that the business development company, under subparagraph (D), has approved the asset coverage requirements under this paragraph; and

(iii) the effective date of the approval described in clause (ii);

(C) with respect to a business development company that is an issuer of common equity securities, each periodic filing of the company required under section 13(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a)) includes disclosures that are reasonably designed to ensure that shareholders are informed of—

(i) the amount of senior securities (and the associated asset coverage ratios) of the company, determined as of the date of the most recent financial statements of the company included in that filing; and

(ii) the principal risk factors associated with the senior securities described in clause (i), to the extent that risk is incurred by the company; and

(D) the company—

(i)(I) through a vote of the required majority (as defined in section 57(o)), approves the application of this paragraph to the company, to become effective on the date that is 1 year after the date of the approval; or

(II) obtains, at a special or annual meeting of shareholders or partners at which a quorum is present, the approval of more than 50 percent of the votes cast for the application of this paragraph to the company, to become effective on the first day after the date of the approval; and

(ii) if the company is not an issuer of common equity securities that are listed on a national securities exchange, extends, to each person that is a shareholder as of the date of an approval described in subclause (I) or (II) of clause (i), as applicable, the opportunity (which may include a tender offer) to sell the securities held by that shareholder as of that applicable approval date, with 25 percent of those securities to be repurchased in each of the 4 calendar quarters following the calendar quarter in which that applicable approval date takes place.

(3) Notwithstanding section 18(c), a business development company may issue more than one class of senior security representing indebtedness.

(4) Notwithstanding section 18(d)—

(A) a business development company may issue warrants, options, or rights to subscribe or convert to voting securities of such company, accompanied by securities, if—

(i) such warrants, options, or rights expire by their terms within ten years;

(ii) such warrants, options, or rights are not separately transferable unless no class of such warrants, options, or rights and the securities accompanying them has been publicly distributed;

(iii) the exercise or conversion price is not less than the current market value at the date of issuance, or if no such market value exists, the current net asset value of such voting securities; and

(iv) the proposal to issue such securities is authorized by the shareholders or partners of such business development company, and such issuance is approved by the required majority (as defined in section 57(o)) of the directors of or general partners in such company on the basis that such issuance is in the best interests of such company and its shareholders or partners;

(B) a business development company may issue, to its directors, officers, employees, and general partners, warrants, options, and rights to purchase voting securities of such company pursuant to an executive compensation plan, if—

(i)(I) in the case of warrants, options, or rights issued to any officer or employee of such business development company (including any officer or employee who is also a director of such company), such securities satisfy the conditions in clauses (i), (iii), and (iv) of subparagraph (A); or (II) in the case of warrants, options, or rights issued to any director of such business development company who is not also an officer or employee of such company, or to any general partner in such company, the proposal to issue such securities satisfies the conditions in clauses (i) and (iii) of subparagraph (A), is authorized by the shareholders or partners of such company, and is approved by order of the Commission, upon application, on the basis that the terms of the proposal are fair and reasonable and do not involve overreaching of such company or its shareholders or partners;

(ii) such securities are not transferable except for disposition by gift, will, or intestacy;

(iii) no investment adviser of such business development company receives any compensation described in section 205(a)(1) of title II of this Act, except to the extent permitted by paragraph (1) or (2) of section 205(b); and

(iv) such business development company does not have a profit-sharing plan described in section 57(n); and

(C) a business development company may issue warrants, options, or rights to subscribe to, convert to, or purchase voting securities not accompanied by securities, if—

(i) such warrants, options, or rights satisfy the conditions in clauses (i) and (iii) of subparagraph (A); and

(ii) the proposal to issue such warrants, options, or rights is authorized by the shareholders or partners of such business development company, and such issuance is approved by the required majority (as defined in section 57(o)) of the directors of or general partners in such company on the basis that such issuance is in the best interests of the company and its shareholders or partners.

Notwithstanding this paragraph, the amount of voting securities that would result from the exercise of all outstanding warrants, options, and rights at the time of issuance shall not exceed 25 per centum of the outstanding voting securities of the business development company, except that if the amount of voting securities that would result from the exercise of all outstanding warrants, options, and rights issued to such company's directors, officers, employees, and general partners pursuant to any executive compensation plan meeting the requirements of subparagraph (B) of this paragraph would exceed 15 per centum of the outstanding voting securities of such company, then the total amount of voting securities that would result from the exercise of all outstanding warrants, options, and rights at the time of issuance shall not exceed 20 per centum of the outstanding voting securities of such company.

(5) For purposes of measuring the asset coverage requirements of section 18(a), a senior security created by the guarantee by a business development company of indebtedness issued by another company shall be the amount of the maximum potential liability less the fair market value of the net unencumbered assets (plus the indebtedness which has been guaranteed) available in the borrowing company whose debts have been guaranteed, except that a guarantee issued by a business development company of indebtedness issued by a company which is a wholly-owned subsidiary of the business development company and is licensed as a small business investment company under the Small Business Investment Act of 1958 shall not be deemed to be a senior security of such business development company for purposes of section 18(a) if the amount of the indebtedness at the time of its issuance by the borrowing company is itself taken fully into account as a liability by such business development company, as if it were issued by such business development company, in determining whether such business development company, at that time, satisfies the asset coverage requirements of section 18(a).

(b) A business development company shall comply with the provisions of this section at the time it becomes subject to sections 55 through 65, as if it were issuing a security of each class which it has outstanding at such time.

LOANS

SEC. 62. [80a–61] Notwithstanding the exemption set forth in section 6(f), section 21 shall apply to a business development company to the same extent as if it were a registered closed-end investment company, except that nothing in that section shall be deemed to prohibit—

(1) any loan to a director, officer, or employee of, or general partner in, a business development company for the purpose of purchasing securities of such company as part of an executive compensation plan, if such loan meets the requirements of section 57(j); or

(2) any loan to a company controlled by a business development company, which companies could be deemed to be under common control solely because a third person controls such business development company.

DISTRIBUTION AND REPURCHASE OF SECURITIES

SEC. 63. [80a–62] Notwithstanding the exemption set forth in section 6(f), section 23 shall apply to a business development company to the same extent as if it were a registered closed-end investment company, except as follows:

(1) The prohibitions of section 23(a)(2) shall not apply to any company which (A) is a wholly-owned subsidiary of, or directly or indirectly controlled by, a business development company, and (B) immediately after the issuance of any of its securities for property other than cash or securities, will not be an investment company within the meaning of section 3(a).

(2) Notwithstanding the provisions of section 23(b), a business development company may sell any common stock of which it is the issuer at a price below the current net asset value of such stock, and may sell warrants, options, or rights to acquire any such common stock at a price below the current net asset value of such stock, if—

(A) the holders of a majority of such business development company's outstanding voting securities, and the holders of a majority of such company's outstanding voting securities that are not affiliated persons of such company, approved such company's policy and practice of making such sales of securities at the last annual meeting of shareholders or partners within one year immediately prior to any such sale, except that the shareholder approval requirements of this subparagraph shall not apply to the initial public offering by a business development company of its securities;

(B) a required majority (as defined in section 57(o)) of the directors of or general partners in such business development company have determined that any such sale would be in the best interests of such company and its shareholders or partners; and

(C) a required majority (as defined in section 57(o)) of the directors of or general partners in such business development company, in consultation with the underwriter or underwriters of the offering if it is to be underwritten,

have determined in good faith, and as of a time immediately prior to the first solicitation by or on behalf of such company of firm commitments to purchase such securities or immediately prior to the issuance of such securities, that the price at which such securities are to be sold is not less than a price which closely approximates the market value of those securities, less any distributing commission or discount.

(3) A business development company may sell any common stock of which it is the issuer at a price below the current net asset value of such stock upon the exercise of any warrant, option, or right issued in accordance with section 61(a)(4).

ACCOUNTS AND RECORDS

SEC. 64. [80a–63] (a) Notwithstanding the exemption set forth in section 6(f), section 31 shall apply to a business development company to the same extent as if it were a registered closed-end investment company, except that the reference to the financial statements required to be filed pursuant to section 30 shall be construed to refer to the financial statements required to be filed by such business development company pursuant to section 13 of the Securities Exchange Act of 1934.

(b)(1) In addition to the requirements of subsection (a), a business development company shall file with the Commission and supply annually to its shareholders a written statement, in such form and manner as the Commission may, by rule, prescribe, describing the risk factors involved in an investment in the securities of a business development company due to the nature of such company's investment portfolio and capital structure, and shall supply copies of such statement to any registered broker or dealer upon request.

(2) If the Commission finds it is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title, the Commission may also require, by rule, any person who, acting as principal or agent, sells a security of a business development company to inform the purchaser of such securities, at or before the time of sale, of the existence of the risk statement prepared by such business development company pursuant to this subsection, and make such risk statement available on request. The Commission, in making such rules and regulations, shall consider, among other matters, whether any such rule or regulation would impose any unreasonable burdens on such brokers or dealers or unreasonably impair the maintenance of fair and orderly markets.

LIABILITY OF CONTROLLING PERSONS; PREVENTING COMPLIANCE WITH TITLE

SEC. 65. [80a–64] Notwithstanding the exemption set forth in section 6(f), section 48 shall apply to a business development company to the same extent as if it were a registered closed-end investment company, except that the provisions of section 48(a) shall not be construed to require any company which is not an investment

company within the meaning of section 3(a) to comply with the provisions of this title which are applicable to a business development company solely because such company is a wholly-owned subsidiary of, or directly or indirectly controlled by, a business development company.

EXHIBIT 302

INVESTMENT ADVISERS ACT OF 1940

[References in brackets [] are to title 15, United States Code]

[Title II of Chapter 686 of the 76th Congress]

[As Amended Through P.L. 117–263, Enacted December 23, 2022]

[Currency: This publication is a compilation of the text of title II of chapter 686 of the 76th Congress. It was last amended by the public law listed in the As Amended Through note above and below at the bottom of each page of the pdf version and reflects current law through the date of the enactment of the public law listed at https://www.govinfo.gov/app/collection/comps/]

[Note: While this publication does not represent an official version of any Federal statute, substantial efforts have been made to ensure the accuracy of its contents. The official version of Federal law is found in the United States Statutes at Large and in the United States Code. The legal effect to be given to the Statutes at Large and the United States Code is established by statute (1 U.S.C. 112, 204).]

TITLE II—INVESTMENT ADVISERS

FINDINGS

SEC. 201. [80b–1] Upon the basis of facts disclosed by the record and report of the Securities and Exchange Commission made pursuant to section 30 of the Public Utility Holding Company Act of 1935, and facts otherwise disclosed and ascertained, it is hereby found that investment advisers are of national concern, in that, among other things—

(1) their advice, counsel, publications, writings, analyses, and reports are furnished and distributed, and their contracts, subscription agreements, and other arrangements with clients are negotiated and performed, by the use of the mails and means and instrumentalities of interstate commerce;

(2) their advice, counsel, publications, writings, analyses, and reports customarily relate to the purchase and sale of securities traded on national securities exchanges and in interstate over-the-counter markets, securities issued by companies engaged in business in interstate commerce, and securities issued by national banks and member banks of the Federal Reserve System; and

(3) the foregoing transactions occur in such volume as substantially to affect interstate commerce, national securities exchanges, and other securities markets, the national banking system and the national economy.

DEFINITIONS

SEC. 202. [80b–2] (a) When used in this title, unless the context otherwise requires, the following definitions shall apply:

(1) "Assignment" includes any direct or indirect transfer or hypothecation of an investment advisory contract by the assignor or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor; but if the investment adviser is a partnership, no assignment of an investment advisory contract shall be deemed to result from the death or withdrawal of a minority of the members of the investment adviser having only a minority interest in the business of the investment adviser, or from the admission to the investment adviser of one or more members who, after such admission, shall be only a minority of the members and shall have only a minority interest in the business.

(2) "Bank" means (A) a banking institution organized under the laws of the United States or a Federal savings association, as defined in section 2(5) of the Home Owners' Loan Act, (B) a member bank of the Federal Reserve System, (C) any other banking institution, savings association, as defined in section 2(4) of the Home Owners' Loan Act, or trust company, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency, and which is supervised and examined by State or Federal authority having supervision over banks or savings associations, and which is not operated for the purpose of evading the provisions of this title, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph.

(3) The term "broker" has the same meaning as given in section 3 of the Securities Exchange Act of 1934.

(4) "Commission" means the Securities and Exchange Commission.

(5) "Company" means a corporation, a partnership, an association, a joint-stock company, a trust, or any organized group of persons, whether incorporated or not; or any receiver, trustee in a case under title 11 of the United States Code, or similar official, or any liquidating agent for any of the foregoing, in his capacity as such.

(6) "Convicted" includes a verdict, judgment, or plea of guilty, or a finding of guilt on a plea of nolo contendere, if such verdict, judgment, plea, or finding has not been reversed, set aside, or withdrawn, whether or not sentence has been imposed.

(7) The term "dealer" has the same meaning as given in section 3 of the Securities Exchange Act of 1934, but does not include an insurance company or investment company.

(8) "Director" means any director of a corporation or any person performing similar functions, with respect to any organization, whether incorporated or unincorporated.

(9) "Exchange" means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securi-

ties or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

(10) "Interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof.

(11) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include (A) a bank, or any bank holding company as defined in the Bank Holding Company Act of 1956, which is not an investment company, except that the term "investment adviser" includes any bank or bank holding company to the extent that such bank or bank holding company serves or acts as an investment adviser to a registered investment company, but if, in the case of a bank, such services or actions are performed through a separately identifiable department or division, the department or division, and not the bank itself, shall be deemed to be the investment adviser; (B) any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession; (C) any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor; (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation; (E) any person whose advice, analyses, or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest which shall have been designated by the Secretary of the Treasury, pursuant to section 3(a)(12) of the Securities Exchange Act of 1934, as exempted securities for the purposes of that Act; (F) any nationally recognized statistical rating organization, as that term is defined in section 3(a)(62) of the Securities Exchange Act of 1934, unless such organization engages in issuing recommendations as to purchasing, selling, or holding securities or in managing assets, consisting in whole or in part of securities, on behalf of others;;[1] (G) any family office, as defined by rule, regulation, or order of the Commission, in accordance with the purposes of this title; or (H) such other persons not within the intent of

[1] Effective on July 21, 2011, section 409(a) of Public Law 111–203 amends section 202(a)(11) by striking "or (G)" and inserting the following: "; (G) any family office, as defined by rule, regulation, or order of the Commission, in accordance with the purposes of this title; or (H)" (shown above). Such amendment probably should not have included a semicolon at the beginning of the inserted language.

this paragraph, as the Commission may designate by rules and regulations or order.

(12) "Investment company", affiliated person, and "insurance company" have the same meanings as in the Investment Company Act of 1940. "Control" means the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company.

(13) "Investment supervisory services" means the giving of continuous advice as to the investment of funds on the basis of the individual needs of each client.

(14) "Means or instrumentality of interstate commerce" includes any facility of a national securities exchange.

(15) "National securities exchange" means an exchange registered under section 6 of the Securities Exchange Act of 1934.

(16) "Person" means a natural person or a company.

(17) The term "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, except that for the purposes of section 203 of this title (other than subsection (f) thereof), persons associated with an investment adviser whose functions are clerical or ministerial shall not be included in the meaning of such term. The Commission may by rules and regulations classify, for the purposes of any portion or portions of this title, persons, including employees controlled by an investment adviser.

(18) "Security" means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guaranty of, or warrant or right to subscribe to or purchase any of the foregoing.

(19) "State" means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States.

(20) "Underwriter" means any person who has purchased from an issuer with a view to, 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; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributor's or seller's commission. As used in this paragraph the term "issuer" shall include in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

(21) "Securities Act of 1933", "Securities Exchange Act of 1934", and "Trust Indenture Act of 1939", mean those Acts, respectively, as heretofore or hereafter amended.

(22) "Business development company" means any company which is a business development company as defined in section 2(a)(48) of title I of this Act and which complies with section 55 of title I of this Act, except that—

(A) the 70 per centum of the value of the total assets condition referred to in sections 2(a)(48) and 55 of title I of this Act shall be 60 per centum for purposes of determining compliance therewith;

(B) such company need not be a closed-end company and need not elect to be subject to the provisions of sections 55 through 65 of title I of this Act; and

(C) the securities which may be purchased pursuant to section 55(a) of title I of this Act may be purchased from any person.

For purposes of this paragraph, all terms in sections 2(a)(48) and 55 of title I of this Act shall have the same meaning set forth in such title as if such company were a registered closed-end investment company, except that the value of the assets of a business development company which is not subject to the provisions of sections 55 through 65 of title I of this Act shall be determined as of the date of the most recent financial statements which it furnished to all holders of its securities, and shall be determined no less frequently than annually.

(23) "Foreign securities authority" means any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters.

(24) "Foreign financial regulatory authority" means any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate the participation of its members in activities listed above.

(25) "Supervised person" means any partner, officer, director (or other person occupying a similar status or performing similar functions), or employee of an investment adviser, or other person who provides investment advice on behalf of the

investment adviser and is subject to the supervision and control of the investment adviser.

(26) The term "separately identifiable department or division" of a bank means a unit—

(A) that is under the direct supervision of an officer or officers designated by the board of directors of the bank as responsible for the day-to-day conduct of the bank's investment adviser activities for one or more investment companies, including the supervision of all bank employees engaged in the performance of such activities; and

(B) for which all of the records relating to its investment adviser activities are separately maintained in or extractable from such unit's own facilities or the facilities of the bank, and such records are so maintained or otherwise accessible as to permit independent examination and enforcement by the Commission of this Act or the Investment Company Act of 1940 and rules and regulations promulgated under this Act or the Investment Company Act of 1940.

(27) The terms "security future" and "narrow-based security index" have the same meanings as provided in section 3(a)(55) of the Securities Exchange Act of 1934.

(28) The term "credit rating agency" has the same meaning as in section 3 of the Securities Exchange Act of 1934.

(29) The term "private fund" means an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), but for section 3(c)(1) or 3(c)(7) of that Act.

(30) The term "foreign private adviser" means any investment adviser who—

(A) has no place of business in the United States;

(B) has, in total, fewer than 15 clients and investors in the United States in private funds advised by the investment adviser;

(C) has aggregate assets under management attributable to clients in the United States and investors in the United States in private funds advised by the investment adviser of less than $25,000,000, or such higher amount as the Commission may, by rule, deem appropriate in accordance with the purposes of this title; and

(D) neither—

(i) holds itself out generally to the public in the United States as an investment adviser; nor

(ii) acts as—

(I) an investment adviser to any investment company registered under the Investment Company Act of 1940; or

(II) a company that has elected to be a business development company pursuant to section 54 of the Investment Company Act of 1940 (15 U.S.C. 80a–53), and has not withdrawn its election.

(29)[2] The terms "commodity pool", "commodity pool operator", "commodity trading advisor", "major swap participant", "swap", "swap dealer", and "swap execution facility" have the same meanings as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

(b) No provision in this title shall apply to, or be deemed to include, the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned directly or indirectly by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(c) CONSIDERATION OF PROMOTION OF EFFICIENCY, COMPETITION, AND CAPITAL FORMATION.—Whenever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

REGISTRATION OF INVESTMENT ADVISERS

SEC. 203. [80b–3] (a) Except as provided in subsection (b) and section 203A[3], it shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser.[4]

(b) The provisions of subsection (a) shall not apply to—

(1) any investment adviser, other than an investment adviser who acts as an investment adviser to any private fund, all of whose clients are residents of the State within which such investment adviser maintains his or its principal office and place of business, and who does not furnish advice or issue analyses or reports with respect to securities listed or admitted to unlisted trading privileges on any national securities exchange;

(2) any investment adviser whose only clients are insurance companies;

(3) any investment adviser that is a foreign private adviser;

(4) any investment adviser that is a charitable organization, as defined in section 3(c)(10)(D) of the Investment Company Act of 1940, or is a trustee, director, officer, employee, or volunteer of such a charitable organization acting within the scope of such person's employment or duties with such organi-

[2] Effective July 21, 2011, sections 402(a) and 770 of Public Law 111–203 provides for amendments to insert new paragraphs (29)–(30) and a second paragraph (29), respectively (shown above). The second paragraph (29) that precedes subsection (b) probably should be redesignated as paragraph (31).

[3] Section 303(d) of the National Securities Markets Improvment Act of 1996 (P.L. 104–290; 110 Stat. 3438) amended section 203 of the Investment Advisers Act of 1940 by striking "subsection (b) *of this section*" and inserting "subsection (b) and section 203A". This compilation reflects this amendment even though the italicized words were not in the underlying law at the time of the amendment.

[4] See also 7 U.S.C. 2, 2a, 6m. [Printed in appendix to this volume.]

zation, whose advice, analyses, or reports are provided only to one or more of the following:

(A) any such charitable organization;

(B) a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940; or

(C) a trust or other donative instrument described in section 3(c)(10)(B) of the Investment Company Act of 1940, or the trustees, administrators, settlors (or potential settlors), or beneficiaries of any such trust or other instrument;

(5) any plan described in section 414(e) of the Internal Revenue Code of 1986, any person or entity eligible to establish and maintain such a plan under the Internal Revenue Code of 1986, or any trustee, director, officer, or employee of or volunteer for any such plan or person, if such person or entity, acting in such capacity, provides investment advice exclusively to, or with respect to, any plan, person, or entity or any company, account, or fund that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940;

(6)(A) any investment adviser that is registered with the Commodity Futures Trading Commission as a commodity trading advisor whose business does not consist primarily of acting as an investment adviser, as defined in section 202(a)(11) of this title, and that does not act as an investment adviser to—

(i) an investment company registered under title I of this Act; or

(ii) a company which has elected to be a business development company pursuant to section 54 of title I of this Act and has not withdrawn its election; or

(B) any investment adviser that is registered with the Commodity Futures Trading Commission as a commodity trading advisor and advises a private fund, provided that, if after the date of enactment of the Private Fund Investment Advisers Registration Act of 2010, the business of the advisor should become predominately the provision of securities-related advice, then such adviser shall register with the Commission;

(7) any investment adviser, other than any entity that has elected to be regulated or is regulated as a business development company pursuant to section 54 of the Investment Company Act of 1940 (15 U.S.C. 80a–54), who solely advises—

(A) small business investment companies that are licensees under the Small Business Investment Act of 1958;

(B) entities that have received from the Small Business Administration notice to proceed to qualify for a license as a small business investment company under the Small Business Investment Act of 1958, which notice or license has not been revoked; or

(C) applicants that are affiliated with 1 or more licensed small business investment companies described in subparagraph (A) and that have applied for another license under the Small Business Investment Act of 1958, which application remains pending; or

(8) any investment adviser, other than an entity that has elected to be regulated or is regulated as a business development company pursuant to section 54 of the Investment Company Act of 1940 (15 U.S.C. 80a–53), who solely advises—

(A) rural business investment companies (as defined in section 384A of the Consolidated Farm and Rural Development Act (7 U.S.C. 2009cc)); or

(B) companies that have submitted to the Secretary of Agriculture an application in accordance with section 384D(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. 2009cc–3(b)) that—

(i) have received from the Secretary of Agriculture a letter of conditions, which has not been revoked; or

(ii) are affiliated with 1 or more rural business investment companies described in subparagraph (A).

(c)(1) An investment adviser, or any person who presently contemplates becoming an investment adviser, may be registered by filing with the Commission an application for registration in such form and containing such of the following information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors:

(A) the name and form of organization under which the investment adviser engages or intends to engage in business; the name of the State or other sovereign power under which such investment adviser is organized; the location of his or its principal office, principal place of business, and branch offices, if any; the names and addresses of his or its partners, officers, directors, and persons performing similar functions or, if such an investment adviser be an individual, of such individual; and the number of his or its employees;

(B) the education, the business affiliations for the past ten years, and the present business affiliations of such investment adviser and of his or its partners, officers, directors, and persons performing similar functions and of any controlling person thereof;

(C) the nature of the business of such investment adviser, including the manner of giving advice and rendering analyses or reports;

(D) a balance sheet certified by an independent public accountant and other financial statements (which shall, as the Commission specifies, be certified);

(E) the nature and scope of the authority of such investment adviser with respect to clients' funds and accounts;

(F) the basis or bases upon which such investment adviser is compensated;

(G) whether such investment adviser, or any person associated with such investment adviser, is subject to any disqualification which would be a basis for denial, suspension, or revocation of registration of such investment adviser under the provisions of subsection (e) of this section; and

(H) a statement as to whether the principal business of such investment adviser consists or is to consist of acting as investment adviser and a statement as to whether a substan-

tial part of the business of such investment adviser, consists or is to consist of rendering investment supervisory services.

(2) Within forty-five days of the date of the filing of such application (or within such longer period as to which the applicant consents) the Commission shall—

(A) by order grant such registration; or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred twenty days of the date of the filing of the application for registration. At the conclusion of such proceedings the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if the Commission finds that the requirements of this section are satisfied and that the applicant is not prohibited from registering as an investment adviser under section 203A. The Commission shall deny such registration if it does not make such a finding or if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under subsection (e) of this section.

(d) Any provision of this title (other than subsection (a) of this section) which prohibits any act, practice, or course of business if the mails or any means or instrumentality of interstate commerce are used in connection therewith shall also prohibit any such act, practice, or course of business by any investment adviser registered pursuant to this section or any person acting on behalf of such an investment adviser, irrespective of any use of the mails or any means or instrumentality of interstate commerce in connection therewith.

(e) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any investment adviser if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such investment adviser, or any person associated with such investment adviser, whether prior to or subsequent to becoming so associated—

(1) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission under this title, or in any proceeding before the Commission with respect to registration, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein.

(2) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor or of a substantially equivalent crime by a foreign court of competent jurisdiction which the Commission finds—

(A) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, any substantially equivalent activity however denominated by the laws of the relevant foreign government, or conspiracy to commit any such offense;

(B) arises out of the conduct of the business of a broker, dealer, municipal securities dealer, investment adviser, bank, insurance company, government securities broker, government securities dealer, fiduciary, transfer agent, credit rating agency, foreign person performing a function substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent statute or regulation;

(C) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities or substantially equivalent activity however denominated by the laws of the relevant foreign government; or

(D) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of title 18, United States Code, or a violation of substantially equivalent foreign statute.

(3) has been convicted during the 10-year period preceding the date of filing of any application for registration, or at any time thereafter, of—

(A) any crime that is punishable by imprisonment for 1 or more years, and that is not described in paragraph (2); or

(B) a substantially equivalent crime by a foreign court of competent jurisdiction.

(4) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction, including any foreign court of competent jurisdiction, from acting as an investment adviser, underwriter, broker, dealer, municipal securities dealer, government securities broker, government securities dealer, transfer agent, credit rating agency, foreign person performing a function substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent statute or regulation, or as an affiliated person or employee of any investment company, bank, insurance company, foreign entity substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent statute or regulation, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(5) has willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, this title, the Commodity Exchange Act, or the rules or regulations under any such statutes or any rule

of the Municipal Securities Rulemaking Board, or is unable to comply with any such provision.

(6) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, this title, the Commodity Exchange Act, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this paragraph no person shall be deemed to have failed reasonably to supervise any person, if—

(A) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(B) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

(7) is subject to any order of the Commission barring or suspending the right of the person to be associated with an investment adviser;

(8) has been found by a foreign financial regulatory authority to have—

(A) made or caused to be made in any application for registration or report required to be filed with a foreign securities authority, or in any proceeding before a foreign securities authority with respect to registration, any statement that was at the time and in light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any application or report to a foreign securities authority any material fact that is required to be stated therein;

(B) violated any foreign statute or regulation regarding transactions in securities or contracts of sale of a commodity for future delivery traded on or subject to the rules of a contract market or any board of trade; or

(C) aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any foreign statute or regulation regarding transactions in securities or contracts of sale of a commodity for future delivery traded on or subject to the rules of a contract market or any board of trade, or has been found, by the foreign finanical regulatory authority, to have failed reasonably to supervise, with a view to preventing violations of statutory provisions, and rules and regulations promulgated thereunder, another person who commits such a violation, if such other person is subject to his supervision; or

(9) is subject to any final order of a State securities commission (or any agency or officer performing like functions),

State authority that supervises or examines banks, savings associations, or credit unions, State insurance commission (or any agency or office performing like functions), an appropriate Federal banking agency (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q))), or the National Credit Union Administration, that—

(A) bars such person from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or

(B) constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct.

(f) The Commission, by order, shall censure or place limitations on the activities of any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser, or suspend for a period not exceeding 12 months or bar any such person from being associated with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in paragraph (1), (5), (6), (8), or (9) of subsection (e) or has been convicted of any offense specified in paragraph (2) or (3) of subsection (e) within ten years of the commencement of the proceedings under this subsection, or is enjoined from any action, conduct, or practice specified in paragraph (4) of subsection (e). It shall be unlawful for any person as to whom such an order suspending or barring him from being associated with an investment adviser is in effect willfully to become, or to be, associated with an investment adviser without the consent of the Commission, and it shall be unlawful for any investment adviser to permit such a person to become, or remain, a person associated with him without the consent of the Commission, if such investment adviser knew, or in the exercise of reasonable care, should have known, of such order.

(g) Any successor to the business of an investment adviser registered under this section shall be deemed likewise registered hereunder, if within thirty days from its succession to such business it shall file an application for registration under this section, unless and until the Commission, pursuant to subsection (c) or subsection (e) of this section, shall deny registration to or revoke or suspend the registration of such successor.

(h) Any person registered under this section may, upon such terms and conditions as the Commission finds necessary in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any person registered under this section, or who has pending an application for registration filed under this section, is no longer in existence, is not engaged in business as an investment adviser, or is prohibited from reg-

istering as an investment adviser under section 203A, the Commission shall by order cancel the registration of such person.

(i) MONEY PENALTIES IN ADMINISTRATIVE PROCEEDINGS.—

(1) AUTHORITY OF COMMISSION.—

(A) IN GENERAL.—In any proceeding instituted pursuant to subsection (e) or (f) against any person, the Commission may impose a civil penalty if it finds, on the record after notice and opportunity for hearing, that such penalty is in the public interest and that such person—

(i) has willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, or this title, or the rules or regulations thereunder;

(ii) has willfully aided, abetted, counseled, commanded, induced, or procured such a violation by any other person;

(iii) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission under this title, or in any proceeding before the Commission with respect to registration, any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which was required to be stated therein; or

(iv) has failed reasonably to supervise, within the meaning of subsection (e)(6), with a view to preventing violations of the provisions of this title and the rules and regulations thereunder, another person who commits such a violation, if such other person is subject to his supervision; [5]

(B) CEASE-AND-DESIST PROCEEDINGS.—In any proceeding instituted pursuant to subsection (k) against any person, the Commission may impose a civil penalty if the Commission finds, on the record, after notice and opportunity for hearing, that such person—

(i) is violating or has violated any provision of this title, or any rule or regulation issued under this title; or

(ii) is or was a cause of the violation of any provision of this title, or any rule or regulation issued under this title.

(2) MAXIMUM AMOUNT OF PENALTY.—

(A) FIRST TIER.—The maximum amount of penalty for each act or omission described in paragraph (1) shall be $5,000 for a natural person or $50,000 for any other person.

(B) SECOND TIER.—Notwithstanding subparagraph (A), the maximum amount of penalty for each such act or omission shall be $50,000 for a natural person or $250,000 for any other person if the act or omission described in para-

[5] So in law. The semicolon at the end of subparagraph (A)(iv) probably should be a period.

graph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(C) THIRD TIER.—Notwithstanding subparagraphs (A) and (B), the maximum amount of penalty for each such act or omission shall be $100,000 for a natural person or $500,000 for any other person if—

(i) the act or omission described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(ii) such act or omission directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission.

(3) DETERMINATION OF PUBLIC INTEREST.—In considering under this section whether a penalty is in the public interest, the Commission may consider—

(A) whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement;

(B) the harm to other persons resulting either directly or indirectly from such act or omission;

(C) the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior;

(D) whether such person previously has been found by the Commission, another appropriate regulatory agency, or a self-regulatory organization to have violated the Federal securities laws, State securities laws, or the rules of a self-regulatory organization, has been enjoined by a court of competent jurisdiction from violations of such laws or rules, or has been convicted by a court of competent jurisdiction of violations of such laws or of any felony or misdemeanor described in section 203(e)(2) of this title;

(E) the need to deter such person and other persons from committing such acts or omissions; and

(F) such other matters as justice may require.

(4) EVIDENCE CONCERNING ABILITY TO PAY.—In any proceeding in which the Commission may impose a penalty under this section, a respondent may present evidence of the respondent's ability to pay such penalty. The Commission may, in its discretion, consider such evidence in determining whether such penalty is in the public interest. Such evidence may relate to the extent of such person's ability to continue in business and the collectability of a penalty, taking into account any other claims of the United States or third parties upon such person's assets and the amount of such person's assets.

(j) AUTHORITY TO ENTER AN ORDER REQUIRING AN ACCOUNTING AND DISGORGEMENT.—In any proceeding in which the Commission may impose a penalty under this section, the Commission may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of

interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.

(k) CEASE-AND-DESIST PROCEEDINGS.—

(1) AUTHORITY OF THE COMMISSION.—If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this title, or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and 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 violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation. Such order may, in addition to requiring a person to cease and desist from committing or causing a violation, require such person to comply, or to take steps to effect compliance, with such provision, rule, or regulation, upon such terms and conditions and within such time as the Commission may specify in such order. Any such order may, as the Commission deems appropriate, require future compliance or steps to effect future compliance, either permanently or for such period of time as the Commission may specify, with such provision, rule, or regulation with respect to any security, any issuer, or any other person.

(2) HEARING.—The notice instituting proceedings pursuant to paragraph (1) shall fix a hearing date not earlier than 30 days nor later than 60 days after service of the notice unless an earlier or a later date is set by the Commission with the consent of any respondent so served.

(3) TEMPORARY ORDER.—

(A) IN GENERAL.—Whenever the Commission determines that the alleged violation or threatened violation specified in the notice instituting proceedings pursuant to paragraph (1), or the continuation thereof, is likely to result in significant dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest, including, but not limited to, losses to the Securities Investor Protection Corporation, prior to the completion of the proceedings, the Commission may enter a temporary order requiring the respondent to cease and desist from the violation or threatened violation and to take such action to prevent the violation or threatened violation and to prevent dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest as the Commission deems appropriate pending completion of such proceedings. Such an order shall be entered only after notice and opportunity for a hearing, unless the Commission, notwithstanding section 211(c) of this title, determines that notice and hearing prior to entry would be impracticable or contrary to the public interest. A temporary order shall become effective upon service upon the respondent and, unless set aside, limited, or suspended by the Commission or a court of competent juris-

diction, shall remain effective and enforceable pending the completion of the proceedings.

(B) APPLICABILITY.—This paragraph shall apply only to a respondent that acts, or, at the time of the alleged misconduct acted, as a broker, dealer, investment adviser, investment company, municipal securities dealer, government securities broker, government securities dealer, or transfer agent, or is, or was at the time of the alleged misconduct, an associated person of, or a person seeking to become associated with, any of the foregoing.

(4) REVIEW OF TEMPORARY ORDERS.—

(A) COMMISSION REVIEW.—At any time after the respondent has been served with a temporary cease-and-desist order pursuant to paragraph (3), the respondent may apply to the Commission to have the order set aside, limited, or suspended. If the respondent has been served with a temporary cease-and-desist order entered without a prior Commission hearing, the respondent may, within 10 days after the date on which the order was served, request a hearing on such application and the Commission shall hold a hearing and render a decision on such application at the earliest possible time.

(B) JUDICIAL REVIEW.—Within—

(i) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or

(ii) 10 days after the Commission renders a decision on an application and hearing under subparagraph (A), with respect to any temporary cease-and-desist order entered without a prior Commission hearing,

the respondent may apply to the United States district court for the district in which the respondent resides or has its principal office or place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under subparagraph (A) of this paragraph.

(C) NO AUTOMATIC STAY OF TEMPORARY ORDER.—The commencement of proceedings under subparagraph (B) of this paragraph shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(D) EXCLUSIVE REVIEW.—Section 213 of this title shall not apply to a temporary order entered pursuant to this section.

(5) AUTHORITY TO ENTER AN ORDER REQUIRING AN ACCOUNTING AND DISGORGEMENT.—In any cease-and-desist proceeding under paragraph (1), the Commission may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules,

regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.

(l) EXEMPTION OF VENTURE CAPITAL FUND ADVISERS.—

(1) IN GENERAL.—No investment adviser that acts as an investment adviser solely to 1 or more venture capital funds shall be subject to the registration requirements of this title with respect to the provision of investment advice relating to a venture capital fund. Not later than 1 year after the date of enactment of this subsection, the Commission shall issue final rules to define the term "venture capital fund" for purposes of this subsection. The Commission shall require such advisers to maintain such records and provide to the Commission such annual or other reports as the Commission determines necessary or appropriate in the public interest or for the protection of investors.

(2) ADVISERS OF SBICS.—For purposes of this subsection, a venture capital fund includes an entity described in subparagraph (A), (B), or (C) of subsection (b)(7) (other than an entity that has elected to be regulated or is regulated as a business development company pursuant to section 54 of the Investment Company Act of 1940).

(3) ADVISERS OF RBICS.—For purposes of this subsection, a venture capital fund includes an entity described in subparagraph (A) or (B) of subsection (b)(8) (other than an entity that has elected to be regulated as a business development company pursuant to section 54 of the Investment Company Act of 1940 (15 U.S.C. 80a–53)).

(m) EXEMPTION OF AND REPORTING BY CERTAIN PRIVATE FUND ADVISERS.—

(1) IN GENERAL.—The Commission shall provide an exemption from the registration requirements under this section to any investment adviser of private funds, if each of such investment adviser acts solely as an adviser to private funds and has assets under management in the United States of less than $150,000,000.

(2) REPORTING.—The Commission shall require investment advisers exempted by reason of this subsection to maintain such records and provide to the Commission such annual or other reports as the Commission determines necessary or appropriate in the public interest or for the protection of investors.

(3) ADVISERS OF SBICS.—For purposes of this subsection, the assets under management of a private fund that is an entity described in subparagraph (A), (B), or (C) of subsection (b)(7) (other than an entity that has elected to be regulated or is regulated as a business development company pursuant to section 54 of the Investment Company Act of 1940) shall be excluded from the limit set forth in paragraph (1).

(4) ADVISERS OF RBICS.—For purposes of this subsection, the assets under management of a private fund that is an entity described in subparagraph (A) or (B) of subsection (b)(8) (other than an entity that has elected to be regulated or is regulated as a business development company pursuant to section

54 of the Investment Company Act of 1940 (15 U.S.C. 80a–53)) shall be excluded from the limit set forth in paragraph (1).

(n) REGISTRATION AND EXAMINATION OF MID-SIZED PRIVATE FUND ADVISERS.—In prescribing regulations to carry out the requirements of this section with respect to investment advisers acting as investment advisers to mid-sized private funds, the Commission shall take into account the size, governance, and investment strategy of such funds to determine whether they pose systemic risk, and shall provide for registration and examination procedures with respect to the investment advisers of such funds which reflect the level of systemic risk posed by such funds.

SEC. 203A. [80b–3a] STATE AND FEDERAL RESPONSIBILITIES.

(a) ADVISERS SUBJECT TO STATE AUTHORITIES.—

(1) IN GENERAL.—No investment adviser that is regulated or required to be regulated as an investment adviser in the State in which it maintains its principal office and place of business shall register under section 203, unless the investment adviser—

(A) has assets under management of not less than $25,000,000, or such higher amount as the Commission may, by rule, deem appropriate in accordance with the purposes of this title; or

(B) is an adviser to an investment company registered under title I of this Act.

(2) TREATMENT OF MID-SIZED INVESTMENT ADVISERS.—

(A) IN GENERAL.—No investment adviser described in subparagraph (B) shall register under section 203, unless the investment adviser is an adviser to an investment company registered under the Investment Company Act of 1940, or a company which has elected to be a business development company pursuant to section 54 of the Investment Company Act of 1940, and has not withdrawn the election, except that, if by effect of this paragraph an investment adviser would be required to register with 15 or more States, then the adviser may register under section 203.

(B) COVERED PERSONS.—An investment adviser described in this subparagraph is an investment adviser that—

(i) is required to be registered as an investment adviser with the securities commissioner (or any agency or office performing like functions) of the State in which it maintains its principal office and place of business and, if registered, would be subject to examination as an investment adviser by any such commissioner, agency, or office; and

(ii) has assets under management between—

(I) the amount specified under subparagraph (A) of paragraph (1), as such amount may have been adjusted by the Commission pursuant to that subparagraph; and

(II) $100,000,000, or such higher amount as the Commission may, by rule, deem appropriate in accordance with the purposes of this title.

(3) DEFINITION.—For purposes of this subsection, the term "assets under management" means the securities portfolios with respect to which an investment adviser provides continuous and regular supervisory or management services.

(b) ADVISERS SUBJECT TO COMMISSION AUTHORITY.—

(1) IN GENERAL.—No law of any State or political subdivision thereof requiring the registration, licensing, or qualification as an investment adviser or supervised person of an investment adviser shall apply to any person—

(A) that is registered under section 203 as an investment adviser, or that is a supervised person of such person, except that a State may license, register, or otherwise qualify any investment adviser representative who has a place of business located within that State;

(B) that is not registered under section 203 because that person is excepted from the definition of an investment adviser under section 202(a)(11); or [6]

(C) that is not registered under section 203 because that person is exempt from registration as provided in subsection (b)(7) of such section, or is a supervised person of such person; or

(D) that is not registered under section 203 because that person is exempt from registration as provided in subsection (b)(8) of such section, or is a supervised person of such person.

(2) LIMITATION.—Nothing in this subsection shall prohibit the securities commission (or any agency or office performing like functions) of any State from investigating and bringing enforcement actions with respect to fraud or deceit against an investment adviser or person associated with an investment adviser.

(c) EXEMPTIONS.—Notwithstanding subsection (a), the Commission, by rule or regulation upon its own motion, or by order upon application, may permit the registration with the Commission of any person or class of persons to which the application of subsection (a) would be unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes of this section.

(d) STATE ASSISTANCE.—Upon request of the securities commissioner (or any agency or officer performing like functions) of any State, the Commission may provide such training, technical assistance, or other reasonable assistance in connection with the regulation of investment advisers by the State. [7]

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[6] The word "or" after the semicolon in paragraph (1)(B) probably should not appear.

[7] Section 307 of the National Securities Markets Improvement Act of 1996 (P.L. 104–290; 110 Stat. 3438) provides as follows:

SEC. 307. [15 U.S.C. 80b–3a note] CONTINUED STATE AUTHORITY.

(a) PRESERVATION OF FILING REQUIREMENTS.—Nothing in this title or any amendment made by this title prohibits the securities commission (or any agency or office performing like functions) of any State from requiring the filing of any documents filed with the Commission pursuant to the securities laws solely for notice purposes, together with a consent to service of process and any required fee.

ANNUAL AND OTHER REPORTS

SEC. 204. [80b–4] (a) IN GENERAL.—Every investment adviser who makes use of the mails or of any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser (other than one specifically exempted from registration pursuant to section 203(b) of this title), shall make and keep for prescribed periods such records (as defined in section 3(a)(37) of the Securities Exchange Act of 1934), furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. All records (as so defined) of such investment advisers are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

(b) RECORDS AND REPORTS OF PRIVATE FUNDS.—

(1) IN GENERAL.—The Commission may require any investment adviser registered under this title—

(A) to maintain such records of, and file with the Commission such reports regarding, private funds advised by the investment adviser, as necessary and appropriate in the public interest and for the protection of investors, or for the assessment of systemic risk by the Financial Stability Oversight Council (in this subsection referred to as the "Council"); and

(B) to provide or make available to the Council those reports or records or the information contained therein.

(2) TREATMENT OF RECORDS.—The records and reports of any private fund to which an investment adviser registered under this title provides investment advice shall be deemed to be the records and reports of the investment adviser.

(3) REQUIRED INFORMATION.—The records and reports required to be maintained by an investment adviser and subject to inspection by the Commission under this subsection shall include, for each private fund advised by the investment adviser, a description of—

(A) the amount of assets under management and use of leverage, including off-balance-sheet leverage;

(b) PRESERVATION OF FEES.—Until otherwise provided by law, rule, regulation, or order, or other administrative action of any State, or any political subdivision thereof, adopted after the date of enactment of this Act, filing, registration, or licensing fees shall, notwithstanding the amendments made by this title, continue to be paid in amounts determined pursuant to the law, rule, regulation, or order, or other administrative action as in effect on the day before such date of enactment.

(c) AVAILABILITY OF PREEMPTION CONTINGENT ON PAYMENT OF FEES.—

(1) IN GENERAL.—During the period beginning on the date of enactment of this Act and ending 3 years after that date of enactment, the securities commission (or any agency or office performing like functions) of any State may require registration of any investment adviser that fails or refuses to pay the fees required by subsection (b) in or to such State, notwithstanding the limitations on the laws, rules, regulations, or orders, or other administrative actions of any State, or any political subdivision thereof, contained in subsection (a), if the laws of such State require registration of investment advisers.

(2) DELAYS.—For purposes of this subsection, delays in payment of fees or underpayments of fees that are promptly remedied in accordance with the applicable laws, rules, regulations, or orders, or other administrative actions of the relevant State shall not constitute a failure or refusal to pay fees.

(B) counterparty credit risk exposure;

(C) trading and investment positions;

(D) valuation policies and practices of the fund;

(E) types of assets held;

(F) side arrangements or side letters, whereby certain investors in a fund obtain more favorable rights or entitlements than other investors;

(G) trading practices; and

(H) such other information as the Commission, in consultation with the Council, determines is necessary and appropriate in the public interest and for the protection of investors or for the assessment of systemic risk, which may include the establishment of different reporting requirements for different classes of fund advisers, based on the type or size of private fund being advised.

(4) MAINTENANCE OF RECORDS.—An investment adviser registered under this title shall maintain such records of private funds advised by the investment adviser for such period or periods as the Commission, by rule, may prescribe as necessary and appropriate in the public interest and for the protection of investors, or for the assessment of systemic risk.

(5) FILING OF RECORDS.—The Commission shall issue rules requiring each investment adviser to a private fund to file reports containing such information as the Commission deems necessary and appropriate in the public interest and for the protection of investors or for the assessment of systemic risk.

(6) EXAMINATION OF RECORDS.—

(A) PERIODIC AND SPECIAL EXAMINATIONS.—The Commission—

(i) shall conduct periodic inspections of the records of private funds maintained by an investment adviser registered under this title in accordance with a schedule established by the Commission; and

(ii) may conduct at any time and from time to time such additional, special, and other examinations as the Commission may prescribe as necessary and appropriate in the public interest and for the protection of investors, or for the assessment of systemic risk.

(B) AVAILABILITY OF RECORDS.—An investment adviser registered under this title shall make available to the Commission any copies or extracts from such records as may be prepared without undue effort, expense, or delay, as the Commission or its representatives may reasonably request.

(7) INFORMATION SHARING.—

(A) IN GENERAL.—The Commission shall make available to the Council copies of all reports, documents, records, and information filed with or provided to the Commission by an investment adviser under this subsection as the Council may consider necessary for the purpose of assessing the systemic risk posed by a private fund.

(B) CONFIDENTIALITY.—The Council shall maintain the confidentiality of information received under this paragraph in all such reports, documents, records, and infor-

mation, in a manner consistent with the level of confidentiality established for the Commission pursuant to paragraph (8). The Council shall be exempt from section 552 of title 5, United States Code, with respect to any information in any report, document, record, or information made available, to the Council under this subsection.

(8) COMMISSION CONFIDENTIALITY OF REPORTS.—Notwithstanding any other provision of law, the Commission may not be compelled to disclose any report or information contained therein required to be filed with the Commission under this subsection, except that nothing in this subsection authorizes the Commission—

(A) to withhold information from Congress, upon an agreement of confidentiality; or

(B) prevent the Commission from complying with—

(i) a request for information from any other Federal department or agency or any self-regulatory organization requesting the report or information for purposes within the scope of its jurisdiction; or

(ii) an order of a court of the United States in an action brought by the United States or the Commission.

(9) OTHER RECIPIENTS CONFIDENTIALITY.—Any department, agency, or self-regulatory organization that receives reports or information from the Commission under this subsection shall maintain the confidentiality of such reports, documents, records, and information in a manner consistent with the level of confidentiality established for the Commission under paragraph (8).

(10) PUBLIC INFORMATION EXCEPTION.—

(A) IN GENERAL.—The Commission, the Council, and any other department, agency, or self-regulatory organization that receives information, reports, documents, records, or information from the Commission under this subsection, shall be exempt from the provisions of section 552 of title 5, United States Code, with respect to any such report, document, record, or information. Any proprietary information of an investment adviser ascertained by the Commission from any report required to be filed with the Commission pursuant to this subsection shall be subject to the same limitations on public disclosure as any facts ascertained during an examination, as provided by section 210(b) of this title.

(B) PROPRIETARY INFORMATION.—For purposes of this paragraph, proprietary information includes sensitive, nonpublic information regarding—

(i) the investment or trading strategies of the investment adviser;

(ii) analytical or research methodologies;

(iii) trading data;

(iv) computer hardware or software containing intellectual property; and

(v) any additional information that the Commission determines to be proprietary.

(11) ANNUAL REPORT TO CONGRESS.—The Commission shall report annually to Congress on how the Commission has used the data collected pursuant to this subsection to monitor the markets for the protection of investors and the integrity of the markets.

(c) FILING DEPOSITORIES.—The Commission may, by rule, require an investment adviser—

(1) to file with the Commission any fee, application, report, or notice required to be filed by this title or the rules issued under this title through any entity designated by the Commission for that purpose; and

(2) to pay the reasonable costs associated with such filing and the establishment and maintenance of the systems required by subsection (c).

(d) ACCESS TO DISCIPLINARY AND OTHER INFORMATION.—

(1) MAINTENANCE OF SYSTEM TO RESPOND TO INQUIRIES.—

(A) IN GENERAL.—The Commission shall require the entity designated by the Commission under subsection (b)(1) to establish and maintain a toll-free telephone listing, or a readily accessible electronic or other process, to receive and promptly respond to inquiries regarding registration information (including disciplinary actions, regulatory, judicial, and arbitration proceedings, and other information required by law or rule to be reported) involving investment advisers and persons associated with investment advisers.

(B) APPLICABILITY.—This subsection shall apply to any investment adviser (and the persons associated with that adviser), whether the investment adviser is registered with the Commission under section 203 or regulated solely by a State, as described in section 203A.

(2) RECOVERY OF COSTS.—An entity designated by the Commission under subsection (b)(1) may charge persons making inquiries, other than individual investors, reasonable fees for responses to inquiries described in paragraph (1).

(3) LIMITATION ON LIABILITY.—An entity designated by the Commission under subsection (b)(1) shall not have any liability to any person for any actions taken or omitted in good faith under this subsection.

(e) RECORDS OF PERSONS WITH CUSTODY OR USE.—

(1) IN GENERAL.—Records of persons having custody or use of the securities, deposits, or credits of a client, that relate to such custody or use, are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations and other information and document requests by representatives of the Commission, as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

(2) CERTAIN PERSONS SUBJECT TO OTHER REGULATION.—Any person that is subject to regulation and examination by a Federal financial institution regulatory agency (as such term is defined under section 212(c)(2) of title 18, United States Code) may satisfy any examination request, information request, or document request described under paragraph (1), by providing

the Commission with a detailed listing, in writing, of the securities, deposits, or credits of the client within the custody or use of such person.

(f) DATA STANDARDS FOR REPORTS FILED UNDER THIS SECTION.—

(1) REQUIREMENT.—The Commission shall, by rule, adopt data standards for all reports filed by investment advisers with the Commission under this section.

(2) CONSISTENCY.—The data standards required under paragraph (1) shall incorporate, and ensure compatibility with (to the extent feasible), all applicable data standards established in the rules promulgated under section 124 of the Financial Stability Act of 2010, including, to the extent practicable, by having the characteristics described in clauses (i) through (vi) of subsection (c)(1)(B) of such section 124.

PREVENTION OF MISUSE OF NONPUBLIC INFORMATION

SEC. 204A. [80b–4a] Every investment adviser subject to section 204 of this title shall establish, maintain, and enforce written policies and procedures reasonably designed, taking into consideration the nature of such investment adviser's business, to prevent the misuse in violation of this Act or the Securities Exchange Act of 1934, or the rules or regulations thereunder, of material, nonpublic information by such investment adviser or any person associated with such investment adviser. The Commission, as it deems necessary or appropriate in the public interest or for the protection of investors, shall adopt rules or regulations to require specific policies or procedures reasonably designed to prevent misuse in violation of this Act or the Securities Exchange Act of 1934 (or the rules or regulations thereunder) of material, nonpublic information.

INVESTMENT ADVISORY CONTRACTS

SEC. 205. [80b–5] (a) No investment adviser registered or required to be registered with the Commission shall enter into, extend, or renew any investment advisory contract, or in any way perform any investment advisory contract entered into, extended, or renewed on or after the effective date of this title, if such contract—

(1) provides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client;

(2) fails to provide, in substance, that no assignment of such contract shall be made by the investment adviser without the consent of the other party by the contract; or

(3) fails to provide, in substance, that the investment adviser, if a partnership, will notify the other party to the contract of any change in the membership of such partnership within a reasonable time after such change.

(b) Paragraph (1) of subsection (a) shall not—

(1) be construed to prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date;

(2) apply to an investment advisory contract with—

(A) an investment company registered under title I of this Act, or

(B) any other person (except a trust, governmental plan, collective trust fund, or separate account referred to in section 3(c)(11) of title I of this Act), provided that the contract relates to the investment of assets in excess of $1 million,

if the contract provides for compensation based on the asset value of the company or fund under management averaged over a specified period and increasing and decreasing proportionately with the investment performance of the company or fund over a specified period in relation to the investment record of an appropriate index of securities prices or such other measure of investment performance as the Commission by rule, regulation, or order may specify;

(3) apply with respect to any investment advisory contract between an investment adviser and a business development company, as defined in this title, if (A) the compensation provided for in such contract does not exceed 20 per centum of the realized capital gains upon the funds of the business development company over a specified period or as of definite dates, computed net of all realized capital losses and unrealized capital depreciation, and the condition of section 61(a)(4)(B)(iii) of title I of this Act is satisfied, and (B) the business development company does not have outstanding any option, warrant, or right issued pursuant to section 61(a)(4)(B) of title I of this Act and does not have a profit-sharing plan described in section 57(n) of title I of this Act;

(4) apply to an investment advisory contract with a company excepted from the definition of an investment company under section 3(c)(7) of title I of this Act; or

(5) apply to an investment advisory contract with a person who is not a resident of the United States.

(c) For purposes of paragraph (2) of subsection (b), the point from which increases and decreases in compensation are measured shall be the fee which is paid or earned when the investment performance of such company or fund is equivalent to that of the index or other measure of performance, and an index of securities prices shall be deemed appropriate unless the Commission by order shall determine otherwise.

(d) As used in paragraphs (2) and (3) of subsection (a), "investment advisory contract" means any contract or agreement whereby a person agrees to act as investment adviser to or to manage any investment or trading account of another person other than an investment company registered under title I of this Act.

(e) The Commission, by rule or regulation, upon its own motion, or by order upon application, may conditionally or unconditionally exempt any person or transaction, or any class or classes of persons or transactions, from subsection (a)(1), if and to the extent that the exemption relates to an investment advisory contract with any person that the Commission determines does not need the protections of subsection (a)(1), on the basis of such factors as financial sophistication, net worth, knowledge of and experience in

financial matters, amount of assets under management, relationship with a registered investment adviser, and such other factors as the Commission determines are consistent with this section. With respect to any factor used in any rule or regulation by the Commission in making a determination under this subsection, if the Commission uses a dollar amount test in connection with such factor, such as a net asset threshold, the Commission shall, by order, not later than 1 year after the date of enactment of the Private Fund Investment Advisers Registration Act of 2010, and every 5 years thereafter, adjust for the effects of inflation on such test. Any such adjustment that is not a multiple of $100,000 shall be rounded to the nearest multiple of $100,000.

(f) AUTHORITY TO RESTRICT MANDATORY PRE-DISPUTE ARBITRATION.—The Commission, by rule, may prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any investment adviser to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors.

PROHIBITED TRANSACTIONS BY REGISTERED INVESTMENT ADVISERS

SEC. 206. [80b–6] It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud any client or prospective client;

(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

(3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such 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. The prohibitions of this paragraph (3) shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction; or

(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

EXEMPTIONS

SEC. 206A. [80b–6a] The Commission, by rules and regulations, upon its own motion, or by order upon application, may conditionally or unconditionally exempt any person or transaction, or

any class or classes of persons, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title.

MATERIAL MISSTATEMENTS

SEC. 207. [80b–7] It shall be unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission under section 203 or 204, or willfully to omit to state in any such application or report any material fact which is required to be stated therein.

GENERAL PROHIBITIONS

SEC. 208. [80b–8] (a) It shall be unlawful for any person registered under section 203 of this title to represent or imply in any manner whatsoever that such person has been sponsored, recommended, or approved, or that his abilities or qualifications have in any respect been passed upon by the United States or any agency or any officer thereof.

(b) No provision of subsection (a) shall be construed to prohibit a statement that a person is registered under this title or under the Securities Exchange Act of 1934, if such statement is true in fact and if the effect of such registration is not misrepresented.

(c) It shall be unlawful for any person registered under section 203 of this title to represent that he is an investment counsel or to use the name "investment counsel" as descriptive of his business unless (1) his or its principal business consists of acting as investment adviser, and (2) a substantial part of his or its business consists of rendering investment supervisory services.

(d) It shall be unlawful for any person indirectly, or through or by any other person, to do any act or thing which it would be unlawful for such person to do directly under the provisions of this title or any rule or regulation thereunder.

ENFORCEMENT OF TITLE

SEC. 209. [80b–9] (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title or of any rule or regulation prescribed under the authority thereof, have been or are about to be violated by any person, it may in its discretion require, and in any event shall permit, such person to file with it a statement in writing, under oath or otherwise, as to all the facts and circumstances relevant to such violation, and may otherwise investigate all such facts and circumstances.

(b) For the purposes of any investigation or any proceeding under this title, any member of the Commission or any officer thereof designated by it is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which are relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required

from any place in any State or in any Territory or other place subject to the jurisdiction of the United States at any designated place of hearing.

(c) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who without just cause shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor, and upon conviction shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) Whenever it shall appear to the Commission that any person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of any provision of this title, or of any rule, regulation, or order hereunder, or that any person has aided, abetted, counseled, commanded, induced, or procured, is aiding, abetting, counseling, commanding, inducing, or procuring, or is about to aid, abet, counsel, command, induce, or procure such a violation, it may in its discretion bring an action in the proper district court of the United States, or the proper United States court of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this title or any rule, regulation, or order hereunder. Upon a showing that such person has engaged, is engaged, or is about to engage in any such act or practice, or in aiding, abetting, counseling, commanding, inducing, or procuring any such act or practice, a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning any violation of the provisions of this title, or of any rule, regulation, or order thereunder, to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this title.

(e) MONEY PENALTIES IN CIVIL ACTIONS.—

(1) AUTHORITY OF COMMISSION.—Whenever it shall appear to the Commission that any person has violated any provision of this title, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 203(k) of this title, the Commission may bring an action in a United States district court to seek, and the court shall

have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

(2) AMOUNT OF PENALTY.—

(A) FIRST TIER.—The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (i) $5,000 for a natural person or $50,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation.

(B) SECOND TIER.—Notwithstanding subparagraph (A), the amount of penalty for each such violation shall not exceed the greater of (i) $50,000 for a natural person or $250,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(C) THIRD TIER.—Notwithstanding subparagraphs (A) and (B), the amount of penalty for each such violation shall not exceed the greater of (i) $100,000 for a natural person or $500,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

(I) the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(II) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

(3) PROCEDURES FOR COLLECTION.—

(A) PAYMENT OF PENALTY TO TREASURY.—A penalty imposed under this section shall be payable into the Treasury of the United States, except as otherwise provided in section 308 of the Sarbanes-Oxley Act of 2002 and section 21F of the Securities Exchange Act of 1934.

(B) COLLECTION OF PENALTIES.—If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(C) REMEDY NOT EXCLUSIVE.—The actions authorized by this subsection may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring.

(D) JURISDICTION AND VENUE.—For purposes of section 214 of this title, actions under this paragraph shall be actions to enforce a liability or a duty created by this title.

(4) SPECIAL PROVISIONS RELATING TO A VIOLATION OF A CEASE-AND-DESIST ORDER.—In an action to enforce a cease-and-desist order entered by the Commission pursuant to section 203(k), each separate violation of such order shall be a sepa-

rate offense, except that in the case of a violation through a continuing failure to comply with the order, each day of the failure to comply shall be deemed a separate offense.

(f) AIDING AND ABETTING.—For purposes of any action brought by the Commission under subsection (e), any person that knowingly or recklessly has aided, abetted, counseled, commanded, induced, or procured a violation of any provision of this Act, or of any rule, regulation, or order hereunder, shall be deemed to be in violation of such provision, rule, regulation, or order to the same extent as the person that committed such violation.

PUBLICITY

SEC. 210. [80b–10] (a) The information contained in any registration application or report or amendment thereto filed with the Commission pursuant to any provision of this title shall be made available to the public, unless and except insofar as the Commission, by rules and regulations upon its own motion, or by order upon application, finds that public disclosure is neither necessary nor appropriate in the public interest or for the protection of investors. Photostatic or other copies of information contained in documents filed with the Commission under this title and made available to the public shall be furnished to any person at such reasonable charge and under such reasonable limitations as the Commission shall prescribe.

(b) Subject to the provisions of subsections (c) and (d) of section 209 of this title and section 24(c) of the Securities Exchange Act of 1934, the Commission, or any member, officer, or employee thereof, shall not make public the fact that any examination or investigation under this title is being conducted, or the results of or any facts ascertained during any such examination or investigation; and no member, officer, or employee of the Commission shall disclose to any person other than a member, officer, or employee of the Commission any information obtained as a result of any such examination or investigation except with the approval of the Commission. The provisions of this subsection shall not apply—

(1) in the case of any hearing which is public under the provisions of section 212; or

(2) in the case of a resolution or request from either House of Congress.

(c) No provision of this title shall be construed to require, or to authorize the Commission to require any investment adviser engaged in rendering investment supervisory services to disclose the identity, investments, or affairs of any client of such investment adviser, except insofar as such disclosure may be necessary or appropriate in a particular proceeding or investigation having as its object the enforcement of a provision or provisions of this title or for purposes of assessment of potential systemic risk.

SEC. 210A. [80b–10a] CONSULTATION.

(a) EXAMINATION RESULTS AND OTHER INFORMATION.—

(1) The appropriate Federal banking agency shall provide the Commission upon request the results of any examination, reports, records, or other information to which such agency may have access—

(A) with respect to the investment advisory activities of any—

(i) bank holding company or savings and loan holding company;

(ii) bank; or

(iii) separately identifiable department or division of a bank,

that is registered under section 203 of this title; and

(B) in the case of a bank holding company or savings and loan holding company or bank that has a subsidiary or a separately identifiable department or division registered under that section, with respect to the investment advisory activities of such bank or bank holding company or savings and loan holding company.

(2) The Commission shall provide to the appropriate Federal banking agency upon request the results of any examination, reports, records, or other information with respect to the investment advisory activities of any bank holding company or savings and loan holding company, bank, or separately identifiable department or division of a bank, which is registered under section 203 of this title.

(3) Notwithstanding any other provision of law, the Commission and the appropriate Federal banking agencies shall not be compelled to disclose any information provided under paragraph (1) or (2). Nothing in this paragraph shall authorize the Commission or such agencies to withhold information from Congress, or prevent the Commission or such agencies from complying with a request for information from any other Federal department or agency or any self-regulatory organization requesting the information for purposes within the scope of its jurisdiction, or complying with an order of a court of the United States in an action brought by the United States, the Commission, or such agencies. For purposes of section 552 of title 5, United States Code, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section 552.

(b) EFFECT ON OTHER AUTHORITY.—Nothing in this section shall limit in any respect the authority of the appropriate Federal banking agency with respect to such bank holding company or savings and loan holding company (or affiliates or subsidiaries thereof), bank, or subsidiary, department, or division or a bank under any other provision of law.

(c) DEFINITION.—For purposes of this section, the term "appropriate Federal banking agency" shall have the same meaning as given in section 3 of the Federal Deposit Insurance Act.

RULES, REGULATIONS, AND ORDERS

SEC. 211. [80b–11] (a) The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the functions and powers conferred upon the Commission elsewhere in this title, including rules and regulations defining technical, trade, and other terms used in this title, except that the Commission may not define the term "client" for purposes

of paragraphs (1) and (2) of section 206 to include an investor in a private fund managed by an investment adviser, if such private fund has entered into an advisory contract with such adviser. For the purposes of its rules or regulations the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters.

(b) Subject to the provisions of chapter 15 of title 44, United States Code, and regulations prescribed under the authority thereof, the rules and regulations of the Commission under this title, and amendments thereof, shall be effective upon publication in the manner which the Commission shall prescribe, or upon such later date as may be provided in such rules and regulations.

(c) Orders of the Commission under this title shall be issued only after appropriate notice and opportunity for hearing. Notice to the parties to a proceeding before the Commission shall be given by personal service upon each party or by registered mail or certified mail or confirmed telegraphic notice to the party's last known business address. Notice to interested persons, if any, other than parties may be given in the same manner or by publication in the Federal Register.

(d) No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(e) DISCLOSURE RULES ON PRIVATE FUNDS.—The Commission and the Commodity Futures Trading Commission shall, after consultation with the Council but not later than 12 months after the date of enactment of the Private Fund Investment Advisers Registration Act of 2010, jointly promulgate rules to establish the form and content of the reports required to be filed with the Commission under subsection 204(b) and with the Commodity Futures Trading Commission by investment advisers that are registered both under this title and the Commodity Exchange Act (7 U.S.C. 1a et seq.).

(g)[8] STANDARD OF CONDUCT.—

(1) IN GENERAL.—The Commission may promulgate rules to provide that the standard of conduct for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers (and such other customers as the Commission may by rule provide), shall be to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice. In accordance with such rules, any material conflicts of interest shall be disclosed and may be consented to by the customer. Such rules shall provide that such standard of conduct shall be no less stringent than the standard applicable to investment advisers under section 206(1) and (2) of this Act when providing personalized investment advice about securities, except the Commission shall not ascribe a meaning to the term "customer" that would include an investor in a private fund managed by an investment ad-

[8] So in law. There is no subsection (f).

viser, where such private fund has entered into an advisory contract with such adviser. The receipt of compensation based on commission or fees shall not, in and of itself, be considered a violation of such standard applied to a broker, dealer, or investment adviser.

(2) RETAIL CUSTOMER DEFINED.—For purposes of this subsection, the term "retail customer" means a natural person, or the legal representative of such natural person, who—

(A) receives personalized investment advice about securities from a broker, dealer, or investment adviser; and

(B) uses such advice primarily for personal, family, or household purposes.

(h) OTHER MATTERS.—The Commission shall—

(1) facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers, and investment advisers, including any material conflicts of interest; and

(2) examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors.

(i) HARMONIZATION OF ENFORCEMENT.—The enforcement authority of the Commission with respect to violations of the standard of conduct applicable to an investment adviser shall include—

(1) the enforcement authority of the Commission with respect to such violations provided under this Act; and

(2) the enforcement authority of the Commission with respect to violations of the standard of conduct applicable to a broker or dealer providing personalized investment advice about securities to a retail customer under the Securities Exchange Act of 1934, including the authority to impose sanctions for such violations, and

the Commission shall seek to prosecute and sanction violators of the standard of conduct applicable to an investment adviser under this Act to same extent as the Commission prosecutes and sanctions violators of the standard of conduct applicable to a broker or dealer providing personalized investment advice about securities to a retail customer under the Securities Exchange Act of 1934.

HEARINGS

SEC. 212. [80b–12] Hearings may be public and may be held before the Commission, any member or members thereof, or any officer or officers of the Commission designated by it, and appropriate records thereof shall be kept.

COURT REVIEW OF ORDERS

SEC. 213. [80b–13] (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the court of appeals of the United States within any circuit wherein such person resides or has his principal office or place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty

days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, or any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

JURISDICTION OF OFFENSES AND SUITS

SEC. 214. [80b–14] (a) IN GENERAL.—The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be

found. In any action or proceeding instituted by the Commission under this title in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of title 28, United States Code. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court.

(b) EXTRATERRITORIAL JURISDICTION.—The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of section 206 involving—

(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the violation is committed by a foreign adviser and involves only foreign investors; or

(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

VALIDITY OF CONTRACTS

SEC. 215. [80b–15] (a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or with any rule, regulation, or order thereunder shall be void.

(b) Every contract made in violation of any provision of this title and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this title, or any rule, regulation, or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision.

ANNUAL REPORTS OF COMMISSION

SEC. 216. [80b–16] The Commission shall submit annually a report to the Congress covering the work of the Commission for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this title as it may find advisable.

PENALTIES [9]

SEC. 217. [80b–17] Any person who willfully violates any provision of this title, or any rule, regulation, or order promulgated by

[9] See also 18 U.S.C. 3571. [Printed in appendix to this volume.]

the Commission under authority thereof, shall, upon conviction, be fined not more than $10,000, imprisoned for not more than five years, or both.

HIRING AND LEASING AUTHORITY OF THE COMMISSION

SEC. 218. [80b–18] The provisions of section 4(b) of the Securities Exchange Act of 1934 shall be applicable with respect to the power of the Commission—

(1) to appoint and fix the compensation of such other employees as may be necessary for carrying out its functions under this title, and

(2) to lease and allocate such real property as may be necessary for carrying out its functions under this title.

SEPARABILITY OF PROVISIONS

SEC. 219. [80b–19] If any provision of this title or the application of such provision to any person or circumstances shall be held invalid, the remainder of the title and the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

SHORT TITLE

SEC. 220. [80b–20] This title may be cited as the "Investment Advisers Act of 1940".

EFFECTIVE DATE

SEC. 221. [80b–21] This title shall become effective on November 1, 1940.

SEC. 222. [80b–18a] STATE REGULATION OF INVESTMENT ADVISERS.

(a) JURISDICTION OF STATE REGULATORS.—Nothing in this title shall affect the jurisdiction of the securities commissioner (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder.

(b) DUAL COMPLIANCE PURPOSES.—No State may enforce any law or regulation that would require an investment adviser to maintain any books or records in addition to those required under the laws of the State in which it maintains its principal office and place of business, if the investment adviser—

(1) is registered or licensed as such in the State in which it maintains its principal office and place of business; and

(2) is in compliance with the applicable books and records requirements of the State in which it maintains its principal office and place of business.

(c) LIMITATION ON CAPITAL AND BOND REQUIREMENTS.—No State may enforce any law or regulation that would require an investment adviser to maintain a higher minimum net capital or to post any bond in addition to any that is required under the laws of the State in which it maintains its principal office and place of business, if the investment adviser—

(1) is registered or licensed as such in the State in which it maintains its principal office and place of business; and

(2) is in compliance with the applicable net capital or bonding requirements of the State in which it maintains its principal office and place of business.

(d) NATIONAL DE MINIMIS STANDARD.—No law of any State or political subdivision thereof requiring the registration, licensing, or qualification as an investment adviser shall require an investment adviser to register with the securities commissioner of the State (or any agency or officer performing like functions) or to comply with such law (other than any provision thereof prohibiting fraudulent conduct) if the investment adviser—

(1) does not have a place of business located within the State; and

(2) during the preceding 12-month period, has had fewer than 6 clients who are residents of that State.

SEC. 223. [15 U.S.C. 80b–18b] CUSTODY OF CLIENT ACCOUNTS.

An investment adviser registered under this title shall take such steps to safeguard client assets over which such adviser has custody, including, without limitation, verification of such assets by an independent public accountant, as the Commission may, by rule, prescribe.

SEC. 224. [15 U.S.C. 80b–18c] RULE OF CONSTRUCTION RELATING TO THE COMMODITIES EXCHANGE ACT.

Nothing in this title shall relieve any person of any obligation or duty, or affect the availability of any right or remedy available to the Commodity Futures Trading Commission or any private party, arising under the Commodity Exchange Act (7 U.S.C. 1 et seq.) governing commodity pools, commodity pool operators, or commodity trading advisors.

EXHIBIT 303

SECURITIES ACT OF 1933

[References in brackets [] are to title 15, United States Code]

[As Amended Through P.L. 117–263, Enacted December 23, 2022]

[Currency: This publication is a compilation of the text of Chapter 38 of the 73rd Congress. It was last amended by the public law listed in the As Amended Through note above and below at the bottom of each page of the pdf version and reflects current law through the date of the enactment of the public law listed at https://www.govinfo.gov/app/collection/comps/]

[Note: While this publication does not represent an official version of any Federal statute, substantial efforts have been made to ensure the accuracy of its contents. The official version of Federal law is found in the United States Statutes at Large and in the United States Code. The legal effect to be given to the Statutes at Large and the United States Code is established by statute (1 U.S.C. 112, 204).]

AN ACT To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

SHORT TITLE

SECTION 1. [77a] This title may be cited as the "Securities Act of 1933".

DEFINITIONS

SEC. 2. [77b] (a) DEFINITIONS.—When used in this title, unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guar-

antee of, or warrant or right to subscribe to or purchase, any of the foregoing.

(2) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof. As used in this paragraph the term "trust" shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security.

(3) The term "sale" or "sell" shall include every contract of sale or disposition of a security or interest in a security, for value. The term "offer to sell", "offer for sale", or "offer" shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. The terms defined in this paragraph and the term "offer to buy" as used in subsection (c) of section 5 shall not include preliminary negotiations or agreements between an issuer (or any person directly or indirectly controlling or controlled by an issuer, or under direct or indirect common control with an issuer) and any underwriter or among underwriters who are or are to be in privity of contract with an issuer (or any person directly or indirectly controlling or controlled by an issuer, or under direct or indirect common control with an issuer). Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been offered and sold for value. The issue or transfer of a right or privilege, when originally issued or transferred with a security, giving the holder of such security the right to convert such security into another security of the same issuer or of another person, or giving a right to subscribe to another security of the same issuer or of another person, which right cannot be exercised until some future date, shall not be deemed to be an offer or sale of such other security; but the issue or transfer of such other security upon the exercise of such right of conversion or subscription shall be deemed a sale of such other security. Any offer or sale of a security futures product by or on behalf of the issuer of the securities underlying the security futures product, an affiliate of the issuer, or an underwriter, shall constitute a contract for sale of, sale of, offer for sale, or offer to sell the underlying securities. Any offer or sale of a security-based swap by or on behalf of the issuer of the securities upon which such security-based swap is based or is referenced, an affiliate of the issuer, or an underwriter, shall constitute a contract for sale of, sale of, offer for sale, or offer to sell such securities. The publication or distribution by a broker or dealer of a research report about an emerging growth company that is the subject of a proposed public offering of the common equity securities of such emerging growth company pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective shall be deemed for purposes of paragraph (10) of this subsection and section 5(c) not to constitute an offer for sale or offer to sell a security, even if the broker or dealer is participating or will participate in the registered offering of the securities of the

issuer. As used in this paragraph, the term "research report" means a written, electronic, or oral communication that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision.

(4) The term "issuer" means every person who issues or proposes to issue any security; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; except that in the case of an unincorporated association which provides by its articles for limited liability of any or all of its members, or in the case of a trust, committee, or other legal entity, the trustees or members thereof shall not be individually liable as issuers of any security issued by the association, trust, committee, or other legal entity; except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is or is to be used; and except that with respect to fractional undivided interests in oil, gas, or other mineral rights, the term "issuer" means the owner of any such right or of any interest in such right (whether whole or fractional) who creates fractional interests therein for the purpose of public offering.

(5) The term "Commission" means the Securities and Exchange Commission.

(6) The term "Territory" means Puerto Rico, the Virgin Islands, and the insular possessions of the United States. [1]

(7) The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia.

(8) The term "registration statement" means the statement provided for in section 6, and includes any amendment thereto and any report, document, or memorandum filed as part of such statement or incorporated therein by reference.

(9) The term "write" or "written" shall include printed, lithographed, or any means of graphic communication.

(10) The term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security; except that (a) a communication

[1] The words "Philippine Islands" were deleted from the definition of the term "Territory" on the basis of Presidential Proclamation No. 2695, effective July 4, 1946 (11 F.R. 7517; 60 Stat. 1352), which granted independence to the Philippine Islands.

sent or given after the effective date of the registration statement (other than a prospectus permitted under subsection (b) of section 10) shall not be deemed a prospectus if it is proved that prior to or at the same time with such communication a written prospectus meeting the requirements of subsection (a) of section 10 at the time of such communication was sent or given to the person to whom the communication was made, and (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of section 10 may be obtained and, in addition, does no more than identify the security, state the price thereof, state by whom orders will be executed, and contain such other information as the Commission, by rules or regulations deemed necessary or appropriate in the public interest and for the protection of investors, and subject to such terms and conditions as may be prescribed therein, may permit.

(11) The term "underwriter" means 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; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

(12) The term "dealer" means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

(13) The term "insurance company" means a company which is organized as an insurance company, whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies, and which is subject to supervision by the insurance commissioner, or a similar official or agency, of a State or territory or the District of Columbia; or any receiver or similar official or any liquidating agent for such company, in his capacity as such.

(14) The term "separate account" means an account established and maintained by an insurance company pursuant to the laws of any State or territory of the United States, the District of Columbia, or of Canada or any province thereof, under which income, gains and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(15) The term "accredited investor" shall mean—

(i) a bank as defined in section 3(a)(2) whether acting in its individual or fiduciary capacity; an insurance company as defined in paragraph (13) of this subsection; an investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of that Act; a Small Business Investment Company licensed by the Small Business Administration; or an employee benefit plan, including an individual retirement account, which is subject to the provisions of the Employee Retirement Income Security Act of 1974,[2] if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such Act, which is either a bank, insurance company, or registered investment adviser; or

(ii) any person who, on the basis of such factors as financial sophistication, net worth, knowledge, and experience in financial matters, or amount of assets under management qualifies as an accredited investor under rules and regulations which the Commission shall prescribe.

(16) The terms "security future", "narrow-based security index", and "security futures product" have the same meanings as provided in section 3(a)(55) of the Securities Exchange Act of 1934.

(17) The terms "swap" and "security-based swap" have the same meanings as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

(18) The terms "purchase" or "sale" of a security-based swap shall be deemed to mean the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require.

(19) The term "emerging growth company" means an issuer that had total annual gross revenues of less than $1,000,000,000 (as such amount is indexed for inflation every 5 years by the Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, setting the threshold to the nearest 1,000,000) during its most recently completed fiscal year. An issuer that is an emerging growth company as of the first day of that fiscal year shall continue to be deemed an emerging growth company until the earliest of—

(A) the last day of the fiscal year of the issuer during which it had total annual gross revenues of $1,000,000,000 (as such amount is indexed for inflation every 5 years by the Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, setting the threshold to the nearest 1,000,000) or more;

(B) the last day of the fiscal year of the issuer following the fifth anniversary of the date of the first sale of

[2] 29 U.S.C. 1001 et seq. [Printed in appendix to this volume.]

common equity securities of the issuer pursuant to an effective registration statement under this title;

(C) the date on which such issuer has, during the previous 3-year period, issued more than $1,000,000,000 in non-convertible debt; or

(D) the date on which such issuer is deemed to be a "large accelerated filer", as defined in section 240.12b–2 of title 17, Code of Federal Regulations, or any successor thereto.

(b) CONSIDERATION OF PROMOTION OF EFFICIENCY, COMPETITION, AND CAPITAL FORMATION.—Whenever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

SEC. 2A. [77b–1] SWAP AGREEMENTS.

(a) Reserved.

(b) SECURITY-BASED SWAP AGREEMENTS.—

(1) The definition of "security" in section 2(a)(1) of this title does not include any security-based swap agreement (as defined in section 3(a)(78) of the Securities Exchange Act of 1934).

(2) The Commission is prohibited from registering, or requiring, recommending, or suggesting, the registration under this title of any security-based swap agreement (as defined in section 3(a)(78) of the Securities Exchange Act of 1934). If the Commission becomes aware that a registrant has filed a registration statement with respect to such a swap agreement, the Commission shall promptly so notify the registrant. Any such registration statement with respect to such a swap agreement shall be void and of no force or effect.

(3) The Commission is prohibited from—

(A) promulgating, interpreting, or enforcing rules; or

(B) issuing orders of general applicability;

under this title in a manner that imposes or specifies reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading with respect to any security-based swap agreement (as defined in section 3(a)(78) of the Securities Exchange Act of 1934).

(4) References in this title to the "purchase" or "sale" of a security-based swap agreement shall be deemed to mean the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap agreement (as defined in section 3(a)(78) of the Securities Exchange Act of 1934), as the context may require.

EXEMPTED SECURITIES [3]

SEC. 3. [77c] (a) Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of securities:

(1) Reserved.

(2) Any security issued or guaranteed by the United States or any Territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or Territory, or by any public instrumentality of one or more States or Territories, or by any person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States; or any certificate of deposit for any of the foregoing; or any security issued or guaranteed by any bank; or any security issued by or representing an interest in or a direct obligation of a Federal Reserve bank; or any interest or participation in any common trust fund or similar fund that is excluded from the definition of the term "investment company" under section 3(c)(3) of the Investment Company Act of 1940; or any security which is an industrial development bond (as defined in section 103(c)(2) of the Internal Revenue Code of 1954) [4] the interest on which is excludable from gross income under section 103(a)(1) of such Code if, by reason of the application of paragraph (4) or (6) of section 103(c) of such Code (determined as if paragraphs (4)(A), (5), and (7) [5] were not included in such section 103(c)), paragraph (1) of such section 103(c) does not apply to such security; or any interest or participation in a single trust fund, or in a collective trust fund maintained by a bank, or any security arising out of a contract issued by an insurance company, which interest, participation, or security is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954, [6] (B) an annuity plan which meets the requirements for the deduction of the employer's contributions under section 404(a)(2) of such Code, [7] (C) a governmental plan as defined in section 414(d) of such Code [8] which has been established by an employer for the exclusive benefit of its employees or their beneficiaries for the purpose of distributing to such employees or their beneficiaries the corpus and income of the funds accumulated under such plan, if under such plan it is impossible, prior to the satisfaction of all liabilities with respect to such employees and their beneficiaries, for any part of the corpus or income to be used for,

[3] Additional exemptions contained at: 7 U.S.C. 1932(d)(6); 12 U.S.C. 1455, 1717, 1719, 1723c; 15 U.S.C. 77c, note; 20 U.S.C. 1087–2, 1087hh; 22 U.S.C. 283(h), 285h, 286k–1, 290i–9; 43 U.S.C. 1625; and 45 U.S.C. 720. [Printed in appendix to this volume except for 7 U.S.C. 1932(d)(6) and 15 U.S.C. 77c.]

[4] Section 103(c) of the Internal Revenue Code of 1954 redesignated as section 103(b) by section 1901(a)(17) of Pub. L. 94–455 (26 U.S.C. 103(b)). [Printed in appendix to this volume.]

[5] Paragraph (7) redesignated as paragraph (13) (26 U.S.C. 103(b)(13)). [Printed in appendix to this volume.]

[6] 26 U.S.C. 401. [Printed in appendix to this volume.]

[7] 26 U.S.C. 404(a)(2). [Printed in appendix to this volume.]

[8] 26 U.S.C. 414(d). [Printed in appendix to this volume.]

or diverted to, purposes other than the exclusive benefit of such employees or their beneficiaries, or (D) a church plan, company, or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940, other than any plan described in subparagraph (A), (B), (C), or (D) of this paragraph (i) the contributions under which are held in a single trust fund or in a separate account maintained by an insurance company for a single employer and under which an amount in excess of the employer's contribution is allocated to the purchase of securities (other than interests or participations in the trust or separate account itself) issued by the employer or any company directly or indirectly controlling, controlled by, or under common control with the employer, (ii) which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of such Code (other than a person participating in a church plan who is described in section 414(e)(3)(B) of the Internal Revenue Code of 1986), or (iii) which is a plan funded by an annuity contract described in section 403(b)[9] of such Code (other than a retirement income account described in section 403(b)(9) of the Internal Revenue Code of 1986, to the extent that the interest or participation in such single trust fund or collective trust fund is issued to a church, a convention or association of churches, or an organization described in section 414(e)(3)(A) of such Code establishing or maintaining the retirement income account or to a trust established by any such entity in connection with the retirement income account). The Commission, by rules and regulations or order, shall exempt from the provisions of section 5 of this title any interest or participation issued in connection with a stock bonus, pension, profit-sharing, or annuity plan which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of the Internal Revenue Code of 1954, if and to the extent that the Commission determines this to be necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title. For purposes of this paragraph, a security issued or guaranteed by a bank shall not include any interest or participation in any collective trust fund maintained by a bank; and the term "bank" means any national bank, or any banking institution organized under the laws of any State, territory, or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official; except that in the case of a common trust fund or similar fund, or a collective trust fund, the term "bank" has the same meaning as in the Investment Company Act of 1940;

(3) Any note, draft, bill of exchange, or banker's acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding

[9] 26 U.S.C. 403(b). [Printed in appendix to this volume.]

nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited;

(4) Any security issued by a person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any person, private stockholder, or individual, or any security of a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940;

(5) Any security issued (A) by a savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, which is supervised and examined by State or Federal authority having supervision over any such institution; or (B) by (i) a farmer's cooperative organization exempt from tax under section 521 of the Internal Revenue Code of 1954,[10] (ii) a corporation described in section 501(c)(16) of such Code[11] and exempt from tax under section 501(a) of such Code, or (iii) a corporation described in section 501(c)(2) of such Code which is exempt from tax under section 501(a) of such Code and is organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization or corporation described in clause (i) or (ii);

(6) Any interest in a railroad equipment trust. For purposes of this paragraph "interest in a railroad equipment trust" means any interest in an equipment trust, lease, conditional sales contract, or other similar arrangement entered into, issued, assumed, guaranteed by, or for the benefit of, a common carrier to finance the acquisition of rolling stock, including motive power;

(7) Certificates issued by a receiver or by a trustee in bankruptcy, with the approval of the court;

(8) Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia;[12]

(9) Except with respect to a security exchanged in a case under title 11, any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange;

(10) Except with respect to a security exchanged in a case under title 11, any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue

[10] 26 U.S.C. 521. [Printed in appendix to this volume.]
[11] 26 U.S.C. 501(c)(16). [Printed in appendix to this volume.]
[12] But see section 24(d) of the Investment Company Act of 1940, infra.

securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval;

(11) Any security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory.

(12) Any equity security issued in connection with the acquisition by a holding company of a bank under section 3(a) of the Bank Holding Company Act of 1956 or a savings association under section 10(e) of the Home Owners' Loan Act, if—

(A) the acquisition occurs solely as part of a reorganization in which security holders exchange their shares of a bank or savings association for shares of a newly formed holding company with no significant assets other than securities of the bank or savings association and the existing subsidiaries of the bank or savings association;

(B) the security holders receive, after that reorganization, substantially the same proportional share interests in the holding company as they held in the bank or savings association, except for nominal changes in shareholders' interests resulting from lawful elimination of fractional interests and the exercise of dissenting shareholders' rights under State or Federal law;

(C) the rights and interests of security holders in the holding company are substantially the same as those in the bank or savings association prior to the transaction, other than as may be required by law; and

(D) the holding company has substantially the same assets and liabilities, on a consolidated basis, as the bank or savings association had prior to the transaction.

For purposes of this paragraph, the term "savings association" means a savings association (as defined in section 3(b) of the Federal Deposit Insurance Act) the deposits of which are insured by the Federal Deposit Insurance Corporation.

(13) Any security issued by or any interest or participation in any church plan, company or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940.

(14) Any security futures product that is—

(A) cleared by a clearing agency registered under section 17A of the Securities Exchange Act of 1934 or exempt from registration under subsection (b)(7) of such section 17A; and

(B) traded on a national securities exchange or a national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934.

(b) ADDITIONAL EXEMPTIONS.—

(1) SMALL ISSUES EXEMPTIVE AUTHORITY.—The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add

any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this title with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $5,000,000.

(2) ADDITIONAL ISSUES.—The Commission shall by rule or regulation add a class of securities to the securities exempted pursuant to this section in accordance with the following terms and conditions:

(A) The aggregate offering amount of all securities offered and sold within the prior 12-month period in reliance on the exemption added in accordance with this paragraph shall not exceed $50,000,000.

(B) The securities may be offered and sold publicly.

(C) The securities shall not be restricted securities within the meaning of the Federal securities laws and the regulations promulgated thereunder.

(D) The civil liability provision in section 12(a)(2) shall apply to any person offering or selling such securities.

(E) The issuer may solicit interest in the offering prior to filing any offering statement, on such terms and conditions as the Commission may prescribe in the public interest or for the protection of investors.

(F) The Commission shall require the issuer to file audited financial statements with the Commission annually.

(G) Such other terms, conditions, or requirements as the Commission may determine necessary in the public interest and for the protection of investors, which may include—

(i) a requirement that the issuer prepare and electronically file with the Commission and distribute to prospective investors an offering statement, and any related documents, in such form and with such content as prescribed by the Commission, including audited financial statements, a description of the issuer's business operations, its financial condition, its corporate governance principles, its use of investor funds, and other appropriate matters; and

(ii) disqualification provisions under which the exemption shall not be available to the issuer or its predecessors, affiliates, officers, directors, underwriters, or other related persons, which shall be substantially similar to the disqualification provisions contained in the regulations adopted in accordance with section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (15 U.S.C. 77d note).

(3) LIMITATION.—Only the following types of securities may be exempted under a rule or regulation adopted pursuant to paragraph (2): equity securities, debt securities, and debt secu-

rities convertible or exchangeable to equity interests, including any guarantees of such securities.

(4) PERIODIC DISCLOSURES.—Upon such terms and conditions as the Commission determines necessary in the public interest and for the protection of investors, the Commission by rule or regulation may require an issuer of a class of securities exempted under paragraph (2) to make available to investors and file with the Commission periodic disclosures regarding the issuer, its business operations, its financial condition, its corporate governance principles, its use of investor funds, and other appropriate matters, and also may provide for the suspension and termination of such a requirement with respect to that issuer.

(5) ADJUSTMENT.—Not later than 2 years after the date of enactment of the Small Company Capital Formation Act of 2011 [13] and every 2 years thereafter, the Commission shall review the offering amount limitation described in paragraph (2)(A) and shall increase such amount as the Commission determines appropriate. If the Commission determines not to increase such amount, it shall report to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate on its reasons for not increasing the amount.

(c) The Commission may from time to time by its rules and regulations and subject to such terms and conditions as may be prescribed therein, add to the securities exempted as provided in this section any class of securities issued by a small business investment company under the Small Business Investment Act of 1958 [14] if it finds, having regard to the purposes of that Act, that the enforcement of this Act with respect to such securities is not necessary in the public interest and for the protection of investors.

EXEMPTED TRANSACTIONS [15]

SEC. 4. [77d] (a) The provisions of section 5 shall not apply to—

(1) transactions by any person other than an issuer, underwriter, or dealer.

(2) transactions by an issuer not involving any public offering.

(3) transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except—

(A) transactions taking place prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter,

(B) transactions in a security as to which a registration statement has been filed taking place prior to the expiration of forty days after the effective date of such reg-

[13] The reference to the Small Company Capital Formation Act of 2011 in this paragraph probably should be a reference to the Jumpstart Our Business Startups Act.

[14] 15 U.S.C. 661 et seq.

[15] See additional exemption contained at 11 U.S.C. 1145.

istration statement or prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter after such effective date, whichever is later (excluding in the computation of such forty days any time during which a stop order issued under section 8 is in effect as to the security), or such shorter period as the Commission may specify by rules and regulations or order, and

(C) transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

With respect to transactions referred to in clause (B), if securities of the issuer have not previously been sold pursuant to an earlier effective registration statement the applicable period, instead of forty days, shall be ninety days, or such shorter period as the Commission may specify by rules and regulations or order.

(4) brokers' transactions executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders.

(5) transactions involving offers or sales by an issuer solely to one or more accredited investors, if the aggregate offering price of an issue of securities offered in reliance on this paragraph does not exceed the amount allowed under section 3(b)(1) of this title, if there is no advertising or public solicitation in connection with the transaction by the issuer or anyone acting on the issuer's behalf, and if the issuer files such notice with the Commission as the Commission shall prescribe.

(6) transactions involving the offer or sale of securities by an issuer (including all entities controlled by or under common control with the issuer), provided that—

(A) the aggregate amount sold to all investors by the issuer, including any amount sold in reliance on the exemption provided under this paragraph during the 12-month period preceding the date of such transaction, is not more than $1,000,000;

(B) the aggregate amount sold to any investor by an issuer, including any amount sold in reliance on the exemption provided under this paragraph during the 12-month period preceding the date of such transaction, does not exceed—

(i) the greater of $2,000 or 5 percent of the annual income or net worth of such investor, as applicable, if either the annual income or the net worth of the investor is less than $100,000; and

(ii) 10 percent of the annual income or net worth of such investor, as applicable, not to exceed a maximum aggregate amount sold of $100,000, if either the annual income or net worth of the investor is equal to or more than $100,000;

(C) the transaction is conducted through a broker or funding portal that complies with the requirements of section 4A(a); and

(D) the issuer complies with the requirements of section 4A(b).

(7) transactions meeting the requirements of subsection (d).

(b) Offers and sales exempt under section 230.506 of title 17, Code of Federal Regulations (as revised pursuant to section 201 of the Jumpstart Our Business Startups Act) shall not be deemed public offerings under the Federal securities laws as a result of general advertising or general solicitation.

(c)(1) With respect to securities offered and sold in compliance with Rule 506 of Regulation D under this Act, no person who meets the conditions set forth in paragraph (2) shall be subject to registration as a broker or dealer pursuant to section 15(a)(1) of this title [17], solely because—

(A) that person maintains a platform or mechanism that permits the offer, sale, purchase, or negotiation of or with respect to securities, or permits general solicitations, general advertisements, or similar or related activities by issuers of such securities, whether online, in person, or through any other means;

(B) that person or any person associated with that person co-invests in such securities; or

(C) that person or any person associated with that person provides ancillary services with respect to such securities.

(2) The exemption provided in paragraph (1) shall apply to any person described in such paragraph if—

(A) such person and each person associated with that person receives no compensation in connection with the purchase or sale of such security;

(B) such person and each person associated with that person does not have possession of customer funds or securities in connection with the purchase or sale of such security; and

(C) such person is not subject to a statutory disqualification as defined in section 3(a)(39) of this title and does not have any person associated with that person subject to such a statutory disqualification.

(3) For the purposes of this subsection, the term "ancillary services" means—

(A) the provision of due diligence services, in connection with the offer, sale, purchase, or negotiation of such security, so long as such services do not include, for separate compensation, investment advice or recommendations to issuers or investors; and

(B) the provision of standardized documents to the issuers and investors, so long as such person or entity does not negotiate the terms of the issuance for and on behalf of third parties and issuers are not required to use the standardized documents as a condition of using the service.

[17] The reference to "section 15(a)(1) of this title" in subsection (b)(1) probably should be a reference to "section 15(a)(1) of the Securities Exchange Act of 1934".

(d) CERTAIN ACCREDITED INVESTOR TRANSACTIONS.—The transactions referred to in subsection (a)(7) are transactions meeting the following requirements:

(1) ACCREDITED INVESTOR REQUIREMENT.—Each purchaser is an accredited investor, as that term is defined in section 230.501(a) of title 17, Code of Federal Regulations (or any successor regulation).

(2) PROHIBITION ON GENERAL SOLICITATION OR ADVERTISING.—Neither the seller, nor any person acting on the seller's behalf, offers or sells securities by any form of general solicitation or general advertising.

(3) INFORMATION REQUIREMENT.—In the case of a transaction involving the securities of an issuer that is neither subject to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m; 78o(d)), nor exempt from reporting pursuant to section 240.12g3–2(b) of title 17, Code of Federal Regulations, nor a foreign government (as defined in section 230.405 of title 17, Code of Federal Regulations) eligible to register securities under Schedule B, the seller and a prospective purchaser designated by the seller obtain from the issuer, upon request of the seller, and the seller in all cases makes available to a prospective purchaser, the following information (which shall be reasonably current in relation to the date of resale under this section):

(A) The exact name of the issuer and the issuer's predecessor (if any).

(B) The address of the issuer's principal executive offices.

(C) The exact title and class of the security.

(D) The par or stated value of the security.

(E) The number of shares or total amount of the securities outstanding as of the end of the issuer's most recent fiscal year.

(F) The name and address of the transfer agent, corporate secretary, or other person responsible for transferring shares and stock certificates.

(G) A statement of the nature of the business of the issuer and the products and services it offers, which shall be presumed reasonably current if the statement is as of 12 months before the transaction date.

(H) The names of the officers and directors of the issuer.

(I) The names of any persons registered as a broker, dealer, or agent that shall be paid or given, directly or indirectly, any commission or remuneration for such person's participation in the offer or sale of the securities.

(J) The issuer's most recent balance sheet and profit and loss statement and similar financial statements, which shall—

(i) be for such part of the 2 preceding fiscal years as the issuer has been in operation;

(ii) be prepared in accordance with generally accepted accounting principles or, in the case of a foreign private issuer, be prepared in accordance with gen-

erally accepted accounting principles or the International Financial Reporting Standards issued by the International Accounting Standards Board;

(iii) be presumed reasonably current if—

(I) with respect to the balance sheet, the balance sheet is as of a date less than 16 months before the transaction date; and

(II) with respect to the profit and loss statement, such statement is for the 12 months preceding the date of the issuer's balance sheet; and

(iv) if the balance sheet is not as of a date less than 6 months before the transaction date, be accompanied by additional statements of profit and loss for the period from the date of such balance sheet to a date less than 6 months before the transaction date.

(K) To the extent that the seller is a control person with respect to the issuer, a brief statement regarding the nature of the affiliation, and a statement certified by such seller that they have no reasonable grounds to believe that the issuer is in violation of the securities laws or regulations.

(4) ISSUERS DISQUALIFIED.—The transaction is not for the sale of a security where the seller is an issuer or a subsidiary, either directly or indirectly, of the issuer.

(5) BAD ACTOR PROHIBITION.—Neither the seller, nor any person that has been or will be paid (directly or indirectly) remuneration or a commission for their participation in the offer or sale of the securities, including solicitation of purchasers for the seller is subject to an event that would disqualify an issuer or other covered person under Rule 506(d)(1) of Regulation D (17 CFR 230.506(d)(1)) or is subject to a statutory disqualification described under section 3(a)(39) of the Securities Exchange Act of 1934.

(6) BUSINESS REQUIREMENT.—The issuer is engaged in business, is not in the organizational stage or in bankruptcy or receivership, and is not a blank check, blind pool, or shell company that has no specific business plan or purpose or has indicated that the issuer's primary business plan is to engage in a merger or combination of the business with, or an acquisition of, an unidentified person.

(7) UNDERWRITER PROHIBITION.—The transaction is not with respect to a security that constitutes the whole or part of an unsold allotment to, or a subscription or participation by, a broker or dealer as an underwriter of the security or a redistribution.

(8) OUTSTANDING CLASS REQUIREMENT.—The transaction is with respect to a security of a class that has been authorized and outstanding for at least 90 days prior to the date of the transaction.

(e) ADDITIONAL REQUIREMENTS.—

(1) IN GENERAL.—With respect to an exempted transaction described under subsection (a)(7):

(A) Securities acquired in such transaction shall be deemed to have been acquired in a transaction not involving any public offering.

(B) Such transaction shall be deemed not to be a distribution for purposes of section 2(a)(11).

(C) Securities involved in such transaction shall be deemed to be restricted securities within the meaning of Rule 144 (17 CFR 230.144).

(2) RULE OF CONSTRUCTION.—The exemption provided by subsection (a)(7) shall not be the exclusive means for establishing an exemption from the registration requirements of section 5.

SEC. 4A. [77d–1] REQUIREMENTS WITH RESPECT TO CERTAIN SMALL TRANSACTIONS.[18]

(a) REQUIREMENTS ON INTERMEDIARIES.—A person acting as an intermediary in a transaction involving the offer or sale of securities for the account of others pursuant to section 4(6) shall—

(1) register with the Commission as—

(A) a broker; or

(B) a funding portal (as defined in section 3(a)(80) of the Securities Exchange Act of 1934);

(2) register with any applicable self-regulatory organization (as defined in section 3(a)(26) of the Securities Exchange Act of 1934);

(3) provide such disclosures, including disclosures related to risks and other investor education materials, as the Commission shall, by rule, determine appropriate;

(4) ensure that each investor—

(A) reviews investor-education information, in accordance with standards established by the Commission, by rule;

(B) positively affirms that the investor understands that the investor is risking the loss of the entire investment, and that the investor could bear such a loss; and

(C) answers questions demonstrating—

(i) an understanding of the level of risk generally applicable to investments in startups, emerging businesses, and small issuers;

(ii) an understanding of the risk of illiquidity; and

(iii) an understanding of such other matters as the Commission determines appropriate, by rule;

(5) take such measures to reduce the risk of fraud with respect to such transactions, as established by the Commission, by rule, including obtaining a background and securities enforcement regulatory history check on each officer, director, and person holding more than 20 percent of the outstanding equity of every issuer whose securities are offered by such person;

(6) not later than 21 days prior to the first day on which securities are sold to any investor (or such other period as the Commission may establish), make available to the Commission

[18] All references to section 4(6) throughout this section probably should be a reference to section 4(a)(6).

and to potential investors any information provided by the issuer pursuant to subsection (b);

(7) ensure that all offering proceeds are only provided to the issuer when the aggregate capital raised from all investors is equal to or greater than a target offering amount, and allow all investors to cancel their commitments to invest, as the Commission shall, by rule, determine appropriate;

(8) make such efforts as the Commission determines appropriate, by rule, to ensure that no investor in a 12-month period has purchased securities offered pursuant to section 4(6) that, in the aggregate, from all issuers, exceed the investment limits set forth in section 4(6)(B);

(9) take such steps to protect the privacy of information collected from investors as the Commission shall, by rule, determine appropriate;

(10) not compensate promoters, finders, or lead generators for providing the broker or funding portal with the personal identifying information of any potential investor;

(11) prohibit its directors, officers, or partners (or any person occupying a similar status or performing a similar function) from having any financial interest in an issuer using its services; and

(12) meet such other requirements as the Commission may, by rule, prescribe, for the protection of investors and in the public interest.

(b) REQUIREMENTS FOR ISSUERS.—For purposes of section 4(6), an issuer who offers or sells securities shall—

(1) file with the Commission and provide to investors and the relevant broker or funding portal, and make available to potential investors—

(A) the name, legal status, physical address, and website address of the issuer;

(B) the names of the directors and officers (and any persons occupying a similar status or performing a similar function), and each person holding more than 20 percent of the shares of the issuer;

(C) a description of the business of the issuer and the anticipated business plan of the issuer;

(D) a description of the financial condition of the issuer, including, for offerings that, together with all other offerings of the issuer under section 4(6) within the preceding 12-month period, have, in the aggregate, target offering amounts of—

(i) $100,000 or less—

(I) the income tax returns filed by the issuer for the most recently completed year (if any); and

(II) financial statements of the issuer, which shall be certified by the principal executive officer of the issuer to be true and complete in all material respects;

(ii) more than $100,000, but not more than $500,000, financial statements reviewed by a public accountant who is independent of the issuer, using professional standards and procedures for such review

or standards and procedures established by the Commission, by rule, for such purpose; and

(iii) more than $500,000 (or such other amount as the Commission may establish, by rule), audited financial statements;

(E) a description of the stated purpose and intended use of the proceeds of the offering sought by the issuer with respect to the target offering amount;

(F) the target offering amount, the deadline to reach the target offering amount, and regular updates regarding the progress of the issuer in meeting the target offering amount;

(G) the price to the public of the securities or the method for determining the price, provided that, prior to sale, each investor shall be provided in writing the final price and all required disclosures, with a reasonable opportunity to rescind the commitment to purchase the securities;

(H) a description of the ownership and capital structure of the issuer, including—

(i) terms of the securities of the issuer being offered and each other class of security of the issuer, including how such terms may be modified, and a summary of the differences between such securities, including how the rights of the securities being offered may be materially limited, diluted, or qualified by the rights of any other class of security of the issuer;

(ii) a description of how the exercise of the rights held by the principal shareholders of the issuer could negatively impact the purchasers of the securities being offered;

(iii) the name and ownership level of each existing shareholder who owns more than 20 percent of any class of the securities of the issuer;

(iv) how the securities being offered are being valued, and examples of methods for how such securities may be valued by the issuer in the future, including during subsequent corporate actions; and

(v) the risks to purchasers of the securities relating to minority ownership in the issuer, the risks associated with corporate actions, including additional issuances of shares, a sale of the issuer or of assets of the issuer, or transactions with related parties; and

(I) such other information as the Commission may, by rule, prescribe, for the protection of investors and in the public interest;

(2) not advertise the terms of the offering, except for notices which direct investors to the funding portal or broker;

(3) not compensate or commit to compensate, directly or indirectly, any person to promote its offerings through communication channels provided by a broker or funding portal, without taking such steps as the Commission shall, by rule, require to ensure that such person clearly discloses the receipt, past or

prospective, of such compensation, upon each instance of such promotional communication;

(4) not less than annually, file with the Commission and provide to investors reports of the results of operations and financial statements of the issuer, as the Commission shall, by rule, determine appropriate, subject to such exceptions and termination dates as the Commission may establish, by rule; and

(5) comply with such other requirements as the Commission may, by rule, prescribe, for the protection of investors and in the public interest.

(c) LIABILITY FOR MATERIAL MISSTATEMENTS AND OMISSIONS.—

(1) ACTIONS AUTHORIZED.—

(A) IN GENERAL.—Subject to paragraph (2), a person who purchases a security in a transaction exempted by the provisions of section 4(6) may bring an action against an issuer described in paragraph (2), either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if such person no longer owns the security.

(B) LIABILITY.—An action brought under this paragraph shall be subject to the provisions of section 12(b) and section 13, as if the liability were created under section 12(a)(2).

(2) APPLICABILITY.—An issuer shall be liable in an action under paragraph (1), if the issuer—

(A) by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by any means of any written or oral communication, in the offering or sale of a security in a transaction exempted by the provisions of section 4(6), makes an untrue statement of a material fact or omits to state a material fact required to be stated or necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading, provided that the purchaser did not know of such untruth or omission; and

(B) does not sustain the burden of proof that such issuer did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.

(3) DEFINITION.—As used in this subsection, the term "issuer" includes any person who is a director or partner of the issuer, and the principal executive officer or officers, principal financial officer, and controller or principal accounting officer of the issuer (and any person occupying a similar status or performing a similar function) that offers or sells a security in a transaction exempted by the provisions of section 4(6), and any person who offers or sells the security in such offering.

(d) INFORMATION AVAILABLE TO STATES.—The Commission shall make, or shall cause to be made by the relevant broker or funding portal, the information described in subsection (b) and such other information as the Commission, by rule, determines appropriate, available to the securities commission (or any agency or

office performing like functions) of each State and territory of the United States and the District of Columbia.

(e) RESTRICTIONS ON SALES.—Securities issued pursuant to a transaction described in section 4(6)—

(1) may not be transferred by the purchaser of such securities during the 1-year period beginning on the date of purchase, unless such securities are transferred—

(A) to the issuer of the securities;

(B) to an accredited investor;

(C) as part of an offering registered with the Commission; or

(D) to a member of the family of the purchaser or the equivalent, or in connection with the death or divorce of the purchaser or other similar circumstance, in the discretion of the Commission; and

(2) shall be subject to such other limitations as the Commission shall, by rule, establish.

(f) APPLICABILITY.—Section 4(6) shall not apply to transactions involving the offer or sale of securities by any issuer that—

(1) is not organized under and subject to the laws of a State or territory of the United States or the District of Columbia;

(2) is subject to the requirement to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934;

(3) is an investment company, as defined in section 3 of the Investment Company Act of 1940, or is excluded from the definition of investment company by section 3(b) or section 3(c) of that Act; or

(4) the Commission, by rule or regulation, determines appropriate.

(g) RULE OF CONSTRUCTION.—Nothing in this section or section 4(6) shall be construed as preventing an issuer from raising capital through methods not described under section 4(6).

(h) CERTAIN CALCULATIONS.—

(1) DOLLAR AMOUNTS.—Dollar amounts in section 4(6) and subsection (b) of this section shall be adjusted by the Commission not less frequently than once every 5 years, by notice published in the Federal Register to reflect any change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics.

(2) INCOME AND NET WORTH.—The income and net worth of a natural person under section 4(6)(B) shall be calculated in accordance with any rules of the Commission under this title regarding the calculation of the income and net worth, respectively, of an accredited investor.

PROHIBITIONS RELATING TO INTERSTATE COMMERCE AND THE MAILS

SEC. 5. [77e] (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails

to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this title, unless such prospectus meets the requirements of section 10; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 10.

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8.

(d) LIMITATION.—Notwithstanding any other provision of this section, an emerging growth company or any person authorized to act on behalf of an emerging growth company may engage in oral or written communications with potential investors that are qualified institutional buyers or institutions that are accredited investors, as such terms are respectively defined in section 230.144A and section 230.501(a) of title 17, Code of Federal Regulations, or any successor thereto, to determine whether such investors might have an interest in a contemplated securities offering, either prior to or following the date of filing of a registration statement with respect to such securities with the Commission, subject to the requirement of subsection (b)(2).

(e) Notwithstanding the provisions of section 3 or 4, unless a registration statement meeting the requirements of section 10(a) is in effect as to a security-based swap, it shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell, offer to buy or purchase or sell a security-based swap to any person who is not an eligible contract participant as defined in section 1a(18) of the Commodity Exchange Act (7 U.S.C. 1a(18)).

REGISTRATION OF SECURITIES AND SIGNING OF REGISTRATION STATEMENT

SEC. 6. **[**77f**]** (a) Any security may be registered with the Commission under the terms and conditions hereinafter provided, by fil-

ing a registration statement in triplicate, at least one of which shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer), and in case the issuer is a foreign or Territorial person by its duly authorized representative in the United States; except that when such registration statement relates to a security issued by a foreign government, or political subdivision thereof, it need be signed only by the underwriter of such security. Signatures of all such persons when written on the said registration statements shall be presumed to have been so written by authority of the person whose signature is so affixed and the burden of proof, in the event such authority shall be denied, shall be upon the party denying the same. The affixing of any signature without the authority of the purported signer shall constitute a violation of this title. A registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered.

(b) REGISTRATION FEE.—

(1) FEE PAYMENT REQUIRED.—At the time of filing a registration statement, the applicant shall pay to the Commission a fee at a rate that shall be equal to $92 per $1,000,000 of the maximum aggregate price at which such securities are proposed to be offered, except that during fiscal year 2003 and any succeeding fiscal year such fee shall be adjusted pursuant to paragraph (2).

(2) ANNUAL ADJUSTMENT.—For each fiscal year, the Commission shall by order adjust the rate required by paragraph (1) for such fiscal year to a rate that, when applied to the baseline estimate of the aggregate maximum offering prices for such fiscal year, is reasonably likely to produce aggregate fee collections under this subsection that are equal to the target fee collection amount for such fiscal year.

(3) PRO RATA APPLICATION.—The rates per $1,000,000 required by this subsection shall be applied pro rata to amounts and balances of less than $1,000,000.

(4) REVIEW AND EFFECTIVE DATE.—In exercising its authority under this subsection, the Commission shall not be required to comply with the provisions of section 553 of title 5, United States Code. An adjusted rate prescribed under paragraph (2) and published under paragraph (5) shall not be subject to judicial review. An adjusted rate prescribed under paragraph (2) shall take effect on the first day of the fiscal year to which such rate applies.

(5) PUBLICATION.—The Commission shall publish in the Federal Register notices of the rate applicable under this subsection and under sections 13(e) and 14(g) for each fiscal year not later than August 31 of the fiscal year preceding the fiscal year to which such rate applies, together with any estimates or projections on which such rate is based.

(6) DEFINITIONS.—For purposes of this subsection:

(A) TARGET OFFSETTING [19] COLLECTION AMOUNT.—The target fee collection amount for each fiscal year is determined according to the following table:

Fiscal year:	Target fee collection amount
2002	$377,000,000
2003	$435,000,000
2004	$467,000,000
2005	$570,000,000
2006	$689,000,000
2007	$214,000,000
2008	$234,000,000
2009	$284,000,000
2010	$334,000,000
2011	$394,000,000
2012	$425,000,000
2013	$455,000,000
2014	$485,000,000
2015	$515,000,000
2016	$550,000,000
2017	$585,000,000
2018	$620,000,000
2019	$660,000,000
2020	$705,000,000
2021 and each fiscal year thereafter ..	An amount that is equal to the target fee collection amount for the prior fiscal year, adjusted by the rate of inflation.

(B) BASELINE ESTIMATE OF THE AGGREGATE MAXIMUM OFFERING PRICES.—The baseline estimate of the aggregate maximum offering prices for any fiscal year is the baseline estimate of the aggregate maximum offering price at which securities are proposed to be offered pursuant to registration statements filed with the Commission during such fiscal year as determined by the Commission, after consultation with the Congressional Budget Office and the Office of Management and Budget, using the methodology required for projections pursuant to section 257 of the Balanced Budget and Emergency Deficit Control Act of 1985.

(c) The filing with the Commission of a registration statement, or of an amendment to a registration statement, shall be deemed to have taken place upon the receipt thereof, but the filing of a registration statement shall not be deemed to have taken place unless it is accompanied by a United States postal money order or a certified bank check or cash for the amount of the fee required under subsection (b).

(d) The information contained in or filed with any registration statement shall be made available to the public under such regulations as the Commission may prescribe, and copies thereof, photostatic or otherwise, shall be furnished to every applicant at such reasonable charge as the Commission may prescribe.

(e) EMERGING GROWTH COMPANIES.—

(1) IN GENERAL.—Any emerging growth company, prior to its initial public offering date, may confidentially submit to the Commission a draft registration statement, for confidential

[19] The word "OFFSETTING" in the heading of paragraph (6)(A) probably should read "FEE". See amendment made by section 991(b)(1)(A) of Public Law 111–203.

nonpublic review by the staff of the Commission prior to public filing, provided that the initial confidential submission and all amendments thereto shall be publicly filed with the Commission not later than 15 days before the date on which the issuer conducts a road show, as such term is defined in section 230.433(h)(4) of title 17, Code of Federal Regulations, or any successor thereto. An issuer that was an emerging growth company at the time it submitted a confidential registration statement or, in lieu thereof, a publicly filed registration statement for review under this subsection but ceases to be an emerging growth company thereafter shall continue to be treated as an emerging market growth company for the purposes of this subsection through the earlier of the date on which the issuer consummates its initial public offering pursuant to such registrations statement or the end of the 1-year period beginning on the date the company ceases to be an emerging growth company.

(2) CONFIDENTIALITY.—Notwithstanding any other provision of this title, the Commission shall not be compelled to disclose any information provided to or obtained by the Commission pursuant to this subsection. For purposes of section 552 of title 5, United States Code, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552. Information described in or obtained pursuant to this subsection shall be deemed to constitute confidential information for purposes of section 24(b)(2) of the Securities Exchange Act of 1934.

INFORMATION REQUIRED IN REGISTRATION STATEMENT [20]

SEC. 7. [21] [77g]

(a) INFORMATION REQUIRED IN REGISTRATION STATEMENT.—

(1) IN GENERAL.—The registration statement, when relating to a security other than a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule A, and when relating to a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule B; except that the Commission may by rules or regulations provide that any such information or document need not be included in respect of any class of issuers or securities if it finds that the requirement of such information or document is inapplicable to such class and that disclosure fully adequate for the protection of investors is otherwise required to be included within the registration statement. If any accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, is named as having prepared or certified any part of the registration statement, or is named as having prepared or certified a report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the reg-

[20] But see sections 24(e) and 24(f) of the Investment Company Act of 1940, infra.

[21] For additional information required of certain public utilities, see 16 U.S.C. 824c(h).

istration statement. If any such person is named as having prepared or certified a report or valuation (other than a public official document or statement) which is used in connection with the registration statement, but is not named as having prepared or certified such report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement unless the Commission dispenses with such filing as impracticable or as involving undue hardship on the person filing the registration statement. Any such registration statement shall contain such other information, and be accompanied by such other documents, as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

(2) TREATMENT OF EMERGING GROWTH COMPANIES.—An emerging growth company—

(A) need not present more than 2 years of audited financial statements in order for the registration statement of such emerging growth company with respect to an initial public offering of its common equity securities to be effective, and in any other registration statement to be filed with the Commission, an emerging growth company need not present selected financial data in accordance with section 229.301 of title 17, Code of Federal Regulations, for any period prior to the earliest audited period presented in connection with its initial public offering; and

(B) may not be required to comply with any new or revised financial accounting standard until such date that a company that is not an issuer (as defined under section 2(a) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201(a))) is required to comply with such new or revised accounting standard, if such standard applies to companies that are not issuers.

(b)(1) The Commission shall prescribe special rules with respect to registration statements filed by any issuer that is a blank check company. Such rules may, as the Commission determines necessary or appropriate in the public interest or for the protection of investors—

(A) require such issuers to provide timely disclosure, prior to or after such statement becomes effective under section 8, of (i) information regarding the company to be acquired and the specific application of the proceeds of the offering, or (ii) additional information necessary to prevent such statement from being misleading;

(B) place limitations on the use of such proceeds and the distribution of securities by such issuer until the disclosures required under subparagraph (A) have been made; and

(C) provide a right of rescission to shareholders of such securities.

(2) The Commission may, as it determines consistent with the public interest and the protection of investors, by rule or order exempt any issuer or class of issuers from the rules prescribed under paragraph (1).

(3) For purposes of paragraph (1) of this subsection, the term "blank check company" means any development stage company that is issuing a penny stock (within the meaning of section 3(a)(51) of the Securities Exchange Act of 1934) and that—

(A) has no specific business plan or purpose; or

(B) has indicated that its business plan is to merge with an unidentified company or companies.

(c) DISCLOSURE REQUIREMENTS.—

(1) IN GENERAL.—The Commission shall adopt regulations under this subsection requiring each issuer of an asset-backed security to disclose, for each tranche or class of security, information regarding the assets backing that security.

(2) CONTENT OF REGULATIONS.—In adopting regulations under this subsection, the Commission shall—

(A) set standards for the format of the data provided by issuers of an asset-backed security, which shall, to the extent feasible, facilitate comparison of such data across securities in similar types of asset classes; and

(B) require issuers of asset-backed securities, at a minimum, to disclose asset-level or loan-level data, if such data are necessary for investors to independently perform due diligence, including—

(i) data having unique identifiers relating to loan brokers or originators;

(ii) the nature and extent of the compensation of the broker or originator of the assets backing the security; and

(iii) the amount of risk retention by the originator and the securitizer of such assets.

(3) DATA STANDARDS FOR ASSET-BACKED SECURITIES DISCLOSURES.—

(A) REQUIREMENT.—The Commission shall, by rule, adopt data standards for all disclosures required under this subsection.

(B) CONSISTENCY.—The data standards required under subparagraph (A) shall incorporate, and ensure compatibility with (to the extent feasible), all applicable data standards established in the rules promulgated under section 124 of the Financial Stability Act of 2010, including, to the extent practicable, by having the characteristics described in clauses (i) through (vi) of subsection (c)(1)(B) of such section 124.

(d) REGISTRATION STATEMENT FOR ASSET-BACKED SECURITIES.—Not later than 180 days after the date of enactment of this subsection, the Commission shall issue rules relating to the registration statement required to be filed by any issuer of an asset-backed security (as that term is defined in section 3(a)(77) of the Securities Exchange Act of 1934) that require any issuer of an asset-backed security—

(1) to perform a review of the assets underlying the asset-backed security; and

(2) to disclose the nature of the review under paragraph (1).

TAKING EFFECT OF REGISTRATION STATEMENTS AND AMENDMENTS THERETO

SEC. 8. [77h] (a) Except as hereinafter provided, the effective date of a registration statement shall be the twentieth day after the filing thereof or such earlier date as the Commission may determine, having due regard to the adequacy of the information respecting the issuer theretofore available to the public, to the facility with which the nature of the securities to be registered, their relationship to the capital structure of the issuer and the rights of holders thereof can be understood, and to the public interest and the protection of investors. If any amendment to any such statement is filed prior to the effective date of such statement, the registration statement shall be deemed to have been filed when such amendment was filed; except that an amendment filed with the consent of the Commission, prior to the effective date of the registration statement, or filed pursuant to an order of the Commission, shall be treated as a part of the registration statement.

(b) If it appears to the Commission that a registration statement is on its face incomplete or inaccurate in any material respect, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice not later than ten days after the filing of the registration statement, and opportunity for hearing (at a time fixed by the Commission) within ten days after such notice by personal service or the sending of such telegraphic notice, issue an order prior to the effective date of registration refusing to permit such statement to become effective until it has been amended in accordance with such order. When such statement has been amended in accordance with such order the Commission shall so declare and the registration shall become effective at the time provided in subsection (a) or upon the date of such declaration, whichever date is the later.

(c) An amendment filed after the effective date of the registration statement, if such amendment, upon its face, appears to the Commission not to be incomplete or inaccurate in any material respect, shall become effective on such date as the Commission may determine, having due regard to the public interest and the protection of investors.

(d) If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after opportunity for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, issue a stop order suspending the effectiveness of the registration statement.[22] When such statement has been amended in accordance with such stop order the Commission shall so declare and thereupon the stop order shall cease to be effective.

(e) The Commission is hereby empowered to make an examination in any case in order to determine whether a stop order should

[22] See also section 14(a) of the Investment Company Act of 1940, infra.

issue under subsection (d). In making such examination the Commission or any officer or officers designated by it shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the issuer, underwriter, or any other person, in respect of any matter relevant to the examination, and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities of the issuer, or its income statement, or both, to be certified to by a public or certified accountant approved by the Commission. If the issuer or underwriter shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order.

(f) Any notice required under this section shall be sent to or served on the issuer, or, in case of a foreign government or political subdivision thereof, to or on the underwriter, or, in the case of a foreign or Territorial person, to or on its duly authorized representative in the United States named in the registration statement, properly directed in each case of telegraphic notice to the address given in such statement.

CEASE-AND-DESIST PROCEEDINGS

SEC. 8A. [77h–1] (a) AUTHORITY OF THE COMMISSION.—If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this title, or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and 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 violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation. Such order may, in addition to requiring a person to cease and desist from committing or causing a violation, require such person to comply, or to take steps to effect compliance, with such provision, rule, or regulation, upon such terms and conditions and within such time as the Commission may specify in such order. Any such order may, as the Commission deems appropriate, require future compliance or steps to effect future compliance, either permanently or for such period of time as the Commission may specify, with such provision, rule, or regulation with respect to any security, any issuer, or any other person.

(b) HEARING.—The notice instituting proceedings pursuant to subsection (a) shall fix a hearing date not earlier than 30 days nor later than 60 days after service of the notice unless an earlier or a later date is set by the Commission with the consent of any respondent so served.

(c) TEMPORARY ORDER.—

(1) IN GENERAL.—Whenever the Commission determines that the alleged violation or threatened violation specified in the notice instituting proceedings pursuant to subsection (a), or the continuation thereof, is likely to result in significant dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest, including, but not limited to, losses to the Securities Investor Protection Corporation, prior to the completion of the proceedings, the Commis-

sion may enter a temporary order requiring the respondent to cease and desist from the violation or threatened violation and to take such action to prevent the violation or threatened violation and to prevent dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest as the Commission deems appropriate pending completion of such proceeding. Such an order shall be entered only after notice and opportunity for a hearing, unless the Commission determines that notice and hearing prior to entry would be impracticable or contrary to the public interest. A temporary order shall become effective upon service upon the respondent and, unless set aside, limited, or suspended by the Commission or a court of competent jurisdiction, shall remain effective and enforceable pending the completion of the proceedings.

(2) APPLICABILITY.—This subsection shall apply only to a respondent that acts, or, at the time of the alleged misconduct acted, as a broker, dealer, investment adviser, investment company, municipal securities dealer, government securities broker, government securities dealer, or transfer agent, or is, or was at the time of the alleged misconduct, an associated person of, or a person seeking to become associated with, any of the foregoing.

(d) REVIEW OF TEMPORARY ORDERS.—

(1) COMMISSION REVIEW.—At any time after the respondent has been served with a temporary cease-and-desist order pursuant to subsection (c), the respondent may apply to the Commission to have the order set aside, limited, or suspended. If the respondent has been served with a temporary cease-and-desist order entered without a prior Commission hearing, the respondent may, within 10 days after the date on which the order was served, request a hearing on such application and the Commission shall hold a hearing and render a decision on such application at the earliest possible time.

(2) JUDICIAL REVIEW.—Within—

(A) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or

(B) 10 days after the Commission renders a decision on an application and hearing under paragraph (1), with respect to any temporary cease-and-desist order entered without a prior Commission hearing,

the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under paragraph (1) of this subsection.

(3) NO AUTOMATIC STAY OF TEMPORARY ORDER.—The commencement of proceedings under paragraph (2) of this sub-

section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(4) EXCLUSIVE REVIEW.—Section 9(a) of this title shall not apply to a temporary order entered pursuant to this section.

(e) AUTHORITY TO ENTER AN ORDER REQUIRING AN ACCOUNTING AND DISGORGEMENT.—In any cease-and-desist proceeding under subsection (a), the Commission may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.

(f) AUTHORITY OF THE COMMISSION TO PROHIBIT PERSONS FROM SERVING AS OFFICERS OR DIRECTORS.—In any cease-and-desist proceeding under subsection (a), the Commission may issue an order to prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who has violated section 17(a)(1) or the rules or regulations thereunder, from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 12 of the Securities Exchange Act of 1934, or that is required to file reports pursuant to section 15(d) of that Act, if the conduct of that person demonstrates unfitness to serve as an officer or director of any such issuer.

(g) AUTHORITY TO IMPOSE MONEY PENALTIES.—

(1) GROUNDS.—In any cease-and-desist proceeding under subsection (a), the Commission may impose a civil penalty on a person if the Commission finds, on the record, after notice and opportunity for hearing, that—

(A) such person—

(i) is violating or has violated any provision of this title, or any rule or regulation issued under this title; or

(ii) is or was a cause of the violation of any provision of this title, or any rule or regulation thereunder; and

(B) such penalty is in the public interest.

(2) MAXIMUM AMOUNT OF PENALTY.—

(A) FIRST TIER.—The maximum amount of a penalty for each act or omission described in paragraph (1) shall be $7,500 for a natural person or $75,000 for any other person.

(B) SECOND TIER.—Notwithstanding subparagraph (A), the maximum amount of penalty for each such act or omission shall be $75,000 for a natural person or $375,000 for any other person, if the act or omission described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(C) THIRD TIER.—Notwithstanding subparagraphs (A) and (B), the maximum amount of penalty for each such act or omission shall be $150,000 for a natural person or $725,000 for any other person, if—

(i) the act or omission described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(ii) such act or omission directly or indirectly resulted in—

(I) substantial losses or created a significant risk of substantial losses to other persons; or

(II) substantial pecuniary gain to the person who committed the act or omission.

(3) EVIDENCE CONCERNING ABILITY TO PAY.—In any proceeding in which the Commission may impose a penalty under this section, a respondent may present evidence of the ability of the respondent to pay such penalty. The Commission may, in its discretion, consider such evidence in determining whether such penalty is in the public interest. Such evidence may relate to the extent of the ability of the respondent to continue in business and the collectability of a penalty, taking into account any other claims of the United States or third parties upon the assets of the respondent and the amount of the assets of the respondent.

COURT REVIEW OF ORDERS

SEC. 9. [77i] (a) Any person aggrieved by an order of the Commission may obtain a review of such order in the court of appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such Court; within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or be set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The jurisdiction of the court shall be exclusive and its judgment and decree, affirming, modifying, or setting aside, in whole or in part, any order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

INFORMATION REQUIRED IN PROSPECTUS

SEC. 10. [77j] (a) Except to the extent otherwise permitted or required pursuant to this subsection or subsections (c), (d), or (e)—

(1) a prospectus relating to a security other than a security issued by a foreign government or political subdivision thereof, shall contain the information contained in the registration statement, but it need not include the documents referred to in paragraphs (28) to (32), inclusive, of schedule A;

(2) a prospectus relating to a security issued by a foreign government or political subdivision thereof shall contain the information contained in the registration statement, but it need not include the documents referred to in paragraphs (13) and (14) of schedule B;

(3) notwithstanding the provisions of paragraphs (1) and (2) of this subsection (a) when a prospectus is used more than nine months after the effective date of the registration statement, the information contained therein shall be as of a date not more than sixteen months prior to such use, so far as such information is known to the user of such prospectus or can be furnished by such user without unreasonable effort or expense; [23]

(4) there may be omitted from any prospectus any of the information required under this subsection (a) which the Commission may by rules or regulations designate as not being necessary or appropriate in the public interest or for the protection of investors.

(b) In addition to the prospectus permitted or required in subsection (a), the Commission shall by rules or regulations deemed necessary or appropriate in the public interest or for the protection of investors permit the use of a prospectus for the purposes of subsection (b)(1) of section 5 which omits in part or summarizes information in the prospectus specified in subsection (a). A prospectus permitted under this subsection shall, except to the extent the Commission by rules or regulations deemed necessary or appropriate in the public interest or for the protection of investors otherwise provides, be filed as part of the registration statement but shall not be deemed a part of such registration statement for the purposes of section 11. The Commission may at any time issue an order preventing or suspending the use of a prospectus permitted under this subsection (b), if it has reason to believe that such prospectus has not been filed (if required to be filed as part of the registration statement) or includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein, in the light of the circumstances under which such prospectus is or is to be used, not misleading. Upon issuance of an order under this subsection, the Commission shall give notice of the issuance of such order and opportunity for hearing by personal service or the sending of con-

[23] See also section 24(e) of the Investment Company Act of 1940, infra.

firmed telegraphic notice. The Commission shall vacate or modify the order at any time for good cause or if such prospectus has been filed or amended in accordance with such order.

(c) Any prospectus shall contain such other information as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

(d) In the exercise of its powers under subsections (a), (b), or (c), the Commission shall have authority to classify prospectuses according to the nature and circumstances of their use or the nature of the security, issue, issuer, or otherwise, and, by rules and regulations and subject to such terms and conditions as it shall specify therein, to prescribe as to each class the form and contents which it may find appropriate and consistent with the public interest and the protection of investors.

(e) The statements or information required to be included in a prospectus by or under authority of subsections (a), (b), (c), or (d), when written, shall be placed in a conspicuous part of the prospectus and, except as otherwise permitted by rules or regulations, in type as large as that used generally in the body of the prospectus.

(f) In any case where a prospectus consists of a radio or television broadcast, copies thereof shall be filed with the Commission under such rules and regulations as it shall prescribe. The Commission may by rules and regulations require the filing with it of forms and prospectuses used in connection with the offer or sale of securities registered under this title.

CIVIL LIABILITIES ON ACCOUNT OF FALSE REGISTRATION STATEMENT

SEC. 11. [77k] (a) In case any part of the registration statement, when such part became effective,[24] contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in, the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the

[24] See also section 24(e) of the Investment Company Act of 1940, infra.

statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Notwithstanding the provisions of subsection (a) no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1), and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registra-

tion statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an ommission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided,* That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter

shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this title the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f)(1) Except as provided in paragraph (2), all or any one or more of the persons specified in subsection (a) shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(2)(A) The liability of an outside director under subsection (e) shall be determined in accordance with section 21D(f) of the Securities Exchange Act of 1934.

(B) For purposes of this paragraph, the term "outside director" shall have the meaning given such term by rule or regulation of the Commission.

(g) In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

CIVIL LIABILITIES ARISING IN CONNECTION WITH PROSPECTUSES AND COMMUNICATIONS

SEC. 12. [77l] (a) IN GENERAL.—Any person who—

(1) offers or sells a security in violation of section 5, or

(2) offers or sells a security (whether or not exempted by the provisions of section 3, other than paragraphs (2) and (14) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable, subject to subsection (b), to the person purchasing such security from him, who may sue either at law or in equity in

any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

(b) LOSS CAUSATION.—In an action described in subsection (a)(2), if the person who offered or sold such security proves that any portion or all of the amount recoverable under subsection (a)(2) represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable.

LIMITATION OF ACTIONS

SEC. 13. [77m] No action shall be maintained to enforce any liability created under section 11 or section 12(a)(2) unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12(a)(1), unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or section 12(a)(1) more than three years after the security was bona fide offered to the public, or under section 12(a)(2) more than three years after the sale. [25]

CONTRARY STIPULATIONS VOID

SEC. 14. [77n] Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.

LIABILITY OF CONTROLLING PERSONS

SEC. 15. [77o] (a) CONTROLLING PERSONS.—Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under section 11 or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

(b) PROSECUTION OF PERSONS WHO AID AND ABET VIOLATIONS.—For purposes of any action brought by the Commission under subparagraph (b) or (d) of section 20, any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this Act, or of any rule or regula-

[25] See also section 24(e) of the Investment Company Act of 1940, infra.

tion issued under this Act, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.

SEC. 16. [77p] ADDITIONAL REMEDIES; LIMITATION ON REMEDIES.[26]

(a) REMEDIES ADDITIONAL.—Except as provided in subsection (b), the rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity.

(b) CLASS ACTION LIMITATIONS.—No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—

(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(c) REMOVAL OF COVERED CLASS ACTIONS.—Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

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[26] Section 16 of the Securities Act of 1933 was amended to add limitations on remedies by section 101 of the Securities Litigation Uniform Standards Act of 1998. Section 2 of that Act contained the following findings:

SEC. 2. FINDINGS.

The Congress finds that—

(1) the Private Securities Litigation Reform Act of 1995 sought to prevent abuses in private securities fraud lawsuits;

(2) since enactment of that legislation, considerable evidence has been presented to Congress that a number of securities class action lawsuits have shifted from Federal to State courts;

(3) this shift has prevented that Act from fully achieving its objectives;

(4) State securities regulation is of continuing importance, together with Federal regulation of securities, to protect investors and promote strong financial markets; and

(5) in order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995, it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.

Section 101(c) of that Act contained the following effective date provision for the amendment to section 16 of the Securities Act of 1933 and section 28(f) of the Securities Exchange Act of 1934:

(c) APPLICABILITY.—The amendments made by this section shall not affect or apply to any action commenced before and pending on the date of enactment of this Act.

In addition, section 102 of the Securities Litigation Uniform Standards Act contained the following provision with respect to reciprocal subpoena enforcement:

SEC. 102. PROMOTION OF RECIPROCAL SUBPOENA ENFORCEMENT.

(a) COMMISSION ACTION.—The Securities and Exchange Commission, in consultation with State securities commissions (or any agencies or offices performing like functions), shall seek to encourage the adoption of State laws providing for reciprocal enforcement by State securities commissions of subpoenas issued by another State securities commission seeking to compel persons to attend, testify in, or produce documents or records in connection with an action or investigation by a State securities commission of an alleged violation of State securities laws.

(b) REPORT.—Not later than 24 months after the date of enactment of this Act, the Securities and Exchange Commission (hereafter in this section referred to as the "Commission") shall submit a report to the Congress—

(1) identifying the States that have adopted laws described in subsection (a);

(2) describing the actions undertaken by the Commission and State securities commissions to promote the adoption of such laws; and

(3) identifying any further actions that the Commission recommends for such purposes.

(d) PRESERVATION OF CERTAIN ACTIONS.—

(1) ACTIONS UNDER STATE LAW OF STATE OF INCORPORATION.—

(A) ACTIONS PRESERVED.—Notwithstanding subsection (b) or (c), a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(B) PERMISSIBLE ACTIONS.—A covered class action is described in this subparagraph if it involves—

(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that—

(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(2) STATE ACTIONS.—

(A) IN GENERAL.—Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(B) STATE PENSION PLAN DEFINED.—For purposes of this paragraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of the State or political subdivision thereof, or by any agency or instrumentality thereof.

(3) ACTIONS UNDER CONTRACTUAL AGREEMENTS BETWEEN ISSUERS AND INDENTURE TRUSTEES.—Notwithstanding subsection (b) or (c), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(4) REMAND OF REMOVED ACTIONS.—In an action that has been removed from a State court pursuant to subsection (c), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(e) PRESERVATION OF STATE JURISDICTION.—The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(f) DEFINITIONS.—For purposes of this section, the following definitions shall apply:

(1) AFFILIATE OF THE ISSUER.—The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(2) COVERED CLASS ACTION.—

(A) IN GENERAL.—The term "covered class action" means—

(i) any single lawsuit in which—

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(B) EXCEPTION FOR DERIVATIVE ACTIONS.—Notwithstanding subparagraph (A), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(C) COUNTING OF CERTAIN CLASS MEMBERS.—For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(D) RULE OF CONSTRUCTION.—Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

(3) COVERED SECURITY.—The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is ex-

empt from registration under this title pursuant to rules issued by the Commission under section 4(2).

FRAUDULENT INTERSTATE TRANSACTIONS

SEC. 17. [77q] (a) It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 3(a)(78) of the Securities Exchange Act[27]) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 3 shall not apply to the provisions of this section.

(d) The authority of the Commission under this section with respect to security-based swap agreements (as defined in section 3(a)(78) of the Securities Exchange Act of 1934) shall be subject to the restrictions and limitations of section 2A(b) of this title.

SEC. 18. [77r] EXEMPTION FROM STATE REGULATION OF SECURITIES OFFERINGS.

(a) SCOPE OF EXEMPTION.—Except as otherwise provided in this section, no law, rule, regulation, or order, or other administrative action of any State or any political subdivision thereof—

(1) requiring, or with respect to, registration or qualification of securities, or registration or qualification of securities transactions, shall directly or indirectly apply to a security that—

(A) is a covered security; or

(B) will be a covered security upon completion of the transaction;

(2) shall directly or indirectly prohibit, limit, or impose any conditions upon the use of—

[27] The reference in the matter preceding paragraph (1) to the "Securities Exchange Act" probably should read "Securities Exchange Act of 1934".

(A) with respect to a covered security described in subsection (b), any offering document that is prepared by or on behalf of the issuer; or

(B) any proxy statement, report to shareholders, or other disclosure document relating to a covered security or the issuer thereof that is required to be and is filed with the Commission or any national securities organization registered under section 15A of the Securities Exchange Act of 1934, except that this subparagraph does not apply to the laws, rules, regulations, or orders, or other administrative actions of the State of incorporation of the issuer; or

(3) shall directly or indirectly prohibit, limit, or impose conditions, based on the merits of such offering or issuer, upon the offer or sale of any security described in paragraph (1).

(b) COVERED SECURITIES.—For purposes of this section, the following are covered securities:

(1) EXCLUSIVE FEDERAL REGISTRATION OF NATIONALLY TRADED SECURITIES.—A security is a covered security if such security is—

(A) a security designated as qualified for trading in the national market system pursuant to section 11A(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78k–1(a)(2)) that is listed, or authorized for listing, on a national securities exchange (or tier or segment thereof); or

(B) a security of the same issuer that is equal in seniority or that is a senior security to a security described in subparagraph (A).

(2) EXCLUSIVE FEDERAL REGISTRATION OF INVESTMENT COMPANIES.—A security is a covered security if such security is a security issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940.

(3) SALES TO QUALIFIED PURCHASERS.—A security is a covered security with respect to the offer or sale of the security to qualified purchasers, as defined by the Commission by rule. In prescribing such rule, the Commission may define the term "qualified purchaser" differently with respect to different categories of securities, consistent with the public interest and the protection of investors.

(4) EXEMPTION IN CONNECTION WITH CERTAIN EXEMPT OFFERINGS.—A security is a covered security with respect to a transaction that is exempt from registration under this title pursuant to—

(A) paragraph (1) or (3) of section 4, and the issuer of such security files reports with the Commission pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934;

(B) section 4(4);

(C) section 4(6)[28];

[28] The reference to section 4(6) in this subparagraph probably should be a reference to section 4(a)(6).

(D) a rule or regulation adopted pursuant to section 3(b)(2) and such security is—

(i) offered or sold on a national securities exchange; or

(ii) offered or sold to a qualified purchaser, as defined by the Commission pursuant to paragraph (3) with respect to that purchase or sale;

(E) section 3(a), other than the offer or sale of a security that is exempt from such registration pursuant to paragraph (4), (10), or (11) of such section, except that a municipal security that is exempt from such registration pursuant to paragraph (2) of such section is not a covered security with respect to the offer or sale of such security in the State in which the issuer of such security is located;

(F) Commission rules or regulations issued under section 4(2), except that this subparagraph does not prohibit a State from imposing notice filing requirements that are substantially similar to those required by rule or regulation under section 4(2) that are in effect on September 1, 1996; or

(G) section 4(a)(7).

(c) PRESERVATION OF AUTHORITY.—

(1) FRAUD AUTHORITY.—Consistent with this section, the securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions, in connection with securities or securities transactions [30]

(A) with respect to—

(i) fraud or deceit; or

(ii) unlawful conduct by a broker or dealer; and

(B) in connection to a transaction described under section 4(6) [31], with respect to—

(i) fraud or deceit; or

(ii) unlawful conduct by a broker, dealer, funding portal, or issuer.

(2) PRESERVATION OF FILING REQUIREMENTS.—

(A) NOTICE FILINGS PERMITTED.—Nothing in this section prohibits the securities commission (or any agency or office performing like functions) of any State from requiring the filing of any document filed with the Commission pursuant to this title, together with annual or periodic reports of the value of securities sold or offered to be sold to persons located in the State (if such sales data is not included in documents filed with the Commission), solely for notice purposes and the assessment of any fee, together with a consent to service of process and any required fee.

(B) PRESERVATION OF FEES.—

(i) IN GENERAL.—Until otherwise provided by law, rule, regulation, or order, or other administrative action of any State or any political subdivision thereof,

[30] In the matter preceding subparagraph (A), the word "transactions" probably should read "transactions—".

[31] The reference to section 4(6) in the matter preceding clause (i) of this subparagraph probably should be a reference to section 4(a)(6).

adopted after the date of enactment of the National Securities Markets Improvement Act of 1996, filing or registration fees with respect to securities or securities transactions shall continue to be collected in amounts determined pursuant to State law as in effect on the day before such date.

(ii) SCHEDULE.—The fees required by this subparagraph shall be paid, and all necessary supporting data on sales or offers for sales required under subparagraph (A), shall be reported on the same schedule as would have been applicable had the issuer not relied on the exemption provided in subsection (a).

(C) AVAILABILITY OF PREEMPTION CONTINGENT ON PAYMENT OF FEES.—

(i) IN GENERAL.—During the period beginning on the date of enactment of the National Securities Markets Improvement Act of 1996 and ending 3 years after that date of enactment, the securities commission (or any agency or office performing like functions) of any State may require the registration of securities issued by any issuer who refuses to pay the fees required by subparagraph (B).

(ii) DELAYS.—For purposes of this subparagraph, delays in payment of fees or underpayments of fees that are promptly remedied shall not constitute a refusal to pay fees.

(D) FEES NOT PERMITTED ON LISTED SECURITIES.—Notwithstanding subparagraphs (A), (B), and (C), no filing or fee may be required with respect to any security that is a covered security pursuant to subsection (b)(1), or will be such a covered security upon completion of the transaction, or is a security of the same issuer that is equal in seniority or that is a senior security to a security that is a covered security pursuant to subsection (b)(1).

(F)[32] FEES NOT PERMITTED ON CROWDFUNDED SECURITIES.—Notwithstanding subparagraphs (A), (B), and (C), no filing or fee may be required with respect to any security that is a covered security pursuant to subsection (b)(4)(B), or will be such a covered security upon completion of the transaction, except for the securities commission (or any agency or office performing like functions) of the State of the principal place of business of the issuer, or any State in which purchasers of 50 percent or greater of the aggregate amount of the issue are residents, provided that for purposes of this subparagraph, the term "State" includes the District of Columbia and the territories of the United States.

(3) ENFORCEMENT OF REQUIREMENTS.—Nothing in this section shall prohibit the securities commission (or any agency or office performing like functions) of any State from suspending the offer or sale of securities within such State as a result of

[32] So in law. There is no subparagraph (E) in paragraph (2).

the failure to submit any filing or fee required under law and permitted under this section.

(d) DEFINITIONS.—For purposes of this section, the following definitions shall apply:

(1) OFFERING DOCUMENT.—The term "offering document"—

(A) has the meaning given the term "prospectus" in section 2(a)(10), but without regard to the provisions of subparagraphs (a) and (b) of that section; and

(B) includes a communication that is not deemed to offer a security pursuant to a rule of the Commission.

(2) PREPARED BY OR ON BEHALF OF THE ISSUER.—Not later than 6 months after the date of enactment of the National Securities Markets Improvement Act of 1996, the Commission shall, by rule, define the term "prepared by or on behalf of the issuer" for purposes of this section.

(3) STATE.—The term "State" has the same meaning as in section 3 of the Securities Exchange Act of 1934.

(4) SENIOR SECURITY.—The term "senior security" means any bond, debenture, note, or similar obligation or instrument constituting a security and evidencing indebtedness, and any stock of a class having priority over any other class as to distribution of assets or payment of dividends.

SPECIAL POWERS OF COMMISSION

SEC. 19. [77s] (a) The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this title, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting, technical and trade terms used in this title. Among other things, the Commission shall have authority, for the purposes of this title, to prescribe the form or forms in which required information shall be set forth, the items or details to be shown in the balance sheet and earning statement, and the methods to be followed in the preparation of accounts, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer. The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe. No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(b) RECOGNITION OF ACCOUNTING STANDARDS.—

(1) IN GENERAL.—In carrying out its authority under subsection (a) and under section 13(b) of the Securities Exchange

Act of 1934, the Commission may recognize, as "generally accepted" for purposes of the securities laws, any accounting principles established by a standard setting body—

(A) that—

(i) is organized as a private entity;

(ii) has, for administrative and operational purposes, a board of trustees (or equivalent body) serving in the public interest, the majority of whom are not, concurrent with their service on such board, and have not been during the 2-year period preceding such service, associated persons of any registered public accounting firm;

(iii) is funded as provided in section 109 of the Sarbanes-Oxley Act of 2002;

(iv) has adopted procedures to ensure prompt consideration, by majority vote of its members, of changes to accounting principles necessary to reflect emerging accounting issues and changing business practices; and

(v) considers, in adopting accounting principles, the need to keep standards current in order to reflect changes in the business environment, the extent to which international convergence on high quality accounting standards is necessary or appropriate in the public interest and for the protection of investors; and

(B) that the Commission determines has the capacity to assist the Commission in fulfilling the requirements of subsection (a) and section 13(b) of the Securities Exchange Act of 1934, because, at a minimum, the standard setting body is capable of improving the accuracy and effectiveness of financial reporting and the protection of investors under the securities laws.

(2) ANNUAL REPORT.—A standard setting body described in paragraph (1) shall submit an annual report to the Commission and the public, containing audited financial statements of that standard setting body.

(c) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

(d)(1) The Commission is authorized to cooperate with any association composed of duly constituted representatives of State governments whose primary assignment is the regulation of the securities business within those States, and which, in the judgment of the Commission, could assist in effectuating greater uniformity in Federal-State securities matters. The Commission shall, at its discretion, cooperate, coordinate, and share information with such an

association for the purposes of carrying out the policies and projects set forth in paragraphs (2) and (3).

(2) It is the declared policy of this subsection that there should be greater Federal and State cooperation in securities matters, including—

(A) maximum effectiveness of regulation,

(B) maximum uniformity in Federal and State regulatory standards,

(C) minimum interference with the business of capital formation, and

(D) a substantial reduction in costs and paperwork to diminish the burdens of raising investment capital (particularly by small business) and to diminish the costs of the administration of the Government programs involved.

(3) The purpose of this subsection is to engender cooperation between the Commission, any such association of State securities officials, and other duly constituted securities associations in the following areas:

(A) the sharing of information regarding the registration or exemption of securities issues applied for in the various States;

(B) the development and maintenance of uniform securities forms and procedures; and

(C) the development of a uniform exemption from registration for small issuers which can be agreed upon among several States or between the States and the Federal Government. The Commission shall have the authority to adopt such an exemption as agreed upon for Federal purposes. Nothing in this Act shall be construed as authorizing preemption of State law.

(4) In order to carry out these policies and purposes, the Commission shall conduct an annual conference as well as such other meetings as are deemed necessary, to which representatives from such securities associations, securities self-regulatory organizations, agencies, and private organizations involved in capital formation shall be invited to participate.

(5) For fiscal year 1982, and for each of the three succeeding fiscal years, there are authorized to be appropriated such amounts as may be necessary and appropriate to carry out the policies, provisions, and purposes of this subsection. Any sums so appropriated shall remain available until expended.

(6) Notwithstanding any other provision of law, neither the Commission nor any other person shall be required to establish any procedures not specifically required by the securities laws, as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934, or by chapter 5 of title 5, United States Code, in connection with cooperation, coordination, or consultation with—

(A) any association referred to in paragraph (1) or (3) or any conference or meeting referred to in paragraph (4), while such association, conference, or meeting is carrying out activities in furtherance of the provisions of this subsection; or

(B) any forum, agency or organization, or group referred to in section 503 of the Small Business Investment Incentive Act of 1980, while such forum, agency, organization, or group is carrying out activities in furtherance of the provisions of such section 503.

As used in this paragraph, the terms "association", "conference", "meeting", "forum", "agency", "organization", and "group" include any committee, subgroup, or representative of such entities.

(e) EVALUATION OF RULES OR PROGRAMS.—For the purpose of evaluating any rule or program of the Commission issued or carried out under any provision of the securities laws, as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c), and the purposes of considering, proposing, adopting, or engaging in any such rule or program or developing new rules or programs, the Commission may—

(1) gather information from and communicate with investors or other members of the public;

(2) engage in such temporary investor testing programs as the Commission determines are in the public interest or would protect investors; and

(3) consult with academics and consultants, as necessary to carry out this subsection.

(f) RULE OF CONSTRUCTION.—For purposes of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), any action taken under subsection (e) shall not be construed to be a collection of information.

(g) FUNDING FOR THE GASB.—

(1) IN GENERAL.—The Commission may, subject to the limitations imposed by section 15B of the Securities Exchange Act of 1934 (15 U.S.C. 78o–4), require a national securities association registered under the Securities Exchange Act of 1934 to establish—

(A) a reasonable annual accounting support fee to adequately fund the annual budget of the Governmental Accounting Standards Board (referred to in this subsection as the "GASB"); and

(B) rules and procedures, in consultation with the principal organizations representing State governors, legislators, local elected officials, and State and local finance officers, to provide for the equitable allocation, assessment, and collection of the accounting support fee established under subparagraph (A) from the members of the association, and the remittance of all such accounting support fees to the Financial Accounting Foundation.

(2) ANNUAL BUDGET.—For purposes of this subsection, the annual budget of the GASB is the annual budget reviewed and approved according to the internal procedures of the Financial Accounting Foundation.

(3) USE OF FUNDS.—Any fees or funds collected under this subsection shall be used to support the efforts of the GASB to establish standards of financial accounting and reporting recognized as generally accepted accounting principles applicable to State and local governments of the United States.

(4) LIMITATION ON FEE.—The annual accounting support fees collected under this subsection for a fiscal year shall not exceed the recoverable annual budgeted expenses of the GASB (which may include operating expenses, capital, and accrued items).

(5) RULES OF CONSTRUCTION.—

(A) FEES NOT PUBLIC MONIES.—Accounting support fees collected under this subsection and other receipts of the GASB shall not be considered public monies of the United States.

(B) LIMITATION ON AUTHORITY OF THE COMMISSION.—Nothing in this subsection shall be construed to—

(i) provide the Commission or any national securities association direct or indirect oversight of the budget or technical agenda of the GASB; or

(ii) affect the setting of generally accepted accounting principles by the GASB.

(C) NONINTERFERENCE WITH STATES.—Nothing in this subsection shall be construed to impair or limit the authority of a State or local government to establish accounting and financial reporting standards.

INJUNCTIONS AND PROSECUTION OF OFFENSES

SEC. 20. [77t] (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

(b) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, the Commission may, in its discretion, bring an action in any district court of the United States, or United States court of any Territory, to enjoin such acts or practices, and upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title. Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received.

(c) Upon application of the Commission, the district courts of the United States and the United States courts of any Territory shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this title or any order of the Commission made in pursuance thereof.

(d) MONEY PENALTIES IN CIVIL ACTIONS.—

(1) AUTHORITY OF COMMISSION.—Whenever it shall appear to the Commission that any person has violated any provision of this title, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 8A of this title, other than by committing a violation subject to a penalty pursuant to section 21A of the Securities Ex-

change Act of 1934, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

(2) AMOUNT OF PENALTY.—

(A) FIRST TIER.—The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (i) $5,000 for a natural person or $50,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation.

(B) SECOND TIER.—Notwithstanding subparagraph (A), the amount of penalty for each such violation shall not exceed the greater of (i) $50,000 for a natural person or $250,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(C) THIRD TIER.—Notwithstanding subparagraphs (A) and (B), the amount of penalty for each such violation shall not exceed the greater of (i) $100,000 for a natural person or $500,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

(I)[33] the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(II)[33] such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

(3) PROCEDURES FOR COLLECTION.—

(A) PAYMENT OF PENALTY TO TREASURY.—A penalty imposed under this section shall be payable into the Treasury of the United States, except as otherwise provided in section 308 of the Sarbanes-Oxley Act of 2002 and section 21F of the Securities Exchange Act of 1934.

(B) COLLECTION OF PENALTIES.—If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(C) REMEDY NOT EXCLUSIVE.—The actions authorized by this subsection may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring.

(D) JURISDICTION AND VENUE.—For purposes of section 22 of this title, actions under this section shall be actions to enforce a liability or a duty created by this title.

[33] So in law. Probably should be clauses (i) and (ii).

(4) SPECIAL PROVISIONS RELATING TO A VIOLATION OF A CEASE-AND-DESIST ORDER.—In an action to enforce a cease-and-desist order entered by the Commission pursuant to section 8A, each separate violation of such order shall be a separate offense, except that in the case of a violation through a continuing failure to comply with such an order, each day of the failure to comply with the order shall be deemed a separate offense.

(e) AUTHORITY OF A COURT TO PROHIBIT PERSONS FROM SERVING AS OFFICERS AND DIRECTORS.—In any proceeding under subsection (b), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 17(a)(1) of this title from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 12 of the Securities Exchange Act of 1934 or that is required to file reports pursuant to section 15(d) of such Act if the person's conduct demonstrates unfitness to serve as an officer or director of any such issuer.

(f) PROHIBITION OF ATTORNEYS' FEES PAID FROM COMMISSION DISGORGEMENT FUNDS.—Except as otherwise ordered by the court upon motion by the Commission, or, in the case of an administrative action, as otherwise ordered by the Commission, funds disgorged as the result of an action brought by the Commission in Federal court, or as a result of any Commission administrative action, shall not be distributed as payment for attorneys' fees or expenses incurred by private parties seeking distribution of the disgorged funds.

(g) AUTHORITY OF A COURT TO PROHIBIT PERSONS FROM PARTICIPATING IN AN OFFERING OF PENNY STOCK.—

(1) IN GENERAL.—In any proceeding under subsection (a) against any person participating in, or, at the time of the alleged misconduct, who was participating in, an offering of penny stock, the court may prohibit that person from participating in an offering of penny stock, conditionally or unconditionally, and permanently or for such period of time as the court shall determine.

(2) DEFINITION.—For purposes of this subsection, the term "person participating in an offering of penny stock" includes any person engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of, any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from inclusion in such term.

HEARINGS BY COMMISSION

SEC. 21. [77u] All hearings shall be public and may be held before the Commission or an officer or officers of the Commission designated by it, and appropriate records thereof shall be kept.

JURISDICTION OF OFFENSES AND SUITS

SEC. 22. [77v] (a) The district courts of the United States and United States courts of any Territory shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section 16 with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this title. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. In any action or proceeding instituted by the Commission under this title in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of title 28, United States Code. Except as provided in section 16(c), no case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

(b) In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.[34]

(c) EXTRATERRITORIAL JURISDICTION.—The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of section 17(a) involving—

(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or

[34] Subsection (c) of section 22, which related to the immunity from prosecution of an individual compelled to testify or produce evidence, after claiming his privilege against self-incrimination, was repealed by the Organized Crime Control Act of 1970 (Pub. L. 91–542, 84 Stat. 929), which made applicable in lieu thereof 18 U.S.C. 6001, 6002, 6004. [Printed in appendix to this volume.]

(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

UNLAWFUL REPRESENTATIONS

SEC. 23. [77w] Neither the fact that the registration statement for a security has been filed or is in effect nor the fact that a stop order is not in effect with respect thereto shall be deemed a finding by the Commission that registration statement is true and accurate on its face or that it does not contain an untrue statement of fact or omit to state a material fact, or be held to mean that the Commission has in any way passed upon the merits of, or given approval to, such security. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to the foregoing provisions of this section.

PENALTIES

SEC. 24. [77x] Any person who willfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both. [35]

JURISDICTION OF OTHER GOVERNMENT AGENCIES OVER SECURITIES

SEC. 25. [77y] Nothing in this title shall relieve any person from submitting to the respective supervisory units of the Government of the United States information, reports, or other documents that are now or may hereafter be required by any provision of law.

SEPARABILITY OF PROVISIONS

SEC. 26. [77z] If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SEC. 27. [77z–1] PRIVATE SECURITIES LITIGATION.

(a) PRIVATE CLASS ACTIONS.—

(1) IN GENERAL.—The provisions of this subsection shall apply to each private action arising under this title that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.

(2) CERTIFICATION FILED WITH COMPLAINT.—

(A) IN GENERAL.—Each plaintiff seeking to serve as a representative party on behalf of a class shall provide a sworn certification, which shall be personally signed by such plaintiff and filed with the complaint, that—

[35] See also 18 U.S.C. 3623. [Printed in appendix to this volume.]

(i) states that the plaintiff has reviewed the complaint and authorized its filing;

(ii) states that the plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel or in order to participate in any private action arising under this title;

(iii) states that the plaintiff is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary;

(iv) sets forth all of the transactions of the plaintiff in the security that is the subject of the complaint during the class period specified in the complaint;

(v) identifies any other action under this title, filed during the 3-year period preceding the date on which the certification is signed by the plaintiff, in which the plaintiff has sought to serve, or served, as a representative party on behalf of a class; and

(vi) states that the plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4).

(B) NONWAIVER OF ATTORNEY-CLIENT PRIVILEGE.—The certification filed pursuant to subparagraph (A) shall not be construed to be a waiver of the attorney-client privilege.

(3) APPOINTMENT OF LEAD PLAINTIFF.—

(A) EARLY NOTICE TO CLASS MEMBERS.—

(i) IN GENERAL.—Not later than 20 days after the date on which the complaint is filed, the plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class—

(I) of the pendency of the action, the claims asserted therein, and the purported class period; and

(II) that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.

(ii) MULTIPLE ACTIONS.—If more than one action on behalf of a class asserting substantially the same claim or claims arising under this title is filed, only the plaintiff or plaintiffs in the first filed action shall be required to cause notice to be published in accordance with clause (i).

(iii) ADDITIONAL NOTICES MAY BE REQUIRED UNDER FEDERAL RULES.—Notice required under clause (i) shall be in addition to any notice required pursuant to the Federal Rules of Civil Procedure.

(B) APPOINTMENT OF LEAD PLAINTIFF.—

(i) IN GENERAL.—Not later than 90 days after the date on which a notice is published under subpara-

graph (A)(i), the court shall consider any motion made by a purported class member in response to the notice, including any motion by a class member who is not individually named as a plaintiff in the complaint or complaints, and shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members (hereafter in this paragraph referred to as the "most adequate plaintiff") in accordance with this subparagraph.

(ii) CONSOLIDATED ACTIONS.—If more than one action on behalf of a class asserting substantially the same claim or claims arising under this title has been filed, and any party has sought to consolidate those actions for pretrial purposes or for trial, the court shall not make the determination required by clause (i) until after the decision on the motion to consolidate is rendered. As soon as practicable after such decision is rendered, the court shall appoint the most adequate plaintiff as lead plaintiff for the consolidated actions in accordance with this subparagraph.

(iii) REBUTTABLE PRESUMPTION.—

(I) IN GENERAL.—Subject to subclause (II), for purposes of clause (i), the court shall adopt a presumption that the most adequate plaintiff in any private action arising under this title is the person or group of persons that—

(aa) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i);

(bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and

(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

(II) REBUTTAL EVIDENCE.—The presumption described in subclause (I) may be rebutted only upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff—

(aa) will not fairly and adequately protect the interests of the class; or

(bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

(iv) DISCOVERY.—For purposes of this subparagraph, discovery relating to whether a member or members of the purported plaintiff class is the most adequate plaintiff may be conducted by a plaintiff only if the plaintiff first demonstrates a reasonable basis for a finding that the presumptively most adequate

plaintiff is incapable of adequately representing the class.

(v) SELECTION OF LEAD COUNSEL.—The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.

(vi) RESTRICTIONS ON PROFESSIONAL PLAINTIFFS.—Except as the court may otherwise permit, consistent with the purposes of this section, a person may be a lead plaintiff, or an officer, director, or fiduciary of a lead plaintiff, in no more than 5 securities class actions brought as plaintiff class actions pursuant to the Federal Rules of Civil Procedure during any 3-year period.

(4) RECOVERY BY PLAINTIFFS.—The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class. Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of the class.

(5) RESTRICTIONS ON SETTLEMENTS UNDER SEAL.—The terms and provisions of any settlement agreement of a class action shall not be filed under seal, except that on motion of any party to the settlement, the court may order filing under seal for those portions of a settlement agreement as to which good cause is shown for such filing under seal. For purposes of this paragraph, good cause shall exist only if publication of a term or provision of a settlement agreement would cause direct and substantial harm to any party.

(6) RESTRICTIONS ON PAYMENT OF ATTORNEYS' FEES AND EXPENSES.—Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.

(7) DISCLOSURE OF SETTLEMENT TERMS TO CLASS MEMBERS.—Any proposed or final settlement agreement that is published or otherwise disseminated to the class shall include each of the following statements, along with a cover page summarizing the information contained in such statements:

(A) STATEMENT OF PLAINTIFF RECOVERY.—The amount of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per share basis.

(B) STATEMENT OF POTENTIAL OUTCOME OF CASE.—

(i) AGREEMENT ON AMOUNT OF DAMAGES.—If the settling parties agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this title, a statement concerning the average amount of such potential damages per share.

(ii) DISAGREEMENT ON AMOUNT OF DAMAGES.—If the parties do not agree on the average amount of

damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this title, a statement from each settling party concerning the issue or issues on which the parties disagree.

(iii) INADMISSIBILITY FOR CERTAIN PURPOSES.—A statement made in accordance with clause (i) or (ii) concerning the amount of damages shall not be admissible in any Federal or State judicial action or administrative proceeding, other than an action or proceeding arising out of such statement.

(C) STATEMENT OF ATTORNEYS' FEES OR COSTS SOUGHT.—If any of the settling parties or their counsel intend to apply to the court for an award of attorneys' fees or costs from any fund established as part of the settlement, a statement indicating which parties or counsel intend to make such an application, the amount of fees and costs that will be sought (including the amount of such fees and costs determined on an average per share basis), and a brief explanation supporting the fees and costs sought.

(D) IDENTIFICATION OF LAWYERS' REPRESENTATIVES.—The name, telephone number, and address of one or more representatives of counsel for the plaintiff class who will be reasonably available to answer questions from class members concerning any matter contained in any notice of settlement published or otherwise disseminated to the class.

(E) REASONS FOR SETTLEMENT.—A brief statement explaining the reasons why the parties are proposing the settlement.

(F) OTHER INFORMATION.—Such other information as may be required by the court.

(8) ATTORNEY CONFLICT OF INTEREST.—If a plaintiff class is represented by an attorney who directly owns or otherwise has a beneficial interest in the securities that are the subject of the litigation, the court shall make a determination of whether such ownership or other interest constitutes a conflict of interest sufficient to disqualify the attorney from representing the plaintiff class.

(b) STAY OF DISCOVERY; PRESERVATION OF EVIDENCE.—

(1) IN GENERAL.—In any private action arising under this title, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon the motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

(2) PRESERVATION OF EVIDENCE.—During the pendency of any stay of discovery pursuant to this subsection, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for

production of documents from an opposing party under the Federal Rules of Civil Procedure.

(3) SANCTION FOR WILLFUL VIOLATION.—A party aggrieved by the willful failure of an opposing party to comply with paragraph (2) may apply to the court for an order awarding appropriate sanctions.

(4) CIRCUMVENTION OF STAY OF DISCOVERY.—Upon a proper showing, a court may stay discovery proceedings in any private action in a State court as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this subsection.

(c) SANCTIONS FOR ABUSIVE LITIGATION.—

(1) MANDATORY REVIEW BY COURT.—In any private action arising under this title, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

(2) MANDATORY SANCTIONS.—If the court makes a finding under paragraph (1) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion, the court shall impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. Prior to making a finding that any party or attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall give such party or attorney notice and an opportunity to respond.

(3) PRESUMPTION IN FAVOR OF ATTORNEYS' FEES AND COSTS.—

(A) IN GENERAL.—Subject to subparagraphs (B) and (C), for purposes of paragraph (2), the court shall adopt a presumption that the appropriate sanction—

(i) for failure of any responsive pleading or dispositive motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation; and

(ii) for substantial failure of any complaint to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred in the action.

(B) REBUTTAL EVIDENCE.—The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that—

(i) the award of attorneys' fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on

the party in whose favor sanctions are to be imposed; or

(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

(C) SANCTIONS.—If the party or attorney against whom sanctions are to be imposed meets its burden under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.

(d) DEFENDANT'S RIGHT TO WRITTEN INTERROGATORIES.—In any private action arising under this title in which the plaintiff may recover money damages only on proof that a defendant acted with a particular state of mind, the court shall, when requested by a defendant, submit to the jury a written interrogatory on the issue of each such defendant's state of mind at the time the alleged violation occurred.

SEC. 27A. [77z–2] APPLICATION OF SAFE HARBOR FOR FORWARD-LOOKING STATEMENTS.

(a) APPLICABILITY.—This section shall apply only to a forward-looking statement made by—

(1) an issuer that, at the time that the statement is made, is subject to the reporting requirements of section 13(a) or section 15(d) of the Securities Exchange Act of 1934;

(2) a person acting on behalf of such issuer;

(3) an outside reviewer retained by such issuer making a statement on behalf of such issuer; or

(4) an underwriter, with respect to information provided by such issuer or information derived from information provided by the issuer.

(b) EXCLUSIONS.—Except to the extent otherwise specifically provided by rule, regulation, or order of the Commission, this section shall not apply to a forward-looking statement—

(1) that is made with respect to the business or operations of the issuer, if the issuer—

(A) during the 3-year period preceding the date on which the statement was first made—

(i) was convicted of any felony or misdemeanor described in clauses (i) through (iv) of section 15(b)(4)(B) of the Securities Exchange Act of 1934; or

(ii) has been made the subject of a judicial or administrative decree or order arising out of a governmental action that—

(I) prohibits future violations of the antifraud provisions of the securities laws;

(II) requires that the issuer cease and desist from violating the antifraud provisions of the securities laws; or

(III) determines that the issuer violated the antifraud provisions of the securities laws;

(B) makes the forward-looking statement in connection with an offering of securities by a blank check company;

(C) issues penny stock;

(D) makes the forward-looking statement in connection with a rollup transaction; or

(E) makes the forward-looking statement in connection with a going private transaction; or

(2) that is—

(A) included in a financial statement prepared in accordance with generally accepted accounting principles;

(B) contained in a registration statement of, or otherwise issued by, an investment company;

(C) made in connection with a tender offer;

(D) made in connection with an initial public offering;

(E) made in connection with an offering by, or relating to the operations of, a partnership, limited liability company, or a direct participation investment program; or

(F) made in a disclosure of beneficial ownership in a report required to be filed with the Commission pursuant to section 13(d) of the Securities Exchange Act of 1934.

(c) SAFE HARBOR.—

(1) IN GENERAL.—Except as provided in subsection (b), in any private action arising under this title that is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading, a person referred to in subsection (a) shall not be liable with respect to any forward-looking statement, whether written or oral, if and to the extent that—

(A) the forward-looking statement is—

(i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or

(ii) immaterial; or

(B) the plaintiff fails to prove that the forward-looking statement—

(i) if made by a natural person, was made with actual knowledge by that person that the statement was false or misleading; or

(ii) if made by a business entity, was—

(I) made by or with the approval of an executive officer of that entity, and

(II) made or approved by such officer with actual knowledge by that officer that the statement was false or misleading.

(2) ORAL FORWARD-LOOKING STATEMENTS.—In the case of an oral forward-looking statement made by an issuer that is subject to the reporting requirements of section 13(a) or section 15(d) of the Securities Exchange Act of 1934, or by a person acting on behalf of such issuer, the requirement set forth in paragraph (1)(A) shall be deemed to be satisfied—

(A) if the oral forward-looking statement is accompanied by a cautionary statement—

(i) that the particular oral statement is a forward-looking statement; and

(ii) that the actual results could differ materially from those projected in the forward-looking statement; and

(B) if—

(i) the oral forward-looking statement is accompanied by an oral statement that additional information concerning factors that could cause actual results to differ materially from those in the forward-looking statement is contained in a readily available written document, or portion thereof;

(ii) the accompanying oral statement referred to in clause (i) identifies the document, or portion thereof, that contains the additional information about those factors relating to the forward-looking statement; and

(iii) the information contained in that written document is a cautionary statement that satisfies the standard established in paragraph (1)(A).

(3) AVAILABILITY.—Any document filed with the Commission or generally disseminated shall be deemed to be readily available for purposes of paragraph (2).

(4) EFFECT ON OTHER SAFE HARBORS.—The exemption provided for in paragraph (1) shall be in addition to any exemption that the Commission may establish by rule or regulation under subsection (g).

(d) DUTY TO UPDATE.—Nothing in this section shall impose upon any person a duty to update a forward-looking statement.

(e) DISPOSITIVE MOTION.—On any motion to dismiss based upon subsection (c)(1), the court shall consider any statement cited in the complaint and cautionary statement accompanying the forward-looking statement, which are not subject to material dispute, cited by the defendant.

(f) STAY PENDING DECISION ON MOTION.—In any private action arising under this title, the court shall stay discovery (other than discovery that is specifically directed to the applicability of the exemption provided for in this section) during the pendency of any motion by a defendant for summary judgment that is based on the grounds that—

(1) the statement or omission upon which the complaint is based is a forward-looking statement within the meaning of this section; and

(2) the exemption provided for in this section precludes a claim for relief.

(g) EXEMPTION AUTHORITY.—In addition to the exemptions provided for in this section, the Commission may, by rule or regulation, provide exemptions from or under any provision of this title, including with respect to liability that is based on a statement or that is based on projections or other forward-looking information, if and to the extent that any such exemption is consistent with the public interest and the protection of investors, as determined by the Commission.

(h) EFFECT ON OTHER AUTHORITY OF COMMISSION.—Nothing in this section limits, either expressly or by implication, the authority of the Commission to exercise similar authority or to adopt similar rules and regulations with respect to forward-looking statements under any other statute under which the Commission exercises rulemaking authority.

(i) DEFINITIONS.—For purposes of this section, the following definitions shall apply:

(1) FORWARD-LOOKING STATEMENT.—The term "forward-looking statement" means—

(A) a statement containing a projection of revenues, income (including income loss), earnings (including earnings loss) per share, capital expenditures, dividends, capital structure, or other financial items;

(B) a statement of the plans and objectives of management for future operations, including plans or objectives relating to the products or services of the issuer;

(C) a statement of future economic performance, including any such statement contained in a discussion and analysis of financial condition by the management or in the results of operations included pursuant to the rules and regulations of the Commission;

(D) any statement of the assumptions underlying or relating to any statement described in subparagraph (A), (B), or (C);

(E) any report issued by an outside reviewer retained by an issuer, to the extent that the report assesses a forward-looking statement made by the issuer; or

(F) a statement containing a projection or estimate of such other items as may be specified by rule or regulation of the Commission.

(2) INVESTMENT COMPANY.—The term "investment company" has the same meaning as in section 3(a) of the Investment Company Act of 1940.

(3) PENNY STOCK.—The term "penny stock" has the same meaning as in section 3(a)(51) of the Securities Exchange Act of 1934, and the rules and regulations, or orders issued pursuant to that section.

(4) GOING PRIVATE TRANSACTION.—The term "going private transaction" has the meaning given that term under the rules or regulations of the Commission issued pursuant to section 13(e) of the Securities Exchange Act of 1934.

(5) SECURITIES LAWS.—The term "securities laws" has the same meaning as in section 3 of the Securities Exchange Act of 1934.

(6) PERSON ACTING ON BEHALF OF AN ISSUER.—The term "person acting on behalf of an issuer" means an officer, director, or employee of the issuer.

(7) OTHER TERMS.—The terms "blank check company", "rollup transaction", "partnership", "limited liability company", "executive officer of an entity" and "direct participation investment program", have the meanings given those terms by rule or regulation of the Commission.

SEC. 27B. [15 U.S.C. 77z–2a] CONFLICTS OF INTEREST RELATING TO CERTAIN SECURITIZATIONS.

(a) IN GENERAL.—An underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of any such entity, of an asset-backed security (as such term is defined in section 3 of the Securities and Exchange Act of 1934 (15 U.S.C. 78c), which for the purposes of this section shall include a synthetic asset-backed

security), shall not, at any time for a period ending on the date that is one year after the date of the first closing of the sale of the asset-backed security, engage in any transaction that would involve or result in any material conflict of interest with respect to any investor in a transaction arising out of such activity.

(b) RULEMAKING.—Not later than 270 days after the date of enactment of this section, the Commission shall issue rules for the purpose of implementing subsection (a).

(c) EXCEPTION.—The prohibitions of subsection (a) shall not apply to—

(1) risk-mitigating hedging activities in connection with positions or holdings arising out of the underwriting, placement, initial purchase, or sponsorship of an asset-backed security, provided that such activities are designed to reduce the specific risks to the underwriter, placement agent, initial purchaser, or sponsor associated with positions or holdings arising out of such underwriting, placement, initial purchase, or sponsorship; or

(2) purchases or sales of asset-backed securities made pursuant to and consistent with—

(A) commitments of the underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of any such entity, to provide liquidity for the asset-backed security, or

(B) bona fide market-making in the asset backed security.

(d) RULE OF CONSTRUCTION.—This subsection shall not otherwise limit the application of section 15G of the Securities Exchange Act of 1934.

SEC. 28. [77z–3] GENERAL EXEMPTIVE AUTHORITY.

The Commission, by rule or regulation, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation issued under this title, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

SCHEDULE A [77AA] (1) THE NAME UNDER WHICH THE ISSUER IS DOING OR INTENDS TO DO BUSINESS;

(2) the name of the State or other sovereign power under which the issuer is organized;

(3) the location of the issuer's principal business office, and if the issuer is a foreign or territorial person, the name and address of its agent in the United States authorized to receive notice;

(4) the names and addresses of the directors or persons performing similar functions, and the chief executive, financial and accounting officers, chosen or to be chosen if the issuer be a corporation, association, trust, or other entity; of all partners, if the issuer be a partnership; and of the issuer, if the issuer be an individual; and of the promoters in the case of a business to be formed, or formed within two years prior to the filing of the registration statement;

(5) the names and addresses of the underwriters;

(6) the names and addresses of all persons, if any, owning of record or beneficially, if known, more than 10 per centum of any class of stock of the issuer, or more than 10 per centum in the aggregate of the outstanding stock of the issuer as of a date within twenty days prior to the filing of the registration statement;

(7) the amount of securities of the issuer held by any person specified in paragraphs (4), (5), and (6) of this schedule, as of a date within twenty days prior to the filing of the registration statement, and, if possible, as of one year prior thereto, and the amount of the securities, for which the registration statement is filed, to which such persons have indicated their intention to subscribe;

(8) the general character of the business actually transacted or to be transacted by the issuer;

(9) a statement of the capitalization of the issuer, including the authorized and outstanding amounts of its capital stock and the proportion thereof paid up, the number and classes of shares in which such capital stock is divided, par value thereof, or if it has no par value, the stated or assigned value thereof, a description of the respective voting rights, preferences, conversion and exchange rights, rights to dividends, profits, or capital of each class, with respect to each other class, including the retirement and liquidation rights or values thereof;

(10) a statement of the securities, if any, covered by options outstanding or to be created in connection with the security to be offered, together with the names and addresses of all persons, if any, to be allotted more than 10 per centum in the aggregate of such options;

(11) the amount of capital stock of each class issued or included in the shares of stock to be offered;

(12) the amount of the funded debt outstanding and to be created by the security to be offered, with a brief description of the date, maturity, and character of such debt, rate of interest, character of amortization provisions, and the security, if any, therefor. If substitution of any security is permissible, a summarized statement of the conditions under which such substitution is permitted. If substitution is permissible without notice, a specific statement to that effect;

(13) the specific purposes in detail and the approximate amounts to be devoted to such purposes, so far as determinable, for which the security to be offered is to supply funds, and if the funds are to be raised in part from other sources, the amounts thereof and the sources thereof, shall be stated;

(14) the remuneration, paid or estimated to be paid, by the issuer or its predecessor, directly or indirectly, during the past year and ensuing year to (a) the directors or persons performing similar functions, and (b) its officers and other persons, naming them wherever such remuneration exceeded $25,000 during any such year;

(15) the estimated net proceeds to be derived from the security to be offered;

(16) the price at which it is proposed that the security shall be offered to the public or the method by which such price is computed and any variation therefrom at which any portion of such security

is proposed to be offered to any persons or classes of persons, other than the underwriters, naming them or specifying the class. A variation in price may be proposed prior to the date of the public offering of the security, but the Commission shall immediately be notified of such variation;

(17) all commissions or discounts paid or to be paid, directly or indirectly, by the issuer to the underwriters in respect of the sale of the security to be offered. Commissions shall include all cash, securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the benefit of any other persons in which any underwriter is interested, made, in connection with the sale of such security. A commission paid or to be paid in connection with the sale of such security by a person in which the issuer has an interest or which is controlled or directed by, or under common control with, the issuer shall be deemed to have been paid by the issuer. Where any such commission is paid the amount of such commission paid to each underwriter shall be stated;

(18) the amount or estimated amounts, itemized in reasonable detail, of expenses, other than commissions specified in paragraph (17) of this schedule, incurred or borne by or for the account of the issuer in connection with the sale of the security to be offered or properly chargeable thereto, including legal, engineering, certification, authentication, and other charges;

(19) the net proceeds derived from any security sold by the issuer during the two years preceding the filing of the registration statement, the price at which such security was offered to the public, and the names of the principal underwriters of such security;

(20) any amount paid within two years preceding the filing of the registration statement or intended to be paid to any promoter and the consideration for any such payment;

(21) the names and addresses of the vendors and the purchase price of any property, or good will, acquired or to be acquired, not in the ordinary course of business, which is to be defrayed in whole or in part from the proceeds of the security to be offered, the amount of any commission payable to any person in connection with such acquisition, and the name or names of such person or persons, together with any expense incurred or to be incurred in connection with such acquisition, including the cost of borrowing money to finance such acquisition;

(22) full particulars of the nature and extent of the interest, if any, of every director, principal executive officer, and of every stockholder holding more than 10 per centum of any class of stock or more than 10 per centum in the aggregate of the stock of the issuer, in any property acquired, not in the ordinary course of business of the issuer, within two years preceding the filing of the registration statement or proposed to be acquired at such date;

(23) the names and addresses of counsel who have passed on the legality of the issue;

(24) dates of and parties to, and the general effect concisely stated of every material contract made, not in the ordinary course of business, which contract is to be executed in whole or in part at or after the filing of the registration statement or which contract has been made not more than two years before such filing. Any

management contract or contract providing for special bonuses or profit-sharing arrangements, and every material patent or contract for a material patent right, and every contract by or with a public utility company or an affiliate thereof, providing for the giving or receiving of technical or financial advice or service (if such contract may involve a charge to any party thereto at a rate in excess of $2,500 per year in cash or securities or anything else of value), shall be deemed a material contract;

(25) a balance sheet as of a date not more than ninety days prior to the date of the filing of the registration statement showing all of the assets of the issuer, the nature and cost thereof, whenever determinable, in such detail and in such form as the Commission shall prescribe (with intangible items segregated), including any loan in excess of $20,000 to any officer, director, stockholder or person directly or indirectly controlling or controlled by the issuer, or person under direct or indirect common control with the issuer. All the liabilities of the issuer in such detail and such form as the Commission shall prescribe, including surplus of the issuer showing how and from what sources such surplus was created, all as of a date not more than ninety days prior to the filing of the registration statement. If such statement be not certified by an independent public or certified accountant, in addition to the balance sheet required to be submitted under this schedule, a similar detailed balance sheet of the assets and liabilities of the issuer, certified by an independent public or certified accountant, of a date not more than one year prior to the filing of the registration statement, shall be submitted;

(26) a profit and loss statement of the issuer showing earnings and income, the nature and source thereof, and the expenses and fixed charges in such detail and such form as the Commission shall prescribe for the latest fiscal year for which such statement is available and for the two preceding fiscal years, year by year, or, if such issuer has been in actual business for less than three years, then for such time as the issuer has been in actual business, year by year. If the date of the filing of the registration statement is more than six months after the close of the last fiscal year, a statement from such closing date to the latest practicable date. Such statement shall show what the practice of the issuer has been during the three years or lesser period as to the character of the charges, dividends or other distributions made against its various surplus accounts, and as to depreciation, depletion, and maintenance charges, in such detail and form as the Commission shall prescribe, and if stock dividends or avails from the sale of rights have been credited to income, they shall be shown separately with a statement of the basis upon which the credit is computed. Such statement shall also differentiate between any recurring and nonrecurring income and between any investment and operating income. Such statement shall be certified by an independent public or certified accountant;

(27) if the proceeds, or any part of the proceeds, of the security to be issued is to be applied directly or indirectly to the purchase of any business, a profit and loss statement of such business certified by an independent public or certified accountant, meeting the requirements of paragraph (26) of this schedule, for the three pre-

ceding fiscal years, together with a balance sheet, similarly certified, of such business, meeting the requirements of paragraph (25) of this schedule of a date not more than ninety days prior to the filing of the registration statement or at the date such business was acquired by the issuer if the business was acquired by the issuer more than ninety days prior to the fiing of the registration statement;

(28) a copy of any agreement or agreements (or, if identical agreements are used, the forms thereof) made with any underwriter, including all contracts and agreements referred to in paragraph (17) of this schedule;

(29) a copy of the opinion or opinions of counsel in respect to the legality of the issue, with a translation of such opinion, when necessary, into the English language;

(30) a copy of all material contracts referred to in paragraph (24) of this schedule, but no disclosure shall be required of any portion of any such contract if the Commission determines that disclosure of such portion would impair the value of the contract and would not be necessary for the protection of the investors;

(31) unless previously filed and registered under the provisions of this title, and brought up to date, (a) a copy of its articles of incorporation, with all amendments thereof and of its existing bylaws or instruments corresponding thereto, whatever the name, if the issuer be a corporation; (b) copy of all instruments by which the trust is created or declared, if the issuer is a trust; (c) a copy of its articles of partnership or association and all other papers pertaining to its organization, if the issuer is a partnership, unincorporated association, joint-stock company, or any other form of organization; and

(32) a copy of the underlying agreements or indentures affecting any stock, bonds, or debentures offered or to be offered.

In case of certificates of deposit, voting trust certificates, collateral trust certificates, certificates of interest or shares in unincorporated investment trusts, equipment trust certificates, interim or other receipts for certificates, and like securities, the Commission shall establish rules and regulations requiring the submission of information of a like character applicable to such cases, together with such other information as it may deem appropriate and necessary regarding the character, financial or otherwise, of the actual issuer of the securities and/or the person performing the acts and assuming the duties of depositor or manager.

SCHEDULE B

(1) Name of borrowing government or subdivision thereof;

(2) specific purposes in detail and the approximate amounts to be devoted to such purposes, so far as determinable, for which the security to be offered is to supply funds, and if the funds are to be raised in part from other sources, the amounts thereof and the sources thereof, shall be stated;

(3) the amount of the funded debt and the estimated amount of the floating debt outstanding and to be created by the security to be offered, excluding intergovernmental debt, and a brief description of the date, maturity, character of such debt, rate of interest, character of amortization provisions, and the security, if any,

therefor. If substitution of any security is permissible, a statement of the conditions under which such substitution is permitted. If substitution is permissible without notice, a specific statement to that effect;

(4) whether or not the issuer or its predecessor has, within a period of twenty years prior to the filing of the registration statement, defaulted on the principal or interest of any external security, excluding intergovernmental debt, and, if so, the date, amount, and circumstances of such default, and the terms of the succeeding arrangement, if any;

(5) the receipts, classified by source, and the expenditures, classified by purpose, in such detail and form as the Commission shall prescribe for the latest fiscal year for which such information is available and the two preceding fiscal years, year by year;

(6) the names and addresses of the underwriters;

(7) the name and address of its authorized agent, if any, in the United States;

(8) the estimated net proceeds to be derived from the sale in the United States of the security to be offered;

(9) the price at which it is proposed that the security shall be offered in the United States to the public or the method by which such price is computed. A variation in price may be proposed prior to the date of the public offering of the security, but the Commission shall immediately be notified of such variation;

(10) all commissions paid or to be paid, directly or indirectly, by the issuer to the underwriters in respect of the sale of the security to be offered. Commissions shall include all cash, securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the benefit of any other persons in which the underwriter is interested, made, in connection with the sale of such security. Where any such commission is paid, the amount of such commission paid to each underwriter shall be stated;

(11) the amount or estimated amounts, itemized in reasonable detail, of expenses, other than the commission specified in paragraph (10) of this schedule, incurred or borne by or for the account of the issuer in connection with the sale of the security to be offered or properly chargeable thereto, including legal, engineering, certification, and other charges;

(12) the names and addresses of counsel who have passed upon the legality of the issue;

(13) a copy of any agreement or agreements made with any underwriter governing the sale of the security within the United States; and

(14) an agreement of the issuer to furnish a copy of the opinion or opinions of counsel in respect to the legality of the issue, with a translation, where necessary, into the English language. Such opinion shall set out in full all laws, decrees, ordinances, or other acts of Government under which the issue of such security has been authorized.

SEC. 29. [77z– 4] DATA STANDARDS.

(a) REQUIREMENT.—The Commission shall, by rule, adopt data standards for all registration statements, and for all prospectuses

included in registration statements, required to be filed with the Commission under this title, except that the Commission may exempt exhibits, signatures, and certifications from those data standards.

(b) CONSISTENCY.—The data standards required under subsection (a) shall incorporate, and ensure compatibility with (to the extent feasible), all applicable data standards established in the rules promulgated under section 124 of the Financial Stability Act of 2010, including, to the extent practicable, by having the characteristics described in clauses (i) through (vi) of subsection (c)(1)(B) of such section 124.

TITLE II

SEC. 201. [77bb] For the purpose of protecting, conserving, and advancing the interests of the holders of foreign securities in default, there is hereby created a body corporate with the name "Corporation of Foreign Security Holders" (herein called the "Corporation"). The principal office of the Corporation shall be located in the District of Columbia, but there may be established agencies or branch offices in any city or cities of the United States under rules and regulations prescribed by the board of directors.

SEC. 202. [77cc] The control and management of the Corporation shall be vested in a board of six directors, who shall be appointed and hold office in the following manner: As soon as practicable after the date this Act takes effect the Federal Trade Commission (hereinafter in this title called "Commission") shall appoint six directors, and shall designate a chairman and a vice chairman from among their number. After the directors designated as chairman and vice chairman cease to be directors, their successors as chairman and vice chairman shall be elected by the board of directors itself. Of the directors first appointed, two shall continue in office for a term of two years, two for a term of four years, and two for a term of six years, from the date of this Act takes effect, the term of each to be designated by the Commission at the time of appointment. Their successors shall be appointed by the Commission, each for a term of six years from the date of the expiration of the term for which his predecessor was appointed, except that any person appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of such predecessor. No person shall be eligible to serve as a director who within the five years preceding has had any interest, direct or indirect, in any corporation, company, partnership, bank or association which has sold, or offered for sale any foreign securities. The office of a director shall be vacated if the board of directors shall at a meeting specially convened for that purpose by resolution passed by a majority of at least two thirds of the board of directors, remove such member from office, provided that the member whom it is proposed to remove shall have seven days' notice sent to him of such meeting and that he may be heard.

SEC. 203. [77dd] The Corporation shall have power to adopt, alter, and use a corporate seal; to make contracts; to lease such real estate as may be necessary for the transaction of its business;

to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal; to require from trustees, financial agents, or dealers in foreign securities information relative to the original or present holders of foreign securities and such other information as may be required and to issue subpenas therefor; to take over the functions of any fiscal and paying agents of any foreign securities in default; to borrow money for the purposes of this title, and to pledge as collateral for such loans any securities deposited with the Corporation pursuant to this title; by and with the consent and approval of the Commission to select, employ, and fix the compensation of officers, directors, members of committees, employees, attorneys, and agents of the Corporation, without regard to the provisions of other laws applicable to the employment and compensation of officers or employees of the United States; to define their authority and duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and agents; and to prescribe, amend, and repeal, by its board of directors, bylaws, rules, and regulations governing the manner in which its general business may be conducted and the powers granted to it by law may be exercised and enjoyed, together with provisions for such committees and the functions thereof as the board of directors may deem necessary for facilitating its business under this title. The board of directors of the Corporation shall determine and prescribe the manner in which its obligations shall be incurred and its expenses allowed and paid.

SEC. 204. [77ee] The board of directors may—

(1) Convene meetings of holders of foreign securities.

(2) Invite the deposit and undertake the custody of foreign securities which have defaulted in the payment either of principal or interest, and issue receipts or certificates in the place of securities so deposited.

(3) Appoint committees from the directors of the Corporation and/or all other persons to represent holders of any class or classes of foreign securities which have defaulted in the payment either of principal or interest and determine and regulate the functions of such committees. The chairman and vice chairman of the board of directors shall be ex officio chairman and vice chairman of each committee.

(4) Negotiate and carry out, or assist in negotiating and carrying out, arrangements for the resumption of payments due or in arrears in respect of any foreign securities in default or for rearranging the terms on which such securities may in future be held or for converting and exchanging the same for new securities or for any other object in relation thereto; and under this paragraph any plan or agreement made with respect to such securities shall be binding upon depositors, providing that the consent of holders resident in the United States of 60 per centum of the securities deposited with the Corporation shall be obtained.

(5) Undertake, superintend, or take part in the collection and application of funds derived from foreign securities which come into the possession of or under the control or management of the Corporation.

(6) Collect, preserve, publish, circulate, and render available in readily accessible form, when deemed essential or necessary, documents, statistics, reports, and information of all kinds in respect of foreign securities, including particularly records of foreign external securities in default and records of the progress made toward the payment of past-due obligations.

(7) Take such steps as it may deem expedient with the view of securing the adoption of clear and simple forms of foreign securities and just and sound principles in the conditions and terms thereof.

(8) Generally, act in the name and on behalf of the holders of foreign securities the care or representation of whose interests may be entrusted to the Corporation; conserve and protect the rights and interests of holders of foreign securities issued, sold, or owned in the United States; adopt measures for the protection, vindication, and preservation or reservation of the rights and interests of holders of foreign securities either on any default in or on breach or contemplated breach of the conditions on which such foreign securities may have been issued, or otherwise; obtain for such holders such legal and other assistance and advice as the board of directors may deem expedient; and do all such other things as are incident or conducive to the attainment of the above objects.

SEC. 205. [77ff] The board of directors shall cause accounts to be kept of all matters relating to or connected with the transactions and business of the Corporation, and cause a general account and balance sheet of the Corporation to be made out in each year, and cause all accounts to be audited by one or more auditors who shall examine the same and report thereon to the board of directors.

SEC. 206. [77gg] The Corporation shall make, print, and make public an annual report of its operations during each year, send a copy thereof, together with a copy of the account and balance sheet and auditor's report, to the Commission and to both Houses of Congress, and provide one copy of such report but not more than one on the application of any person and on receipt of a sum not exceeding $1: *Provided,* That the board of directors in its discretion may distribute copies gratuitously.

SEC. 207. [77hh] The Corporation may in its discretion levy charges, assessed on a pro rata basis, on the holders of foreign securities deposited with it: *Provided,* That any charge levied at the time of depositing securities with the Corporation shall not exceed one fifth of 1 per centum of the face value of such securities: *Provided further,* That any additional charges shall bear a close relationship to the cost of operations and negotiations including those enumerated in sections 203 and 204 and shall not exceed 1 per centum of the face value of such securities.

SEC. 208. [77ii] The Corporation may receive subscriptions from any person, foundation with a public purpose, or agency of the United States Government, and such subscriptions may, in the discretion of the board of directors, be treated as loans repayable when and as the board of directors shall determine.

SEC. 209. [77jj] The Reconstruction Finance Corporation is hereby authorized to loan out of its funds not to exceed $75,000 for the use of the Corporation.

SEC. 210. [77kk] Notwithstanding the foregoing provisions of this title, it shall be unlawful for, and nothing in this title shall be taken or construed as permitting or authorizing, the Corporation in this title created, or any committee of said Corporation, or any person or persons acting for or representing or purporting to represent it—

(a) to claim or assert or pretend to be acting for or to represent the Department of State or the United States Government;

(b) to make any statements or representations of any kind to any foreign government or its officials or the officials of any political subdivision of any foreign government that said Corporation or any committee thereof or any individual or individuals connected therewith were speaking or acting for the said Department of State or the United States Government; or

(c) to do any act directly or indirectly which would interfere with or obstruct or hinder or which might be calculated to obstruct, hinder or interfere with the policy or policies of the said Department of State or the Government of the United States or any pending or contemplated diplomatic negotiations, arrangements, business or exchanges between the Government of the United States or said Department of State and any foreign government or any political subdivision thereof.

SEC. 211. [77ll] This title shall not take effect until the President finds that its taking effect is in the public interest and by proclamation so declares.

SEC. 212. [77mm] This title may be cited as the "Corporation of Foreign Bondholders Act, 1933."

TITLE III

[Title III, the Trust Indenture Act of 1939, is set forth beginning on page 361.]

EXHIBIT 304

SECURITIES EXCHANGE ACT OF 1934

[References in brackets [] are to title 15, United States Code]

[As Amended Through P.L. 117–328, Enacted December 29, 2022]

[Currency: This publication is a compilation of the text of Chapter 404 of the 73rd Congress. It was last amended by the public law listed in the As Amended Through note above and below at the bottom of each page of the pdf version and reflects current law through the date of the enactment of the public law listed at https://www.govinfo.gov/app/collection/comps/]

[Note: While this publication does not represent an official version of any Federal statute, substantial efforts have been made to ensure the accuracy of its contents. The official version of Federal law is found in the United States Statutes at Large and in the United States Code. The legal effect to be given to the Statutes at Large and the United States Code is established by statute (1 U.S.C. 112, 204).]

AN ACT To provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—REGULATION OF SECURITIES EXCHANGES

SHORT TITLE

SECTION 1. [78a] This Act may be cited as the "Securities Exchange Act of 1934".

NECESSITY FOR REGULATION AS PROVIDED IN THIS TITLE [1]

SEC. 2. [78b] For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities ex-

[1] Section 7 of the Insider Trading and Securities Fraud Enforcement Act (15 U.S.C. 78b note; P.L. 100–704) contained the following additional provisions:

SEC. 7. SECURITIES LAWS STUDY.

(a) FINDINGS.—The Congress finds that—
(1) recent disclosures of securities fraud and insider trading have caused public concern about the adequacy of Federal securities laws, rules, and regulations;
(2) Federal securities laws, rules, and regulations have not undergone a comprehensive and exhaustive review since the advent of the modern international, institutionalized securities market;
(3) since that review, the volume of securities transactions and the nature of the securities industry have changed dramatically; and
(4) there is an important national interest in maintaining fair and orderly securities trading, assuring the fairness of securities transactions and markets and protecting investors.

(b) STUDY AND INVESTIGATION REQUIRED.—
(1) GENERAL REQUIREMENT.—The Securities and Exchange Commission shall, subject to the availability of funds appropriated pursuant to subsection (d), make a study and investigation of the adequacy of the Federal securities laws and rules and regulations thereunder for the protection of the public interest and the interests of investors.

Continued

changes and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, to remove impediments to and perfect the mechanisms of a national market system for securities and a national system for the clearance and settlement of securities transactions and the safeguarding of securities and funds related thereto, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions:

(1) Such transactions (a) are carried on in large volume by the public generally and in large part originate outside the States in

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(2) REQUIRED SUBJECTS FOR STUDY AND INVESTIGATION.—Such study and investigation shall include an analysis of—

(A) the extent of improper trading while in possession of insider information, such as trading with advance knowledge of tender offers or forthcoming announcements of material financial information;

(B) the adequacy of surveillance methods and technologies of brokers, dealers, and self-regulatory organizations;

(C) the adequacy of cooperation between the Federal, State, and foreign enforcement authorities concerning securities laws enforcement; and

(D) impediments to the fairness and orderliness of the securities markets and to improvements in the breadth and depth of the capital available to the securities markets, and additional methods to promote those objectives.

(3) CONDUCT OF STUDY AND INVESTIGATION.—In conducting the study and investigation required by this section, the Commission—

(A) may exercise any existing authority to gather information, including all power and authority the Commission would have if such investigation were being conducted pursuant to section 21 of the Securities Exchange Act of 1934;

(B) may consult with and obtain such assistance and information from other agencies in the executive and legislative branches of the Government (including the Department of Justice) as is necessary to enable the Commission to carry out this section;

(C) may appoint, without regard to the civil service laws, rules, and regulations, such personnel as the Commission deems advisable to carry out such study and investigation and to fix their respective rates of compensation without regard to such laws, rules, and regulations, but no such rate shall exceed the rate payable pursuant to section 5314 of title 5, United States Code; and

(D) may, on a reimbursable basis, use the services of personnel detailed to the Commission from any Federal agency.

(4) SUPPORT FROM OTHER AGENCIES.—(A) The head of any Federal agency—

etail employees to the Commission for the purposes of this section; and

(ii) shall provide to the Commission such information as it requires for the performance of its functions under this section, consistent with applicable law.

(B) The Comptroller General and the Director of the Office of Technology Assessment are authorized to assist the Commission in the performance of its functions under this section.

(c) REPORTS AND INFORMATION TO CONGRESS.—

(1) GENERAL REPORT.—The Commission shall report to the Congress on the results of its study and investigation within 18 months after the date funds to carry out this section are appropriated under subsection (d). Such report shall include the Commission's recommendations, including such recommendations for legislation as the Commission deems advisable.

(2) INTERIM INFORMATION TO CONGRESS.—The Commission shall keep the Committee on Energy and Commerce of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate, and the members thereof, fully informed on the progress of, and any impediments to completing, the study and investigation required by this section.

(d) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated $5,000,000 to carry out the study and investigation required by this section.

(e) DEFINITIONS.—As used in this section—

(1) the term "Commission" means the Securities and Exchange Commission; and

(2) the term "Federal securities laws" has the meaning given the term securities laws by section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)).

which the exchanges and over-the-counter markets are located and/or are affected [2] by means of the mails and instrumentalities of interstate commerce; (b) constitute an important part of the current of interstate commerce; (c) involve in large part the securities of issuers engaged in interstate commerce; (d) involve the use of credit, directly affect the financing of trade, industry, and transportation in interstate commerce, and directly affect and influence the volume of interstate commerce; and affect the national credit.

(2) The prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign countries and constitute a basis for determining and establishing the prices at which securities are bought and sold, the amount of certain taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and the value of collateral for bank loans.

(3) Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities which (a) cause alternately unreasonable expansion and unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce, (b) hinder the proper appraisal of the value of securities and thus prevent a fair calculation of taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and (c) prevent the fair valuation of collateral for bank loans and/or obstruct the effective operation of the national banking system and Federal Reserve System.

(4) National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is put to such great expense as to burden the national credit.

DEFINITIONS AND APPLICATION OF TITLE

SEC. 3. [78c] (a) When used in this title, unless the context otherwise requires—

(1) The term "exchange" means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

[2] So in law. Should be "effected".

Section 985(b)(1) of Public Law 111–203 provides for an amendment to section 2 by striking "affected" and inserting "effected". Such amendment was not executed because the word "affected" appears more than one time in section 2 and it did not specify to which occurrence of such word to strike.

(2) The term "facility" when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.

(3)(A) The term "member" when used with respect to a national securities exchange means (i) any natural person permitted to effect transactions on the floor of the exchange without the services of another person acting as broker, (ii) any registered broker or dealer with which such a natural person is associated, (iii) any registered broker or dealer permitted to designate as a representative such a natural person, and (iv) any other registered broker or dealer which agrees to be regulated by such exchange and with respect to which the exchange undertakes to enforce compliance with the provisions of this title, the rules and regulations thereunder, and its own rules. For purposes of sections 6(b)(1), 6(b)(4), 6(b)(6), 6(b)(7), 6(d), 17(d), 19(d), 19(e), 19(g), 19(h), and 21 of this title, the term "member" when used with respect to a national securities exchange also means, to the extent of the rules of the exchange specified by the Commission, any person required by the Commission to comply with such rules pursuant to section 6(f) of this title.

(B) The term "member" when used with respect to a registered securities association means any broker or dealer who agrees to be regulated by such association and with respect to whom the association undertakes to enforce compliance with the provisions of this title, the rules and regulations thereunder, and its own rules.

(4) BROKER.—

(A) IN GENERAL.—The term "broker" means any person engaged in the business of effecting transactions in securities for the account of others.

(B) EXCEPTION FOR CERTAIN BANK ACTIVITIES.—A bank shall not be considered to be a broker because the bank engages in any one or more of the following activities under the conditions described:

(i) THIRD PARTY BROKERAGE ARRANGEMENTS.—The bank enters into a contractual or other written arrangement with a broker or dealer registered under this title under which the broker or dealer offers brokerage services on or off the premises of the bank if—

(I) such broker or dealer is clearly identified as the person performing the brokerage services;

(II) the broker or dealer performs brokerage services in an area that is clearly marked and, to the extent practicable, physically separate from the routine deposit-taking activities of the bank;

(III) any materials used by the bank to advertise or promote generally the availability of bro-

kerage services under the arrangement clearly indicate that the brokerage services are being provided by the broker or dealer and not by the bank;

(IV) any materials used by the bank to advertise or promote generally the availability of brokerage services under the arrangement are in compliance with the Federal securities laws before distribution;

(V) bank employees (other than associated persons of a broker or dealer who are qualified pursuant to the rules of a self-regulatory organization) perform only clerical or ministerial functions in connection with brokerage transactions including scheduling appointments with the associated persons of a broker or dealer, except that bank employees may forward customer funds or securities and may describe in general terms the types of investment vehicles available from the bank and the broker or dealer under the arrangement;

(VI) bank employees do not receive incentive compensation for any brokerage transaction unless such employees are associated persons of a broker or dealer and are qualified pursuant to the rules of a self-regulatory organization, except that the bank employees may receive compensation for the referral of any customer if the compensation is a nominal one-time cash fee of a fixed dollar amount and the payment of the fee is not contingent on whether the referral results in a transaction;

(VII) such services are provided by the broker or dealer on a basis in which all customers that receive any services are fully disclosed to the broker or dealer;

(VIII) the bank does not carry a securities account of the customer except as permitted under clause (ii) or (viii) of this subparagraph; and

(IX) the bank, broker, or dealer informs each customer that the brokerage services are provided by the broker or dealer and not by the bank and that the securities are not deposits or other obligations of the bank, are not guaranteed by the bank, and are not insured by the Federal Deposit Insurance Corporation.

(ii) TRUST ACTIVITIES.—The bank effects transactions in a trustee capacity, or effects transactions in a fiduciary capacity in its trust department or other department that is regularly examined by bank examiners for compliance with fiduciary principles and standards, and—

(I) is chiefly compensated for such transactions, consistent with fiduciary principles and standards, on the basis of an administration or annual fee (payable on a monthly, quarterly, or

other basis), a percentage of assets under management, or a flat or capped per order processing fee equal to not more than the cost incurred by the bank in connection with executing securities transactions for trustee and fiduciary customers, or any combination of such fees; and

(II) does not publicly solicit brokerage business, other than by advertising that it effects transactions in securities in conjunction with advertising its other trust activities.

(iii) PERMISSIBLE SECURITIES TRANSACTIONS.—The bank effects transactions in—

(I) commercial paper, bankers acceptances, or commercial bills;

(II) exempted securities;

(III) qualified Canadian government obligations as defined in section 5136 of the Revised Statutes, in conformity with section 15C of this title and the rules and regulations thereunder, or obligations of the North American Development Bank; or

(IV) any standardized, credit enhanced debt security issued by a foreign government pursuant to the March 1989 plan of then Secretary of the Treasury Brady, used by such foreign government to retire outstanding commercial bank loans.

(iv) CERTAIN STOCK PURCHASE PLANS.—

(I) EMPLOYEE BENEFIT PLANS.—The bank effects transactions, as part of its transfer agency activities, in the securities of an issuer as part of any pension, retirement, profit-sharing, bonus, thrift, savings, incentive, or other similar benefit plan for the employees of that issuer or its affiliates (as defined in section 2 of the Bank Holding Company Act of 1956), if the bank does not solicit transactions or provide investment advice with respect to the purchase or sale of securities in connection with the plan.

(II) DIVIDEND REINVESTMENT PLANS.—The bank effects transactions, as part of its transfer agency activities, in the securities of an issuer as part of that issuer's dividend reinvestment plan, if—

(aa) the bank does not solicit transactions or provide investment advice with respect to the purchase or sale of securities in connection with the plan; and

(bb) the bank does not net shareholders' buy and sell orders, other than for programs for odd-lot holders or plans registered with the Commission.

(III) ISSUER PLANS.—The bank effects transactions, as part of its transfer agency activities, in the securities of an issuer as part of a plan or pro-

gram for the purchase or sale of that issuer's shares, if—

(aa) the bank does not solicit transactions or provide investment advice with respect to the purchase or sale of securities in connection with the plan or program; and

(bb) the bank does not net shareholders' buy and sell orders, other than for programs for odd-lot holders or plans registered with the Commission.

(IV) PERMISSIBLE DELIVERY OF MATERIALS.—The exception to being considered a broker for a bank engaged in activities described in subclauses (I), (II), and (III) will not be affected by delivery of written or electronic plan materials by a bank to employees of the issuer, shareholders of the issuer, or members of affinity groups of the issuer, so long as such materials are—

(aa) comparable in scope or nature to that permitted by the Commission as of the date of the enactment of the Gramm-Leach-Bliley Act[3]; or

(bb) otherwise permitted by the Commission.

(v) SWEEP ACCOUNTS.—The bank effects transactions as part of a program for the investment or reinvestment of deposit funds into any no-load, open-end management investment company registered under the Investment Company Act of 1940 that holds itself out as a money market fund.

(vi) AFFILIATE TRANSACTIONS.—The bank effects transactions for the account of any affiliate of the bank (as defined in section 2 of the Bank Holding Company Act of 1956) other than—

(I) a registered broker or dealer; or

(II) an affiliate that is engaged in merchant banking, as described in section 4(k)(4)(H) of the Bank Holding Company Act of 1956.

(vii) PRIVATE SECURITIES OFFERINGS.—The bank—

(I) effects sales as part of a primary offering of securities not involving a public offering, pursuant to section 3(b), 4(2), or 4(5) of the Securities Act of 1933 or the rules and regulations issued thereunder;

(II) at any time after the date that is 1 year after the date of the enactment of the Gramm-Leach-Bliley Act[3], is not affiliated with a broker or dealer that has been registered for more than 1 year in accordance with this Act, and engages in dealing, market making, or underwriting activi-

[3] The Gramm-Leach-Bliley Act was enacted on November 12, 1999 (P.L. 106–102; 113 Stat. 1338).

ties, other than with respect to exempted securities; and

(III) if the bank is not affiliated with a broker or dealer, does not effect any primary offering described in subclause (I) the aggregate amount of which exceeds 25 percent of the capital of the bank, except that the limitation of this subclause shall not apply with respect to any sale of government securities or municipal securities.

(viii) SAFEKEEPING AND CUSTODY ACTIVITIES.—

(I) IN GENERAL.—The bank, as part of customary banking activities—

(aa) provides safekeeping or custody services with respect to securities, including the exercise of warrants and other rights on behalf of customers;

(bb) facilitates the transfer of funds or securities, as a custodian or a clearing agency, in connection with the clearance and settlement of its customers' transactions in securities;

(cc) effects securities lending or borrowing transactions with or on behalf of customers as part of services provided to customers pursuant to division (aa) or (bb) or invests cash collateral pledged in connection with such transactions;

(dd) holds securities pledged by a customer to another person or securities subject to purchase or resale agreements involving a customer, or facilitates the pledging or transfer of such securities by book entry or as otherwise provided under applicable law, if the bank maintains records separately identifying the securities and the customer; or

(ee) serves as a custodian or provider of other related administrative services to any individual retirement account, pension, retirement, profit sharing, bonus, thrift savings, incentive, or other similar benefit plan.

(II) EXCEPTION FOR CARRYING BROKER ACTIVITIES.—The exception to being considered a broker for a bank engaged in activities described in subclause (I) shall not apply if the bank, in connection with such activities, acts in the United States as a carrying broker (as such term, and different formulations thereof, are used in section 15(c)(3) of this title and the rules and regulations thereunder) for any broker or dealer, unless such carrying broker activities are engaged in with respect to government securities (as defined in paragraph (42) of this subsection).

(ix) IDENTIFIED BANKING PRODUCTS.—The bank effects transactions in identified banking products as defined in section 206 of the Gramm-Leach-Bliley Act.

(x) MUNICIPAL SECURITIES.—The bank effects transactions in municipal securities.

(xi) DE MINIMIS EXCEPTION.—The bank effects, other than in transactions referred to in clauses (i) through (x), not more than 500 transactions in securities in any calendar year, and such transactions are not effected by an employee of the bank who is also an employee of a broker or dealer.

(C) EXECUTION BY BROKER OR DEALER.—The exception to being considered a broker for a bank engaged in activities described in clauses (ii), (iv), and (viii) of subparagraph (B) shall not apply if the activities described in such provisions result in the trade in the United States of any security that is a publicly traded security in the United States, unless—

(i) the bank directs such trade to a registered broker or dealer for execution;

(ii) the trade is a cross trade or other substantially similar trade of a security that—

(I) is made by the bank or between the bank and an affiliated fiduciary; and

(II) is not in contravention of fiduciary principles established under applicable Federal or State law; or

(iii) the trade is conducted in some other manner permitted under rules, regulations, or orders as the Commission may prescribe or issue.

(D) FIDUCIARY CAPACITY.—For purposes of subparagraph (B)(ii), the term "fiduciary capacity" means—

(i) in the capacity as trustee, executor, administrator, registrar of stocks and bonds, transfer agent, guardian, assignee, receiver, or custodian under a uniform gift to minor act, or as an investment adviser if the bank receives a fee for its investment advice;

(ii) in any capacity in which the bank possesses investment discretion on behalf of another; or

(iii) in any other similar capacity.

(E) EXCEPTION FOR ENTITIES SUBJECT TO SECTION 15(e).—The term "broker" does not include a bank that—

(i) was, on the day before the date of enactment of the Gramm-Leach-Bliley Act[4], subject to section 15(e); and

(ii) is subject to such restrictions and requirements as the Commission considers appropriate.

(F) JOINT RULEMAKING REQUIRED.—The Commission and the Board of Governors of the Federal Reserve System shall jointly adopt a single set of rules or regulations to implement the exceptions in subparagraph (B).

[4] The Gramm-Leach-Bliley Act was enacted on November 12, 1999 (P.L. 106–102; 113 Stat. 1338).

(5) DEALER.—

(A) IN GENERAL.—The term "dealer" means any person engaged in the business of buying and selling securities (not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants) for such person's own account through a broker or otherwise.

(B) EXCEPTION FOR PERSON NOT ENGAGED IN THE BUSINESS OF DEALING.—The term "dealer" does not include a person that buys or sells securities (not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants) for such person's own account, either individually or in a fiduciary capacity, but not as a part of a regular business.

(C) EXCEPTION FOR CERTAIN BANK ACTIVITIES.—A bank shall not be considered to be a dealer because the bank engages in any of the following activities under the conditions described:

(i) PERMISSIBLE SECURITIES TRANSACTIONS.—The bank buys or sells—

(I) commercial paper, bankers acceptances, or commercial bills;

(II) exempted securities;

(III) qualified Canadian government obligations as defined in section 5136 of the Revised Statutes of the United States, in conformity with section 15C of this title and the rules and regulations thereunder, or obligations of the North American Development Bank; or

(IV) any standardized, credit enhanced debt security issued by a foreign government pursuant to the March 1989 plan of then Secretary of the Treasury Brady, used by such foreign government to retire outstanding commercial bank loans.

(ii) INVESTMENT, TRUSTEE, AND FIDUCIARY TRANSACTIONS.—The bank buys or sells securities for investment purposes—

(I) for the bank; or

(II) for accounts for which the bank acts as a trustee or fiduciary.

(iii) ASSET-BACKED TRANSACTIONS.—The bank engages in the issuance or sale to qualified investors, through a grantor trust or other separate entity, of securities backed by or representing an interest in notes, drafts, acceptances, loans, leases, receivables, other obligations (other than securities of which the bank is not the issuer), or pools of any such obligations predominantly originated by—

(I) the bank;

(II) an affiliate of any such bank other than a broker or dealer; or

(III) a syndicate of banks of which the bank is a member, if the obligations or pool of obligations

consists of mortgage obligations or consumer-related receivables.

(iv) IDENTIFIED BANKING PRODUCTS.—The bank buys or sells identified banking products, as defined in section 206 of the Gramm-Leach-Bliley Act.

(6) The term "bank" means (A) a banking institution organized under the laws of the United States or a Federal savings association, as defined in section 2(5) of the Home Owners' Loan Act, (B) a member bank of the Federal Reserve System, (C) any other banking institution or savings association, as defined in section 2(4) of the Home Owners' Loan Act, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency pursuant to the first section of Public Law 87–722 (12 U.S.C. 92a), and which is supervised and examined by State or Federal authority having supervision over banks or savings associations, and which is not operated for the purpose of evading the provisions of this title, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph. [5]

(7) The term "director" means any director of a corporation or any person performing similar functions with respect to any organization, whether incorporated or unincorporated.

(8) The term "issuer" means any person who issues or proposes to issue any security; except that with respect to certificates of deposit for securities, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is, or is to be, used.

(9) The term "person" means a natural person, company, government, or political subdivision, agency, or instrumentality of a government.

(10) The term "security" means any note, stock, treasury stock, security future, security-based swap, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, strad-

[5] Replaced by 12 U.S.C. 92a. [Printed in appendix to this volume.]

dle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

(11) The term "equity security" means any stock or similar security; or any security future on any such security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.

(12)(A) The term "exempted security" or "exempted securities" includes—

(i) government securities, as defined in paragraph (42) of this subsection;

(ii) municipal securities, as defined in paragraph (29) of this subsection;

(iii) any interest or participation in any common trust fund or similar fund that is excluded from the definition of the term "investment company" under section 3(c)(3) of the Investment Company Act of 1940;

(iv) any interest or participation in a single trust fund, or a collective trust fund maintained by a bank, or any security arising out of a contract issued by an insurance company, which interest, participation, or security is issued in connection with a qualified plan as defined in subparagraph (C) of this paragraph;

(v) any security issued by or any interest or participation in any pooled income fund, collective trust fund, collective investment fund, or similar fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940;

(vi) solely for purposes of sections 12, 13, 14, and 16 of this title, any security issued by or any interest or participation in any church plan, company, or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940; and

(vii) such other securities (which may include, among others, unregistered securities, the market in which is predominantly intrastate) as the Commission may, by such rules and regulations as it deems consistent with the public interest and the protection of investors, either unconditionally or upon specified terms and conditions or for stated periods, exempt from the operation of any one or more

provisions of this title which by their terms do not apply to an "exempted security" or to "exempted securities".[6]

(B)(i) Notwithstanding subparagraph (A)(i) of this paragraph, government securities shall not be deemed to be "exempted securities" for the purposes of section 17A of this title.

(ii) Notwithstanding subparagraph (A)(ii) of this paragraph, municipal securities shall not be deemed to be "exempted securities" for the purposes of sections 15 and 17A of this title.

(C) For purposes of subparagraph (A)(iv) of this paragraph, the term "qualified plan" means (i) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954,[7] (ii) an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of such Code,[8] (iii) a governmental plan as defined in section 414(d)[9] of such Code which has been established by an employer for the exclusive benefit of its employees or their beneficiaries for the purpose of distributing to such employees or their beneficiaries the corpus and income of the funds accumulated under such plan, if under such plan it is impossible, prior to the satisfaction of all liabilities with respect to such employees and their beneficiaries, for any part of the corpus or income to be used for, or diverted to, purposes other than the exclusive benefit of such employees or their beneficiaries, or (iv) a church plan, company, or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940, other than any plan described in clause (i), (ii), or (iii) of this subparagraph which (I) covers employees some or all of whom are employees within the meaning of section 401(c) of such Code, or (II) is a plan funded by an annuity contract described in section 403(b) of such Code.[10]

(13) The terms "buy" and "purchase" each include any contract to buy, purchase, or otherwise acquire. For security futures products, such term includes any contract, agreement, or transaction for future delivery. For security-based swaps, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require.

(14) The terms "sale" and "sell" each include any contract to sell or otherwise dispose of. For security futures products, such term includes any contract, agreement, or transaction for future delivery. For security-based swaps, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require.

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[6] Additional exemptions contained at: 12 U.S.C. 1455, 1717, 1719, 1723c, 20 U.S.C. 1087–2, 1087hh; 22 U.S.C. 283h, 285h, 286k–1, 290i–9, 43 U.S.C. 1625; 45 U.S.C. 270.

[7] 26 U.S.C. 401.

[8] 26 U.S.C. 404(a)(2).

[9] 26 U.S.C. 414(d).

[10] 26 U.S.C. 403(b).

(15) The term "Commission" means the Securities and Exchange Commission established by section 4 of this title.

(16) The term "State" means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States. [11]

(17) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof. The term also includes intrastate use of (A) any facility of a national securities exchange or of a telephone or other interstate means of communication, or (B) any other interstate instrumentality.

(18) The term "person associated with a broker or dealer" or "associated person of a broker or dealer" means any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer, 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).

(19) The terms "investment company,""affiliated person,""insurance company,""separate account," and "company" have the same meanings as in the Investment Company Act of 1940.

(20) The terms "investment adviser" and "underwriter" have the same meanings as in the Investment Advisers Act of 1940.

(21) The term "persons associated with a member" or "associated person of a member" when used with respect to a member of a national securities exchange or registered securities association means any partner, officer, director, or branch manager of such member (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such member, or any employee of such member.

(22)(A) The term "securities information processor" means any person engaged in the business of (i) collecting, processing, or preparing for distribution or publication, or assisting, participating in, or coordinating the distribution or publication of, information with respect to transactions in or quotations for any security (other than an exempted security) or (ii) distributing or publishing (whether by means of a ticker tape, a communications network, a terminal display device, or otherwise) on a current and continuing basis, information with respect to such transactions or quotations. The term "securities information processor" does not include any bona fide newspaper, news magazine, or business or financial publication of general and

[11] The words "Philippine Islands" were deleted from the definition of the term "State" on the basis of Presidential Proclamation No. 2695, effective July 4, 1946 (11 F.R. 7517; 60 Stat. 1352), which granted Independence to the Philippine Islands.

regular circulation, any self-regulatory organization, any bank, broker, dealer, building and loan, savings and loan, or homestead association, or cooperative bank, if such bank, broker, dealer, association, or cooperative bank would be deemed to be a securities information processor solely by reason of functions performed by such institutions as part of customary banking, brokerage, dealing, association, or cooperative bank activities, or any common carrier, as defined in section 3 of the Communications Act of 1934, [12] subject to the jurisdiction of the Federal Communications Commission or a State commission, as defined in section 3 of that Act, unless the Commission determines that such carrier is engaged in the business of collecting, processing, or preparing for distribution or publication, information with respect to transactions in or quotations for any security.

(B) The term "exclusive processor" means any securities information processor or self-regulatory organization which, directly or indirectly, engages on an exclusive basis on behalf of any national securities exchange or registered securities association, or any national securities exchange or registered securities association which engages on an exclusive basis on its own behalf, in collecting, processing, or preparing for distribution or publication any information with respect to (i) transactions or quotations on or effected or made by means of any facility of such exchange or (ii) quotations distributed or published by means of any electronic system operated or controlled by such association.

(23)(A) The term "clearing agency" means any person who acts as an intermediary in making payments or deliveries or both in connection with transactions in securities or who provides facilities for comparison of data respecting the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or for the allocation of securities settlement responsibilities. Such term also means any person, such as a securities depository, who (i) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates, or (ii) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates.

(B) The term "clearing agency" does not include (i) any Federal Reserve bank, Federal home loan bank, or Federal land bank; (ii) any national securities exchange or registered securities association solely by reason of its providing facilities for comparison of data respecting the terms of settlement of securities transactions effected on such exchange or by means of any electronic system operated or controlled by such association; (iii) any bank, broker, dealer, building and loan, savings and loan, or homestead association, or cooperative bank if such

[12] 47 U.S.C. 153. [Printed in appendix to this volume.]

bank, broker, dealer, association, or cooperative bank would be deemed to be a clearing agency solely by reason of functions performed by such institution as part of customary banking, brokerage, dealing, association, or cooperative banking activities, or solely by reason of acting on behalf of a clearing agency or a participant therein in connection with the furnishing by the clearing agency of services to its participants or the use of services of the clearing agency by its participants, unless the Commission, by rule, otherwise provides as necessary or appropriate to assure the prompt and accurate clearance and settlement of securities transactions or to prevent evasion of this title; (iv) any life insurance company, its registered separate accounts, or a subsidiary of such insurance company solely by reason of functions commonly performed by such entities in connection with variable annuity contracts or variable life policies issued by such insurance company or its separate accounts; (v) any registered open-end investment company or unit investment trust solely by reason of functions commonly performed by it in connection with shares in such registered open-end investment company or unit investment trust, or (vi) any person solely by reason of its performing functions described in paragraph 25(E) of this subsection.

(24) The term "participant" when used with respect to a clearing agency means any person who uses a clearing agency to clear or settle securities transactions or to transfer, pledge, lend, or hypothecate securities. Such term does not include a person whose only use of a clearing agency is (A) through another person who is a participant or (B) as a pledgee of securities.

(25) The term "transfer agent" means any person who engages on behalf of an issuer of securities or on behalf of itself as an issuer of securities in (A) countersigning such securities upon issuance; (B) monitoring the issuance of such securities with a view to preventing unauthorized issuance, a function commonly performed by a person called a registrar; (C) registering the transfer of such securities; (D) exchanging or converting such securities; or (E) transferring record ownership of securities by bookkeeping entry without physical issuance of securities certificates. The term "transfer agent" does not include any insurance company or separate account which performs such functions solely with respect to variable annuity contracts or variable life policies which it issues or any registered clearing agency which performs such functions solely with respect to options contracts which it issues.

(26) The term "self-regulatory organization" means any national securities exchange, registered securities association, or registered clearing agency, or (solely for purposes of sections 19(b), 19(c), and 23(b) of this title) the Municipal Securities Rulemaking Board established by section 15B of this title.

(27) The term "rules of an exchange", "rules of an association", or "rules of a clearing agency" means the constitution, articles of incorporation, bylaws, and rules, or instruments corresponding to the foregoing, of an exchange, association of brokers and dealers, or clearing agency, respectively, and such of

the stated policies, practices, and interpretations of such exchange, association, or clearing agency as the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors to be deemed to be rules of such exchange, association, or clearing agency.

(28) The term "rules of a self-regulatory organization" means the rules of an exchange which is a national securities exchange, the rules of an association of brokers and dealers which is a registered securities association, the rules of a clearing agency which is a registered clearing agency, or the rules of the Municipal Securities Rulemaking Board.

(29) The term "municipal securities" means securities which are direct obligations of, or obligations guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, or any municipal corporate instrumentality of one or more States, or any security which is an industrial development bond (as defined in section 103(c)(2) of the Internal Revenue Code of 1954)[13] the interest on which is excludable from gross income under section 103(a)(1) of such Code if, by reason of the application of paragraph (4) or (6) of section 103(c) of such Code (determined as if paragraphs (4)(A), (5), and (7)[14] were not included in such section 103(c)), paragraph (1) of such section 103(c) does not apply to such security.

(30) The term "municipal securities dealer" means any person (including a separately identifiable department or division of a bank) engaged in the business of buying and selling municipal securities for his own account, through a broker or otherwise, but does not include—

(A) any person insofar as he buys or sells such securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business; or

(B) a bank, unless the bank is engaged in the business of buying and selling municipal securities for its own account other than in a fiduciary capacity, through a broker or otherwise; *Provided, however,* That if the bank is engaged in such business through a separately identifiable department or division (as defined by the Municipal Securities Rulemaking Board in accordance with section 15B(b)(2)(H) of this title), the department or division and not the bank itself shall be deemed to be the municipal securities dealer.

(31) The term "municipal securities broker" means a broker engaged in the business of effecting transactions in municipal securities for the account of others.

(32) The term "person associated with a municipal securities dealer" when used with respect to a municipal securities dealer which is a bank or a division or department of a bank means any person directly engaged in the management, direction, supervision, or performance of any of the municipal secu-

[13] See footnote 1, p. 8. (26 U.S.C. 103(b).)
[14] See footnote 2, p. 8. (26 U.S.C. 103(b)(13).)

rities dealer's activities with respect to municipal securities, and any person directly or indirectly controlling such activities or controlled by the municipal securities dealer in connection with such activities.

(33) The term "municipal securities investment portfolio" means all municipal securities held for investment and not for sale as part of a regular business by a municipal securities dealer or by a person, directly or indirectly, controlling, controlled by, or under common control with a municipal securities dealer.

(34) The term "appropriate regulatory agency" means—

(A) When used with respect to a municipal securities dealer:

(i) the Comptroller of the Currency, in the case of a national bank, a subsidiary or a department or division of any such bank, a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2))), the deposits of which are insured by the Federal Deposit Insurance Corporation, or a subsidiary or department or division of any such Federal savings association;

(ii) the Board of Governors of the Federal Reserve System, in the case of a State member bank of the Federal Reserve System, a subsidiary or a department or division thereof, a bank holding company, a subsidiary of a bank holding company which is a bank other than a bank specified in clause (i), (iii), or (iv) of this subparagraph, a subsidiary or a department or division of such subsidiary, or a savings and loan holding company;

(iii) the Federal Deposit Insurance Corporation, in the case of a bank insured by the Federal Deposit Insurance Corporation (other than a member of the Federal Reserve System), a subsidiary or department or division of any such bank, a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))), the deposits of which are insured by the Federal Deposit Insurance Corporation, or a subsidiary or a department or division of any such State savings association; and

(iv) the Commission in the case of all other municipal securities dealers.

(B) When used with respect to a clearing agency or transfer agent:

(i) the Comptroller of the Currency, in the case of a national bank, a subsidiary of any such bank, a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2))), the deposits of which are insured by the Federal Deposit Insurance Corporation, or a subsidiary of any such Federal savings association;

(ii) the Board of Governors of the Federal Reserve System, in the case of a State member bank of the Federal Reserve System, a subsidiary thereof, a bank

holding company, a subsidiary of a bank holding company that is a bank other than a bank specified in clause (i) or (iii) of this subparagraph, or a savings and loan holding company;

(iii) the Federal Deposit Insurance Corporation, in the case of a bank insured by the Federal Deposit Insurance Corporation (other than a member of the Federal Reserve System), a subsidiary of any such bank, a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))), the deposits of which are insured by the Federal Deposit Insurance Corporation, or a subsidiary of any such State savings association; and

(iv) the Commission in the case of all other clearing agencies and transfer agents.

(C) When used with respect to a participant or applicant to become a participant in a clearing agency or a person requesting or having access to services offered by a clearing agency:

(i) the Comptroller of the Currency, in the case of a national bank or a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2))), the deposits of which are insured by the Federal Deposit Insurance Corporation when the appropriate regulatory agency for such clearing agency is not the Commission;

(ii) the Board of Governors of the Federal Reserve System in the case of a State member bank of the Federal Reserve System, a bank holding company, or a subsidiary of a bank holding company, a subsidiary of a bank holding company that is a bank other than a bank specified in clause (i) or (iii) of this subparagraph, or a savings and loan holding company when the appropriate regulatory agency for such clearing agency is not the Commission;

(iii) the Federal Deposit Insurance Corporation, in the case of a bank insured by the Federal Deposit Insurance Corporation (other than a member of the Federal Reserve System) or a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))), the deposits of which are insured by the Federal Deposit Insurance Corporation; and when the appropriate regulatory agency for such clearing agency is not the Commission;

(iv) the Commission in all other cases.

(D) When used with respect to an institutional investment manager which is a bank the deposits of which are insured in accordance with the Federal Deposit Insurance Act:

(i) the Comptroller of the Currency, in the case of a national bank or a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2))), the deposits of which

are insured by the Federal Deposit Insurance Corporation;

(ii) the Board of Governors of the Federal Reserve System, in the case of any other member bank of the Federal Reserve System; and

(iii) the Federal Deposit Insurance Corporation, in the case of any other insured bank or a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))), the deposits of which are insured by the Federal Deposit Insurance Corporation.

(E) When used with respect to a national securities exchange or registered securities association, member thereof, person associated with a member thereof, applicant to become a member thereof or to become associated with a member thereof, or person requesting or having access to services offered by such exchange or association or member thereof, or the Municipal Securities Rulemaking Board, the Commission.

(F) When used with respect to a person exercising investment discretion with respect to an account:

(i) the Comptroller of the Currency, in the case of a national bank or a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2))), the deposits of which are insured by the Federal Deposit Insurance Corporation;

(ii) the Board of Governors of the Federal Reserve System in the case of any other member bank of the Federal Reserve System;

(iii) the Federal Deposit Insurance Corporation, in the case of any other bank the deposits of which are insured in accordance with the Federal Deposit Insurance Act or a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))), the deposits of which are insured by the Federal Deposit Insurance Corporation; and

(iv) the Commission in the case of all other such persons.

(G) When used with respect to a government securities broker or government securities dealer, or person associated with a government securities broker or government securities dealer:

(i) the Comptroller of the Currency, in the case of a national bank, a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act), the deposits of which are insured by the Federal Deposit Insurance Corporation, or a Federal branch or Federal agency of a foreign bank (as such terms are used in the International Banking Act of 1978);

(ii) the Board of Governors of the Federal Reserve System, in the case of a State member bank of the

Federal Reserve System, a foreign bank, an uninsured State branch or State agency of a foreign bank, a commercial lending company owned or controlled by a foreign bank (as such terms are used in the International Banking Act of 1978), or a corporation organized or having an agreement with the Board of Governors of the Federal Reserve System pursuant to section 25 or section 25A of the Federal Reserve Act;

(iii) the Federal Deposit Insurance Corporation, in the case of a bank insured by the Federal Deposit Insurance Corporation (other than a member of the Federal Reserve System or a Federal savings bank), a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act), the deposits of which are insured by the Federal Deposit Insurance Corporation, or an insured State branch of a foreign bank (as such terms are used in the International Banking Act of 1978); and

(iv) the Commission, in the case of all other government securities brokers and government securities dealers.

(H) When used with respect to an institution described in subparagraph (D), (F), or (G) of section 2(c)(2), or held under section 4(f), of the Bank Holding Company Act of 1956—

(i) the Comptroller of the Currency, in the case of a national bank;

(ii) the Board of Governors of the Federal Reserve System, in the case of a State member bank of the Federal Reserve System or any corporation chartered under section 25A of the Federal Reserve Act;

(iii) the Federal Deposit Insurance Corporation, in the case of any other bank the deposits of which are insured in accordance with the Federal Deposit Insurance Act; or

(iv) the Commission in the case of all other such institutions.

As used in this paragraph, the terms "bank holding company" and "subsidiary of a bank holding company" have the meanings given them in section 2 of the Bank Holding Company Act of 1956. As used in this paragraph, the term "savings and loan holding company" has the same meaning as in section 10(a) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)).

(35) A person exercises "investment discretion" with respect to an account if, directly or indirectly, such person (A) is authorized to determine what securities or other property shall be purchased or sold by or for the account, (B) makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for such investment decisions, or (C) otherwise exercises such influence with respect to the purchase and sale of securities or other property by or for the account as the Commission, by rule, determines, in the public interest or for the protection of investors, should be subject to the operation

of the provisions of this title and rules and regulations thereunder.

(36) A class of persons or markets is subject to "equal regulation" if no member of the class has a competitive advantage over any other member thereof resulting from a disparity in their regulation under this title which the Commission determines is unfair and not necessary or appropriate in furtherance of the purposes of this title.

(37) The term "records" means accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type, whether expressed in ordinary or machine language.

(38) The term "market maker" means any specialist permitted to act as a dealer, any dealer acting in the capacity of block positioner, and any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis.

(39) A person is subject to a "statutory disqualification" with respect to membership or participation in, or association with a member of, a self-regulatory organization, if such person—

(A) has been and is expelled or suspended from membership or participation in, or barred or suspended from being associated with a member of, any self-regulatory organization, foreign equivalent of a self-regulatory organization, foreign or international securities exchange, contract market designated pursuant to section 5 of the Commodity Exchange Act (7 U.S.C. 7), or any substantially equivalent foreign statute or regulation, or futures association registered under section 17 of such Act (7 U.S.C. 21), or any substantially equivalent foreign statute or regulation, or has been and is denied trading privileges on any such contract market or foreign equivalent;

(B) [15] is subject to—

(i) an order of the Commission, other appropriate regulatory agency, or foreign financial regulatory authority—

(I) denying, suspending for a period not exceeding 12 months, or revoking his registration as a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, security-based swap dealer, or major security-based swap participant or limiting his activities as a foreign person performing a function substantially equivalent to any of the above; or

(II) barring or suspending for a period not exceeding 12 months his being associated with a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, security-based swap dealer, major security-based swap partici-

[15] Margin so in law.

pant, or foreign person performing a function substantially equivalent to any of the above;

(ii) an order of the Commodity Futures Trading Commission denying, suspending, or revoking his registration under the Commodity Exchange Act (7 U.S.C. 1 et seq.); or

(iii) an order by a foreign financial regulatory authority denying, suspending, or revoking the person's authority to engage in transactions in contracts of sale of a commodity for future delivery or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent thereof;

(C) by his conduct while associated with a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, security-based swap dealer, or major security-based swap participant, or while associated with an entity or person required to be registered under the Commodity Exchange Act, has been found to be a cause of any effective suspension, expulsion, or order of the character described in subparagraph (A) or (B) of this paragraph, and in entering such a suspension, expulsion, or order, the Commission, an appropriate regulatory agency, or any such self-regulatory organization shall have jurisdiction to find whether or not any person was a cause thereof;

(D) by his conduct while associated with any broker, dealer, municipal securities dealer, government securities broker, government securities dealer, security-based swap dealer, major security-based swap participant, or any other entity engaged in transactions in securities, or while associated with an entity engaged in transactions in contracts of sale of a commodity for future delivery or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent thereof, has been found to be a cause of any effective suspension, expulsion, or order by a foreign or international securities exchange or foreign financial regulatory authority empowered by a foreign government to administer or enforce its laws relating to financial transactions as described in subparagraph (A) or (B) of this paragraph;

(E) has associated with him any person who is known, or in the exercise of reasonable care should be known, to him to be a person described by subparagraph (A), (B), (C), or (D) of this paragraph; or

(F) has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (D), (E), (H), or (G) of paragraph (4) of section 15(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) or any other felony within ten years of the date of the filing of an application for membership or participation in, or to become associated with a member of, such self-regulatory organization, is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4), has willfully

made or caused to be made in any application for membership or participation in, or to become associated with a member of, a self-regulatory organization, report required to be filed with a self-regulatory organization, or proceeding before a self-regulatory organization, any statement which was at the time, and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application, report, or proceeding any material fact which is required to be stated therein.

(40) The term "financial responsibility rules" means the rules and regulations of the Commission or the rules and regulations prescribed by any self-regulatory organization relating to financial responsibility and related practices which are designated by the Commission, by rule or regulation, to be financial responsibility rules.

(41) The term "mortgage related security" means a security that meets standards of credit-worthiness as established by the Commission, and either:

(A) represents ownership of one or more promissory notes or certificates of interest or participation in such notes (including any rights designed to assure servicing of, or the receipt or timeliness of receipt by the holders of such notes, certificates, or participations of amounts payable under, such notes, certificates, or participations), which notes:

(i) are directly secured by a first lien on a single parcel of real estate, including stock allocated to a dwelling unit in a residential cooperative housing corporation, upon which is located a dwelling or mixed residential and commercial structure, on a residential manufactured home as defined in section 603(6) of the National Manufactured Housing Construction and Safety Standards Act of 1974,[16] whether such manufactured home is considered real or personal property under the laws of the State in which it is to be located, or on one or more parcels of real estate upon which is located one or more commercial structures; and

(ii) were originated by a savings and loan association, savings bank, commercial bank, credit union, insurance company, or similar institution which is supervised and examined by a Federal or State authority, or by a mortgage approved by the Secretary of Housing and Urban Development pursuant to sections 203 and 211 of the National Housing Act,[17] or, where such notes involve a lien on the manufactured home, by any such institution or by any financial institution approved for insurance by the Secretary of Housing and Urban Development pursuant to section 2 of the National Housing Act;[18] or

[16] 42 U.S.C. 5402(6).
[17] 12 U.S.C. 1709, 1715b.
[18] 12 U.S.C. 1703.

(B) is secured by one or more promissory notes or certificates of interest or participations in such notes (with or without recourse to the issuer thereof) and, by its terms, provides for payments of principal in relation to payments, or reasonable projections of payments, on notes meeting the requirements of subparagraphs (A) (i) and (ii) or certificates of interest or participations in promissory notes meeting such requirements.

For the purpose of this paragraph, the term "promissory note", when used in connection with a manufactured home, shall also include a loan, advance, or credit sale as evidence by a retail installment sales contract or other instrument.

(42) The term "government securities" means—

(A) securities which are direct obligations of, or obligations guaranteed as to principal or interest by, the United States;

(B) securities which are issued or guaranteed by the Tennessee Valley Authority or by corporations in which the United States has a direct or indirect interest and which are designated by the Secretary of the Treasury for exemption as necessary or appropriate in the public interest or for the protection of investors;

(C) securities issued or guaranteed as to principal or interest by any corporation the securities of which are designated, by statute specifically naming such corporation, to constitute exempt securities within the meaning of the laws administered by the Commission;

(D) for purposes of sections 15C and 17A, any put, call, straddle, option, or privilege on a security described in subparagraph (A), (B), or (C) other than a put, call, straddle, option, or privilege—

(i) that is traded on one or more national securities exchanges; or

(ii) for which quotations are disseminated through an automated quotation system operated by a registered securities association; or

(E) for purposes of sections 15, 15C, and 17A as applied to a bank, a qualified Canadian government obligation as defined in section 5136 of the Revised Statutes of the United States.

(43) The term "government securities broker" means any person regularly engaged in the business of effecting transactions in government securities for the account of others, but does not include—

(A) any corporation the securities of which are government securities under subparagraph (B) or (C) of paragraph (42) of this subsection; or

(B) any person registered with the Commodity Futures Trading Commission, any contract market designated by the Commodity Futures Trading Commission, such contract market's affiliated clearing organization, or any floor trader on such contract market, solely because such person effects transactions in government securities that the Commission, after consultation with the Commodity Futures

Trading Commission, has determined by rule or order to be incidental to such person's futures-related business.

(44) The term "government securities dealer" means any person engaged in the business of buying and selling government securities for his own account, through a broker or otherwise, but does not include—

(A) any person insofar as he buys or sells such securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business;

(B) any corporation the securities of which are government securities under subparagraph (B) or (C) of paragraph (42) of this subsection;

(C) any bank, unless the bank is engaged in the business of buying and selling government securities for its own account other than in a fiduciary capacity, through a broker or otherwise; or

(D) any person registered with the Commodity Futures Trading Commission, any contract market designated by the Commodity Futures Trading Commission, such contract market's affiliated clearing organization, or any floor trader on such contract market, solely because such person effects transactions in government securities that the Commission, after consultation with the Commodity Futures Trading Commission, has determined by rule or order to be incidental to such person's futures-related business.

(45) The term "person associated with a government securities broker or government securities dealer" means any partner, officer, director, or branch manager of such government securities broker or government securities dealer (or any person occupying a similar status or performing similar functions), and any other employee of such government securities broker or government securities dealer who is engaged in the management, direction, supervision, or performance of any activities relating to government securities, and any person directly or indirectly controlling, controlled by, or under common control with such government securities broker or government securities dealer.

(46) The term "financial institution" means—

(A) a bank (as defined in paragraph (6) of this subsection);

(B) a foreign bank (as such term is used in the International Banking Act of 1978); and

(C) a savings association (as defined in section 3(b) of the Federal Deposit Insurance Act) the deposits of which are insured by the Federal Deposit Insurance Corporation.

(47) The term "securities laws" means the Securities Act of 1933 (15 U.S.C. 77a et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), the Sarbanes-Oxley Act of 2002 [19], the Trust Indenture Act of 1939 (15 U.S.C. 77aaa et seq.), the

[19] So in law. May include provisions amended by the Sarbanes-Oxley Act of 2002, such as sections 101(i) and 502(c)(7) of the Employee Retirement Income Security Act of 1974, sections 1348, 1349, 1350, 1514A, 1519, and 1520 of title 18, 523(a)(19) of title 11, and section 1658(b) of title 28, United States Code, printed in the appendix to this volume.

Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.), the Investment Advisers Act of 1940 (15 U.S.C. 80b et seq.), and the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.).

(48) The term "registered broker or dealer" means a broker or dealer registered or required to register pursuant to section 15 or 15B of this title, except that in paragraph (3) of this subsection and sections 6 and 15A the term means such a broker or dealer and a government securities broker or government securities dealer registered or required to register pursuant to section 15C(a)(1)(A) of this title.

(49) The terms "person associated with a transfer agent" and "associated person of a transfer agent" mean any person (except an employee whose functions are solely clerical or ministerial) directly engaged in the management, direction, supervision, or performance of any of the transfer agent's activities with respect to transfer agent functions, and any person directly or indirectly controlling such activities or controlled by the transfer agent in connection with such activities.

(50) The term "foreign securities authority" means any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters.

(51)(A) The term "penny stock" means any equity security other than a security that is—

(i) registered or approved for registration and traded on a national securities exchange that meets such criteria as the Commission shall prescribe by rule or regulation for purposes of this paragraph;

(ii) authorized for quotation on an automated quotation system sponsored by a registered securities association, if such system (I) was established and in operation before January 1, 1990, and (II) meets such criteria as the Commission shall prescribe by rule or regulation for purposes of this paragraph;

(iii) issued by an investment company registered under the Investment Company Act of 1940;

(iv) excluded, on the basis of exceeding a minimum price, net tangible assets of the issuer, or other relevant criteria, from the definition of such term by rule or regulation which the Commission shall prescribe for purposes of this paragraph; or

(v) exempted, in whole or in part, conditionally or unconditionally, from the definition of such term by rule, regulation, or order prescribed by the Commission.

(B) The Commission may, by rule, regulation, or order, designate any equity security or class of equity securities described in clause (i) or (ii) of subparagraph (A) as within the meaning of the term "penny stock" if such security or class of securities is traded other than on a national securities exchange or through an automated quotation system described in clause (ii) of subparagraph (A).

(C) In exercising its authority under this paragraph to prescribe rules, regulations, and orders, the Commission shall de-

termine that such rule, regulation, or order is consistent with the public interest and the protection of investors.

(52) The term "foreign financial regulatory authority" means any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate participation of its members in activities listed above.

(53)(A) The term "small business related security" means a security that meets standards of credit-worthiness as established by the Commission, and either—

(i) represents an interest in 1 or more promissory notes or leases of personal property evidencing the obligation of a small business concern and originated by an insured depository institution, insured credit union, insurance company, or similar institution which is supervised and examined by a Federal or State authority, or a finance company or leasing company; or

(ii) is secured by an interest in 1 or more promissory notes or leases of personal property (with or without recourse to the issuer or lessee) and provides for payments of principal in relation to payments, or reasonable projections of payments, on notes or leases described in clause (i).

(B) For purposes of this paragraph—

(i) an "interest in a promissory note or a lease of personal property" includes ownership rights, certificates of interest or participation in such notes or leases, and rights designed to assure servicing of such notes or leases, or the receipt or timely receipt of amounts payable under such notes or leases;

(ii) the term "small business concern" means a business that meets the criteria for a small business concern established by the Small Business Administration under section 3(a) of the Small Business Act;

(iii) the term "insured depository institution" has the same meaning as in section 3 of the Federal Deposit Insurance Act; and

(iv) the term "insured credit union" has the same meaning as in section 101 of the Federal Credit Union Act.

(54) QUALIFIED INVESTOR.—

(A) DEFINITION.—Except as provided in subparagraph (B), for purposes of this title, the term "qualified investor" means—

(i) any investment company registered with the Commission under section 8 of the Investment Company Act of 1940;

(ii) any issuer eligible for an exclusion from the definition of investment company pursuant to section 3(c)(7) of the Investment Company Act of 1940;

(iii) any bank (as defined in paragraph (6) of this subsection), savings association (as defined in section 3(b) of the Federal Deposit Insurance Act), broker, dealer, insurance company (as defined in section 2(a)(13) of the Securities Act of 1933), or business development company (as defined in section 2(a)(48) of the Investment Company Act of 1940);

(iv) any small business investment company licensed by the United States Small Business Administration under section 301 (c) or (d) of the Small Business Investment Act of 1958;

(v) any State sponsored employee benefit plan, or any other employee benefit plan, within the meaning of the Employee Retirement Income Security Act of 1974, other than an individual retirement account, if the investment decisions are made by a plan fiduciary, as defined in section 3(21) of that Act, which is either a bank, savings and loan association, insurance company, or registered investment adviser;

(vi) any trust whose purchases of securities are directed by a person described in clauses (i) through (v) of this subparagraph;

(vii) any market intermediary exempt under section 3(c)(2) of the Investment Company Act of 1940;

(viii) any associated person of a broker or dealer other than a natural person;

(ix) any foreign bank (as defined in section 1(b)(7) of the International Banking Act of 1978);

(x) the government of any foreign country;

(xi) any corporation, company, or partnership that owns and invests on a discretionary basis, not less than $25,000,000 in investments;

(xii) any natural person who owns and invests on a discretionary basis, not less than $25,000,000 in investments;

(xiii) any government or political subdivision, agency, or instrumentality of a government who owns and invests on a discretionary basis not less than $50,000,000 in investments; or

(xiv) any multinational or supranational entity or any agency or instrumentality thereof.

(B) ALTERED THRESHOLDS FOR ASSET-BACKED SECURITIES AND LOAN PARTICIPATIONS.—For purposes of section 3(a)(5)(C)(iii) of this title and section 206(a)(5) of the Gramm-Leach-Bliley Act, the term "qualified investor" has the meaning given such term by subparagraph (A) of this paragraph except that clauses (xi) and (xii) shall be applied by substituting "$10,000,000" for "$25,000,000".

(C) ADDITIONAL AUTHORITY.—The Commission may, by rule or order, define a "qualified investor" as any other person, taking into consideration such factors as the finan-

cial sophistication of the person, net worth, and knowledge and experience in financial matters.

(55)(A) The term "security future" means a contract of sale for future delivery of a single security or of a narrow-based security index, including any interest therein or based on the value thereof, except an exempted security under section 3(a)(12) of this title [20] as in effect on the date of the enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) as in effect on the date of the enactment of the Futures Trading Act of 1982). The term "security future" does not include any agreement, contract, or transaction excluded from the Commodity Exchange Act under section 2(c), 2(d), 2(f), or 2(g) of the Commodity Exchange Act (as in effect on the date of the enactment of the Commodity Futures Modernization Act of 2000) or title IV of the Commodity Futures Modernization Act of 2000.

(B) The term "narrow-based security index" means an index—

(i) that has 9 or fewer component securities;

(ii) in which a component security comprises more than 30 percent of the index's weighting;

(iii) in which the five highest weighted component securities in the aggregate comprise more than 60 percent of the index's weighting; or

(iv) in which the lowest weighted component securities comprising, in the aggregate, 25 percent of the index's weighting have an aggregate dollar value of average daily trading volume of less than $50,000,000 (or in the case of an index with 15 or more component securities, $30,000,000), except that if there are two or more securities with equal weighting that could be included in the calculation of the lowest weighted component securities comprising, in the aggregate, 25 percent of the index's weighting, such securities shall be ranked from lowest to highest dollar value of average daily trading volume and shall be included in the calculation based on their ranking starting with the lowest ranked security.

(C) Notwithstanding subparagraph (B), an index is not a narrow-based security index if—

(i)(I) it has at least nine component securities;

(II) no component security comprises more than 30 percent of the index's weighting; and

(III) each component security is—

(aa) registered pursuant to section 12 of the Securities Exchange Act of 1934;

(bb) one of 750 securities with the largest market capitalization; and

(cc) one of 675 securities with the largest dollar value of average daily trading volume;

(ii) a board of trade was designated as a contract market by the Commodity Futures Trading Commission with respect to a contract of sale for future delivery on the

[20] So in law. The phrase "of this title" probably should not appear.

index, before the date of the enactment of the Commodity Futures Modernization Act of 2000;

(iii)(I) a contract of sale for future delivery on the index traded on a designated contract market or registered derivatives transaction execution facility for at least 30 days as a contract of sale for future delivery on an index that was not a narrow-based security index; and

(II) it has been a narrow-based security index for no more than 45 business days over 3 consecutive calendar months;

(iv) a contract of sale for future delivery on the index is traded on or subject to the rules of a foreign board of trade and meets such requirements as are jointly established by rule or regulation by the Commission and the Commodity Futures Trading Commission;

(v) no more than 18 months have passed since the date of the enactment of the Commodity Futures Modernization Act of 2000 and—

(I) it is traded on or subject to the rules of a foreign board of trade;

(II) the offer and sale in the United States of a contract of sale for future delivery on the index was authorized before the date of the enactment of the Commodity Futures Modernization Act of 2000; and

(III) the conditions of such authorization continue to be met; or

(vi) a contract of sale for future delivery on the index is traded on or subject to the rules of a board of trade and meets such requirements as are jointly established by rule, regulation, or order by the Commission and the Commodity Futures Trading Commission.

(D) Within 1 year after the enactment of the Commodity Futures Modernization Act of 2000, the Commission and the Commodity Futures Trading Commission jointly shall adopt rules or regulations that set forth the requirements under clause (iv) of subparagraph (C).

(E) An index that is a narrow-based security index solely because it was a narrow-based security index for more than 45 business days over 3 consecutive calendar months pursuant to clause (iii) of subparagraph (C) shall not be a narrow-based security index for the 3 following calendar months.

(F) For purposes of subparagraphs (B) and (C) of this paragraph—

(i) the dollar value of average daily trading volume and the market capitalization shall be calculated as of the preceding 6 full calendar months; and

(ii) the Commission and the Commodity Futures Trading Commission shall, by rule or regulation, jointly specify the method to be used to determine market capitalization and dollar value of average daily trading volume.

(56) The term "security futures product" means a security future or any put, call, straddle, option, or privilege on any security future.

(57)(A) The term "margin", when used with respect to a security futures product, means the amount, type, and form of collateral required to secure any extension or maintenance of credit, or the amount, type, and form of collateral required as a performance bond related to the purchase, sale, or carrying of a security futures product.

(B) The terms "margin level" and "level of margin", when used with respect to a security futures product, mean the amount of margin required to secure any extension or maintenance of credit, or the amount of margin required as a performance bond related to the purchase, sale, or carrying of a security futures product.

(C) The terms "higher margin level" and "higher level of margin", when used with respect to a security futures product, mean a margin level established by a national securities exchange registered pursuant to section 6(g) that is higher than the minimum amount established and in effect pursuant to section 7(c)(2)(B).

(58) AUDIT COMMITTEE.—The term "audit committee" means—

(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.

(59) REGISTERED PUBLIC ACCOUNTING FIRM.—The term "registered public accounting firm" has the same meaning as in section 2 of the Sarbanes-Oxley Act of 2002.

(60) CREDIT RATING.—The term "credit rating" means an assessment of the creditworthiness of an obligor as an entity or with respect to specific securities or money market instruments.

(61) CREDIT RATING AGENCY.—The term "credit rating agency" means any person—

(A) engaged in the business of issuing credit ratings on the Internet or through another readily accessible means, for free or for a reasonable fee, but does not include a commercial credit reporting company;

(B) employing either a quantitative or qualitative model, or both, to determine credit ratings; and

(C) receiving fees from either issuers, investors, or other market participants, or a combination thereof.

(62) NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATION.—The term "nationally recognized statistical rating organization" means a credit rating agency that—

(A) issues credit ratings certified by qualified institutional buyers, in accordance with section 15E(a)(1)(B)(ix), with respect to—

(i) financial institutions, brokers, or dealers;

(ii) insurance companies;

(iii) corporate issuers;

(iv) issuers of asset-backed securities (as that term is defined in section 1101(c) of part 229 of title 17, Code of Federal Regulations, as in effect on the date of enactment of this paragraph);

(v) issuers of government securities, municipal securities, or securities issued by a foreign government; or

(vi) a combination of one or more categories of obligors described in any of clauses (i) through (v); and

(B) is registered under section 15E.

(63) PERSON ASSOCIATED WITH A NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATION.—The term "person associated with" a nationally recognized statistical rating organization means any partner, officer, director, or branch manager of a nationally recognized statistical rating organization (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with a nationally recognized statistical rating organization, or any employee of a nationally recognized statistical rating organization.

(64) QUALIFIED INSTITUTIONAL BUYER.—The term "qualified institutional buyer" has the meaning given such term in section 230.144A(a) of title 17, Code of Federal Regulations, or any successor thereto.

(79)[21] ASSET-BACKED SECURITY.—The term "asset-backed security"—

(A) means a fixed-income or other security collateralized by any type of self-liquidating financial asset (including a loan, a lease, a mortgage, or a secured or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flow from the asset, including—

(i) a collateralized mortgage obligation;

(ii) a collateralized debt obligation;

(iii) a collateralized bond obligation;

(iv) a collateralized debt obligation of asset-backed securities;

(v) a collateralized debt obligation of collateralized debt obligations; and

(vi) a security that the Commission, by rule, determines to be an asset-backed security for purposes of this section; and

(B) does not include a security issued by a finance subsidiary held by the parent company or a company controlled by the parent company, if none of the securities issued by the finance subsidiary are held by an entity that is not controlled by the parent company.

(65) ELIGIBLE CONTRACT PARTICIPANT.—The term "eligible contract participant" has the same meaning as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

[21] Placement of paragraph (79) so in law. Section 101(b)(1) of Public Law 112–106 redesignated paragraph (77) as paragraph (79), however, such amendment did not transfer paragraph (79) (as so redesignated) to appear after paragraph (78).

(66) MAJOR SWAP PARTICIPANT.—The term "major swap participant" has the same meaning as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

(67) MAJOR SECURITY-BASED SWAP PARTICIPANT.—

(A) IN GENERAL.—The term "major security-based swap participant" means any person—

(i) who is not a security-based swap dealer; and

(ii)(I) who maintains a substantial position in security-based swaps for any of the major security-based swap categories, as such categories are determined by the Commission, excluding both positions held for hedging or mitigating commercial risk and positions maintained by any employee benefit plan (or any contract held by such a plan) as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan;

(II) whose outstanding security-based swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets; or

(III) that is a financial entity that—

(aa) is highly leveraged relative to the amount of capital such entity holds and that is not subject to capital requirements established by an appropriate Federal banking agency; and

(bb) maintains a substantial position in outstanding security-based swaps in any major security-based swap category, as such categories are determined by the Commission.

(B) DEFINITION OF SUBSTANTIAL POSITION.—For purposes of subparagraph (A), the Commission shall define, by rule or regulation, the term "substantial position" at the threshold that the Commission determines to be prudent for the effective monitoring, management, and oversight of entities that are systemically important or can significantly impact the financial system of the United States. In setting the definition under this subparagraph, the Commission shall consider the person's relative position in uncleared as opposed to cleared security-based swaps and may take into consideration the value and quality of collateral held against counterparty exposures.

(C) SCOPE OF DESIGNATION.—For purposes of subparagraph (A), a person may be designated as a major security-based swap participant for 1 or more categories of security-based swaps without being classified as a major security-based swap participant for all classes of security-based swaps.

(68) SECURITY-BASED SWAP.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the term "security-based swap" means any agreement, contract, or transaction that—

(i) is a swap, as that term is defined under section 1a of the Commodity Exchange Act (without regard to paragraph (47)(B)(x) of such section); and

(ii) is based on—

(I) an index that is a narrow-based security index, including any interest therein or on the value thereof;

(II) a single security or loan, including any interest therein or on the value thereof; or

(III) the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer.

(B) RULE OF CONSTRUCTION REGARDING MASTER AGREEMENTS.—The term "security-based swap" shall be construed to include a master agreement that provides for an agreement, contract, or transaction that is a security-based swap pursuant to subparagraph (A), together with all supplements to any such master agreement, without regard to whether the master agreement contains an agreement, contract, or transaction that is not a security-based swap pursuant to subparagraph (A), except that the master agreement shall be considered to be a security-based swap only with respect to each agreement, contract, or transaction under the master agreement that is a security-based swap pursuant to subparagraph (A).

(C) EXCLUSIONS.—The term "security-based swap" does not include any agreement, contract, or transaction that meets the definition of a security-based swap only because such agreement, contract, or transaction references, is based upon, or settles through the transfer, delivery, or receipt of an exempted security under paragraph (12), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in paragraph (29) as in effect on the date of enactment of the Futures Trading Act of 1982), unless such agreement, contract, or transaction is of the character of, or is commonly known in the trade as, a put, call, or other option.

(D) MIXED SWAP.—The term "security-based swap" includes any agreement, contract, or transaction that is as described in subparagraph (A) and also is based on the value of 1 or more interest or other rates, currencies, commodities, instruments of indebtedness, indices, quantitative measures, other financial or economic interest or property of any kind (other than a single security or a narrow-based security index), or the occurrence, non-occurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence (other than an event described in subparagraph (A)(ii)(III)).

(E) RULE OF CONSTRUCTION REGARDING USE OF THE TERM INDEX.—The term "index" means an index or group of securities, including any interest therein or based on the value thereof.

(69) SWAP.—The term "swap" has the same meaning as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

(70) PERSON ASSOCIATED WITH A SECURITY-BASED SWAP DEALER OR MAJOR SECURITY-BASED SWAP PARTICIPANT.—

(A) IN GENERAL.—The term "person associated with a security-based swap dealer or major security-based swap participant" or "associated person of a security-based swap dealer or major security-based swap participant" means—

(i) any partner, officer, director, or branch manager of such security-based swap dealer or major security-based swap participant (or any person occupying a similar status or performing similar functions);

(ii) any person directly or indirectly controlling, controlled by, or under common control with such security-based swap dealer or major security-based swap participant; or

(iii) any employee of such security-based swap dealer or major security-based swap participant.

(B) EXCLUSION.—Other than for purposes of section 15F(l)(2), the term "person associated with a security-based swap dealer or major security-based swap participant" or "associated person of a security-based swap dealer or major security-based swap participant" does not include any person associated with a security-based swap dealer or major security-based swap participant whose functions are solely clerical or ministerial.

(71) SECURITY-BASED SWAP DEALER.—

(A) IN GENERAL.—The term "security-based swap dealer" means any person who—

(i) holds themself out as a dealer in security-based swaps;

(ii) makes a market in security-based swaps;

(iii) regularly enters into security-based swaps with counterparties as an ordinary course of business for its own account; or

(iv) engages in any activity causing it to be commonly known in the trade as a dealer or market maker in security-based swaps.

(B) DESIGNATION BY TYPE OR CLASS.—A person may be designated as a security-based swap dealer for a single type or single class or category of security-based swap or activities and considered not to be a security-based swap dealer for other types, classes, or categories of security-based swaps or activities.

(C) EXCEPTION.—The term "security-based swap dealer" does not include a person that enters into security-based swaps for such person's own account, either individually or in a fiduciary capacity, but not as a part of regular business.

(D) DE MINIMIS EXCEPTION.—The Commission shall exempt from designation as a security-based swap dealer an entity that engages in a de minimis quantity of security-based swap dealing in connection with transactions with or on behalf of its customers. The Commission shall promulgate regulations to establish factors with respect to the making of any determination to exempt.

(72) APPROPRIATE FEDERAL BANKING AGENCY.—The term "appropriate Federal banking agency" has the same meaning as in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)).

(73) BOARD.—The term "Board" means the Board of Governors of the Federal Reserve System.

(74) PRUDENTIAL REGULATOR.—The term "prudential regulator" has the same meaning as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

(75) SECURITY-BASED SWAP DATA REPOSITORY.—The term "security-based swap data repository" means any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, security-based swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for security-based swaps.

(76) SWAP DEALER.—The term "swap dealer" has the same meaning as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

(77) SECURITY-BASED SWAP EXECUTION FACILITY.—The term "security-based swap execution facility" means a trading system or platform in which multiple participants have the ability to execute or trade security-based swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that—

(A) facilitates the execution of security-based swaps between persons; and

(B) is not a national securities exchange.

(78) SECURITY-BASED SWAP AGREEMENT.—

(A) IN GENERAL.—For purposes of sections 9, 10, 16, 20, and 21A of this Act, and section 17 of the Securities Act of 1933 (15 U.S.C. 77q), the term "security-based swap agreement" means a swap agreement as defined in section 206A of the Gramm-Leach-Bliley Act (15 U.S.C. 78c note) of which a material term is based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein.

(B) EXCLUSIONS.—The term "security-based swap agreement" does not include any security-based swap.

(80) EMERGING GROWTH COMPANY.—The term "emerging growth company" means an issuer that had total annual gross revenues of less than $1,000,000,000 (as such amount is indexed for inflation every 5 years by the Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, setting the threshold to the nearest 1,000,000) during its most recently

completed fiscal year. An issuer that is an emerging growth company as of the first day of that fiscal year shall continue to be deemed an emerging growth company until the earliest of—

(A) the last day of the fiscal year of the issuer during which it had total annual gross revenues of $1,000,000,000 (as such amount is indexed for inflation every 5 years by the Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, setting the threshold to the nearest 1,000,000) or more;

(B) the last day of the fiscal year of the issuer following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act of 1933;

(C) the date on which such issuer has, during the previous 3-year period, issued more than $1,000,000,000 in non-convertible debt; or

(D) the date on which such issuer is deemed to be a "large accelerated filer", as defined in section 240.12b–2 of title 17, Code of Federal Regulations, or any successor thereto.

(80)[22] FUNDING PORTAL.—The term "funding portal" means any person acting as an intermediary in a transaction involving the offer or sale of securities for the account of others, solely pursuant to section 4(6) of the Securities Act of 1933 (15 U.S.C. 77d(6)), that does not—

(A) offer investment advice or recommendations;

(B) solicit purchases, sales, or offers to buy the securities offered or displayed on its website or portal;

(C) compensate employees, agents, or other persons for such solicitation or based on the sale of securities displayed or referenced on its website or portal;

(D) hold, manage, possess, or otherwise handle investor funds or securities; or

(E) engage in such other activities as the Commission, by rule, determines appropriate.

(b) The Commission and the Board of Governors of the Federal Reserve System, as to matters within their respective jurisdictions, shall have power by rules and regulations to define technical, trade, accounting, and other terms used in this title, consistently with the provisions and purposes of this title.

(c) No provision of this title shall apply to, or be deemed to include, any executive department or independent establishment of the United States, or any lending agency which is wholly owned, directly or indirectly, by the United States, or any officer, agent, or employee of any such department, establishment, or agency, acting in the course of his official duty as such, unless such provision makes specific reference to such department, establishment, or agency.

[22] Two paragraph s designated as paragraph (80) so in law. See amendments made by sections 101(b)(2) and 304(b) of Public Law 112–106. Note that a paragraph (79) exists after paragraph (64).

(d) No issuer of municipal securities or officer or employee thereof acting in the course of his official duties as such shall be deemed to be a "broker", "dealer", or "municipal securities dealer" solely by reason of buying, selling, or effecting transactions in the issuer's securities.

(e) CHARITABLE ORGANIZATIONS.—

(1) EXEMPTION.—Notwithstanding any other provision of this title, but subject to paragraph (2) of this subsection, a charitable organization, as defined in section 3(c)(10)(D) of the Investment Company Act of 1940, or any trustee, director, officer, employee, or volunteer of such a charitable organization acting within the scope of such person's employment or duties with such organization, shall not be deemed to be a "broker", "dealer", "municipal securities broker", "municipal securities dealer", "government securities broker", or "government securities dealer" for purposes of this title solely because such organization or person buys, holds, sells, or trades in securities for its own account in its capacity as trustee or administrator of, or otherwise on behalf of or for the account of—

(A) such a charitable organization;

(B) a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940; or

(C) a trust or other donative instrument described in section 3(c)(10)(B) of the Investment Company Act of 1940, or the settlors (or potential settlors) or beneficiaries of any such trust or other instrument.

(2) LIMITATION ON COMPENSATION.—The exemption provided under paragraph (1) shall not be available to any charitable organization, or any trustee, director, officer, employee, or volunteer of such a charitable organization, unless each person who, on or after 90 days after the date of enactment of this subsection, solicits donations on behalf of such charitable organization from any donor to a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940, is either a volunteer or is engaged in the overall fund raising activities of a charitable organization and receives no commission or other special compensation based on the number or the value of donations collected for the fund.

(f) CONSIDERATION OF PROMOTION OF EFFICIENCY, COMPETITION, AND CAPITAL FORMATION.—Whenever pursuant to this title the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

(g) CHURCH PLANS.—No church plan described in section 414(e) of the Internal Revenue Code of 1986, no person or entity eligible to establish and maintain such a plan under the Internal Revenue Code of 1986, no company or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940, and no trustee, di-

rector, officer or employee of or volunteer for such plan, company, account, person, or entity, acting within the scope of that person's employment or activities with respect to such plan, shall be deemed to be a "broker", "dealer", "municipal securities broker", "municipal securities dealer", "government securities broker", "government securities dealer", "clearing agency", or "transfer agent" for purposes of this title—

(1) solely because such plan, company, person, or entity buys, holds, sells, trades in, or transfers securities or acts as an intermediary in making payments in connection with transactions in securities for its own account in its capacity as trustee or administrator of, or otherwise on behalf of, or for the account of, any church plan, company, or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940; and

(2) if no such person or entity receives a commission or other transaction-related sales compensation in connection with any activities conducted in reliance on the exemption provided by this subsection.

(h) LIMITED EXEMPTION FOR FUNDING PORTALS.—

(1) IN GENERAL.—The Commission shall, by rule, exempt, conditionally or unconditionally, a registered funding portal from the requirement to register as a broker or dealer under section 15(a)(1), provided that such funding portal—

(A) remains subject to the examination, enforcement, and other rulemaking authority of the Commission;

(B) is a member of a national securities association registered under section 15A; and

(C) is subject to such other requirements under this title as the Commission determines appropriate under such rule.

(2) NATIONAL SECURITIES ASSOCIATION MEMBERSHIP.—For purposes of sections 15(b)(8) and 15A, the term "broker or dealer" includes a funding portal and the term "registered broker or dealer" includes a registered funding portal, except to the extent that the Commission, by rule, determines otherwise, provided that a national securities association shall only examine for and enforce against a registered funding portal rules of such national securities association written specifically for registered funding portals.

SEC. 3A. [78c–1] SWAP AGREEMENTS.

(a) [Section 762(d)(1)(A) of Public Law 111–203 repeals subsection (a) and states "...and reserving that subsection".]

(b) SECURITY-BASED SWAP AGREEMENTS.—

(1) The definition of "security" in section 3(a)(10) of this title does not include any security-based swap agreement.

(2) The Commission is prohibited from registering, or requiring, recommending, or suggesting, the registration under this title of any security-based swap agreement. If the Commission becomes aware that a registrant has filed a registration application with respect to such a swap agreement, the Commission shall promptly so notify the registrant. Any such reg-

istration with respect to such a swap agreement shall be void and of no force or effect.

(3) Except as provided in section 16(a) with respect to reporting requirements, the Commission is prohibited from—

(A) promulgating, interpreting, or enforcing rules; or

(B) issuing orders of general applicability;

under this title in a manner that imposes or specifies reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading with respect to any security-based swap agreement.

(4) References in this title to the "purchase" or "sale" of a security-based swap agreement shall be deemed to mean the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap agreement, as the context may require.

SEC. 3B. [78c–2] SECURITIES-RELATED DERIVATIVES.

(a) Any agreement, contract, or transaction (or class thereof) that is exempted by the Commodity Futures Trading Commission pursuant to section 4(c)(1) of the Commodity Exchange Act (7 U.S.C. 6(c)(1)) with the condition that the Commission exercise concurrent jurisdiction over such agreement, contract, or transaction (or class thereof) shall be deemed a security for purposes of the securities laws.

(b) With respect to any agreement, contract, or transaction (or class thereof) that is exempted by the Commodity Futures Trading Commission pursuant to section 4(c)(1) of the Commodity Exchange Act (7 U.S.C. 6(c)(1)) with the condition that the Commission exercise concurrent jurisdiction over such agreement, contract, or transaction (or class thereof), references in the securities laws to the "purchase" or "sale" of a security shall be deemed to include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under such agreement, contract, or transaction, as the context may require.

SEC. 3C. [78c–3] CLEARING FOR SECURITY-BASED SWAPS.

(a) IN GENERAL.—

(1) STANDARD FOR CLEARING.—It shall be unlawful for any person to engage in a security-based swap unless that person submits such security-based swap for clearing to a clearing agency that is registered under this Act or a clearing agency that is exempt from registration under this Act if the security-based swap is required to be cleared.

(2) OPEN ACCESS.—The rules of a clearing agency described in paragraph (1) shall—

(A) prescribe that all security-based swaps submitted to the clearing agency with the same terms and conditions are economically equivalent within the clearing agency and may be offset with each other within the clearing agency; and

(B) provide for non-discriminatory clearing of a security-based swap executed bilaterally or on or through the

rules of an unaffiliated national securities exchange or security-based swap execution facility.

(b) COMMISSION REVIEW.—

(1) COMMISSION-INITIATED REVIEW.—

(A) The Commission on an ongoing basis shall review each security-based swap, or any group, category, type, or class of security-based swaps to make a determination that such security-based swap, or group, category, type, or class of security-based swaps should be required to be cleared.

(B) The Commission shall provide at least a 30-day public comment period regarding any determination under subparagraph (A).

(2) SWAP SUBMISSIONS.—

(A) A clearing agency shall submit to the Commission each security-based swap, or any group, category, type, or class of security-based swaps that it plans to accept for clearing and provide notice to its members (in a manner to be determined by the Commission) of such submission.

(B) Any security-based swap or group, category, type, or class of security-based swaps listed for clearing by a clearing agency as of the date of enactment of this subsection shall be considered submitted to the Commission.

(C) The Commission shall—

(i) make available to the public any submission received under subparagraphs (A) and (B);

(ii) review each submission made under subparagraphs (A) and (B), and determine whether the security-based swap, or group, category, type, or class of security-based swaps, described in the submission is required to be cleared; and

(iii) provide at least a 30-day public comment period regarding its determination whether the clearing requirement under subsection (a)(1) shall apply to the submission.

(3) DEADLINE.—The Commission shall make its determination under paragraph (2)(C) not later than 90 days after receiving a submission made under paragraphs (2)(A) and (2)(B), unless the submitting clearing agency agrees to an extension for the time limitation established under this paragraph.

(4) DETERMINATION.—

(A) In reviewing a submission made under paragraph (2), the Commission shall review whether the submission is consistent with section 17A.

(B) In reviewing a security-based swap, group of security-based swaps or class of security-based swaps pursuant to paragraph (1) or a submission made under paragraph (2), the Commission shall take into account the following factors:

(i) The existence of significant outstanding notional exposures, trading liquidity and adequate pricing data.

(ii) The availability of rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that

are consistent with the material terms and trading conventions on which the contract is then traded.

(iii) The effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the clearing agency available to clear the contract.

(iv) The effect on competition, including appropriate fees and charges applied to clearing.

(v) The existence of reasonable legal certainty in the event of the insolvency of the relevant clearing agency or 1 or more of its clearing members with regard to the treatment of customer and security-based swap counterparty positions, funds, and property.

(C) In making a determination under subsection (b)(1) or paragraph (2)(C) that the clearing requirement shall apply, the Commission may require such terms and conditions to the requirement as the Commission determines to be appropriate.

(5) RULES.—Not later than 1 year after the date of the enactment of this section, the Commission shall adopt rules for a clearing agency's submission for review, pursuant to this subsection, of a security-based swap, or a group, category, type, or class of security-based swaps, that it seeks to accept for clearing. Nothing in this paragraph limits the Commission from making a determination under paragraph (2)(C) for security-based swaps described in paragraph (2)(B).

(c) STAY OF CLEARING REQUIREMENT.—

(1) IN GENERAL.—After making a determination pursuant to subsection (b)(2), the Commission, on application of a counterparty to a security-based swap or on its own initiative, may stay the clearing requirement of subsection (a)(1) until the Commission completes a review of the terms of the security-based swap (or the group, category, type, or class of security-based swaps) and the clearing arrangement.

(2) DEADLINE.—The Commission shall complete a review undertaken pursuant to paragraph (1) not later than 90 days after issuance of the stay, unless the clearing agency that clears the security-based swap, or group, category, type, or class of security-based swaps, agrees to an extension of the time limitation established under this paragraph.

(3) DETERMINATION.—Upon completion of the review undertaken pursuant to paragraph (1), the Commission may—

(A) determine, unconditionally or subject to such terms and conditions as the Commission determines to be appropriate, that the security-based swap, or group, category, type, or class of security-based swaps, must be cleared pursuant to this subsection if it finds that such clearing is consistent with subsection (b)(4); or

(B) determine that the clearing requirement of subsection (a)(1) shall not apply to the security-based swap, or group, category, type, or class of security-based swaps.

(4) RULES.—Not later than 1 year after the date of the enactment of this section, the Commission shall adopt rules for reviewing, pursuant to this subsection, a clearing agency's

clearing of a security-based swap, or a group, category, type, or class of security-based swaps, that it has accepted for clearing.

(d) PREVENTION OF EVASION.—

(1) IN GENERAL.—The Commission shall prescribe rules under this section (and issue interpretations of rules prescribed under this section), as determined by the Commission to be necessary to prevent evasions of the mandatory clearing requirements under this Act.

(2) DUTY OF COMMISSION TO INVESTIGATE AND TAKE CERTAIN ACTIONS.—To the extent the Commission finds that a particular security-based swap or any group, category, type, or class of security-based swaps that would otherwise be subject to mandatory clearing but no clearing agency has listed the security-based swap or the group, category, type, or class of security-based swaps for clearing, the Commission shall—

(A) investigate the relevant facts and circumstances;

(B) within 30 days issue a public report containing the results of the investigation; and

(C) take such actions as the Commission determines to be necessary and in the public interest, which may include requiring the retaining of adequate margin or capital by parties to the security-based swap or the group, category, type, or class of security-based swaps.

(3) EFFECT ON AUTHORITY.—Nothing in this subsection—

(A) authorizes the Commission to adopt rules requiring a clearing agency to list for clearing a security-based swap or any group, category, type, or class of security-based swaps if the clearing of the security-based swap or the group, category, type, or class of security-based swaps would threaten the financial integrity of the clearing agency; and

(B) affects the authority of the Commission to enforce the open access provisions of subsection (a)(2) with respect to a security-based swap or the group, category, type, or class of security-based swaps that is listed for clearing by a clearing agency.

(e) REPORTING TRANSITION RULES.—Rules adopted by the Commission under this section shall provide for the reporting of data, as follows:

(1) Security-based swaps entered into before the date of the enactment of this section shall be reported to a registered security-based swap data repository or the Commission no later than 180 days after the effective date of this section.

(2) Security-based swaps entered into on or after such date of enactment shall be reported to a registered security-based swap data repository or the Commission no later than the later of—

(A) 90 days after such effective date; or

(B) such other time after entering into the security-based swap as the Commission may prescribe by rule or regulation.

(f) CLEARING TRANSITION RULES.—

(1) Security-based swaps entered into before the date of the enactment of this section are exempt from the clearing re-

quirements of this subsection if reported pursuant to subsection (e)(1).

(2) Security-based swaps entered into before application of the clearing requirement pursuant to this section are exempt from the clearing requirements of this section if reported pursuant to subsection (e)(2).

(g) EXCEPTIONS.—

(1) IN GENERAL.—The requirements of subsection (a)(1) shall not apply to a security-based swap if 1 of the counterparties to the security-based swap—

(A) is not a financial entity;

(B) is using security-based swaps to hedge or mitigate commercial risk; and

(C) notifies the Commission, in a manner set forth by the Commission, how it generally meets its financial obligations associated with entering into non-cleared security-based swaps.

(2) OPTION TO CLEAR.—The application of the clearing exception in paragraph (1) is solely at the discretion of the counterparty to the security-based swap that meets the conditions of subparagraphs (A) through (C) of paragraph (1).

(3) FINANCIAL ENTITY DEFINITION.—

(A) IN GENERAL.—For the purposes of this subsection, the term "financial entity" means—

(i) a swap dealer;

(ii) a security-based swap dealer;

(iii) a major swap participant;

(iv) a major security-based swap participant;

(v) a commodity pool as defined in section 1a(10) of the Commodity Exchange Act;

(vi) a private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80–b–2(a));

(vii) an employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);

(viii) a person predominantly engaged in activities that are in the business of banking or financial in nature, as defined in section 4(k) of the Bank Holding Company Act of 1956.

(B) EXCLUSION.—The Commission shall consider whether to exempt small banks, savings associations, farm credit system institutions, and credit unions, including—

(i) depository institutions with total assets of $10,000,000,000 or less;

(ii) farm credit system institutions with total assets of $10,000,000,000 or less; or

(iii) credit unions with total assets of $10,000,000,000 or less.

(4) TREATMENT OF AFFILIATES.—

(A) IN GENERAL.—An affiliate of a person that qualifies for an exception under this subsection (including affiliate entities predominantly engaged in providing financing for the purchase of the merchandise or manufactured

goods of the person) may qualify for the exception only if the affiliate—

(i) enters into the security-based swap to hedge or mitigate the commercial risk of the person or other affiliate of the person that is not a financial entity, and the commercial risk that the affiliate is hedging or mitigating has been transferred to the affiliate;

(ii) is directly and wholly-owned by another affiliate qualified for the exception under this paragraph or an entity that is not a financial entity;

(iii) is not indirectly majority-owned by a financial entity;

(iv) is not ultimately owned by a parent company that is a financial entity; and

(v) does not provide any services, financial or otherwise, to any affiliate that is a nonbank financial company supervised by the Board of Governors (as defined under section 102 of the Financial Stability Act of 2010).

(B) LIMITATION ON QUALIFYING AFFILIATES.—The exception in subparagraph (A) shall not apply if the affiliate is—

(i) a swap dealer;

(ii) a security-based swap dealer;

(iii) a major swap participant;

(iv) a major security-based swap participant;

(v) a commodity pool;

(vi) a bank holding company;

(vii) a private fund, as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80–b–2(a));

(viii) an employee benefit plan or government plan, as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);

(ix) an insured depository institution;

(x) a farm credit system institution;

(xi) a credit union;

(xii) a nonbank financial company supervised by the Board of Governors (as defined under section 102 of the Financial Stability Act of 2010); or

(xiii) an entity engaged in the business of insurance and subject to capital requirements established by an insurance governmental authority of a State, a territory of the United States, the District of Columbia, a country other than the United States, or a political subdivision of a country other than the United States that is engaged in the supervision of insurance companies under insurance law.

(C) LIMITATION ON AFFILIATES' AFFILIATES.—Unless the Commission determines, by order, rule, or regulation, that it is in the public interest, the exception in subparagraph (A) shall not apply with respect to an affiliate if such affiliate is itself affiliated with—

(i) a major security-based swap participant;
(ii) a security-based swap dealer;
(iii) a major swap participant; or
(iv) a swap dealer.

(D) CONDITIONS ON TRANSACTIONS.—With respect to an affiliate that qualifies for the exception in subparagraph (A)—

(i) such affiliate may not enter into any security-based swap other than for the purpose of hedging or mitigating commercial risk; and

(ii) neither such affiliate nor any person affiliated with such affiliate that is not a financial entity may enter into a security-based swap with or on behalf of any affiliate that is a financial entity or otherwise assume, net, combine, or consolidate the risk of security-based swaps entered into by any such financial entity, except one that is an affiliate that qualifies for the exception under subparagraph (A).

(E) TRANSITION RULE FOR AFFILIATES.—An affiliate, subsidiary, or a wholly owned entity of a person that qualifies for an exception under subparagraph (A) and is predominantly engaged in providing financing for the purchase or lease of merchandise or manufactured goods of the person shall be exempt from the margin requirement described in section 15F(e) and the clearing requirement described in subsection (a) with regard to security-based swaps entered into to mitigate the risk of the financing activities for not less than a 2-year period beginning on the date of enactment of this subparagraph.

(F) RISK MANAGEMENT PROGRAM.—Any security-based swap entered into by an affiliate that qualifies for the exception in subparagraph (A) shall be subject to a centralized risk management program of the affiliate, which is reasonably designed both to monitor and manage the risks associated with the security-based swap and to identify each of the affiliates on whose behalf a security-based swap was entered into.

(5) ELECTION OF COUNTERPARTY.—

(A) SECURITY-BASED SWAPS REQUIRED TO BE CLEARED.—With respect to any security-based swap that is subject to the mandatory clearing requirement under subsection (a) and entered into by a security-based swap dealer or a major security-based swap participant with a counterparty that is not a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant, the counterparty shall have the sole right to select the clearing agency at which the security-based swap will be cleared.

(B) SECURITY-BASED SWAPS NOT REQUIRED TO BE CLEARED.—With respect to any security-based swap that is not subject to the mandatory clearing requirement under subsection (a) and entered into by a security-based swap dealer or a major security-based swap participant with a counterparty that is not a swap dealer, major swap partici-

pant, security-based swap dealer, or major security-based swap participant, the counterparty—

(i) may elect to require clearing of the security-based swap; and

(ii) shall have the sole right to select the clearing agency at which the security-based swap will be cleared.

(6) ABUSE OF EXCEPTION.—The Commission may prescribe such rules or issue interpretations of the rules as the Commission determines to be necessary to prevent abuse of the exceptions described in this subsection. The Commission may also request information from those persons claiming the clearing exception as necessary to prevent abuse of the exceptions described in this subsection.

(h) TRADE EXECUTION.—

(1) IN GENERAL.—With respect to transactions involving security-based swaps subject to the clearing requirement of subsection (a)(1), counterparties shall—

(A) execute the transaction on an exchange; or

(B) execute the transaction on a security-based swap execution facility registered under section 3D or a security-based swap execution facility that is exempt from registration under section 3D(e).

(2) EXCEPTION.—The requirements of subparagraphs (A) and (B) of paragraph (1) shall not apply if no exchange or security-based swap execution facility makes the security-based swap available to trade or for security-based swap transactions subject to the clearing exception under subsection (g).

(i) BOARD APPROVAL.—Exemptions from the requirements of this section to clear a security-based swap or execute a security-based swap through a national securities exchange or security-based swap execution facility shall be available to a counterparty that is an issuer of securities that are registered under section 12 or that is required to file reports pursuant to section 15(d), only if an appropriate committee of the issuer's board or governing body has reviewed and approved the issuer's decision to enter into security-based swaps that are subject to such exemptions.

(j) DESIGNATION OF CHIEF COMPLIANCE OFFICER.—

(1) IN GENERAL.—Each registered clearing agency shall designate an individual to serve as a chief compliance officer.

(2) DUTIES.—The chief compliance officer shall—

(A) report directly to the board or to the senior officer of the clearing agency;

(B) in consultation with its board, a body performing a function similar thereto, or the senior officer of the registered clearing agency, resolve any conflicts of interest that may arise;

(C) be responsible for administering each policy and procedure that is required to be established pursuant to this section;

(D) ensure compliance with this title (including regulations issued under this title) relating to agreements, contracts, or transactions, including each rule prescribed by the Commission under this section;

(E) establish procedures for the remediation of noncompliance issues identified by the compliance officer through any—

(i) compliance office review;

(ii) look-back;

(iii) internal or external audit finding;

(iv) self-reported error; or

(v) validated complaint; and

(F) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

(3) ANNUAL REPORTS.—

(A) IN GENERAL.—In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—

(i) the compliance of the registered clearing agency or security-based swap execution facility of the compliance officer with respect to this title (including regulations under this title); and

(ii) each policy and procedure of the registered clearing agency of the compliance officer (including the code of ethics and conflict of interest policies of the registered clearing agency).

(B) REQUIREMENTS.—A compliance report under subparagraph (A) shall—

(i) accompany each appropriate financial report of the registered clearing agency that is required to be furnished to the Commission pursuant to this section; and

(ii) include a certification that, under penalty of law, the compliance report is accurate and complete.

SEC. 3D. [78c–4] SECURITY-BASED SWAP EXECUTION FACILITIES.

(a) REGISTRATION.—

(1) IN GENERAL.—No person may operate a facility for the trading or processing of security-based swaps, unless the facility is registered as a security-based swap execution facility or as a national securities exchange under this section.

(2) DUAL REGISTRATION.—Any person that is registered as a security-based swap execution facility under this section shall register with the Commission regardless of whether the person also is registered with the Commodity Futures Trading Commission as a swap execution facility.

(b) TRADING AND TRADE PROCESSING.—A security-based swap execution facility that is registered under subsection (a) may—

(1) make available for trading any security-based swap; and

(2) facilitate trade processing of any security-based swap.

(c) IDENTIFICATION OF FACILITY USED TO TRADE SECURITY-BASED SWAPS BY NATIONAL SECURITIES EXCHANGES.—A national securities exchange shall, to the extent that the exchange also operates a security-based swap execution facility and uses the same electronic trade execution system for listing and executing trades

of security-based swaps on or through the exchange and the facility, identify whether electronic trading of such security-based swaps is taking place on or through the national securities exchange or the security-based swap execution facility.

(d) CORE PRINCIPLES FOR SECURITY-BASED SWAP EXECUTION FACILITIES.—

(1) COMPLIANCE WITH CORE PRINCIPLES.—

(A) IN GENERAL.—To be registered, and maintain registration, as a security-based swap execution facility, the security-based swap execution facility shall comply with—

(i) the core principles described in this subsection; and

(ii) any requirement that the Commission may impose by rule or regulation.

(B) REASONABLE DISCRETION OF SECURITY-BASED SWAP EXECUTION FACILITY.—Unless otherwise determined by the Commission, by rule or regulation, a security-based swap execution facility described in subparagraph (A) shall have reasonable discretion in establishing the manner in which it complies with the core principles described in this subsection.

(2) COMPLIANCE WITH RULES.—A security-based swap execution facility shall—

(A) establish and enforce compliance with any rule established by such security-based swap execution facility, including—

(i) the terms and conditions of the security-based swaps traded or processed on or through the facility; and

(ii) any limitation on access to the facility;

(B) establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules, including means—

(i) to provide market participants with impartial access to the market; and

(ii) to capture information that may be used in establishing whether rule violations have occurred; and

(C) establish rules governing the operation of the facility, including rules specifying trading procedures to be used in entering and executing orders traded or posted on the facility, including block trades.

(3) SECURITY-BASED SWAPS NOT READILY SUSCEPTIBLE TO MANIPULATION.—The security-based swap execution facility shall permit trading only in security-based swaps that are not readily susceptible to manipulation.

(4) MONITORING OF TRADING AND TRADE PROCESSING.—The security-based swap execution facility shall—

(A) establish and enforce rules or terms and conditions defining, or specifications detailing—

(i) trading procedures to be used in entering and executing orders traded on or through the facilities of the security-based swap execution facility; and

(ii) procedures for trade processing of security-based swaps on or through the facilities of the security-based swap execution facility; and

(B) monitor trading in security-based swaps to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process through surveillance, compliance, and disciplinary practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.

(5) ABILITY TO OBTAIN INFORMATION.—The security-based swap execution facility shall—

(A) establish and enforce rules that will allow the facility to obtain any necessary information to perform any of the functions described in this subsection;

(B) provide the information to the Commission on request; and

(C) have the capacity to carry out such international information-sharing agreements as the Commission may require.

(6) FINANCIAL INTEGRITY OF TRANSACTIONS.—The security-based swap execution facility shall establish and enforce rules and procedures for ensuring the financial integrity of security-based swaps entered on or through the facilities of the security-based swap execution facility, including the clearance and settlement of security-based swaps pursuant to section 3C(a)(1).

(7) EMERGENCY AUTHORITY.—The security-based swap execution facility shall adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, as is necessary and appropriate, including the authority to liquidate or transfer open positions in any security-based swap or to suspend or curtail trading in a security-based swap.

(8) TIMELY PUBLICATION OF TRADING INFORMATION.—

(A) IN GENERAL.—The security-based swap execution facility shall make public timely information on price, trading volume, and other trading data on security-based swaps to the extent prescribed by the Commission.

(B) CAPACITY OF SECURITY-BASED SWAP EXECUTION FACILITY.—The security-based swap execution facility shall be required to have the capacity to electronically capture and transmit and disseminate trade information with respect to transactions executed on or through the facility.

(9) RECORDKEEPING AND REPORTING.—

(A) IN GENERAL.—A security-based swap execution facility shall—

(i) maintain records of all activities relating to the business of the facility, including a complete audit trail, in a form and manner acceptable to the Commission for a period of 5 years; and

(ii) report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appro-

priate for the Commission to perform the duties of the Commission under this title.

(B) REQUIREMENTS.—The Commission shall adopt data collection and reporting requirements for security-based swap execution facilities that are comparable to corresponding requirements for clearing agencies and security-based swap data repositories.

(10) ANTITRUST CONSIDERATIONS.—Unless necessary or appropriate to achieve the purposes of this title, the security-based swap execution facility shall not—

(A) adopt any rules or taking any actions that result in any unreasonable restraint of trade; or

(B) impose any material anticompetitive burden on trading or clearing.

(11) CONFLICTS OF INTEREST.—The security-based swap execution facility shall—

(A) establish and enforce rules to minimize conflicts of interest in its decision-making process; and

(B) establish a process for resolving the conflicts of interest.

(12) FINANCIAL RESOURCES.—

(A) IN GENERAL.—The security-based swap execution facility shall have adequate financial, operational, and managerial resources to discharge each responsibility of the security-based swap execution facility, as determined by the Commission.

(B) DETERMINATION OF RESOURCE ADEQUACY.—The financial resources of a security-based swap execution facility shall be considered to be adequate if the value of the financial resources—

(i) enables the organization to meet its financial obligations to its members and participants notwithstanding a default by the member or participant creating the largest financial exposure for that organization in extreme but plausible market conditions; and

(ii) exceeds the total amount that would enable the security-based swap execution facility to cover the operating costs of the security-based swap execution facility for a 1-year period, as calculated on a rolling basis.

(13) SYSTEM SAFEGUARDS.—The security-based swap execution facility shall—

(A) establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and automated systems, that—

(i) are reliable and secure; and

(ii) have adequate scalable capacity;

(B) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for—

(i) the timely recovery and resumption of operations; and

(ii) the fulfillment of the responsibilities and obligations of the security-based swap execution facility; and

(C) periodically conduct tests to verify that the backup resources of the security-based swap execution facility are sufficient to ensure continued—

(i) order processing and trade matching;

(ii) price reporting;

(iii) market surveillance; and

(iv) maintenance of a comprehensive and accurate audit trail.

(14) DESIGNATION OF CHIEF COMPLIANCE OFFICER.—

(A) IN GENERAL.—Each security-based swap execution facility shall designate an individual to serve as a chief compliance officer.

(B) DUTIES.—The chief compliance officer shall—

(i) report directly to the board or to the senior officer of the facility;

(ii) review compliance with the core principles in this subsection;

(iii) in consultation with the board of the facility, a body performing a function similar to that of a board, or the senior officer of the facility, resolve any conflicts of interest that may arise;

(iv) be responsible for establishing and administering the policies and procedures required to be established pursuant to this section;

(v) ensure compliance with this title and the rules and regulations issued under this title, including rules prescribed by the Commission pursuant to this section;

(vi) establish procedures for the remediation of noncompliance issues found during—

(I) compliance office reviews;

(II) look backs;

(III) internal or external audit findings;

(IV) self-reported errors; or

(V) through validated complaints; and

(vii) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

(C) ANNUAL REPORTS.—

(i) IN GENERAL.—In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—

(I) the compliance of the security-based swap execution facility with this title; and

(II) the policies and procedures, including the code of ethics and conflict of interest policies, of the security-based security-based swap execution facility.

(ii) REQUIREMENTS.—The chief compliance officer shall—

(I) submit each report described in clause (i) with the appropriate financial report of the security-based swap execution facility that is required to be submitted to the Commission pursuant to this section; and

(II) include in the report a certification that, under penalty of law, the report is accurate and complete.

(e) EXEMPTIONS.—The Commission may exempt, conditionally or unconditionally, a security-based swap execution facility from registration under this section if the Commission finds that the facility is subject to comparable, comprehensive supervision and regulation on a consolidated basis by the Commodity Futures Trading Commission.

(f) RULES.—The Commission shall prescribe rules governing the regulation of security-based swap execution facilities under this section.

SEC. 3E. [78c–5] SEGREGATION OF ASSETS HELD AS COLLATERAL IN SECURITY-BASED SWAP TRANSACTIONS.

(a) REGISTRATION REQUIREMENT.—It shall be unlawful for any person to accept any money, securities, or property (or to extend any credit in lieu of money, securities, or property) from, for, or on behalf of a security-based swaps customer to margin, guarantee, or secure a security-based swap cleared by or through a clearing agency (including money, securities, or property accruing to the customer as the result of such a security-based swap), unless the person shall have registered under this title with the Commission as a broker, dealer, or security-based swap dealer, and the registration shall not have expired nor been suspended nor revoked.

(b) CLEARED SECURITY-BASED SWAPS.—

(1) SEGREGATION REQUIRED.—A broker, dealer, or security-based swap dealer shall treat and deal with all money, securities, and property of any security-based swaps customer received to margin, guarantee, or secure a security-based swap cleared by or though a clearing agency (including money, securities, or property accruing to the security-based swaps customer as the result of such a security-based swap) as belonging to the security-based swaps customer.

(2) COMMINGLING PROHIBITED.—Money, securities, and property of a security-based swaps customer described in paragraph (1) shall be separately accounted for and shall not be commingled with the funds of the broker, dealer, or security-based swap dealer or be used to margin, secure, or guarantee any trades or contracts of any security-based swaps customer or person other than the person for whom the same are held.

(c) EXCEPTIONS.—

(1) USE OF FUNDS.—

(A) IN GENERAL.—Notwithstanding subsection (b), money, securities, and property of a security-based swaps customer of a broker, dealer, or security-based swap dealer described in subsection (b) may, for convenience, be commingled and deposited in the same 1 or more accounts with any bank or trust company or with a clearing agency.

(B) WITHDRAWAL.—Notwithstanding subsection (b), such share of the money, securities, and property described in subparagraph (A) as in the normal course of business shall be necessary to margin, guarantee, secure, transfer, adjust, or settle a cleared security-based swap with a clearing agency, or with any member of the clearing agency, may be withdrawn and applied to such purposes, including the payment of commissions, brokerage, interest, taxes, storage, and other charges, lawfully accruing in connection with the cleared security-based swap.

(2) COMMISSION ACTION.—Notwithstanding subsection (b), in accordance with such terms and conditions as the Commission may prescribe by rule, regulation, or order, any money, securities, or property of the security-based swaps customer of a broker, dealer, or security-based swap dealer described in subsection (b) may be commingled and deposited as provided in this section with any other money, securities, or property received by the broker, dealer, or security-based swap dealer and required by the Commission to be separately accounted for and treated and dealt with as belonging to the security-based swaps customer of the broker, dealer, or security-based swap dealer.

(d) PERMITTED INVESTMENTS.—Money described in subsection (b) may be invested in obligations of the United States, in general obligations of any State or of any political subdivision of a State, and in obligations fully guaranteed as to principal and interest by the United States, or in any other investment that the Commission may by rule or regulation prescribe, and such investments shall be made in accordance with such rules and regulations and subject to such conditions as the Commission may prescribe.

(e) PROHIBITION.—It shall be unlawful for any person, including any clearing agency and any depository institution, that has received any money, securities, or property for deposit in a separate account or accounts as provided in subsection (b) to hold, dispose of, or use any such money, securities, or property as belonging to the depositing broker, dealer, or security-based swap dealer or any person other than the swaps customer of the broker, dealer, or security-based swap dealer.

(f) SEGREGATION REQUIREMENTS FOR UNCLEARED SECURITY-BASED SWAPS.—

(1) SEGREGATION OF ASSETS HELD AS COLLATERAL IN UNCLEARED SECURITY-BASED SWAP TRANSACTIONS.—

(A) NOTIFICATION.—A security-based swap dealer or major security-based swap participant shall be required to notify the counterparty of the security-based swap dealer or major security-based swap participant at the beginning of a security-based swap transaction that the counterparty has the right to require segregation of the funds of other property supplied to margin, guarantee, or secure the obligations of the counterparty.

(B) SEGREGATION AND MAINTENANCE OF FUNDS.—At the request of a counterparty to a security-based swap that provides funds or other property to a security-based swap dealer or major security-based swap participant to margin,

guarantee, or secure the obligations of the counterparty, the security-based swap dealer or major security-based swap participant shall—

(i) segregate the funds or other property for the benefit of the counterparty; and

(ii) in accordance with such rules and regulations as the Commission may promulgate, maintain the funds or other property in a segregated account separate from the assets and other interests of the security-based swap dealer or major security-based swap participant.

(2) APPLICABILITY.—The requirements described in paragraph (1) shall—

(A) apply only to a security-based swap between a counterparty and a security-based swap dealer or major security-based swap participant that is not submitted for clearing to a clearing agency; and

(B)(i) not apply to variation margin payments; or

(ii) not preclude any commercial arrangement regarding—

(I) the investment of segregated funds or other property that may only be invested in such investments as the Commission may permit by rule or regulation; and

(II) the related allocation of gains and losses resulting from any investment of the segregated funds or other property.

(3) USE OF INDEPENDENT THIRD-PARTY CUSTODIANS.—The segregated account described in paragraph (1) shall be—

(A) carried by an independent third-party custodian; and

(B) designated as a segregated account for and on behalf of the counterparty.

(4) REPORTING REQUIREMENT.—If the counterparty does not choose to require segregation of the funds or other property supplied to margin, guarantee, or secure the obligations of the counterparty, the security-based swap dealer or major security-based swap participant shall report to the counterparty of the security-based swap dealer or major security-based swap participant on a quarterly basis that the back office procedures of the security-based swap dealer or major security-based swap participant relating to margin and collateral requirements are in compliance with the agreement of the counterparties.

(g) BANKRUPTCY.—A security-based swap, as defined in section 3(a)(68) shall be considered to be a security as such term is used in section 101(53A)(B) and subchapter III of title 11, United States Code. An account that holds a security-based swap, other than a portfolio margining account referred to in section 15(c)(3)(C) shall be considered to be a securities account, as that term is defined in section 741 of title 11, United States Code. The definitions of the terms "purchase" and "sale" in section 3(a)(13) and (14) shall be applied to the terms "purchase" and "sale", as used in section 741 of title 11, United States Code. The term "customer", as defined in section 741 of title 11, United States Code, excludes any person, to

the extent that such person has a claim based on any open repurchase agreement, open reverse repurchase agreement, stock borrowed agreement, non-cleared option, or non-cleared security-based swap except to the extent of any margin delivered to or by the customer with respect to which there is a customer protection requirement under section 15(c)(3) or a segregation requirement.

SECURITIES AND EXCHANGE COMMISSION

SEC. 4. [78d] (a) There is hereby established a Securities and Exchange Commission (hereinafter referred to as the "Commission") to be composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate. Not more than three of such commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable. No commissioner shall engage in any other business, vocation, or employment than that of serving as commissioner, nor shall any commissioner participate, directly or indirectly, in any stock-market operations or transactions of a character subject to regulation by the Commission pursuant to this title. Each commissioner shall hold office for a term of five years and until his successor is appointed and has qualified, except that he shall not so continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office, and except (1) any commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and (2) the terms of office of the commissioners first taking office after the enactment of this title shall expire as designated by the President at the time of nomination, one at the end of one year, one at the end of two years, one at the end of three years, one at the end of four years, and one at the end of five years, after the date of the enactment of this title.[23]

(b) APPOINTMENT AND COMPENSATION OF STAFF AND LEASING AUTHORITY.—

(1) APPOINTMENT AND COMPENSATION.—The Commission shall appoint and compensate officers, attorneys, economists, examiners, and other employees in accordance with section 4802 of title 5, United States Code.

(2) REPORTING OF INFORMATION.—In establishing and adjusting schedules of compensation and benefits for officers, attorneys, economists, examiners, and other employees of the Commission under applicable provisions of law, the Commission shall inform the heads of the agencies referred to under section 1206 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 1833b) and Congress of such compensation and benefits and shall seek to maintain comparability with such agencies regarding compensation and benefits.

(3) LEASING AUTHORITY.—Nothwithstanding any other provision of law, the Commission is authorized to enter directly

[23] See also Reorganization Plan No. 10 of 1950 and Pub. L. 87–592, printed in the appendix to this compilation.

into leases for real property for office, meeting, storage, and such other space as is necessary to carry out its functions, and shall be exempt from any General Services Administration space management regulations or directives.

(c) Notwithstanding any other provision of law, in accordance with regulations which the Commission shall prescribe to prevent conflicts of interest, the Commission may accept payment and reimbursement, in cash or in kind, from non-Federal agencies, organizations, and individuals for travel, subsistence, and other necessary expenses incurred by Commission members and employees in attending meetings and conferences concerning the functions or activities of the Commission. Any payment or reimbursement accepted shall be credited to the appropriated funds of the Commission. The amount of travel, subsistence, and other necessary expenses for members and employees paid or reimbursed under this subsection may exceed per diem amounts established in official travel regulations, but the Commission may include in its regulations under this subsection a limitation on such amounts.

(d) Notwithstanding any other provision of law, former employers of participants in the Commission's professional fellows programs may pay such participants their actual expenses for relocation to Washington, District of Columbia, to facilitate their participation in such programs, and program participants may accept such payments.

(e) Notwithstanding any other provision of law, whenever any fee is required to be paid to the Commission pursuant to any provision of the securities laws or any other law, the Commission may provide by rule that such fee shall be paid in a manner other than in cash and the Commission may also specify the time that such fee shall be determined and paid relative to the filing of any statement or document with the Commission.

(f) REIMBURSEMENT OF EXPENSES FOR ASSISTING FOREIGN SECURITIES AUTHORITIES.—Notwithstanding any other provision of law, the Commission may accept payment and reimbursement, in cash or in kind, from a foreign securities authority, or made on behalf of such authority, for necessary expenses incurred by the Commission, its members, and employees in carrying out any investigation pursuant to section 21(a)(2) of this title or in providing any other assistance to a foreign securities authority. Any payment or reimbursement accepted shall be considered a reimbursement to the appropriated funds of the Commission.

(g) OFFICE OF THE INVESTOR ADVOCATE.—

(1) OFFICE ESTABLISHED.—There is established within the Commission the Office of the Investor Advocate (in this subsection referred to as the "Office").

(2) INVESTOR ADVOCATE.—

(A) IN GENERAL.—The head of the Office shall be the Investor Advocate, who shall—

(i) report directly to the Chairman; and

(ii) be appointed by the Chairman, in consultation with the Commission, from among individuals having experience in advocating for the interests of investors in securities and investor protection issues, from the perspective of investors.

(B) COMPENSATION.—The annual rate of pay for the Investor Advocate shall be equal to the highest rate of annual pay for other senior executives who report to the Chairman of the Commission.

(C) LIMITATION ON SERVICE.—An individual who serves as the Investor Advocate may not be employed by the Commission—

(i) during the 2-year period ending on the date of appointment as Investor Advocate; or

(ii) during the 5-year period beginning on the date on which the person ceases to serve as the Investor Advocate.

(3) STAFF OF OFFICE.—The Investor Advocate, after consultation with the Chairman of the Commission, may retain or employ independent counsel, research staff, and service staff, as the Investor Advocate deems necessary to carry out the functions, powers, and duties of the Office.

(4) FUNCTIONS OF THE INVESTOR ADVOCATE.—The Investor Advocate shall—

(A) assist retail investors in resolving significant problems such investors may have with the Commission or with self-regulatory organizations;

(B) identify areas in which investors would benefit from changes in the regulations of the Commission or the rules of self-regulatory organizations;

(C) identify problems that investors have with financial service providers and investment products;

(D) analyze the potential impact on investors of—

(i) proposed regulations of the Commission; and

(ii) proposed rules of self-regulatory organizations registered under this title; and

(E) to the extent practicable, propose to the Commission changes in the regulations or orders of the Commission and to Congress any legislative, administrative, or personnel changes that may be appropriate to mitigate problems identified under this paragraph and to promote the interests of investors.

(5) ACCESS TO DOCUMENTS.—The Commission shall ensure that the Investor Advocate has full access to the documents of the Commission and any self-regulatory organization, as necessary to carry out the functions of the Office.

(6) ANNUAL REPORTS.—

(A) REPORT ON OBJECTIVES.—

(i) IN GENERAL.—Not later than June 30 of each year after 2010, the Investor Advocate shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report on the objectives of the Investor Advocate for the following fiscal year.

(ii) CONTENTS.—Each report required under clause (i) shall contain full and substantive analysis and explanation.

(B) REPORT ON ACTIVITIES.—

(i) IN GENERAL.—Not later than December 31 of each year after 2010, the Investor Advocate shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report on the activities of the Investor Advocate during the immediately preceding fiscal year.

(ii) CONTENTS.—Each report required under clause (i) shall include—

(I) appropriate statistical information and full and substantive analysis;

(II) information on steps that the Investor Advocate has taken during the reporting period to improve investor services and the responsiveness of the Commission and self-regulatory organizations to investor concerns;

(III) a summary of the most serious problems encountered by investors during the reporting period;

(IV) an inventory of the items described in subclause (III) that includes—

(aa) identification of any action taken by the Commission or the self-regulatory organization and the result of such action;

(bb) the length of time that each item has remained on such inventory; and

(cc) for items on which no action has been taken, the reasons for inaction, and an identification of any official who is responsible for such action;

(V) recommendations for such administrative and legislative actions as may be appropriate to resolve problems encountered by investors; and

(VI) any other information, as determined appropriate by the Investor Advocate.

(iii) INDEPENDENCE.—Each report required under this paragraph shall be provided directly to the Committees listed in clause (i) without any prior review or comment from the Commission, any commissioner, any other officer or employee of the Commission, or the Office of Management and Budget.

(iv) CONFIDENTIALITY.—No report required under clause (i) may contain confidential information.

(7) REGULATIONS.—The Commission shall, by regulation, establish procedures requiring a formal response to all recommendations submitted to the Commission by the Investor Advocate, not later than 3 months after the date of such submission.

(8) OMBUDSMAN.—

(A) APPOINTMENT.—Not later than 180 days after the date on which the first Investor Advocate is appointed under paragraph (2)(A)(i), the Investor Advocate shall appoint an Ombudsman, who shall report directly to the Investor Advocate.

(B) DUTIES.—The Ombudsman appointed under subparagraph (A) shall—

(i) act as a liaison between the Commission and any retail investor in resolving problems that retail investors may have with the Commission or with self-regulatory organizations;

(ii) review and make recommendations regarding policies and procedures to encourage persons to present questions to the Investor Advocate regarding compliance with the securities laws; and

(iii) establish safeguards to maintain the confidentiality of communications between the persons described in clause (ii) and the Ombudsman.

(C) LIMITATION.—In carrying out the duties of the Ombudsman under subparagraph (B), the Ombudsman shall utilize personnel of the Commission to the extent practicable. Nothing in this paragraph shall be construed as replacing, altering, or diminishing the activities of any ombudsman or similar office of any other agency.

(D) REPORT.—The Ombudsman shall submit a semi-annual report to the Investor Advocate that describes the activities and evaluates the effectiveness of the Ombudsman during the preceding year. The Investor Advocate shall include the reports required under this section in the reports required to be submitted by the Inspector Advocate under paragraph (6).

(h) EXAMINERS.—

(1) DIVISION OF TRADING AND MARKETS.—The Division of Trading and Markets of the Commission, or any successor organizational unit, shall have a staff of examiners who shall—

(A) perform compliance inspections and examinations of entities under the jurisdiction of that Division; and

(B) report to the Director of that Division.

(2) DIVISION OF INVESTMENT MANAGEMENT.—The Division of Investment Management of the Commission, or any successor organizational unit, shall have a staff of examiners who shall—

(A) perform compliance inspections and examinations of entities under the jurisdiction of that Division; and

(B) report to the Director of that Division.

(i) SECURITIES AND EXCHANGE COMMISSION RESERVE FUND.—

(1) RESERVE FUND ESTABLISHED.—There is established in the Treasury of the United States a separate fund, to be known as the "Securities and Exchange Commission Reserve Fund" (referred to in this subsection as the "Reserve Fund").

(2) RESERVE FUND AMOUNTS.—

(A) IN GENERAL.—Except as provided in subparagraph (B), any registration fees collected by the Commission under section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)) or section 24(f) of the Investment Company Act of 1940 (15 U.S.C. 80a-24(f)) shall be deposited into the Reserve Fund.

(B) LIMITATIONS.—For any 1 fiscal year—

(i) the amount deposited in the Fund may not exceed $50,000,000; and

(ii) the balance in the Fund may not exceed $100,000,000.

(C) EXCESS FEES.—Any amounts in excess of the limitations described in subparagraph (B) that the Commission collects from registration fees under section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)) or section 24(f) of the Investment Company Act of 1940 (15 U.S.C. 80a-24(f)) shall be deposited in the General Fund of the Treasury of the United States and shall not be available for obligation by the Commission.

(3) USE OF AMOUNTS IN RESERVE FUND.—The Commission may obligate amounts in the Reserve Fund, not to exceed a total of $100,000,000 in any 1 fiscal year, as the Commission determines is necessary to carry out the functions of the Commission. Any amounts in the reserve fund shall remain available until expended. Not later than 10 days after the date on which the Commission obligates amounts under this paragraph, the Commission shall notify Congress of the date, amount, and purpose of the obligation.

(4) RULE OF CONSTRUCTION.—Amounts collected and deposited in the Reserve Fund shall not be construed to be Government funds or appropriated monies and shall not be subject to apportionment for the purpose of chapter 15 of title 31, United States Code, or under any other authority.

(j) OFFICE OF THE ADVOCATE FOR SMALL BUSINESS CAPITAL FORMATION.—

(1) OFFICE ESTABLISHED.—There is established within the Commission the Office of the Advocate for Small Business Capital Formation (hereafter in this subsection referred to as the "Office").

(2) ADVOCATE FOR SMALL BUSINESS CAPITAL FORMATION.—

(A) IN GENERAL.—The head of the Office shall be the Advocate for Small Business Capital Formation, who shall—

(i) report directly to the Commission; and

(ii) be appointed by the Commission, from among individuals having experience in advocating for the interests of small businesses and encouraging small business capital formation.

(B) COMPENSATION.—The annual rate of pay for the Advocate for Small Business Capital Formation shall be equal to the highest rate of annual pay for other senior executives who report directly to the Commission.

(C) NO CURRENT EMPLOYEE OF THE COMMISSION.—An individual may not be appointed as the Advocate for Small Business Capital Formation if the individual is currently employed by the Commission.

(3) STAFF OF OFFICE.—The Advocate for Small Business Capital Formation, after consultation with the Commission, may retain or employ independent counsel, research staff, and service staff, as the Advocate for Small Business Capital For-

mation determines to be necessary to carry out the functions of the Office.

(4) FUNCTIONS OF THE ADVOCATE FOR SMALL BUSINESS CAPITAL FORMATION.—The Advocate for Small Business Capital Formation shall—

(A) assist small businesses and small business investors in resolving significant problems such businesses and investors may have with the Commission or with self-regulatory organizations;

(B) identify areas in which small businesses and small business investors would benefit from changes in the regulations of the Commission or the rules of self-regulatory organizations;

(C) identify problems that small businesses have with securing access to capital, including any unique challenges to minority-owned small businesses, women-owned small businesses, and small businesses affected by hurricanes or other natural disasters;

(D) analyze the potential impact on small businesses and small business investors of—

(i) proposed regulations of the Commission that are likely to have a significant economic impact on small businesses and small business capital formation; and

(ii) proposed rules that are likely to have a significant economic impact on small businesses and small business capital formation of self-regulatory organizations registered under this title;

(E) conduct outreach to small businesses and small business investors, including through regional roundtables, in order to solicit views on relevant capital formation issues;

(F) to the extent practicable, propose to the Commission changes in the regulations or orders of the Commission and to Congress any legislative, administrative, or personnel changes that may be appropriate to mitigate problems identified under this paragraph and to promote the interests of small businesses and small business investors;

(G) consult with the Investor Advocate on proposed recommendations made under subparagraph (F); and

(H) advise the Investor Advocate on issues related to small businesses and small business investors.

(5) ACCESS TO DOCUMENTS.—The Commission shall ensure that the Advocate for Small Business Capital Formation has full access to the documents and information of the Commission and any self-regulatory organization, as necessary to carry out the functions of the Office.

(6) ANNUAL REPORT ON ACTIVITIES.—

(A) IN GENERAL.—Not later than December 31 of each year after 2015, the Advocate for Small Business Capital Formation shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representa-

tives a report on the activities of the Advocate for Small Business Capital Formation during the immediately preceding fiscal year.

(B) CONTENTS.—Each report required under subparagraph (A) shall include—

(i) appropriate statistical information and full and substantive analysis;

(ii) information on steps that the Advocate for Small Business Capital Formation has taken during the reporting period to improve small business services and the responsiveness of the Commission and self-regulatory organizations to small business and small business investor concerns;

(iii) a summary of the most serious issues encountered by small businesses and small business investors, including any unique issues encountered by minority-owned small businesses, women-owned small businesses, and small businesses affected by hurricanes or other natural disasters and their investors, during the reporting period;

(iv) an inventory of the items summarized under clause (iii) (including items summarized under such clause for any prior reporting period on which no action has been taken or that have not been resolved to the satisfaction of the Advocate for Small Business Capital Formation as of the beginning of the reporting period covered by the report) that includes—

(I) identification of any action taken by the Commission or the self-regulatory organization and the result of such action;

(II) the length of time that each item has remained on such inventory; and

(III) for items on which no action has been taken, the reasons for inaction, and an identification of any official who is responsible for such action;

(v) recommendations for such changes to the regulations, guidance and orders of the Commission and such legislative actions as may be appropriate to resolve problems with the Commission and self-regulatory organizations encountered by small businesses and small business investors and to encourage small business capital formation; and

(vi) any other information, as determined appropriate by the Advocate for Small Business Capital Formation.

(C) CONFIDENTIALITY.—No report required by subparagraph (A) may contain confidential information.

(D) INDEPENDENCE.—Each report required under subparagraph (A) shall be provided directly to the committees of Congress listed in such subparagraph without any prior review or comment from the Commission, any commissioner, any other officer or employee of the Commission, or the Office of Management and Budget.

(7) REGULATIONS.—The Commission shall establish procedures requiring a formal response to all recommendations submitted to the Commission by the Advocate for Small Business Capital Formation, not later than 3 months after the date of such submission.

(8) GOVERNMENT-BUSINESS FORUM ON SMALL BUSINESS CAPITAL FORMATION.—The Advocate for Small Business Capital Formation shall be responsible for planning, organizing, and executing the annual Government-Business Forum on Small Business Capital Formation described in section 503 of the Small Business Investment Incentive Act of 1980 (15 U.S.C. 80c–1).

(9) RULE OF CONSTRUCTION.—Nothing in this subsection may be construed as replacing or reducing the responsibilities of the Investor Advocate with respect to small business investors.

(k) OPEN DATA PUBLICATION.—All public data assets published by the Commission under the securities laws and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111–203; 124 Stat. 1376) shall be—

(1) made available as an open Government data asset (as defined in section 3502 of title 44, United States Code);

(2) freely available for download;

(3) rendered in a human-readable format; and

(4) accessible via application programming interface where appropriate.

DELEGATION OF FUNCTIONS BY COMMISSION

SEC. 4A. [78d–1] (a) In addition to its existing authority, the Securities and Exchange Commission shall have the authority to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter. Nothing in this section shall be deemed to supersede the provisions of section 556(b) of title 5, or to authorize the delegation of the function of rulemaking as defined in subchapter II of chapter 5 title 5, United States Code, with reference to general rules as distinguished from rules of particular applicability, or of the making of any rule pursuant to section 19(c) of this title.

(b) With respect to the delegation of any of its functions, as provided in subsection (a) of this section, the Commission shall retain a discretionary right to review the action of any such division of the Commission, individual Commissioner, administrative law judge, employee, or employee board, upon its own initiative or upon petition of a party to or intervenor in such action, within such time and in such manner as the Commission by rule shall prescribe. The vote of one member of the Commission shall be sufficient to bring any such action before the Commission for review. A person or party shall be entitled to review by the Commission if he or it is adversely affected by action at a delegated level which (1) denies any request for action pursuant to section 8(a) or section 8(c) of the

Securities Act of 1933 or the first sentence of section 12(d) of this title; (2) suspends trading in a security pursuant to section 12(k) of this title; or (3) is pursuant to any provision of this title in a case of adjudication, as defined in section 551 of title 5, United States Code, not required by this title to be determined on the record after notice and opportunity for hearing (except to the extent there is involved a matter described in section 554(a) (1) through (6) of such title 5).

(c) If the right to exercise such review is declined, or if no such review is sought within the time stated in the rules promulgated by the Commission, then the action of any such division of the Commission, individual Commissioner, administrative law judge, employee, or employee board, shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission.

TRANSFER OF FUNCTIONS WITH RESPECT TO ASSIGNMENT OF PERSONNEL TO CHAIRMAN

SEC. 4B. [78d–2] In addition to the functions transferred by the provisions of Reorganization Plan Numbered 10 of 1950 (64 Stat. 1265), there are hereby transferred from the Commission to the Chairman of the Commission the functions of the Commission with respect to the assignment of Commission personnel, including Commissioners, to perform such functions as may have been delegated by the Commission to the Commission personnel, including Commissioners, pursuant to section 4A of this title.

SEC. 4C. [78d–3] APPEARANCE AND PRACTICE BEFORE THE COMMISSION.

(a) AUTHORITY TO CENSURE.—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 by the Commission, after notice and opportunity for hearing in the matter—

(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 issued thereunder.

(b) DEFINITION.—With respect to any registered public accounting firm or associated person, for purposes of this section, the term "improper professional conduct" means—

(1) intentional or knowing conduct, including reckless conduct, that results in a violation of applicable professional standards; and

(2) negligent conduct in the form of—

(A) a single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which the registered public accounting firm or associated person knows, or should know, that heightened scrutiny is warranted; or

(B) repeated instances of unreasonable conduct, each resulting in a violation of applicable professional stand-

ards, that indicate a lack of competence to practice before the Commission.

SEC. 4D. [78d–4] ADDITIONAL DUTIES OF INSPECTOR GENERAL.

(a) SUGGESTION SUBMISSIONS BY COMMISSION EMPLOYEES.—

(1) HOTLINE ESTABLISHED.—The Inspector General of the Commission shall establish and maintain a telephone hotline or other electronic means for the receipt of—

(A) suggestions by employees of the Commission for improvements in the work efficiency, effectiveness, and productivity, and the use of the resources, of the Commission; and

(B) allegations by employees of the Commission of waste, abuse, misconduct, or mismanagement within the Commission.

(2) CONFIDENTIALITY.—The Inspector General shall maintain as confidential—

(A) the identity of any individual who provides information by the means established under paragraph (1), unless the individual requests otherwise, in writing; and

(B) at the request of any such individual, any specific information provided by the individual.

(b) CONSIDERATION OF REPORTS.—The Inspector General shall consider any suggestions or allegations received by the means established under subsection (a)(1), and shall recommend appropriate action in relation to such suggestions or allegations.

(c) RECOGNITION.—The Inspector General may recognize any employee who makes a suggestion under subsection (a)(1) (or by other means) that would or does—

(1) increase the work efficiency, effectiveness, or productivity of the Commission; or

(2) reduce waste, abuse, misconduct, or mismanagement within the Commission.

(d) REPORT.—The Inspector General of the Commission shall submit to Congress an annual report containing a description of—

(1) the nature, number, and potential benefits of any suggestions received under subsection (a);

(2) the nature, number, and seriousness of any allegations received under subsection (a);

(3) any recommendations made or actions taken by the Inspector General in response to substantiated allegations received under subsection (a); and

(4) any action the Commission has taken in response to suggestions or allegations received under subsection (a).

(e) FUNDING.—The activities of the Inspector General under this subsection shall be funded by the Securities and Exchange Commission Investor Protection Fund established under section 21F.

SEC. 4E. [78d–5] DEADLINE FOR COMPLETING ENFORCEMENT INVESTIGATIONS AND COMPLIANCE EXAMINATIONS AND INSPECTIONS.

(a) ENFORCEMENT INVESTIGATIONS.—

(1) IN GENERAL.—Not later than 180 days after the date on which Commission staff provide a written Wells notification to

any person, the Commission staff shall either file an action against such person or provide notice to the Director of the Division of Enforcement of its intent to not file an action.

(2) EXCEPTIONS FOR CERTAIN COMPLEX ACTIONS.—Notwithstanding paragraph (1), if the Director of the Division of Enforcement of the Commission or the Director's designee determines that a particular enforcement investigation is sufficiently complex such that a determination regarding the filing of an action against a person cannot be completed within the deadline specified in paragraph (1), the Director of the Division of Enforcement of the Commission or the Director's designee may, after providing notice to the Chairman of the Commission, extend such deadline as needed for one additional 180-day period. If after the additional 180-day period the Director of the Division of Enforcement of the Commission or the Director's designee determines that a particular enforcement investigation is sufficiently complex such that a determination regarding the filing of an action against a person cannot be completed within the additional 180-day period, the Director of the Division of Enforcement of the Commission or the Director's designee may, after providing notice to and receiving approval of the Commission, extend such deadline as needed for one or more additional successive 180-day periods.

(b) COMPLIANCE EXAMINATIONS AND INSPECTIONS.—

(1) IN GENERAL.—Not later than 180 days after the date on which Commission staff completes the on-site portion of its compliance examination or inspection or receives all records requested from the entity being examined or inspected, whichever is later, Commission staff shall provide the entity being examined or inspected with written notification indicating either that the examination or inspection has concluded, has concluded without findings, or that the staff requests the entity undertake corrective action.

(2) EXCEPTION FOR CERTAIN COMPLEX ACTIONS.—Notwithstanding paragraph (1), if the head of any division or office within the Commission responsible for compliance examinations and inspections or his designee determines that a particular compliance examination or inspection is sufficiently complex such that a determination regarding concluding the examination or inspection, or regarding the staff requests the entity undertake corrective action, cannot be completed within the deadline specified in paragraph (1), the head of any division or office within the Commission responsible for compliance examinations and inspections or his designee may, after providing notice to the Chairman of the Commission, extend such deadline as needed for one additional 180-day period.

TRANSACTIONS ON UNREGISTERED EXCHANGES

SEC. 5. [78e] It shall be unlawful for any broker, dealer, or exchange, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce for the purpose of using any facility of an exchange within or subject to the jurisdiction of the United States to effect any transaction in a security, or

to report any such transaction, unless such exchange (1) is registered as a national securities exchange under section 6 of this title, or (2) is exempted from such registration upon application by the exchange because, in the opinion of the Commission, by reason of the limited volume of transactions effected on such exchange, it is not practicable and not necessary or appropriate in the public interest or for the protection of investors to require such registration.

NATIONAL SECURITIES EXCHANGES

SEC. 6. [78f] (a) An exchange may be registered as a national securities exchange under the terms and conditions hereinafter provided in this section and in accordance with the provisions of section 19(a) of this title, by filing with the Commission an application for registration in such form as the Commission, by rule, may prescribe containing the rules of the exchange and such other information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) An exchange shall not be registered as a national securities exchange unless the Commission determines that—

(1) Such exchange is so organized and has the capacity to be able to carry out the purposes of this title and to comply, and (subject to any rule or order of the Commission pursuant to section 17(d) or 19(g)(2) of this title) to enforce compliance by its members and persons associated with its members, with the provisions of this title, the rules and regulations thereunder, and the rules of the exchange.

(2) Subject to the provisions of subsection (c) of this section, the rules of the exchange provide that any registered broker or dealer or natural person associated with a registered broker or dealer may become a member of such exchange and any person may become associated with a member thereof.

(3) The rules of the exchange assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer.

(4) The rules of the exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

(5) The rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the exchange.

(6) The rules of the exchange provide that (subject to any rule or order of the Commission pursuant to section 17(d) or 19(g)(2) of this title) its members and persons associated with its members shall be appropriately disciplined for violation of the provisions of this title, the rules or regulations thereunder, or the rules of the exchange, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.

(7) The rules of the exchange are in accordance with the provisions of subsection (d) of this section, and in general, provide a fair procedure for the disciplining of members and persons associated with members, the denial of membership to any person seeking membership therein, the barring of any person from becoming associated with a member thereof, and the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange or a member thereof.

(8) The rules of the exchange do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title.

(9)(A) The rules of the exchange prohibit the listing of any security issued in a limited partnership rollup transaction (as such term is defined in paragraphs (4) and (5) of section 14(h)), unless such transaction was conducted in accordance with procedures designed to protect the rights of limited partners, including—

(i) the right of dissenting limited partners to one of the following:

(I) an appraisal and compensation;

(II) retention of a security under substantially the same terms and conditions as the original issue;

(III) approval of the limited partnership rollup transaction by not less than 75 percent of the outstanding securities of each of the participating limited partnerships;

(IV) the use of a committee of limited partners that is independent, as determined in accordance with rules prescribed by the exchange, of the general partner or sponsor, that has been approved by a majority of the outstanding units of each of the participating limited partnerships, and that has such authority as is necessary to protect the interest of limited partners, including the authority to hire independent advisors, to negotiate with the general partner or sponsor on behalf of the limited partners, and to make a recommendation to the limited partners with respect to the proposed transaction; or

(V) other comparable rights that are prescribed by rule by the exchange and that are designed to protect dissenting limited partners;

(ii) the right not to have their voting power unfairly reduced or abridged;

(iii) the right not to bear an unfair portion of the costs of a proposed limited partnership rollup transaction that is rejected; and

(iv) restrictions on the conversion of contingent interests or fees into non-contingent interests or fees and restrictions on the receipt of a non-contingent equity interest in exchange for fees for services which have not yet been provided.

(B) As used in this paragraph, the term "dissenting limited partner" means a person who, on the date on which soliciting material is mailed to investors, is a holder of a beneficial interest in a limited partnership that is the subject of a limited partnership rollup transaction, and who casts a vote against the transaction and complies with procedures established by the exchange, except that for purposes of an exchange or tender offer, such person shall file an objection in writing under the rules of the exchange during the period during which the offer is outstanding.

(10)(A) The rules of the exchange prohibit any member that is not the beneficial owner of a security registered under section 12 from granting a proxy to vote the security in connection with a shareholder vote described in subparagraph (B), unless the beneficial owner of the security has instructed the member to vote the proxy in accordance with the voting instructions of the beneficial owner.

(B) A shareholder vote described in this subparagraph is a shareholder vote with respect to the election of a member of the board of directors of an issuer, executive compensation, or any other significant matter, as determined by the Commission, by rule, and does not include a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80b–1 et seq.).

(C) Nothing in this paragraph shall be construed to prohibit a national securities exchange from prohibiting a member that is not the beneficial owner of a security registered under section 12 from granting a proxy to vote the security in connection with a shareholder vote not described in subparagraph (A).

(c)(1) A national securities exchange shall deny membership to (A) any person, other than a natural person, which is not a registered broker or dealer or (B) any natural person who is not, or is not associated with, a registered broker or dealer.

(2) A national securities exchange may, and in cases in which the Commission, by order, directs as necessary or appropriate in the public interest or for the protection of investors shall, deny membership to any registered broker or dealer or natural person associated with a registered broker or dealer, and bar from becoming associated with a member any person, who is subject to a statutory disqualification. A national securities exchange shall file notice with the Commission not less than thirty days prior to admitting any person to membership or permitting any person to become associated with a member, if the exchange knew, or in the exercise of reasonable care should have known, that such person was sub-

ject to a statutory disqualification. The notice shall be in such form and contain such information as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3)(A) A national securities exchange may deny membership to, or condition the membership of, a registered broker or dealer if (i) such broker or dealer does not meet such standards of financial responsibility or operational capability or such broker or dealer or any natural person associated with such broker or dealer does not meet such standards of training, experience, and competence as are prescribed by the rules of the exchange or (ii) such broker or dealer or person associated with such broker or dealer has engaged and there is a reasonable likelihood he may again engage in acts or practices inconsistent with just and equitable principles of trade. A national securities exchange may examine and verify the qualifications of an applicant to become a member and the natural persons associated with such an applicant in accordance with procedures established by the rules of the exchange.

(B) A national securities exchange may bar a natural person from becoming a member or associated with a member, or condition the membership of a natural person or association of a natural person with a member, if such natural person (i) does not meet such standards of training, experience, and competence as are prescribed by the rules of the exchange or (ii) has engaged and there is a reasonable likelihood he may again engage in acts or practices inconsistent with just and equitable principles of trade. A national securities exchange may examine and verify the qualifications of an applicant to become a person associated with a member in accordance with procedures established by the rules of the exchange and require any person associated with a member, or any class of such persons, to be registered with the exchange in accordance with procedures so established.

(C) A national securities exchange may bar any person from becoming associated with a member if such person does not agree (i) to supply the exchange with such information with respect to its relationship and dealings with the member as may be specified in the rules of the exchange and (ii) to permit the examination of its books and records to verify the accuracy of any information so supplied.

(4) A national securities exchange may limit (A) the number of members of the exchange and (B) the number of members and designated representatives of members permitted to effect transactions on the floor of the exchange without the services of another person acting as broker: *Provided*, *however*, That no national securities exchange shall have the authority to decrease the number of memberships in such exchange, or the number of members and designated representatives of members permitted to effect transactions on the floor of such exchange without the services of another person acting as broker, below such number in effect on May 1, 1975, or the date such exchange was registered with the Commission, whichever is later: *And provided further*, That the Commission, in accordance with the provisions of section 19(c) of this title, may amend the rules of any national securities exchange to increase (but not to decrease) or to remove any limitation on the number of memberships

in such exchange or the number of members or designated representatives of members permitted to effect transactions on the floor of the exchange without the services of another person acting as broker, if the Commission finds that such limitation imposes a burden on competition not necessary or appropriate in furtherance of the purposes of this title.

(d)(1) In any proceeding by a national securities exchange to determine whether a member or person associated with a member should be disciplined (other than a summary proceeding pursuant to paragraph (3) of this subsection), the exchange shall bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record. A determination by the exchange to impose a disciplinary sanction shall be supported by a statement setting forth—

(A) any act or practice in which such member or person associated with a member has been found to have engaged, or which such member or person has been found to have omitted;

(B) the specific provision of this title, the rules or regulations thereunder, or the rules of the exchange which any such act or practice, or omission to act, is deemed to violate; and

(C) the sanction imposed and the reasons therefor.

(2) In any proceeding by a national securities exchange to determine whether a person shall be denied membership, barred from becoming associated with a member, or prohibited or limited with respect to access to services offered by the exchange or a member thereof (other than a summary proceeding pursuant to paragraph (3) of this subsection), the exchange shall notify such person of, and give him an opportunity to be heard upon, the specific grounds for denial, bar, or prohibition or limitation under consideration and keep a record. A determination by the exchange to deny membership, bar a person from becoming associated with a member, or prohibit or limit a person with respect to access to services offered by the exchange or a member thereof shall be supported by a statement setting forth the specific grounds on which the denial, bar, or prohibition or limitation is based.

(3) A national securities exchange may summarily (A) suspend a member or person associated with a member who has been and is expelled or suspended from any self-regulatory organization or barred or suspended from being associated with a member of any self-regulatory organization, (B) suspend a member who is in such financial or operating difficulty that the exchange determines and so notifies the Commission that the member cannot be permitted to continue to do business as a member with safety to investors, creditors, other members, or the exchange, or (C) limit or prohibit any person with respect to access to services offered by the exchange if subparagraph (A) or (B) of this paragraph is applicable to such person or, in the case of a person who is not a member, if the exchange determines that such person does not meet the qualification requirements or other prerequisites for such access and such person cannot be permitted to continue to have such access with safety to investors, creditors, members, or the exchange. Any person aggrieved by any such summary action shall be promptly afforded an opportunity for a hearing by the exchange in accordance with the provisions of paragraph (1) or (2) of this sub-

section. The Commission, by order, may stay any such summary action on its own motion or upon application by any person aggrieved thereby, if the Commission determines summarily or after notice and opportunity for hearing (which hearing may consist solely of the submission of affidavits or presentation of oral arguments) that such stay is consistent with the public interest and the protection of investors.

(e)(1) On and after the date of enactment of the Securities Acts Amendments of 1975, no national securities exchange may impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members: *Provided*, *however*, That until May 1, 1976, the preceding provisions of this paragraph shall not prohibit any such exchange from imposing or fixing any schedule of commissions, allowances, discounts, or other fees to be charged by its members for acting as broker on the floor of the exchange or as odd-lot dealer: *And provided further*, That the Commission, in accordance with the provisions of section 19(b) of this title as modified by the provisions of paragraph (3) of this subsection, may—

(A) permit a national securities exchange, by rule, to impose a reasonable schedule or fix reasonable rates of commissions, allowances, discounts, or other fees to be charged by its members for effecting transactions on such exchange prior to November 1, 1976, if the Commission finds that such schedule or fixed rates of commissions, allowances, discounts, or other fees are in the public interest; and

(B) permit a national securities exchange, by rule, to impose a schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members for effecting transactions on such exchange after November 1, 1976, if the Commission finds that such schedule or fixed rates of commissions, allowances, discounts, or other fees (i) are reasonable in relation to the costs of providing the service for which such fees are charged (and the Commission publishes the standards employed in adjudging reasonableness) and (ii) do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title, taking into consideration the competitive effects of permitting such schedule or fixed rates weighed against the competitive effects of other lawful actions which the Commission is authorized to take under this title.

(2) Notwithstanding the provisions of section 19(c) of this title, the Commission, by rule, may abrogate any exchange rule which imposes a schedule or fixes rates of commissions, allowances, discounts, or other fees, if the Commission determines that such schedule or fixed rates are no longer reasonable, in the public interest, or necessary to accomplish the purposes of this title.

(3)(A) Before approving or disapproving any proposed rule change submitted by a national securities exchange which would impose a schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members for effecting transactions on such exchange, the Commission shall afford interested persons (i) an opportunity for oral presentation of data, views, and arguments and (ii) with respect to any such rule con-

cerning transactions effected after November 1, 1976, if the Commission determines there are disputed issues of material fact, to present such rebuttal submissions and to conduct (or have conducted under subparagraph (B) of this paragraph) such cross-examination as the Commission determines to be appropriate and required for full disclosure and proper resolution of such disputed issues of material fact.

(B) The Commission shall prescribe rules and make rulings concerning any proceeding in accordance with subparagraph (A) of this paragraph designed to avoid unnecessary costs or delay. Such rules or rulings may (i) impose reasonable time limits on each interested person's oral presentations, and (ii) require any cross-examination to which a person may be entitled under subparagraph (A) of this paragraph to be conducted by the Commission on behalf of that person in such manner as the Commission determines to be appropriate and required for full disclosure and proper resolution of disputed issues of material fact.

(C)(i) If any class of persons, the members of which are entitled to conduct (or have conducted) cross-examination under subparagraphs (A) and (B) of this paragraph and which have, in the view of the Commission, the same or similar interests in the proceeding, cannot agree upon a single representative of such interests for purposes of cross-examination, the Commission may make rules and rulings specifying the manner in which such interests shall be represented and such cross-examination conducted.

(ii) No member of any class of persons with respect to which the Commission has specified the manner in which its interests shall be represented pursuant to clause (i) of this subparagraph shall be denied, pursuant to such clause (i), the opportunity to conduct (or have conducted) cross-examination as to issues affecting his particular interests if he satisfies the Commission that he has made a reasonable and good faith effort to reach agreement upon group representation and there are substantial and relevant issues which would not be presented adequately by group representation.

(D) A transcript shall be kept of any oral presentation and cross-examination.

(E) In addition to the bases specified in subsection 25(a), a reviewing Court may set aside an order of the Commission under section 19(b) approving an exchange rule imposing a schedule or fixing rates of commissions, allowances, discounts, or other fees, if the Court finds—

(1)[24]a Commission determination under subparagraph (A) of this paragraph that an interested person is not entitled to conduct cross-examination or make rebuttal submissions, or

(2)[24]a Commission rule or ruling under subparagraph (B) of this paragraph limiting the petitioner's cross-examination or rebuttal submissions,

has precluded full disclosure and proper resolution of disputed issues of material fact which were necessary for fair determination by the Commission.

(f) The Commission, by rule or order, as it deems necessary or appropriate in the public interest and for the protection of inves-

[24] So in law. Probably should be clauses (i) and (ii).

tors, to maintain fair and orderly markets, or to assure equal regulation, may require—

(1) any person not a member or a designated representative of a member of a national securities exchange effecting transactions on such exchange without the services of another person acting as a broker, or

(2) any broker or dealer not a member of a national securities exchange effecting transactions on such exchange on a regular basis,

to comply with such rules of such exchange as the Commission may specify.

(g) NOTICE REGISTRATION OF SECURITY FUTURES PRODUCT EXCHANGES.—

(1) REGISTRATION REQUIRED.—An exchange that lists or trades security futures products may register as a national securities exchange solely for the purposes of trading security futures products if—

(A) the exchange is a board of trade, as that term is defined by the Commodity Exchange Act (7 U.S.C. 1a(2)), that has been designated a contract market by the Commodity Futures Trading Commission and such designation is not suspended by order of the Commodity Futures Trading Commission; and

(B) such exchange does not serve as a market place for transactions in securities other than—

(i) security futures products; or

(ii) futures on exempted securities or groups or indexes of securities or options thereon that have been authorized under section 2(a)(1)(C) of the Commodity Exchange Act.

(2) REGISTRATION BY NOTICE FILING.—

(A) FORM AND CONTENT.—An exchange required to register only because such exchange lists or trades security futures products may register for purposes of this section by filing with the Commission a written notice in such form as the Commission, by rule, may prescribe containing the rules of the exchange and such other information and documents concerning such exchange, comparable to the information and documents required for national securities exchanges under section 6(a), as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. If such exchange has filed documents with the Commodity Futures Trading Commission, to the extent that such documents contain information satisfying the Commission's informational requirements, copies of such documents may be filed with the Commission in lieu of the required written notice.

(B) IMMEDIATE EFFECTIVENESS.—Such registration shall be effective contemporaneously with the submission of notice, in written or electronic form, to the Commission, except that such registration shall not be effective if such registration would be subject to suspension or revocation.

(C) TERMINATION.—Such registration shall be terminated immediately if any of the conditions for registration set forth in this subsection are no longer satisfied.

(3) PUBLIC AVAILABILITY.—The Commission shall promptly publish in the Federal Register an acknowledgment of receipt of all notices the Commission receives under this subsection and shall make all such notices available to the public.

(4) EXEMPTION OF EXCHANGES FROM SPECIFIED PROVISIONS.—

(A) TRANSACTION EXEMPTIONS.—An exchange that is registered under paragraph (1) of this subsection shall be exempt from, and shall not be required to enforce compliance by its members with, and its members shall not, solely with respect to those transactions effected on such exchange in security futures products, be required to comply with, the following provisions of this title and the rules thereunder:

(i) Subsections (b)(2), (b)(3), (b)(4), (b)(7), (b)(9), (c), (d), and (e) of this section.

(ii) Section 8.

(iii) Section 11.

(iv) Subsections (d), (f), and (k) of section 17.

(v) Subsections (a), (f), and (h) of section 19.

(B) RULE CHANGE EXEMPTIONS.—An exchange that registered under paragraph (1) of this subsection shall also be exempt from submitting proposed rule changes pursuant to section 19(b) of this title, except that—

(i) such exchange shall file proposed rule changes related to higher margin levels, fraud or manipulation, recordkeeping, reporting, listing standards, or decimal pricing for security futures products, sales practices for security futures products for persons who effect transactions in security futures products, or rules effectuating such exchange's obligation to enforce the securities laws pursuant to section 19(b)(7);

(ii) such exchange shall file pursuant to sections 19(b)(1) and 19(b)(2) proposed rule changes related to margin, except for changes resulting in higher margin levels; and

(iii) such exchange shall file pursuant to section 19(b)(1) proposed rule changes that have been abrogated by the Commission pursuant to section 19(b)(7)(C).

(5) TRADING IN SECURITY FUTURES PRODUCTS.—

(A) IN GENERAL.—Subject to subparagraph (B), it shall be unlawful for any person to execute or trade a security futures product until the later of—

(i) 1 year after the date of the enactment of the Commodity Futures Modernization Act of 2000; or

(ii) such date that a futures association registered under section 17 of the Commodity Exchange Act has met the requirements set forth in section 15A(k)(2) of this title.

(B) PRINCIPAL-TO-PRINCIPAL TRANSACTIONS.—Notwithstanding subparagraph (A), a person may execute or trade a security futures product transaction if—

(i) the transaction is entered into—

(I) on a principal-to-principal basis between parties trading for their own accounts or as described in section 1a(18)(B)(ii) of the Commodity Exchange Act; and

(II) only between eligible contract participants (as defined in subparagraphs (A), (B)(ii), and (C) of such section 1a(18)) at the time at which the persons enter into the agreement, contract, or transaction; and

(ii) the transaction is entered into on or after the later of—

(I) 8 months after the date of the enactment of the Commodity Futures Modernization Act of 2000; or

(II) such date that a futures association registered under section 17 of the Commodity Exchange Act has met the requirements set forth in section 15A(k)(2) of this title.

(h) TRADING IN SECURITY FUTURES PRODUCTS.—

(1) TRADING ON EXCHANGE OR ASSOCIATION REQUIRED.—It shall be unlawful for any person to effect transactions in security futures products that are not listed on a national securities exchange or a national securities association registered pursuant to section 15A(a).

(2) LISTING STANDARDS REQUIRED.—Except as otherwise provided in paragraph (7), a national securities exchange or a national securities association registered pursuant to section 15A(a) may trade only security futures products that (A) conform with listing standards that such exchange or association files with the Commission under section 19(b) and (B) meet the criteria specified in section 2(a)(1)(D)(i) of the Commodity Exchange Act.

(3) REQUIREMENTS FOR LISTING STANDARDS AND CONDITIONS FOR TRADING.—Such listing standards shall—

(A) except as otherwise provided in a rule, regulation, or order issued pursuant to paragraph (4), require that any security underlying the security future, including each component security of a narrow-based security index, be registered pursuant to section 12 of this title;

(B) require that if the security futures product is not cash settled, the market on which the security futures product is traded have arrangements in place with a registered clearing agency for the payment and delivery of the securities underlying the security futures product;

(C) be no less restrictive than comparable listing standards for options traded on a national securities exchange or national securities association registered pursuant to section 15A(a) of this title;

(D) except as otherwise provided in a rule, regulation, or order issued pursuant to paragraph (4), require that the

security future be based upon common stock and such other equity securities as the Commission and the Commodity Futures Trading Commission jointly determine appropriate;

(E) require that the security futures product is cleared by a clearing agency that has in place provisions for linked and coordinated clearing with other clearing agencies that clear security futures products, which permits the security futures product to be purchased on one market and offset on another market that trades such product;

(F) require that only a broker or dealer subject to suitability rules comparable to those of a national securities association registered pursuant to section 15A(a) effect transactions in the security futures product;

(G) require that the security futures product be subject to the prohibition against dual trading in section 4j of the Commodity Exchange Act (7 U.S.C. 6j) and the rules and regulations thereunder or the provisions of section 11(a) of this title and the rules and regulations thereunder, except to the extent otherwise permitted under this title and the rules and regulations thereunder;

(H) require that trading in the security futures product not be readily susceptible to manipulation of the price of such security futures product, nor to causing or being used in the manipulation of the price of any underlying security, option on such security, or option on a group or index including such securities;

(I) require that procedures be in place for coordinated surveillance among the market on which the security futures product is traded, any market on which any security underlying the security futures product is traded, and other markets on which any related security is traded to detect manipulation and insider trading;

(J) require that the market on which the security futures product is traded has in place audit trails necessary or appropriate to facilitate the coordinated surveillance required in subparagraph (I);

(K) require that the market on which the security futures product is traded has in place procedures to coordinate trading halts between such market and any market on which any security underlying the security futures product is traded and other markets on which any related security is traded; and

(L) require that the margin requirements for a security futures product comply with the regulations prescribed pursuant to section 7(c)(2)(B), except that nothing in this subparagraph shall be construed to prevent a national securities exchange or national securities association from requiring higher margin levels for a security futures product when it deems such action to be necessary or appropriate.

(4) AUTHORITY TO MODIFY CERTAIN LISTING STANDARD REQUIREMENTS.—

(A) AUTHORITY TO MODIFY.—The Commission and the Commodity Futures Trading Commission, by rule, regulation, or order, may jointly modify the listing standard requirements specified in subparagraph (A) or (D) of paragraph (3) to the extent such modification fosters the development of fair and orderly markets in security futures products, is necessary or appropriate in the public interest, and is consistent with the protection of investors.

(B) AUTHORITY TO GRANT EXEMPTIONS.—The Commission and the Commodity Futures Trading Commission, by order, may jointly exempt any person from compliance with the listing standard requirement specified in subparagraph (E) of paragraph (3) to the extent such exemption fosters the development of fair and orderly markets in security futures products, is necessary or appropriate in the public interest, and is consistent with the protection of investors.

(5) REQUIREMENTS FOR OTHER PERSONS TRADING SECURITY FUTURE PRODUCTS.—It shall be unlawful for any person (other than a national securities exchange or a national securities association registered pursuant to section 15A(a)) to constitute, maintain, or provide a marketplace or facilities for bringing together purchasers and sellers of security future products or to otherwise perform with respect to security future products the functions commonly performed by a stock exchange as that term is generally understood, unless a national securities association registered pursuant to section 15A(a) or a national securities exchange of which such person is a member—

(A) has in place procedures for coordinated surveillance among such person, the market trading the securities underlying the security future products, and other markets trading related securities to detect manipulation and insider trading;

(B) has rules to require audit trails necessary or appropriate to facilitate the coordinated surveillance required in subparagraph (A); and

(C) has rules to require such person to coordinate trading halts with markets trading the securities underlying the security future products and other markets trading related securities.

(6) DEFERRAL OF OPTIONS ON SECURITY FUTURES TRADING.—No person shall offer to enter into, enter into, or confirm the execution of any put, call, straddle, option, or privilege on a security future, except that, after 3 years after the date of the enactment of this subsection, the Commission and the Commodity Futures Trading Commission may by order jointly determine to permit trading of puts, calls, straddles, options, or privileges on any security future authorized to be traded under the provisions of this Act and the Commodity Exchange Act.

(7) DEFERRAL OF LINKED AND COORDINATED CLEARING.—

(A) Notwithstanding paragraph (2), until the compliance date, a national securities exchange or national secu-

rities association registered pursuant to section 15A(a) may trade a security futures product that does not—

(i) conform with any listing standard promulgated to meet the requirement specified in subparagraph (E) of paragraph (3); or

(ii) meet the criterion specified in section 2(a)(1)(D)(i)(IV) of the Commodity Exchange Act.

(B) The Commission and the Commodity Futures Trading Commission shall jointly publish in the Federal Register a notice of the compliance date no later than 165 days before the compliance date.

(C) For purposes of this paragraph, the term "compliance date" means the later of—

(i) 180 days after the end of the first full calendar month period in which the average aggregate comparable share volume for all security futures products based on single equity securities traded on all national securities exchanges, any national securities associations registered pursuant to section 15A(a), and all other persons equals or exceeds 10 percent of the average aggregate comparable share volume of options on single equity securities traded on all national securities exchanges and any national securities associations registered pursuant to section 15A(a); or

(ii) 2 years after the date on which trading in any security futures product commences under this title.

(i) Consistent with this title, each national securities exchange registered pursuant to subsection (a) of this section shall issue such rules as are necessary to avoid duplicative or conflicting rules applicable to any broker or dealer registered with the Commission pursuant to section 15(b) (except paragraph (11) thereof), that is also registered with the Commodity Futures Trading Commission pursuant to section 4f(a) of the Commodity Exchange Act (except paragraph (2) thereof), with respect to the application of—

(1) rules of such national securities exchange of the type specified in section 15(c)(3)(B) involving security futures products; and

(2) similar rules of national securities exchanges registered pursuant to section 6(g) and national securities associations registered pursuant to section 15A(k) involving security futures products.

(j) PROCEDURES AND RULES FOR SECURITY FUTURE PRODUCTS.—A national securities exchange registered pursuant to subsection (a) shall implement the procedures specified in section 6(h)(5)(A) of this title and adopt the rules specified in subparagraphs (B) and (C) of section 6(h)(5) of this title not later than 8 months after the date of receipt of a request from an alternative trading system for such implementation and rules.

(k)(1) To the extent necessary or appropriate in the public interest, to promote fair competition, and consistent with the promotion of market efficiency, innovation, and expansion of investment opportunities, the protection of investors, and the maintenance of fair and orderly markets, the Commission and the Commodity Futures Trading Commission shall jointly issue such rules,

regulations, or orders as are necessary and appropriate to permit the offer and sale of a security futures product traded on or subject to the rules of a foreign board of trade to United States persons.

(2) The rules, regulations, or orders adopted under paragraph (1) shall take into account, as appropriate, the nature and size of the markets that the securities underlying the security futures product reflect.

(l) SECURITY-BASED SWAPS.—It shall be unlawful for any person to effect a transaction in a security-based swap with or for a person that is not an eligible contract participant, unless such transaction is effected on a national securities exchange registered pursuant to subsection (b).

MARGIN REQUIREMENTS

SEC. 7. [78g] (a) For the purpose of preventing the excessive use of credit for the purchase or carrying of securities, the Board of Governors of the Federal Reserve System shall, prior to the effective date of this section and from time to time thereafter, prescribe rules and regulations with respect to the amount of credit that may be initially extended and subsequently maintained on any security (other than an exempted security or a security futures product). For the initial extension of credit, such rules and regulations shall be based upon the following standard: An amount not greater than whichever is the higher of—

(1) 55 per centum of the current market price of the security, or

(2) 100 per centum of the lowest market price of the security during the preceding thirty-six calendar months, but not more than 75 per centum of the current market price.

Such rules and regulations may make appropriate provision with respect to the carrying of undermargined accounts for limited periods and under specified conditions; the withdrawal of funds or securities; the substitution or additional purchases of securities; the transfer of accounts from one lender to another; special or different margin requirements for delayed deliveries, short sales, arbitrage transactions, and securities to which paragraph (2) of this subsection does not apply; the bases and the methods to be used in calculating loans, and margins and market prices; and similar administrative adjustments and details. For the purposes of paragraph (2) of this subsection until July 1, 1936, the lowest price at which a security has sold on or after July 1, 1933, shall be considered as the lowest price at which such security has sold during the preceding thirty-six calendar months.

(b) Notwithstanding the provisions of subsection (a) of this section, the Board of Governors of the Federal Reserve System, may, from time to time, with respect to all or specified securities or transactions, or classes of securities, or classes of transactions, by such rules and regulations (1) prescribe such lower margin requirements for the initial extension or maintenance of credit as it deems necessary or appropriate for the accommodation of commerce and industry, having due regard to the general credit situation of the country, and (2) prescribe such higher margin requirements for the initial extension or maintenance of credit as it may deem necessary

or appropriate to prevent the excessive use of credit to finance transactions in securities.

(c) UNLAWFUL CREDIT EXTENSION TO CUSTOMERS.—

(1) PROHIBITION.—It shall be unlawful for any member of a national securities exchange or any broker or dealer, directly or indirectly, to extend or maintain credit or arrange for the extension or maintenance of credit to or for any customer—

(A) on any security (other than an exempted security), except as provided in paragraph (2), in contravention of the rules and regulations which the Board of Governors of the Federal Reserve System (hereafter in this section referred to as the "Board") shall prescribe under subsections (a) and (b); or

(B) without collateral or on any collateral other than securities, except in accordance with such rules and regulations as the Board may prescribe—

(i) to permit under specified conditions and for a limited period any such member, broker, or dealer to maintain a credit initially extended in conformity with the rules and regulations of the Board; and

(ii) to permit the extension or maintenance of credit in cases where the extension or maintenance of credit is not for the purpose of purchasing or carrying securities or of evading or circumventing the provisions of subparagraph (A).

(2) MARGIN REGULATIONS.—

(A) COMPLIANCE WITH MARGIN RULES REQUIRED.—It shall be unlawful for any broker, dealer, or member of a national securities exchange to, directly or indirectly, extend or maintain credit to or for, or collect margin from any customer on, any security futures product unless such activities comply with the regulations—

(i) which the Board shall prescribe pursuant to subparagraph (B); or

(ii) if the Board determines to delegate the authority to prescribe such regulations, which the Commission and the Commodity Futures Trading Commission shall jointly prescribe pursuant to subparagraph (B).

If the Board delegates the authority to prescribe such regulations under clause (ii) and the Commission and the Commodity Futures Trading Commission have not jointly prescribed such regulations within a reasonable period of time after the date of such delegation, the Board shall prescribe such regulations pursuant to subparagraph (B).

(B) CRITERIA FOR ISSUANCE OF RULES.—The Board shall prescribe, or, if the authority is delegated pursuant to subparagraph (A)(ii), the Commission and the Commodity Futures Trading Commission shall jointly prescribe, such regulations to establish margin requirements, including the establishment of levels of margin (initial and maintenance) for security futures products under such terms, and at such levels, as the Board deems appropriate, or as the Commission and the Commodity Futures Trading Commission jointly deem appropriate—

(i) to preserve the financial integrity of markets trading security futures products;

(ii) to prevent systemic risk;

(iii) to require that—

(I) the margin requirements for a security future product be consistent with the margin requirements for comparable option contracts traded on any exchange registered pursuant to section 6(a) of this title; and

(II) initial and maintenance margin levels for a security future product not be lower than the lowest level of margin, exclusive of premium, required for any comparable option contract traded on any exchange registered pursuant to section 6(a) of this title, other than an option on a security future;

except that nothing in this subparagraph shall be construed to prevent a national securities exchange or national securities association from requiring higher margin levels for a security future product when it deems such action to be necessary or appropriate; and

(iv) to ensure that the margin requirements (other than levels of margin), including the type, form, and use of collateral for security futures products, are and remain consistent with the requirements established by the Board, pursuant to subparagraphs (A) and (B) of paragraph (1).

(3) EXCEPTION.—This subsection and the rules and regulations issued under this subsection shall not apply to any credit extended, maintained, or arranged by a member of a national securities exchange or a broker or dealer to or for a member of a national securities exchange or a registered broker or dealer—

(A) a substantial portion of whose business consists of transactions with persons other than brokers or dealers; or

(B) to finance its activities as a market maker or an underwriter;

except that the Board may impose such rules and regulations, in whole or in part, on any credit otherwise exempted by this paragraph if the Board determines that such action is necessary or appropriate in the public interest or for the protection of investors.

(d) UNLAWFUL CREDIT EXTENSION IN VIOLATION OF RULES AND REGULATIONS; EXCEPTIONS TO APPLICATION OF RULES, ETC.—

(1) PROHIBITION.—It shall be unlawful for any person not subject to subsection (c) to extend or maintain credit or to arrange for the extension or maintenance of credit for the purpose of purchasing or carrying any security, in contravention of such rules and regulations as the Board shall prescribe to prevent the excessive use of credit for the purchasing or carrying of or trading in securities in circumvention of the other provisions of this section. Such rules and regulations may impose upon all loans made for the purpose of purchasing or carrying securities limitations similar to those imposed upon

members, brokers, or dealers by subsection (c) and the rules and regulations thereunder.

(2) EXCEPTIONS.—This subsection and the rules and regulations issued under this subsection shall not apply to any credit extended, maintained, or arranged—

(A) by a person not in the ordinary course of business;

(B) on an exempted security;

(C) to or for a member of a national securities exchange or a registered broker or dealer—

(i) a substantial portion of whose business consists of transactions with persons other than brokers or dealers; or

(ii) to finance its activities as a market maker or an underwriter;

(D) by a bank on a security other than an equity security; or

(E) as the Board shall, by such rules, regulations, or orders as it may deem necessary or appropriate in the public interest or for the protection of investors, exempt, either unconditionally or upon specified terms and conditions or for stated periods, from the operation of this subsection and the rules and regulations thereunder.

(3) BOARD AUTHORITY.—The Board may impose such rules and regulations, in whole or in part, on any credit otherwise exempted by subparagraph (C) if it determines that such action is necessary or appropriate in the public interest or for the protection of investors.

(e) The provisions of this section or the rules and regulations thereunder shall not apply on or before July 1, 1937, to any loan or extension of credit made prior to the enactment of this title or to the maintenance, renewal, or extension of any such loan or credit, except to the extent that the Federal Reserve Board may by rules and regulations prescribe as necessary to prevent the circumvention of the provisions of this section or the rules and regulations thereunder by means of withdrawals of funds or securities, substitutions of securities, or additional purchases or by any other device.

(f)(1) It is unlawful for any United States person, or any foreign person controlled by a United States person or acting on behalf of or in conjunction with such person, to obtain, receive, or enjoy the beneficial use of a loan or other extension of credit from any lender (without regard to whether the lender's office or place of business is in a State or the transaction occurred in whole or in part within a State) for the purpose of (A) purchasing or carrying United States securities, or (B) purchasing or carrying within the United States of any other securities, if, under this section or rules and regulations prescribed thereunder, the loan or other credit transaction is prohibited or would be prohibited if it had been made or the transaction had otherwise occurred in a lender's office or other place of business in a State.

(2) For the purposes of this subsection—

(A) The term "United States person" includes a person which is organized or exists under the laws of any State or, in the case of a natural person, a citizen or resident of the United

States; a domestic estate; or a trust in which one or more of the foregoing persons has a cumulative direct or indirect beneficial interest in excess of 50 per centum of the value of the trust.

(B) The term "United States security" means a security (other than an exempted security) issued by a person incorporated under the laws of any State, or whose principal place of business is within a State.

(C) The term "foreign person controlled by a United States person" includes any noncorporate entity in which United States persons directly or indirectly have more than a 50 per centum beneficial interest, and any corporation in which one or more United States persons, directly or indirectly, own stock possessing more than 50 per centum of the total combined voting power of all classes of stock entitled to vote, or more than 50 per centum of the total value of shares of all classes of stock.

(3) The Board of Governors of the Federal Reserve System may, in its discretion and with due regard for the purposes of this section, by rule or regulation exempt any class of United States persons or foreign persons controlled by a United States person from the application of this subsection.

(g) Subject to such rules and regulations as the Board of Governors of the Federal Reserve System may adopt in the public interest and for the protection of investors, no member of a national securities exchange or broker or dealer shall be deemed to have extended or maintained credit or arranged for the extension or maintenance of credit for the purpose of purchasing a security, within the meaning of this section, by reason of a bona fide agreement for delayed delivery of a mortgage related security or a small business related security against full payment of the purchase price thereof upon such delivery within one hundred and eighty days after the purchase, or within such shorter period as the Board of Governors of the Federal Reserve System may prescribe by rule or regulation.

RESTRICTIONS ON BORROWING BY MEMBERS, BROKERS, AND DEALERS

SEC. 8. [78h] It shall be unlawful for any registered broker or dealer, member of a national securities exchange, or broker or dealer who transacts a business in securities through the medium of any member of a national securities exchange, directly or indirectly—

(a) In contravention of such rules and regulations as the Commission shall prescribe for the protection of investors to hypothecate or arrange for the hypothecation of any securities carried for the account of any customer under circumstances (1) that will permit the commingling of his securities without his written consent with the securities of any other customer, (2) that will permit such securities to be commingled with the securities of any person other than a bona fide customer, or (3) that will permit such securities to be hypothecated, or subjected to any lien or claim of the pledgee, for a sum in excess of the aggregate indebtedness of such customers in respect of such securities.

(b) To lend or arrange for the lending of any securities carried for the account of any customer without the written consent of such customer or in contravention of such rules and regulations as the Commission shall prescribe for the protection of investors.

PROHIBITION AGAINST MANIPULATION OF SECURITY PRICES

SEC. 9. [78i] (a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

(1) For 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, (A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

(2) To effect, alone or with 1 or more other persons, a series of transactions in any security registered on a national securities exchange, any security not so registered, or in connection with any security-based swap or security-based swap agreement with respect to such security creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

(3) If a dealer, broker, security-based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the security, a security-based swap, or a security-based swap agreement with respect to such security, to induce the purchase or sale of any security registered on a national securities exchange, any security not so registered, any security-based swap, or any security-based swap agreement with respect to such security by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any 1 or more persons conducted for the purpose of raising or depressing the price of such security.

(4) If a dealer, broker, security-based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the security, a security-based swap, or security-based swap agreement with respect to such security, to make, regarding any security registered on a national securities exchange, any security not so registered, any security-based swap, or any security-based swap agreement with respect to such security, for the purpose of inducing the purchase or sale of

such security, such security-based swap, or such security-based swap agreement any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which that person knew or had reasonable ground to believe was so false or misleading.

(5) For a consideration, received directly or indirectly from a broker, dealer, security-based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the security, a security-based swap, or security-based swap agreement with respect to such security, to induce the purchase of any security registered on a national securities exchange, any security not so registered, any security-based swap, or any security-based swap agreement with respect to such security by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of the market operations of any 1 or more persons conducted for the purpose of raising or depressing the price of such security.

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security other than a government security for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) It shall be unlawful for any person to effect, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors—

(1) any transaction in connection with any security whereby any party to such transaction acquires—

(A) any put, call, straddle, or other option or privilege of buying the security from or selling the security to another without being bound to do so;

(B) any security futures product on the security; or

(C) any security-based swap involving the security or the issuer of the security;

(2) any transaction in connection with any security with relation to which such person has, directly or indirectly, any interest in any—

(A) such put, call, straddle, option, or privilege;

(B) such security futures product; or

(C) such security-based swap; or

(3) any transaction in any security for the account of any person who such person has reason to believe has, and who actually has, directly or indirectly, any interest in any—

(A) such put, call, straddle, option, or privilege;

(B) such security futures product with relation to such security; or

(C) any security-based swap involving such security or the issuer of such security.

(c) It shall be unlawful for any broker, dealer, or member of a national securities exchange directly or indirectly to endorse or

guarantee the performance of any put, call, straddle, option, or privilege in relation to any security other than a government security, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(d) TRANSACTIONS RELATING TO SHORT SALES OF SECURITIES.—It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange to effect, alone or with one or more other persons, a manipulative short sale of any security. The Commission shall issue such other rules as are necessary or appropriate to ensure that the appropriate enforcement options and remedies are available for violations of this subsection in the public interest or for the protection of investors.

(e) The terms "put", "call", "straddle", "option", or "privilege" as used in this section shall not include any registered warrant, right, or convertible security.

(f) Any person who willfully participates in any act or transaction in violation of subsection (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

(g) The provisions of subsection (a) shall not apply to an exempted security.

(h)(1) Notwithstanding any other provision of law, the Commission shall have the authority to regulate the trading of any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency (but not, with respect to any of the foregoing, an option on a contract for future delivery other than a security futures product).

(2) Notwithstanding the Commodity Exchange Act, the Commission shall have the authority to regulate the trading of any security futures product to the extent provided in the securities laws.

(i) LIMITATIONS ON PRACTICES THAT AFFECT MARKET VOLATILITY.—It shall be unlawful for any person, by the use of the mails or any means or instrumentality of interstate commerce or of any facility of any national securities exchange, to use or employ any act or practice in connection with the purchase or sale of any eq-

uity security in contravention of such rules or regulations as the Commission may adopt, consistent with the public interest, the protection of investors, and the maintenance of fair and orderly markets—

(1) to prescribe means reasonably designed to prevent manipulation of price levels of the equity securities market or a substantial segment thereof; and

(2) to prohibit or constrain, during periods of extraordinary market volatility, any trading practice in connection with the purchase or sale of equity securities that the Commission determines (A) has previously contributed significantly to extraordinary levels of volatility that have threatened the maintenance of fair and orderly markets; and (B) is reasonably certain to engender such levels of volatility if not prohibited or constrained.

In adopting rules under paragraph (2), the Commission shall, consistent with the purposes of this subsection, minimize the impact on the normal operations of the market and a natural person's freedom to buy or sell any equity security.

(j) The authority of the Commission under this section with respect to security-based swap agreements shall be subject to the restrictions and limitations of section 3A(b) of this title.

(j)[25] It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange, to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security-based swap, in connection with which such person engages in any fraudulent, deceptive, or manipulative act or practice, makes any fictitious quotation, or engages in any transaction, practice, or course of business which operates as a fraud or deceit upon any person. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such transactions, acts, practices, and courses of business as are fraudulent, deceptive, or manipulative, and such quotations as are fictitious.

REGULATION OF THE USE OF MANIPULATIVE AND DECEPTIVE DEVICES

SEC. 10. [78j] It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a)(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security other than a government security, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2)[26] Paragraph (1) of this subsection shall not apply to security futures products.

[25] Two subsection (j)s' so in law. See amendments made by sections 763(g) and 929X(b) of Public Law 111–203.

[26] Margin so in law.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(c)(1)[27] To effect, accept, or facilitate a transaction involving the loan or borrowing of securities in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Nothing in paragraph (1) may be construed to limit the authority of the appropriate Federal banking agency (as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q))), the National Credit Union Administration, or any other Federal department or agency having a responsibility under Federal law to prescribe rules or regulations restricting transactions involving the loan or borrowing of securities in order to protect the safety and soundness of a financial institution or to protect the financial system from systemic risk.

Rules promulgated under subsection (b) that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements to the same extent as they apply to securities. Judicial precedents decided under section 17(a) of the Securities Act of 1933 and sections 9, 15, 16, 20, and 21A of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements to the same extent as they apply to securities.

SEC. 10A. [78j–1] AUDIT REQUIREMENTS.

(a) IN GENERAL.—Each audit required pursuant to this title of the financial statements of an issuer by a registered public accounting firm shall include, in accordance with generally accepted auditing standards, as may be modified or supplemented from time to time by the Commission—

(1) procedures designed to provide reasonable assurance of detecting illegal acts that would have a direct and material effect on the determination of financial statement amounts;

(2) procedures designed to identify related party transactions that are material to the financial statements or otherwise require disclosure therein; and

[27] Placement of paragraph (c) (as added by section 984(a) of Public Law 111–203) reflects the probable intent of Congress. Such amendment inserts this new provision at the end of section 10.

(3) an evaluation of whether there is substantial doubt about the ability of the issuer to continue as a going concern during the ensuing fiscal year.

(b) REQUIRED RESPONSE TO AUDIT DISCOVERIES.—

(1) INVESTIGATION AND REPORT TO MANAGEMENT.—If, in the course of conducting an audit pursuant to this title to which subsection (a) applies, the registered public accounting firm detects or otherwise becomes aware of information indicating that an illegal act (whether or not perceived to have a material effect on the financial statements of the issuer) has or may have occurred, the firm shall, in accordance with generally accepted auditing standards, as may be modified or supplemented from time to time by the Commission—

(A)(i) determine whether it is likely that an illegal act has occurred; and

(ii) if so, determine and consider the possible effect of the illegal act on the financial statements of the issuer, including any contingent monetary effects, such as fines, penalties, and damages; and

(B) as soon as practicable, inform the appropriate level of the management of the issuer and assure that the audit committee of the issuer, or the board of directors of the issuer in the absence of such a committee, is adequately informed with respect to illegal acts that have been detected or have otherwise come to the attention of such firm in the course of the audit, unless the illegal act is clearly inconsequential.

(2) RESPONSE TO FAILURE TO TAKE REMEDIAL ACTION.—If, after determining that the audit committee of the board of directors of the issuer, or the board of directors of the issuer in the absence of an audit committee, is adequately informed with respect to illegal acts that have been detected or have otherwise come to the attention of the firm in the course of the audit of such accountant, the registered public accounting firm concludes that—

(A) the illegal act has a material effect on the financial statements of the issuer;

(B) the senior management has not taken, and the board of directors has not caused senior management to take, timely and appropriate remedial actions with respect to the illegal act; and

(C) the failure to take remedial action is reasonably expected to warrant departure from a standard report of the auditor, when made, or warrant resignation from the audit engagement;

the registered public accounting firm shall, as soon as practicable, directly report its conclusions to the board of directors.

(3) NOTICE TO COMMISSION; RESPONSE TO FAILURE TO NOTIFY.—An issuer whose board of directors receives a report under paragraph (2) shall inform the Commission by notice not later than 1 business day after the receipt of such report and shall furnish the registered public accounting firm making such report with a copy of the notice furnished to the Commission. If the registered public accounting firm fails to receive a

copy of the notice before the expiration of the required 1-business-day period, the registered public accounting firm shall—

(A) resign from the engagement; or

(B) furnish to the Commission a copy of its report (or the documentation of any oral report given) not later than 1 business day following such failure to receive notice.

(4) REPORT AFTER RESIGNATION.—If a registered public accounting firm resigns from an engagement under paragraph (3)(A), the firm shall, not later than 1 business day following the failure by the issuer to notify the Commission under paragraph (3), furnish to the Commission a copy of the report of the firm (or the documentation of any oral report given).

(c) AUDITOR LIABILITY LIMITATION.—No registered public accounting firm shall be liable in a private action for any finding, conclusion, or statement expressed in a report made pursuant to paragraph (3) or (4) of subsection (b), including any rule promulgated pursuant thereto.

(d) CIVIL PENALTIES IN CEASE-AND-DESIST PROCEEDINGS.—If the Commission finds, after notice and opportunity for hearing in a proceeding instituted pursuant to section 21C, that a registered public accounting firm has willfully violated paragraph (3) or (4) of subsection (b), the Commission may, in addition to entering an order under section 21C, impose a civil penalty against the registered public accounting firm and any other person that the Commission finds was a cause of such violation. The determination to impose a civil penalty and the amount of the penalty shall be governed by the standards set forth in section 21B.

(e) PRESERVATION OF EXISTING AUTHORITY.—Except as provided in subsection (d), nothing in this section shall be held to limit or otherwise affect the authority of the Commission under this title.

(f) DEFINITIONS.—As used in this section, the term "illegal act" means an act or omission that violates any law, or any rule or regulation having the force of law. As used in this section, the term "issuer" means an issuer (as defined in section 3), the securities of which are registered under section 12, or that is required to file reports pursuant to section 15(d), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn.

(g) PROHIBITED ACTIVITIES.—Except as provided in subsection (h), it shall be unlawful for a registered public accounting firm (and any associated person of that firm, to the extent determined appropriate by the Commission) that performs for any issuer any audit required by this title or the rules of the Commission under this title or, beginning 180 days after the date of commencement of the operations of the Public Company Accounting Oversight Board established under section 101 of the Sarbanes-Oxley Act of 2002 (in this section referred to as the "Board"), the rules of the Board, to provide to that issuer, contemporaneously with the audit, any non-audit service, including—

(1) bookkeeping or other services related to the accounting records or financial statements of the audit client;

(2) financial information systems design and implementation;

(3) appraisal or valuation services, fairness opinions, or contribution-in-kind reports;

(4) actuarial services;

(5) internal audit outsourcing services;

(6) management functions or human resources;

(7) broker or dealer, investment adviser, or investment banking services;

(8) legal services and expert services unrelated to the audit; and

(9) any other service that the Board determines, by regulation, is impermissible.

(h) PREAPPROVAL REQUIRED FOR NON-AUDIT SERVICES.—A registered public accounting firm may engage in any non-audit service, including tax services, that is not described in any of paragraphs (1) through (9) of subsection (g) for an audit client, only if the activity is approved in advance by the audit committee of the issuer, in accordance with subsection (i).

(i) PREAPPROVAL REQUIREMENTS.—

(1) IN GENERAL.—

(A) AUDIT COMMITTEE ACTION.—All auditing services (which may entail providing comfort letters in connection with securities underwritings or statutory audits required for insurance companies for purposes of State law) and non-audit services, other than as provided in subparagraph (B), provided to an issuer by the auditor of the issuer shall be preapproved by the audit committee of the issuer.

(B) DE MINIMIS EXCEPTION.—The preapproval requirement under subparagraph (A) is waived with respect to the provision of non-audit services for an issuer, if—

(i) the aggregate amount of all such non-audit services provided to the issuer constitutes not more than 5 percent of the total amount of revenues paid by the issuer to its auditor during the fiscal year in which the non-audit services are provided;

(ii) such services were not recognized by the issuer at the time of the engagement to be non-audit services; and

(iii) such services are promptly brought to the attention of the audit committee of the issuer and approved prior to the completion of the audit by the audit committee or by 1 or more members of the audit committee who are members of the board of directors to whom authority to grant such approvals has been delegated by the audit committee.

(2) DISCLOSURE TO INVESTORS.—Approval by an audit committee of an issuer under this subsection of a non-audit service to be performed by the auditor of the issuer shall be disclosed to investors in periodic reports required by section 13(a).

(3) DELEGATION AUTHORITY.—The audit committee of an issuer may delegate to 1 or more designated members of the audit committee who are independent directors of the board of

directors, the authority to grant preapprovals required by this subsection. The decisions of any member to whom authority is delegated under this paragraph to preapprove an activity under this subsection shall be presented to the full audit committee at each of its scheduled meetings.

(4) APPROVAL OF AUDIT SERVICES FOR OTHER PURPOSES.—In carrying out its duties under subsection (m)(2), if the audit committee of an issuer approves an audit service within the scope of the engagement of the auditor, such audit service shall be deemed to have been preapproved for purposes of this subsection.

(j) AUDIT PARTNER ROTATION.—It shall be unlawful for a registered public accounting firm to provide audit services to an issuer if the lead (or coordinating) audit partner (having primary responsibility for the audit), or the audit partner responsible for reviewing the audit, has performed audit services for that issuer in each of the 5 previous fiscal years of that issuer.

(k) REPORTS TO AUDIT COMMITTEES.—Each registered public accounting firm that performs for any issuer any audit required by this title shall timely report to the audit committee of the issuer—

(1) all critical accounting policies and practices to be used;

(2) all alternative treatments of financial information within generally accepted accounting principles that have been discussed with management officials of the issuer, ramifications of the use of such alternative disclosures and treatments, and the treatment preferred by the registered public accounting firm; and

(3) other material written communications between the registered public accounting firm and the management of the issuer, such as any management letter or schedule of unadjusted differences.

(l) CONFLICTS OF INTEREST.—It shall be unlawful for a registered public accounting firm to perform for an issuer any audit service required by this title, if a chief executive officer, controller, chief financial officer, chief accounting officer, or any person serving in an equivalent position for the issuer, was employed by that registered independent public accounting firm and participated in any capacity in the audit of that issuer during the 1-year period preceding the date of the initiation of the audit.

(m) STANDARDS RELATING TO AUDIT COMMITTEES.—

(1) COMMISSION RULES.—

(A) IN GENERAL.—Effective not later than 270 days after the date of enactment of this subsection, the Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that is not in compliance with the requirements of any portion of paragraphs (2) through (6).

(B) OPPORTUNITY TO CURE DEFECTS.—The rules of the Commission under subparagraph (A) shall provide for appropriate procedures for an issuer to have an opportunity to cure any defects that would be the basis for a prohibition under subparagraph (A), before the imposition of such prohibition.

(2) RESPONSIBILITIES RELATING TO REGISTERED PUBLIC ACCOUNTING FIRMS.—The audit committee of each issuer, in its capacity as a committee of the board of directors, shall be directly responsible for the appointment, compensation, and oversight of the work of any registered public accounting firm employed by that issuer (including resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or related work, and each such registered public accounting firm shall report directly to the audit committee.

(3) INDEPENDENCE.—

(A) IN GENERAL.—Each member of the audit committee of the issuer shall be a member of the board of directors of the issuer, and shall otherwise be independent.

(B) CRITERIA.—In order to be considered to be independent for purposes of this paragraph, a member of an audit committee of an issuer may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee—

(i) accept any consulting, advisory, or other compensatory fee from the issuer; or

(ii) be an affiliated person of the issuer or any subsidiary thereof.

(C) EXEMPTION AUTHORITY.—The Commission may exempt from the requirements of subparagraph (B) a particular relationship with respect to audit committee members, as the Commission determines appropriate in light of the circumstances.

(4) COMPLAINTS.—Each audit committee shall establish procedures for—

(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and

(B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.

(5) AUTHORITY TO ENGAGE ADVISERS.—Each audit committee shall have the authority to engage independent counsel and other advisers, as it determines necessary to carry out its duties.

(6) FUNDING.—Each issuer shall provide for appropriate funding, as determined by the audit committee, in its capacity as a committee of the board of directors, for payment of compensation—

(A) to the registered public accounting firm employed by the issuer for the purpose of rendering or issuing an audit report; and

(B) to any advisers employed by the audit committee under paragraph (5).

SEC. 10B. [78J–2] POSITION LIMITS AND POSITION ACCOUNTABILITY FOR SECURITY-BASED SWAPS AND LARGE TRADER REPORTING.

(a) POSITION LIMITS.—As a means reasonably designed to prevent fraud and manipulation, the Commission shall, by rule or reg-

ulation, as necessary or appropriate in the public interest or for the protection of investors, establish limits (including related hedge exemption provisions) on the size of positions in any security-based swap that may be held by any person. In establishing such limits, the Commission may require any person to aggregate positions in—

(1) any security-based swap and any security or loan or group of securities or loans on which such security-based swap is based, which such security-based swap references, or to which such security-based swap is related as described in paragraph (68) of section 3(a), and any other instrument relating to such security or loan or group or index of securities or loans; or

(2) any security-based swap and—

(A) any security or group or index of securities, the price, yield, value, or volatility of which, or of which any interest therein, is the basis for a material term of such security-based swap as described in paragraph (68) of section 3(a); and

(B) any other instrument relating to the same security or group or index of securities described under subparagraph (A).

(b) EXEMPTIONS.—The Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person or class of persons, any security-based swap or class of security-based swaps, or any transaction or class of transactions from any requirement the Commission may establish under this section with respect to position limits.

(c) SRO RULES.—

(1) IN GENERAL.—As a means reasonably designed to prevent fraud or manipulation, the Commission, by rule, regulation, or order, as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title, may direct a self-regulatory organization—

(A) to adopt rules regarding the size of positions in any security-based swap that may be held by—

(i) any member of such self-regulatory organization; or

(ii) any person for whom a member of such self-regulatory organization effects transactions in such security-based swap; and

(B) to adopt rules reasonably designed to ensure compliance with requirements prescribed by the Commission under this subsection.

(2) REQUIREMENT TO AGGREGATE POSITIONS.—In establishing the limits under paragraph (1), the self-regulatory organization may require such member or person to aggregate positions in—

(A) any security-based swap and any security or loan or group or narrow-based security index of securities or loans on which such security-based swap is based, which such security-based swap references, or to which such security-based swap is related as described in section 3(a)(68), and any other instrument relating to such secu-

rity or loan or group or narrow-based security index of securities or loans; or

(B)(i) any security-based swap; and

(ii) any security-based swap and any other instrument relating to the same security or group or narrow-based security index of securities.

(d) LARGE TRADER REPORTING.—The Commission, by rule or regulation, may require any person that effects transactions for such person's own account or the account of others in any securities-based swap or uncleared security-based swap and any security or loan or group or narrow-based security index of securities or loans as set forth in paragraphs (1) and (2) of subsection (a) under this section to report such information as the Commission may prescribe regarding any position or positions in any security-based swap or uncleared security-based swap and any security or loan or group or narrow-based security index of securities or loans and any other instrument relating to such security or loan or group or narrow-based security index of securities or loans as set forth in paragraphs (1) and (2) of subsection (a) under this section.

SEC. 10C. [78j–3] COMPENSATION COMMITTEES.

(a) INDEPENDENCE OF COMPENSATION COMMITTEES.—

(1) LISTING STANDARDS.—The Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any equity security of an issuer, other than an issuer that is a controlled company, limited partnership, company in bankruptcy proceedings, open-ended management investment company that is registered under the Investment Company Act of 1940, or a foreign private issuer that provides annual disclosures to shareholders of the reasons that the foreign private issuer does not have an independent compensation committee, that does not comply with the requirements of this subsection.

(2) INDEPENDENCE OF COMPENSATION COMMITTEES.—The rules of the Commission under paragraph (1) shall require that each member of the compensation committee of the board of directors of an issuer be—

(A) a member of the board of directors of the issuer; and

(B) independent.

(3) INDEPENDENCE.—The rules of the Commission under paragraph (1) shall require that, in determining the definition of the term "independence" for purposes of paragraph (2), the national securities exchanges and the national securities associations shall consider relevant factors, including—

(A) the source of compensation of a member of the board of directors of an issuer, including any consulting, advisory, or other compensatory fee paid by the issuer to such member of the board of directors; and

(B) whether a member of the board of directors of an issuer is affiliated with the issuer, a subsidiary of the issuer, or an affiliate of a subsidiary of the issuer.

(4) EXEMPTION AUTHORITY.—The rules of the Commission under paragraph (1) shall permit a national securities ex-

change or a national securities association to exempt a particular relationship from the requirements of paragraph (2), with respect to the members of a compensation committee, as the national securities exchange or national securities association determines is appropriate, taking into consideration the size of an issuer and any other relevant factors.

(b) INDEPENDENCE OF COMPENSATION CONSULTANTS AND OTHER COMPENSATION COMMITTEE ADVISERS.—

(1) IN GENERAL.—The compensation committee of an issuer may only select a compensation consultant, legal counsel, or other adviser to the compensation committee after taking into consideration the factors identified by the Commission under paragraph (2).

(2) RULES.—The Commission shall identify factors that affect the independence of a compensation consultant, legal counsel, or other adviser to a compensation committee of an issuer. Such factors shall be competitively neutral among categories of consultants, legal counsel, or other advisers and preserve the ability of compensation committees to retain the services of members of any such category, and shall include—

(A) the provision of other services to the issuer by the person that employs the compensation consultant, legal counsel, or other adviser;

(B) the amount of fees received from the issuer by the person that employs the compensation consultant, legal counsel, or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel, or other adviser;

(C) the policies and procedures of the person that employs the compensation consultant, legal counsel, or other adviser that are designed to prevent conflicts of interest;

(D) any business or personal relationship of the compensation consultant, legal counsel, or other adviser with a member of the compensation committee; and

(E) any stock of the issuer owned by the compensation consultant, legal counsel, or other adviser.

(c) COMPENSATION COMMITTEE AUTHORITY RELATING TO COMPENSATION CONSULTANTS.—

(1) AUTHORITY TO RETAIN COMPENSATION CONSULTANT.—

(A) IN GENERAL.—The compensation committee of an issuer, in its capacity as a committee of the board of directors, may, in its sole discretion, retain or obtain the advice of a compensation consultant.

(B) DIRECT RESPONSIBILITY OF COMPENSATION COMMITTEE.—The compensation committee of an issuer shall be directly responsible for the appointment, compensation, and oversight of the work of a compensation consultant.

(C) RULE OF CONSTRUCTION.—This paragraph may not be construed—

(i) to require the compensation committee to implement or act consistently with the advice or recommendations of the compensation consultant; or

(ii) to affect the ability or obligation of a compensation committee to exercise its own judgment in

fulfillment of the duties of the compensation committee.

(2) DISCLOSURE.—In any proxy or consent solicitation material for an annual meeting of the shareholders (or a special meeting in lieu of the annual meeting) occurring on or after the date that is 1 year after the date of enactment of this section, each issuer shall disclose in the proxy or consent material, in accordance with regulations of the Commission, whether—

(A) the compensation committee of the issuer retained or obtained the advice of a compensation consultant; and

(B) the work of the compensation consultant has raised any conflict of interest and, if so, the nature of the conflict and how the conflict is being addressed.

(d) AUTHORITY TO ENGAGE INDEPENDENT LEGAL COUNSEL AND OTHER ADVISERS.—

(1) IN GENERAL.—The compensation committee of an issuer, in its capacity as a committee of the board of directors, may, in its sole discretion, retain and obtain the advice of independent legal counsel and other advisers.

(2) DIRECT RESPONSIBILITY OF COMPENSATION COMMITTEE.—The compensation committee of an issuer shall be directly responsible for the appointment, compensation, and oversight of the work of independent legal counsel and other advisers.

(3) RULE OF CONSTRUCTION.—This subsection may not be construed—

(A) to require a compensation committee to implement or act consistently with the advice or recommendations of independent legal counsel or other advisers under this subsection; or

(B) to affect the ability or obligation of a compensation committee to exercise its own judgment in fulfillment of the duties of the compensation committee.

(e) COMPENSATION OF COMPENSATION CONSULTANTS, INDEPENDENT LEGAL COUNSEL, AND OTHER ADVISERS.—Each issuer shall provide for appropriate funding, as determined by the compensation committee in its capacity as a committee of the board of directors, for payment of reasonable compensation—

(1) to a compensation consultant; and

(2) to independent legal counsel or any other adviser to the compensation committee.

(f) COMMISSION RULES.—

(1) IN GENERAL.—Not later than 360 days after the date of enactment of this section, the Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that is not in compliance with the requirements of this section.

(2) OPPORTUNITY TO CURE DEFECTS.—The rules of the Commission under paragraph (1) shall provide for appropriate procedures for an issuer to have a reasonable opportunity to cure any defects that would be the basis for the prohibition under paragraph (1), before the imposition of such prohibition.

(3) EXEMPTION AUTHORITY.—

(A) IN GENERAL.—The rules of the Commission under paragraph (1) shall permit a national securities exchange or a national securities association to exempt a category of issuers from the requirements under this section, as the national securities exchange or the national securities association determines is appropriate.

(B) CONSIDERATIONS.—In determining appropriate exemptions under subparagraph (A), the national securities exchange or the national securities association shall take into account the potential impact of the requirements of this section on smaller reporting issuers.

(g) CONTROLLED COMPANY EXEMPTION.—

(1) IN GENERAL.—This section shall not apply to any controlled company.

(2) DEFINITION.—For purposes of this section, the term "controlled company" means an issuer—

(A) that is listed on a national securities exchange or by a national securities association; and

(B) that holds an election for the board of directors of the issuer in which more than 50 percent of the voting power is held by an individual, a group, or another issuer.

SEC. 10D. [78j–4] RECOVERY OF ERRONEOUSLY AWARDED COMPENSATION POLICY.

(a) LISTING STANDARDS.—The Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that does not comply with the requirements of this section.

(b) RECOVERY OF FUNDS.—The rules of the Commission under subsection (a) shall require each issuer to develop and implement a policy providing—

(1) 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; and

(2) 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 from any current or former executive officer of the issuer who received incentive-based compensation (including stock options awarded as compensation) during the 3-year period preceding the date on which the issuer is required to prepare an accounting restatement, based on the erroneous data, in excess of what would have been paid to the executive officer under the accounting restatement.

TRADING BY MEMBERS OF EXCHANGES, BROKERS, AND DEALERS

SEC. 11. [78k] (a)(1) It shall be unlawful for any member of a national securities exchange to effect any transaction on such exchange for its own account, the account of an associated person, or an account with respect to which it or an associated person thereof exercises investment discretion: *Provided*, *however*, That this paragraph shall not make unlawful—

(A) any transaction by a dealer acting in the capacity of market maker;

(B) any transaction for the account of an odd-lot dealer in a security in which he is so registered;

(C) any stabilizing transaction effected in compliance with rules under section 10(b) of this title to facilitate a distribution of a security in which the member effecting such transaction is participating;

(D) any bona fide arbitrage transaction, any bona fide hedge transaction involving a long or short position in an equity security and a long or short position in a security entitling the holder to acquire or sell such equity security, or any risk arbitrage transaction in connection with a merger, acquisition, tender offer, or similar transaction involving a recapitalization;

(E) any transaction for the account of a natural person, the estate of a natural person, or a trust created by a natural person for himself or another natural person;

(F) any transaction to offset a transaction made in error;

(G) any other transaction for a member's own account provided that (i) such member is primarily engaged in the business of underwriting and distributing securities issued by other persons, selling securities to customers, and acting as broker, or any one or more of such activities, and whose gross income normally is derived principally from such business and related activities and (ii) such transaction is effected in compliance with rules of the Commission which, as a minimum, assure that the transaction is not inconsistent with the maintenance of fair and orderly markets and yields priority, parity, and precedence in execution to orders for the account of persons who are not members or associated with members of the exchange;

(H) any transaction for an account with respect to which such member or an associated person thereof exercises investment discretion if such member—

(i) has obtained, from the person or persons authorized to transact business for the account, express authorization for such member or associated person to effect such transactions prior to engaging in the practice of effecting such transactions;

(ii) furnishes the person or persons authorized to transact business for the account with a statement at least annually disclosing the aggregate compensation received by the exchange member in effecting such transactions; and

(iii) complies with any rules the Commission has prescribed with respect to the requirements of clauses (i) and (ii); and

(I) any other transaction of a kind which the Commission, by rule, determines is consistent with the purposes of this paragraph, the protection of investors, and the maintenance of fair and orderly markets.

(2) The Commission, by rule, as it deems necessary or appropriate in the public interest and for the protection of investors, to maintain fair and orderly markets, or to assure equal regulation of

exchange markets and markets occurring otherwise than on an exchange, may regulate or prohibit:

(A) transactions on a national securities exchange not unlawful under paragraph (1) of this subsection effected by any member thereof for its own account (unless such member is acting in the capacity of market maker or odd-lot dealer), the account of an associated person, or an account with respect to which such member or an associated person thereof exercises investment discretion;

(B) transactions otherwise than on a national securities exchange effected by use of the mails or any means or instrumentality of interstate commerce by any member of a national securities exchange, broker, or dealer for the account of such member, broker, or dealer (unless such member, broker, or dealer is acting in the capacity of a market maker) the account of an associated person, or an account with respect to which such member, broker, or dealer or associated person thereof exercises investment discretion; and

(C) transactions on a national securities exchange effected by any broker or dealer not a member thereof for the account of such broker or dealer (unless such broker or dealer is acting in the capacity of market maker), the account of an associated person, or an account with respect to which such broker or dealer or associated person thereof exercises investment discretion.

The provisions of paragraph (1) of this subsection insofar as they apply to transactions on a national securities exchange effected by a member thereof who was a member on February 1, 1978 shall not become effective until February 1, 1979. Nothing in this paragraph shall be construed to impair or limit the authority of the Commission to regulate or prohibit such transactions prior to February 1, 1979, pursuant to paragraph (2) of this subsection.

(b) When not in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest and for the protection of investors, to maintain fair and orderly markets, or to remove impediments to and perfect the mechanism of a national market system, the rules of a national securities exchange may permit (1) a member to be registered as an odd-lot dealer and as such to buy and sell for his own account so far as may be reasonably necessary to carry on such odd-lot transactions, and (2) a member to be registered as a specialist. Under the rules and regulations of the Commission a specialist may be permitted to act as a broker and dealer or limited to acting as a broker or dealer. It shall be unlawful for a specialist or an official of the exchange to disclose information in regard to orders placed with such specialist which is not available to all members of the exchange, to any person other than an official of the exchange, a representative of the Commission, or a specialist who may be acting for such specialist: *Provided*, *however*, That the Commission, by rule, may require disclosure to all members of the exchange of all orders placed with specialists, under such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. It shall also be unlawful for a specialist permitted to act as a broker and dealer to

effect on the exchange as broker any transaction except upon a market or limited price order.

(c) If because of the limited volume of transactions effected on an exchange, it is in the opinion of the Commission impracticable and not necessary or appropriate in the public interest or for the protection of investors to apply any of the foregoing provisions of this section or the rules and regulations thereunder, the Commission shall have power, upon application of the exchange and on a showing that the rules of such exchange are otherwise adequate for the protection of investors, to exempt such exchange and its members from any such provision or rules and regulations.

(d) It shall be unlawful for a member of a national securities exchange who is both a dealer and a broker, or for any person who both as a broker and a dealer transacts a business in securities through the medium of a member or otherwise, to effect through the use of any facility of a national securities exchange or of the mails or of any means or instrumentality of interstate commerce, or otherwise in the case of a member, (1) any transaction in connection with which, directly or indirectly, he extends or maintains or arranges for the extension or maintenance of credit to or for a customer on any security (other than an exempted security) which was a part of a new issue in the distribution of which he participated as a member of a selling syndicate or group within thirty days prior to such transaction: *Provided*, That credit shall not be deemed extended by reason of a bona fide delayed delivery of (i) any such security against full payment of the entire purchase price thereof upon such delivery within thirty-five days after such purchase or (ii) any mortgage related security or any small business related security against full payment of the entire purchase price thereof upon such delivery within one hundred and eighty days after such purchase, or within such shorter period as the Commission may prescribe by rule or regulation, or (2) any transaction with respect to any security (other than an exempted security) unless, if the transaction is with a customer, he discloses to such customer in writing at or before the completion of the transaction whether he is acting as a dealer for his own account, as a broker for such customer, or as a broker for some other person.

NATIONAL MARKET SYSTEM FOR SECURITIES; SECURITIES INFORMATION PROCESSORS

SEC. 11A. [78k–1] (a)(1) The Congress finds that—

(A) The securities markets are an important national asset which must be preserved and strengthened.

(B) New data processing and communications techniques create the opportunity for more efficient and effective market operations.

(C) It is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure—

(i) economically efficient execution of securities transactions;

(ii) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets;

(iii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities;

(iv) the practicability of brokers executing investors' orders in the best market; and

(v) an opportunity, consistent with the provisions of clauses (i) and (iv) of this subparagraph, for investors' orders to be executed without the participation of a dealer.

(D) The linking of all markets for qualified securities through communication and data processing facilities will foster efficiency, enhance competition, increase the information available to brokers, dealers, and investors, facilitate the offsetting of investors' orders, and contribute to best execution of such orders.

(2) The Commission is directed, therefore, having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets, to use its authority under this title to facilitate the establishment of a national market system for securities (which may include subsystems for particular types of securities with unique trading characteristics) in accordance with the findings and to carry out the objectives set forth in paragraph (1) of this subsection. The Commission, by rule, shall designate the securities or classes of securities qualified for trading in the national market system from among securities other than exempted securities. (Securities or classes of securities so designated hereinafter in this section referred to as "qualified securities".)

(3) The Commission is authorized in furtherance of the directive in paragraph (2) of this subsection—

(A) to create one or more advisory committees pursuant to chapter 10 of title 5, United States Code (which shall be in addition to the National Market Advisory Board established pursuant to subsection (d) of this section), and to employ one or more outside experts;

(B) by rule or order, to authorize or require self-regulatory organizations to act jointly with respect to matters as to which they share authority under this title in planning, developing, operating, or regulating a national market system (or a subsystem thereof) or one or more facilities thereof; and

(C) to conduct studies and make recommendations to the Congress from time to time as to the possible need for modifications of the scheme of self-regulation provided for in this title so as to adapt it to a national market system.

(b)(1) Except as otherwise provided in this section, it shall be unlawful for any securities information processor unless registered in accordance with this subsection, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a securities information processor. The Commission, by rule or order, upon its own motion or upon application, may conditionally or unconditionally exempt any securities information processor or class of securities information processors or security or class of securities from any provision of

this section or the rules or regulations thereunder, if the Commission finds that such exemption is consistent with the public interest, the protection of investors, and the purposes of this section, including the maintenance of fair and orderly markets in securities and the removal of impediments to and perfection of the mechanism of a national market system: *Provided, however,* That a securities information processor not acting as the exclusive processor of any information with respect to quotations for or transactions in securities is exempt from the requirement to register in accordance with this subsection unless the Commission, by rule or order, finds that the registration of such securities information processor is necessary or appropriate in the public interest, for the protection of investors, or for the achievement of the purposes of this section.

(2) A securities information processor may be registered by filing with the Commission an application for registration in such form as the Commission, by rule, may prescribe containing the address of its principal office, or offices, the names of the securities and markets for which it is then acting and for which it proposes to act as a securities information processor, and such other information and documents as the Commission, by rule, may prescribe with regard to performance capability, standards and procedures for the collection, processing, distribution, and publication of information with respect to quotations for and transactions in securities, personnel qualifications, financial condition, and such other matters as the Commission determines to be germane to the provisions of this title and the rules and regulations thereunder, or necessary or appropriate in furtherance of the purposes of this section.

(3) The Commission shall, upon the filing of an application for registration pursuant to paragraph (2) of this subsection, publish notice of the filing and afford interested persons an opportunity to submit written data, views, and arguments concerning such application. Within ninety days of the date of the publication of such notice (or within such longer period as to which the applicant consents) the Commission shall—

(A) by order grant such registration, or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred eighty days of the date of publication of notice of the filing of the application for registration. At the conclusion of such proceedings the Commission, by order, shall grant or deny such registration. The Commission may extend the time for the conclusion of such proceedings for up to sixty days if it finds good cause for such extension and publishes its reasons for so finding or for such longer periods as to which the applicant consents.

The Commission shall grant the registration of a securities information processor if the Commission finds that such securities information processor is so organized, and has the capacity, to be able to assure the prompt, accurate, and reliable performance of its functions as a securities information processor, comply with the provisions of this title and the rules and regulations thereunder, carry out its functions in a manner consistent with the purposes of this section, and, insofar as it is acting as an exclusive processor,

operate fairly and efficiently. The Commission shall deny the registration of a securities information processor if the Commission does not make any such finding.

(4) A registered securities information processor may, upon such terms and conditions as the Commission deems necessary or appropriate in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any registered securities information processor is no longer in existence or has ceased to do business in the capacity specified in its application for registration, the Commission, by order, shall cancel the registration.

(5)(A) If any registered securities information processor prohibits or limits any person in respect of access to services offered, directly or indirectly, by such securities information processor, the registered securities information processor shall promptly file notice thereof with the Commission. The notice shall be in such form and contain such information as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Any prohibition or limitation on access to services with respect to which a registered securities information processor is required by this paragraph to file notice shall be subject to review by the Commission on its own motion, or upon application by any person aggrieved thereby filed within thirty days after such notice has been filed with the Commission and received by such aggrieved person, or within such longer period as the Commission may determine. Application to the Commission for review, or the institution of review by the Commission on its own motion, shall not operate as a stay of such prohibition or limitation, unless the Commission otherwise orders, summarily or after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of the submission of affidavits or presentation of oral arguments). The Commission shall establish for appropriate cases an expedited procedure for consideration and determination of the question of a stay.

(B) In any proceeding to review the prohibition or limitation of any person in respect of access to services offered by a registered securities information processor, if the Commission finds, after notice and opportunity for hearing, that such prohibition or limitation is consistent with the provisions of this title and the rules and regulations thereunder and that such person has not been discriminated against unfairly, the Commission, by order, shall dismiss the proceeding. If the Commission does not make any such finding or if it finds that such prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this title, the Commission, by order, shall set aside the prohibition or limitation and require the registered securities information processor to permit such person access to services offered by the registered securities information processor.

(6) The Commission, by order, may censure or place limitations upon the activities, functions, or operations of any registered securities information processor or suspend for a period not exceeding twelve months or revoke the registration of any such processor, if the Commission finds, on the record after notice and opportunity

for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest, necessary or appropriate for the protection of investors or to assure the prompt, accurate, or reliable performance of the functions of such securities information processor, and that such securities information processor has violated or is unable to comply with any provision of this title or the rules or regulations thereunder.

(c)(1) No self-regulatory organization, member thereof, securities information processor, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to collect, process, distribute, publish, or prepare for distribution or publication any information with respect to quotations for or transactions in any security other than an exempted security, to assist, participate in, or coordinate the distribution or publication of such information, or to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any such security in contravention of such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title to—

(A) prevent the use, distribution, or publication of fraudulent, deceptive, or manipulative information with respect to quotations for and transactions in such securities;

(B) assure the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information;

(C) assure that all securities information processors may, for purposes of distribution and publication, obtain on fair and reasonable terms such information with respect to quotations for and transactions in such securities as is collected, processed, or prepared for distribution or publication by any exclusive processor of such information acting in such capacity;

(D) assure that all exchange members, brokers, dealers, securities information processors, and, subject to such limitations as the Commission, by rule, may impose as necessary or appropriate for the protection of investors or maintenance of fair and orderly markets, all other persons may obtain on terms which are not unreasonably discriminatory such information with respect to quotations for and transactions in such securities as is published or distributed by any self-regulatory organization or securities information processor;

(E) assure that all exchange members, brokers, and dealers transmit and direct orders for the purchase or sale of qualified securities in a manner consistent with the establishment and operation of a national market system; and

(F) assure equal regulation of all markets for qualified securities and all exchange members, brokers, and dealers effecting transactions in such securities.

(2) The Commission, by rule, as it deems necessary or appropriate in the public interest or for the protection of investors, may require any person who has effected the purchase or sale of any qualified security by use of the mails or any means or instrumen-

tality of interstate commerce to report such purchase or sale to a registered securities information processor, national securities exchange, or registered securities association and require such processor, exchange, or association to make appropriate distribution and publication of information with respect to such purchase or sale.

(3)(A) The Commission, by rule, is authorized to prohibit brokers and dealers from effecting transactions in securities registered pursuant to section 12(b) otherwise than on a national securities exchange, if the Commission finds, on the record after notice and opportunity for hearing, that—

(i) as a result of transactions in such securities effected otherwise than on a national securities exchange the fairness or orderliness of the markets for such securities has been affected in a manner contrary to the public interest or the protection of investors;

(ii) no rule of any national securities exchange unreasonably impairs the ability of any dealer to solicit or effect transactions in such securities for his own account or unreasonably restricts competition among dealers in such securities or between dealers acting in the capacity of market makers who are specialists in such securities and such dealers who are not specialists in such securities, and

(iii) the maintenance or restoration of fair and orderly markets in such securities may not be assured through other lawful means under this title.

The Commission may conditionally or unconditionally exempt any security or transaction or any class of securities or transactions from any such prohibition if the Commission deems such exemption consistent with the public interest, the protection of investors, and the maintenance of fair and orderly markets.

(B) For the purposes of subparagraph (A) of this paragraph, the ability of a dealer to solicit or effect transactions in securities for his own account shall not be deemed to be unreasonably impaired by any rule of an exchange fairly and reasonably prescribing the sequence in which orders brought to the exchange must be executed or which has been adopted to effect compliance with a rule of the Commission promulgated under this title.

(4) The Commission is directed to review any and all rules of national securities exchanges which limit or condition the ability of members to effect transactions in securities otherwise than on such exchanges.

(5) No national securities exchange or registered securities association may limit or condition the participation of any member in any registered clearing agency.

(6) TICK SIZE.—

(A) STUDY AND REPORT.—The Commission shall conduct a study examining the transition to trading and quoting securities in one penny increments, also known as decimalization. The study shall examine the impact that decimalization has had on the number of initial public offerings since its implementation relative to the period before its implementation. The study shall also examine the impact that this change has had on liquidity for small and

middle capitalization company securities and whether there is sufficient economic incentive to support trading operations in these securities in penny increments. Not later than 90 days after the date of enactment of this paragraph, the Commission shall submit to Congress a report on the findings of the study.

(B) DESIGNATION.—If the Commission determines that the securities of emerging growth companies should be quoted and traded using a minimum increment of greater than $0.01, the Commission may, by rule not later than 180 days after the date of enactment of this paragraph, designate a minimum increment for the securities of emerging growth companies that is greater than $0.01 but less than $0.10 for use in all quoting and trading of securities in any exchange or other execution venue.

(d)(1) Not later than one hundred eighty days after the date of enactment of the Securities Acts Amendments of 1975, the Commission shall establish a National Market Advisory Board (hereinafter in this section referred to as the "Advisory Board") to be composed of fifteen members, not all of whom shall be from the same geographical area of the United States, appointed by the Commission for a term specified by the Commission of not less than two years or more than five years. The Advisory Board shall consist of persons associated with brokers and dealers (who shall be a majority) and persons not so associated who are representative of the public and, to the extent feasible, have knowledge of the securities markets of the United States.

(2) It shall be the responsibility of the Advisory Board to formulate and furnish to the Commission its views on significant regulatory proposals made by the Commission or any self-regulatory organization concerning the establishment, operation, and regulation of the markets for securities in the United States.

(3)(A) The Advisory Board shall study and make recommendations to the Commission as to the steps it finds appropriate to facilitate the establishment of a national market system. In so doing, the Advisory Board shall assume the responsibilities of any advisory committee appointed to advise the Commission with respect to the national market system which is in existence at the time of the establishment of the Advisory Board.

(B) The Advisory Board shall study the possible need for modifications of the scheme of self-regulation provided for in this title so as to adapt it to a national market system, including the need for the establishment of a new self-regulatory organization (hereinafter in this section referred to as a "National Market Regulatory Board" or "Regulatory Board") to administer the national market system. In the event the Advisory Board determines a National Market Regulatory Board should be established, it shall make recommendations as to:

(i) the point in time at which a Regulatory Board should be established;

(ii) the composition of a Regulatory Board;

(iii) the scope of the authority of a Regulatory Board;

(iv) the relationship of a Regulatory Board to the Commission and to existing self-regulatory organizations; and

(v) the manner in which a Regulatory Board should be funded.

The Advisory Board shall report to the Congress, on or before December 31, 1976, the results of such study and its recommendations, including such recommendations for legislation as it deems appropriate.

(C) In carrying out its responsibilities under this paragraph, the Advisory Board shall consult with self-regulatory organizations, brokers, dealers, securities information processors, issuers, investors, representatives of Government agencies, and other persons interested or likely to participate in the establishment, operation, or regulation of the national market system.

(e) NATIONAL MARKETS SYSTEM FOR SECURITY FUTURES PRODUCTS.—

(1) CONSULTATION AND COOPERATION REQUIRED.—With respect to security futures products, the Commission and the Commodity Futures Trading Commission shall consult and cooperate so that, to the maximum extent practicable, their respective regulatory responsibilities may be fulfilled and the rules and regulations applicable to security futures products may foster a national market system for security futures products if the Commission and the Commodity Futures Trading Commission jointly determine that such a system would be consistent with the congressional findings in subsection (a)(1). In accordance with this objective, the Commission shall, at least 15 days prior to the issuance for public comment of any proposed rule or regulation under this section concerning security futures products, consult and request the views of the Commodity Futures Trading Commission.

(2) APPLICATION OF RULES BY ORDER OF CFTC.—No rule adopted pursuant to this section shall be applied to any person with respect to the trading of security futures products on an exchange that is registered under section 6(g) unless the Commodity Futures Trading Commission has issued an order directing that such rule is applicable to such persons.

REGISTRATION REQUIREMENTS FOR SECURITIES

SEC. 12. **[**78*l***]** (a) It shall be unlawful for any member, broker, or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is effective as to such security for such exchange in accordance with the provisions of this title and the rules and regulations thereunder. The provisions of this subsection shall not apply in respect of a security futures product traded on a national securities exchange.

(b) A security may be registered on a national securities exchange by the issuer filing an application with the exchange (and filing with the Commission such duplicate originals thereof as the Commission may require), which application shall contain—

(1) Such information, in such detail, as to the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer, and any guarantor of the security as to principal or interest or

both, as the Commission may by rules and regulations require, as necessary or appropriate in the public interest or for the protection of investors, in respect of the following: [28]

(A) the organization, financial structures, and nature of the business;

(B) the terms, position, rights, and privileges of the different classes of securities outstanding;

(C) the terms on which their securities are to be, and during the preceding three years have been, offered to the public or otherwise;

(D) the directors, officers, and underwriters, and each security holder of record holding more than 10 per centum of any class of any equity security of the issuer (other than an exempted security), their remuneration and their interests in the securities of, and their material contracts with, the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer;

(E) remuneration to others than directors and officers exceeding $20,000 per annum;

(F) bonus and profit-sharing arrangements;

(G) management and service contracts;

(H) options existing or to be created in respect of their securities;

(I) material contracts, not made in the ordinary course of business, which are to be executed in whole or in part at or after the filing of the application or which were made not more than two years before such filing, and every material patent or contract for a material patent right shall be deemed a material contract;

(J) balance sheets for not more than the three preceding fiscal years, certified if required by the rules and regulations of the Commission by a registered public accounting firm;

(K) profit and loss statements for not more than the three preceding fiscal years, certified if required by the rules and regulations of the Commission by a registered public accounting firm; and

(L) any further financial statements which the Commission may deem necessary or appropriate for the protection of investors.

(2) Such copies of articles of incorporation, bylaws, trust indentures, or corresponding documents by whatever name known, underwriting arrangements, and other similar documents of, and voting trust agreements with respect to, the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer as the Commission may require as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security.

(3) Such copies of material contracts, referred to in paragraph (1)(I) above, as the Commission may require as nec-

[28] For additional information required of certain public utilities, see 16 U.S.C. 824c(h).

essary or appropriate for the proper protection of investors and to insure fair dealing in the security.

(c) If in the judgment of the Commission any information required under subsection (b) of this section is inapplicable to any specified class or classes of issuers, the Commission shall require in lieu thereof the submission of such other information of comparable character as it may deem applicable to such class of issuers.

(d) If the exchange authorities certify to the Commission that the security has been approved by the exchange for listing and registration, the registration shall become effective thirty days after the receipt of such certification by the Commission or within such shorter period of time as the Commission may determine. A security registered with a national securities exchange may be withdrawn or stricken from listing and registration in accordance with the rules of the exchange and, upon such terms as the Commission may deem necessary to impose for the protection of investors, upon application by the issuer or the exchange to the Commission; whereupon the issuer shall be relieved from further compliance with the provisions of this section and section 13 of this title and any rules or regulations under such sections as to the securities so withdrawn or stricken. An unissued security may be registered only in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(e) Notwithstanding the foregoing provisions of this section, the Commission may by such rules and regulations as it deems necessary or appropriate in the public interest or for the protection of investors permit securities listed on any exchange at the time the registration of such exchange as a national securities exchange becomes effective, to be registered for a period ending not later than July 1, 1935, without complying with the provisions of this section.

(f)(1)(A) Notwithstanding the preceding subsections of this section, any national securities exchange, in accordance with the requirements of this subsection and the rules hereunder, may extend unlisted trading privileges to—

(i) any security that is listed and registered on a national securities exchange, subject to subparagraph (B); and

(ii) any security that is otherwise registered pursuant to this section, or that would be required to be so registered except for the exemption from registration provided in subparagraph (B) or (G) of subsection (g)(2), subject to subparagraph (E) of this paragraph.

(B) A national securities exchange may not extend unlisted trading privileges to a security described in subparagraph (A)(i) during such interval, if any, after the commencement of an initial public offering of such security, as is or may be required pursuant to subparagraph (C).

(C) Not later than 180 days after the date of enactment of the Unlisted Trading Privileges Act of 1994, the Commission shall prescribe, by rule or regulation, the duration of the interval referred to in subparagraph (B), if any, as the Commission determines to be necessary or appropriate for the maintenance of fair and orderly markets, the protection of investors and the public interest, or oth-

erwise in furtherance of the purposes of this title. Until the earlier of the effective date of such rule or regulation or 240 days after such date of enactment, such interval shall begin at the opening of trading on the day on which such security commences trading on the national securities exchange with which such security is registered and end at the conclusion of the next day of trading.

(D) The Commission may prescribe, by rule or regulation such additional procedures or requirements for extending unlisted trading privileges to any security as the Commission deems necessary or appropriate for the maintenance of fair and orderly markets, the protection of investors and the public interest, or otherwise in furtherance of the purposes of this title.

(E) No extension of unlisted trading privileges to securities described in subparagraph (A)(ii) may occur except pursuant to a rule, regulation, or order of the Commission approving such extension or extensions. In promulgating such rule or regulation or in issuing such order, the Commission—

(i) shall find that such extension or extensions of unlisted trading privileges is consistent with the maintenance of fair and orderly markets, the protection of investors and the public interest, and otherwise in furtherance of the purposes of this title;

(ii) shall take account of the public trading activity in such securities, the character of such trading, the impact of such extension on the existing markets for such securities, and the desirability of removing impediments to and the progress that has been made toward the development of a national market system; and

(iii) shall not permit a national securities exchange to extend unlisted trading privileges to such securities if any rule of such national securities exchange would unreasonably impair the ability of a dealer to solicit or effect transactions in such securities for its own account, or would unreasonably restrict competition among dealers in such securities or between such dealers acting in the capacity of market makers who are specialists and such dealers who are not specialists.

(F) An exchange may continue to extend unlisted trading privileges in accordance with this paragraph only if the exchange and the subject security continue to satisfy the requirements for eligibility under this paragraph, including any rules and regulations issued by the Commission pursuant to this paragraph, except that unlisted trading privileges may continue with regard to securities which had been admitted on such exchange prior to July 1, 1964, notwithstanding the failure to satisfy such requirements. If unlisted trading privileges in a security are discontinued pursuant to this subparagraph, the exchange shall cease trading in that security, unless the exchange and the subject security thereafter satisfy the requirements of this paragraph and the rules issued hereunder.

(G) For purposes of this paragraph—

(i) a security is the subject of an initial public offering if—

(I) the offering of the subject security is registered under the Securities Act of 1933; and

(II) the issuer of the security, immediately prior to filing the registration statement with respect to the offering,

was not subject to the reporting requirements of section 13 or 15(d) of this title; and

(ii) an initial public offering of such security commences at the opening of trading on the day on which such security commences trading on the national securities exchange with which such security is registered.

(2)(A) At any time within 60 days of commencement of trading on an exchange of a security pursuant to unlisted trading privileges, the Commission may summarily suspend such unlisted trading privileges on the exchange. Such suspension shall not be reviewable under section 25 of this title and shall not be deemed to be a final agency action for purposes of section 704 of title 5, United States Code. Upon such suspension—

(i) the exchange shall cease trading in the security by the close of business on the date of such suspension, or at such time as the Commission may prescribe by rule or order for the maintenance of fair and orderly markets, the protection of investors and the public interest, or otherwise in furtherance of the purposes of this title; and

(ii) if the exchange seeks to extend unlisted trading privileges to the security, the exchange shall file an application to reinstate its ability to do so with the Commission pursuant to such procedures as the Commission may prescribe by rule or order for the maintenance of fair and orderly markets, the protection of investors and the public interest, or otherwise in furtherance of the purposes of this title.

(B) A suspension under subparagraph (A) shall remain in effect until the Commission, by order, grants approval of an application to reinstate, as described in subparagraph (A)(ii).

(C) A suspension under subparagraph (A) shall not affect the validity or force of an extension of unlisted trading privileges in effect prior to such suspension.

(D) The Commission shall not approve an application by a national securities exchange to reinstate its ability to extend unlisted trading privileges to a security unless the Commission finds, after notice and opportunity for hearing, that the extension of unlisted trading privileges pursuant to such application is consistent with the maintenance of fair and orderly markets, the protection of investors and the public interest, and otherwise in furtherance of the purposes of this title. If the application is made to reinstate unlisted trading privileges to a security described in paragraph (1)(A)(ii), the Commission—

(i) shall take account of the public trading activity in such security, the character of such trading, the impact of such extension on the existing markets for such a security, and the desirability of removing impediments to and the progress that has been made toward the development of a national market system; and

(ii) shall not grant any such application if any rule of the national securities exchange making application under this subsection would unreasonably impair the ability of a dealer to solicit or effect transactions in such security for its own account, or would unreasonably restrict competition among dealers in such security or between such dealers acting in the ca-

pacity of marketmakers who are specialists and such dealers who are not specialists.

(3) Notwithstanding paragraph (2), the Commission shall by rules and regulations suspend unlisted trading privileges in whole or in part for any or all classes of securities for a period not exceeding twelve months, if it deems such suspension necessary or appropriate in the public interest or for the protection of investors or to prevent evasion of the purposes of this title.

(4) On the application of the issuer of any security for which unlisted trading privileges on any exchange have been continued or extended pursuant to this subsection, or of any broker or dealer who makes or creates a market for such security, or of any other person having a bona fide interest in the question of termination or suspension of such unlisted trading privileges, or on its own motion, the Commission shall by order terminate, or suspend for a period not exceeding twelve months, such unlisted trading privileges for such security if the Commission finds, after appropriate notice and opportunity for hearing, that such termination or suspension is necessary or appropriate in the public interest or for the protection of investors.

(5) In any proceeding under this subsection in which appropriate notice and opportunity for hearing are required, notice of not less than ten days to the applicant in such proceeding, to the issuer of the security involved, to the exchange which is seeking to continue or extend or has continued or extended unlisted trading privileges for such security, and to the exchange, if any, on which such security is listed and registered, shall be deemed adequate notice, and any broker or dealer who makes or creates a market for such security, and any other person having a bona fide interest in such proceeding, shall upon application be entitled to be heard.

(6) Any security for which unlisted trading privileges are continued or extended pursuant to this subsection shall be deemed to be registered on a national securities exchange within the meaning of this title. The powers and duties of the Commission under this title shall be applicable to the rules of an exchange in respect to any such security. The Commission may, by such rules and regulations as it deems necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions, or for stated periods, exempt such securities from the operation of any provision of section 13, 14, or 16 of this title.

(g)(1) Every issuer which is engaged in interstate commerce, or in a business affecting interstate commerce, or whose securities are traded by use of the mails or any means or instrumentality of interstate commerce shall—

(A) within 120 days after the last day of its first fiscal year ended on which the issuer has total assets exceeding $10,000,000 and a class of equity security (other than an exempted security) held of record by either—

(i)[29] 2,000 persons, or

(ii) 500 persons who are not accredited investors (as such term is defined by the Commission), and

[29] Margins for clauses (i) and (ii) so in law and probably should be moved 2 ems to the right.

(B) in the case of an issuer that is a bank, a savings and loan holding company (as defined in section 10 of the Home Owners' Loan Act), or a bank holding company, as such term is defined in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841), not later than 120 days after the last day of its first fiscal year ended after the effective date of this subsection, on which the issuer has total assets exceeding $10,000,000 and a class of equity security (other than an exempted security) held of record by 2,000 or more persons,

register such security by filing with the Commission a registration statement (and such copies thereof as the Commission may require) with respect to such security containing such information and documents as the Commission may specify comparable to that which is required in an application to register a security pursuant to subsection (b) of this section. Each such registration statement shall become effective sixty days after filing with the Commission or within such shorter period as the Commission may direct. Until such registration statement becomes effective it shall not be deemed filed for the purposes of section 18 of this title. Any issuer may register any class of equity security not required to be registered by filing a registration statement pursuant to the provisions of this paragraph. The Commission is authorized to extend the date upon which any issuer or class of issuers is required to register a security pursuant to the provisions of this paragraph.

(2) The provisions of this subsection shall not apply in respect of—

(A) any security listed and registered on a national securities exchange.

(B) any security issued by an investment company registered pursuant to section 8 of the Investment Company Act of 1940.

(C) any security, other than permanent stock, guaranty stock, permanent reserve stock, or any similar certificate evidencing nonwithdrawable capital, issued by a savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, which is supervised and examined by State or Federal authority having supervision over any such institution.

(D) any security of an issuer organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any private shareholder or individual; or any security of a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940.

(E) any security of an issuer which is a "cooperative association" as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended,[30] or a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined.

[30] 12 U.S.C. 1141j(a). [Printed in appendix to this volume.]

(F) any security issued by a mutual or cooperative organization which supplies a commodity or service primarily for the benefit of its members and operates not for pecuniary profit, but only if the security is part of a class issuable only to persons who purchase commodities or services from the issuer, the security is transferable only to a successor in interest or occupancy of premises serviced or to be served by the issuer, and no dividends are payable to the holder of the security.

(G) any security issued by an insurance company if all of the following conditions are met:

(i) Such insurance company is required to and does file an annual statement with the Commissioner of Insurance (or other officer or agency performing a similar function) of its domiciliary State, and such annual statement conforms to that prescribed by the National Association of Insurance Commissioners or in the determination of such State commissioner, officer or agency substantially conforms to that so prescribed.

(ii) Such insurance company is subject to regulation by its domiciliary State of proxies, consents, or authorizations in respect of securities issued by such company and such regulation conforms to that prescribed by the National Association of Insurance Commissioners.

(iii) After July 1, 1966, the purchase and sales of securities issued by such insurance company by beneficial owners, directors, or officers of such company are subject to regulation (including reporting) by its domiciliary State substantially in the manner provided in section 16 of this title.

(H) any interest or participation in any collective trust funds maintained by a bank or in a separate account maintained by an insurance company which interest or participation is issued in connection with (i) a stock-bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954,[31] (ii) an annuity plan which meets the requirements for deduction of the employer's contribution under section 404(a)(2) of such Code[32], or (iii) a church plan, company, or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940.

(3) The Commission may by rules or regulations or, on its own motion, after notice and opportunity for hearing, by order, exempt from this subsection any security of a foreign issuer, including any certificate of deposit for such a security, if the Commission finds that such exemption is in the public interest and is consistent with the protection of investors.

(4) Registration of any class of security pursuant to this subsection shall be terminated ninety days, or such shorter period as the Commission may determine, after the issuer files a certification with the Commission that the number of holders of record of such class of security is reduced to less than 300 persons, or, in the case

[31] 26 U.S.C. 401. [Printed in appendix to this volume.]
[32] 26 U.S.C. 404(a)(2). [Printed in appendix to this volume.]

of a bank, a savings and loan holding company (as defined in section 10 of the Home Owners' Loan Act), or a bank holding company, as such term is defined in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841), 1,200 persons persons [33]. The Commission shall after notice and opportunity for hearing deny termination of registration if it finds that the certification is untrue. Termination of registration shall be deferred pending final determination on the question of denial.

(5) For the purposes of this subsection the term "class" shall include all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges. The Commission may for the purpose of this subsection define by rules and regulations the terms "total assets" and "held of record" as it deems necessary or appropriate in the public interest or for the protection of investors in order to prevent circumvention of the provisions of this subsection. For purposes of this subsection, a security futures product shall not be considered a class of equity security of the issuer of the securities underlying the security futures product. For purposes of determining whether an issuer is required to register a security with the Commission pursuant to paragraph (1), the definition of "held of record" shall not include securities held by persons who received the securities pursuant to an employee compensation plan in transactions exempted from the registration requirements of section 5 of the Securities Act of 1933. [34]

(6) EXCLUSION FOR PERSONS HOLDING CERTAIN SECURITIES.—The Commission shall, by rule, exempt, conditionally or unconditionally, securities acquired pursuant to an offering made under section 4(6) of the Securities Act of 1933 from the provisions of this subsection.

(h) The Commission may by rules and regulations, or upon application of an interested person, by order, after notice and opportunity for hearing, exempt in whole or in part any issuer or class of issuers from the provisions of subsection (g) of this section or from section 13, 14, or 15(d) or may exempt from section 16 any officer, director, or beneficial owner of securities of any issuer, any security of which is required to be registered pursuant to subsection (g) hereof, upon such terms and conditions and for such period as it deems necessary or appropriate, if the Commission finds, by reason of the number of public investors, amount of trading interest in the securities, the nature and extent of the activities of the issuer, income or assets of the issuer, or otherwise, that such action is not inconsistent with the public interest or the protection of investors. The Commission may, for the purposes of any of the above-mentioned sections or subsections of this title, classify issuers and prescribe requirements appropriate for each such class.

[33] The second occurence of the word "persons" in the first sentence of paragraph (4) probably should not appear. See amendment made by section 601(a)(2) of Public Law 112–106.

[34] The last sentence of paragraph (5) was added by section 502 of Public Law 112–106. The amendment instructions state "[s]ection 12(g)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78l(g)(5)), as amended by section 302, is amended in subparagraph (A) by adding at the end the following:". The reference to section 302 does not relate to any provision of the Securities Exchange Act of 1934 and the placement of the new sentence was added to appear at the end of paragraph (5) to reflect the probable intent of Congress.

(i) In respect of any securities issued by banks and savings associations the deposits of which are insured in accordance with the Federal Deposit Insurance Act, the powers, functions, and duties vested in the Commission to administer and enforce sections 10A(m), 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of this Act, and sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes-Oxley Act of 2002, (1) with respect to national banks and Federal savings associations, the accounts of which are insured by the Federal Deposit Insurance Corporation are vested in the Comptroller of the Currency, (2) with respect to all other member banks of the Federal Reserve System are vested in the Board of Governors of the Federal Reserve System, and (3) with respect to all other insured banks and State savings associations, the accounts of which are insured by the Federal Deposit Insurance Corporation, are vested in the Federal Deposit Insurance Corporation. The Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation shall have the power to make such rules and regulations as may be necessary for the execution of the functions vested in them as provided in this subsection. In carrying out their responsibilities under this subsection, the agencies named in the first sentence of this subsection shall issue substantially similar regulations to regulations and rules issued by the Commission under sections 10A(m), 12, 13, 14(a), 14(c), 14(d), 14(f) and 16 of this Act, and sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes-Oxley Act of 2002, unless they find that implementation of substantially similar regulations with respect to insured banks and insured institutions are not necessary or appropriate in the public interest or for protection of investors, and publish such findings, and the detailed reasons therefor, in the Federal Register. Such regulations of the above-named agencies, or the reasons for failure to publish such substantially similar regulations to those of the Commission, shall be published in the Federal Register within 120 days of the date of enactment of this subsection, and, thereafter, within 60 days of any changes made by the Commission in its relevant regulations and rules.[35]

(j) 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.

(k) TRADING SUSPENSIONS; EMERGENCY AUTHORITY.—

(1) TRADING SUSPENSIONS.—If in its opinion the public interest and the protection of investors so require, the Commission is authorized by order—

[35] Referred to at 12 U.S.C. 3305.

(A) summarily to suspend trading in any security (other than an exempted security) for a period not exceeding 10 business days, and

(B) summarily to suspend all trading on any national securities exchange or otherwise, in securities other than exempted securities, for a period not exceeding 90 calendar days.

The action described in subparagraph (B) shall not take effect unless the Commission notifies the President of its decision and the President notifies the Commission that the President does not disapprove of such decision. If the actions described in subparagraph (A) or (B) involve a security futures product, the Commission shall consult with and consider the views of the Commodity Futures Trading Commission.

(2) EMERGENCY ORDERS.—

(A) IN GENERAL.—The Commission, in an emergency, may by order summarily take such action to alter, supplement, suspend, or impose requirements or restrictions with respect to any matter or action subject to regulation by the Commission or a self-regulatory organization under the securities laws, as the Commission determines is necessary in the public interest and for the protection of investors—

(i) to maintain or restore fair and orderly securities markets (other than markets in exempted securities);

(ii) to ensure prompt, accurate, and safe clearance and settlement of transactions in securities (other than exempted securities); or

(iii) to reduce, eliminate, or prevent the substantial disruption by the emergency of—

(I) securities markets (other than markets in exempted securities), investment companies, or any other significant portion or segment of such markets; or

(II) the transmission or processing of securities transactions (other than transactions in exempted securities).

(B) EFFECTIVE PERIOD.—An order of the Commission under this paragraph shall continue in effect for the period specified by the Commission, and may be extended. Except as provided in subparagraph (C), an order of the Commission under this paragraph may not continue in effect for more than 10 business days, including extensions.

(C) EXTENSION.—An order of the Commission under this paragraph may be extended to continue in effect for more than 10 business days if, at the time of the extension, the Commission finds that the emergency still exists and determines that the continuation of the order beyond 10 business days is necessary in the public interest and for the protection of investors to attain an objective described in clause (i), (ii), or (iii) of subparagraph (A). In no event shall an order of the Commission under this paragraph continue in effect for more than 30 calendar days.

(D) SECURITY FUTURES.—If the actions described in subparagraph (A) involve a security futures product, the Commission shall consult with and consider the views of the Commodity Futures Trading Commission.

(E) EXEMPTION.—In exercising its authority under this paragraph, the Commission shall not be required to comply with the provisions of—

(i) section 19(c); or

(ii) section 553 of title 5, United States Code.

(3) TERMINATION OF EMERGENCY ACTIONS BY PRESIDENT.—The President may direct that action taken by the Commission under paragraph (1)(B) or paragraph (2) of this subsection shall not continue in effect.

(4) COMPLIANCE WITH ORDERS.—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 in contravention of an order of the Commission under this subsection unless such order has been stayed, modified, or set aside as provided in paragraph (5) of this subsection or has ceased to be effective upon direction of the President as provided in paragraph (3).

(5) LIMITATIONS ON REVIEW OF ORDERS.—An order of the Commission pursuant to this subsection shall be subject to review only as provided in section 25(a) of this title. Review shall be based on an examination of all the information before the Commission at the time such order was issued. The reviewing court shall not enter a stay, writ of mandamus, or similar relief unless the court finds, after notice and hearing before a panel of the court, that the Commission's action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(6) CONSULTATION.—Prior to taking any action described in paragraph (1)(B), the Commission shall consult with and consider the views of the Secretary of the Treasury, the Board of Governors of the Federal Reserve System, and the Commodity Futures Trading Commission, unless such consultation is impracticable in light of the emergency.

(7) DEFINITION.—For purposes of this subsection, the term "emergency" means—

(A) a major market disturbance characterized by or constituting—

(i) sudden and excessive fluctuations of securities prices generally, or a substantial threat thereof, that threaten fair and orderly markets; or

(ii) a substantial disruption of the safe or efficient operation of the national system for clearance and settlement of transactions in securities, or a substantial threat thereof; or

(B) a major disturbance that substantially disrupts, or threatens to substantially disrupt—

(i) the functioning of securities markets, investment companies, or any other significant portion or segment of the securities markets; or

(ii) the transmission or processing of securities transactions.

(l) It shall be unlawful for an issuer, any class of whose securities is registered pursuant to this section or would be required to be so registered except for the exemption from registration provided by subsection (g)(2)(B) or (g)(2)(G) of this section, by the use of any means or instrumentality of interstate commerce, or of the mails, to issue, either originally or upon transfer, any of such securities in a form or with a format which contravenes such rules and regulations as the Commission may prescribe as necessary or appropriate for the prompt and accurate clearance and settlement of transactions in securities. The provisions of this subsection shall not apply to variable annuity contracts or variable life policies issued by an insurance company or its separate accounts.

PERIODICAL AND OTHER REPORTS [36]

SEC. 13. [78m] (a) Every issuer of a security registered pursuant to section 12 of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 12, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange. In any registration statement, periodic report, or other reports to be filed with the Commission, an emerging growth company need not present selected financial data in accordance with section 229.301 of title 17, Code of Federal Regulations, for any period prior to the earliest audited period presented in connection with its first registration statement that became effective under this Act or the Securities Act of 1933 and, with respect to any such statement or reports, an emerging growth company may not be required to comply with any new or revised financial accounting standard until such date that a company that is not an issuer (as defined under section 2(a) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201(a))) is required to comply with such new or revised accounting standard, if such standard applies to companies that are not issuers.

(b)(1) The Commission may prescribe, in regard to reports made pursuant to this title, the form or forms in which the required information shall be set forth, the items or details to be shown in the balance sheet and the earnings statement, and the

[36] See also 16 U.S.C. 824c(h).

methods to be followed in the preparation of reports, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of separate and/or consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but in the case of the reports of any person whose methods of accounting are prescribed under the provisions of any law of the United States, or any rule or regulation thereunder, the rules and regulations of the Commission with respect to reports shall not be inconsistent with the requirements imposed by such law or rule or regulation in respect of the same subject matter (except that such rules and regulations of the Commission may be inconsistent with such requirements to the extent that the Commission determines that the public interest or the protection of investors so requires).

(2) Every issuer which has a class of securities registered pursuant to section 12 of this title and every issuer which is required to file reports pursuant to section 15(d) of this title shall—

(A) 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;

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

(i) transactions are executed in accordance with management's general or specific authorization;

(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences; and

(C) notwithstanding any other provision of law, pay the allocable share of such issuer of a reasonable annual accounting support fee or fees, determined in accordance with section 109 of the Sarbanes-Oxley Act of 2002.

(3)(A) With respect to matters concerning the national security of the United States, no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives. Each directive issued under this paragraph shall set forth the specific facts and circumstances with respect to which the provisions of this paragraph are to be invoked. Each such directive shall, unless renewed in writing, expire one year after the date of issuance.

(B) Each head of a Federal department or agency of the United States who issues a directive pursuant to this paragraph shall maintain a complete file of all such directives and shall, on October 1 of each year, transmit a summary of matters covered by such directives in force at any time during the previous year to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

(4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection except as provided in paragraph (5) of this subsection.

(5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).

(6) Where an issuer which has a class of securities registered pursuant to section 12 of this title or an issuer which is required to file reports pursuant to section 15(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such circumstances include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2).

(7) For the purpose of paragraph (2) of this subsection, the terms "reasonable assurances" and "reasonable detail" mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.

(c) If in the judgment of the Commission any report required under subsection (a) is inapplicable to any specified class or classes of issuers, the Commission shall require in lieu thereof the submission of such reports of comparable character as it may deem applicable to such class or classes of issuers.

(d)(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 12 of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940 or any equity security issued by a Native Corporation pursuant to section 37(d)(6) of the Alaska Native Claims Settlement Act, or otherwise becomes or is deemed to become a beneficial owner of any of the foregoing upon the purchase or sale of a security-based swap that the Commission may define by rule, and is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition or within such shorter time as the Commission may establish by rule, file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by

rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 3(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(2) If any material change occurs in the facts set forth in the statement filed with the Commission, an amendment shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933;

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of an equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e)(1) It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 12 of this title, or which is a closed-end investment company registered under the Investment Company Act of 1940, to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices. Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information, as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which the Commission deems to be material to a determination whether such security should be sold.

(2) For the purpose of this subsection, a purchase by or for the issuer or any person controlling, controlled by, or under common control with the issuer, or a purchase subject to control of the issuer or any such person, shall be deemed to be a purchase by the issuer. The Commission shall have power to make rules and regulations implementing this paragraph in the public interest and for the protection of investors, including exemptive rules and regulations covering situations in which the Commission deems it unnec-

essary or inappropriate that a purchase of the type described in this paragraph shall be deemed to be a purchase by the issuer for purposes of some or all of the provisions of paragraph (1) of this subsection.

(3) At the time of filing such statement as the Commission may require by rule pursuant to paragraph (1) of this subsection, the person making the filing shall pay to the Commission a fee at a rate that, subject to paragraph (4), is equal to $92 per $1,000,000 of the value of securities proposed to be purchased. The fee shall be reduced with respect to securities in an amount equal to any fee paid with respect to any securities issued in connection with the proposed transaction under section 6(b) of the Securities Act of 1933, or the fee paid under that section shall be reduced in an amount equal to the fee paid to the Commission in connection with such transaction under this paragraph.

(4) ANNUAL ADJUSTMENT.—For each fiscal year, the Commission shall by order adjust the rate required by paragraph (3) for such fiscal year to a rate that is equal to the rate (expressed in dollars per million) that is applicable under section 6(b) of the Securities Act of 1933 for such fiscal year.

(5) FEE COLLECTIONS.—Fees collected pursuant to this subsection for fiscal year 2012 and each fiscal year thereafter shall be deposited and credited as general revenue of the Treasury and shall not be available for obligation.

(6) EFFECTIVE DATE; PUBLICATION.—In exercising its authority under this subsection, the Commission shall not be required to comply with the provisions of section 553 of title 5, United States Code. An adjusted rate prescribed under paragraph (4) shall be published and take effect in accordance with section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)).

(7) PRO RATA APPLICATION.—The rates per $1,000,000 required by this subsection shall be applied pro rata to amounts and balances of less than $1,000,000.

(f)(1) Every institutional investment manager which uses the mails, or any means or instrumentality of interstate commerce in the course of its business as an institutional investment manager and which exercises investment discretion with respect to accounts holding equity securities of a class described in section 13(d)(1) of this title[37] having an aggregate fair market value on the last trading day in any of the preceding twelve months of at least $100,000,000 or such lesser amount (but in no case less than $10,000,000) as the Commission, by rule, may determine, shall file reports with the Commission in such form, for such periods, and at such times after the end of such periods as the Commission, by rule, may prescribe, but in no event shall such reports be filed for periods longer than one year or shorter than one quarter. Such reports shall include for each such equity security held on the last day of the reporting period by accounts (in aggregate or by type as the Commission, by rule, may prescribe) with respect to which the

[37] Section 766(c) of Public Law 111–203 amends section 13(f)(1) by inserting "or otherwise becomes or is deemed to become a beneficial owner of any security of a class described in subsection (d)(1) upon the purchase or sale of a security-based swap that the Commission may define by rule," after "subsection (d)(1) of this section". Such amendment does not execute because the language where to insert new text doesn't appear in law.

institutional investment manager exercises investment discretion (other than securities held in amounts which the Commission, by rule, determines to be insignificant for purposes of this subsection), the name of the issuer and the title, class, CUSIP number, number of shares or principal amount, and aggregate fair market value of each such security. Such reports may also include for accounts (in aggregate or by type) with respect to which the institutional investment manager exercises investment discretion such of the following information as the Commission, by rule, prescribes—

(A) the name of the issuer and the title, class, CUSIP number, number of shares or principal amount, and aggregate fair market value or cost or amortized cost of each other security (other than an exempted security) held on the last day of the reporting period by such accounts;

(B) the aggregate fair market value or cost or amortized cost of exempted securities (in aggregate or by class) held on the last day of the reporting period by such accounts;

(C) the number of shares of each equity security of a class described in section 13(d)(1) of this title held on the last day of the reporting period by such accounts with respect to which the institutional investment manager possesses sole or shared authority to exercise the voting rights evidenced by such securities;

(D) the aggregate purchases and aggregate sales during the reporting period of each security (other than an exempted security) effected by or for such accounts; and

(E) with respect to any transaction or series of transactions having a market value of at least $500,000 or such other amount as the Commission, by rule, may determine, effected during the reporting period by or for such accounts in any equity security of a class described in section 13(d)(1) of this title—

(i) the name of the issuer and the title, class, and CUSIP number of the security;

(ii) the number of shares or principal amount of the security involved in the transaction;

(iii) whether the transaction was a purchase or sale;

(iv) the per share price or prices at which the transaction was effected;

(v) the date or dates of the transaction;

(vi) the date or dates of the settlement of the transaction;

(vii) the broker or dealer through whom the transaction was effected;

(viii) the market or markets in which the transaction was effected; and

(ix) such other related information as the Commission, by rule, may prescribe.

(2)[38] The Commission shall prescribe rules providing for the public disclosure of the name of the issuer and the title, class, CUSIP number, aggregate amount of the number of short sales of each security, and any additional information de-

[38] So in law.

termined by the Commission following the end of the reporting period. At a minimum, such public disclosure shall occur every month.

(3) The Commission, by rule or order, may exempt, conditionally or unconditionally, any institutional investment manager or security or any class of institutional investment managers or securities from any or all of the provisions of this subsection or the rules thereunder.

(4) The Commission shall make available to the public for a reasonable fee a list of all equity securities of a class described in section 13(d)(1) of this title, updated no less frequently than reports are required to be filed pursuant to paragraph (1) of this subsection. The Commission shall tabulate the information contained in any report filed pursuant to this subsection in a manner which will, in the view of the Commission, maximize the usefulness of the information to other Federal and State authorities and the public. Promptly after the filing of any such report, the Commission shall make the information contained therein conveniently available to the public for a reasonable fee in such form as the Commission, by rule, may prescribe, except that the Commission, as it determines to be necessary or appropriate in the public interest or for the protection of investors, may delay or prevent public disclosure of any such information in accordance with section 552 of title 5, United States Code. Notwithstanding the preceding sentence, any such information identifying the securities held by the account of a natural person or an estate or trust (other than a business trust or investment company) shall not be disclosed to the public.

(5) In exercising its authority under this subsection, the Commission shall determine (and so state) that its action is necessary or appropriate in the public interest and for the protection of investors or to maintain fair and orderly markets or, in granting an exemption, that its action is consistent with the protection of investors and the purposes of this subsection. In exercising such authority the Commission shall take such steps as are within its power, including consulting with the Comptroller General of the United States, the Director of the Office of Management and Budget, the appropriate regulatory agencies, Federal and State authorities which, directly or indirectly, require reports from institutional investment managers of information substantially similar to that called for by this subsection, national securities exchanges, and registered securities associations, (A) to achieve uniform, centralized reporting of information concerning the securities holdings of and transactions by or for accounts with respect to which institutional investment managers exercise investment discretion, and (B) consistently with the objective set forth in the preceding subparagraph, to avoid unnecessarily duplicative reporting by, and minimize the compliance burden on, institutional investment managers. Federal authorities which, directly or indirectly, require reports from institutional investment managers of information substantially similar to that called for by this subsection shall cooperate with the Commission in the performance of its responsibilities under the preceding sentence. An institutional investment manager which is a bank, the deposits of which are insured in accordance with the Federal Deposit Insurance Act, shall file with the appro-

priate regulatory agency a copy of every report filed with the Commission pursuant to this subsection.

(6)(A) For purposes of this subsection the term "institutional investment manager" includes any person, other than a natural person, investing in or buying and selling securities for its own account, and any person exercising investment discretion with respect to the account of any other person.

(B) The Commission shall adopt such rules as it deems necessary or appropriate to prevent duplicative reporting pursuant to this subsection by two or more institutional investment managers exercising investment discretion with respect to the same amount.

(g)(1) Any person who is directly or indirectly the beneficial owner of more than 5 per centum of any security of a class described in subsection (d)(1) of this section or otherwise becomes or is deemed to become a beneficial owner of any security of a class described in subsection (d)(1) upon the purchase or sale of a security-based swap that the Commission may define by rule shall file with the Commission a statement setting forth, in such form and at such time as the Commission may, by rule, prescribe—

(A) such person's identity, residence, and citizenship; and

(B) the number and description of the shares in which such person has an interest and the nature of such interest.

(2) If any material change occurs in the facts set forth in the statement filed with the Commission, an amendment shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) In exercising its authority under this subsection, the Commission shall take such steps as it deems necessary or appropriate in the public interest or for the protection of investors (A) to achieve centralized reporting of information regarding ownership, (B) to avoid unnecessarily duplicative reporting by and minimize the compliance burden on persons required to report, and (C) to tabulate and promptly make available the information contained in any report filed pursuant to this subsection in a manner which will, in the view of the Commission, maximize the usefulness of the information to other Federal and State agencies and the public.

(6) The Commission may, by rule or order, exempt, in whole or in part, any person or class of persons from any or all of the reporting requirements of this subsection as it deems necessary or appropriate in the public interest or for the protection of investors.

(h) LARGE TRADER REPORTING.—

(1) IDENTIFICATION REQUIREMENTS FOR LARGE TRADERS.—For the purpose of monitoring the impact on the securities

markets of securities transactions involving a substantial volume or a large fair market value or exercise value and for the purpose of otherwise assisting the Commission in the enforcement of this title, each large trader shall—

(A) provide such information to the Commission as the Commission may by rule or regulation prescribe as necessary or appropriate, identifying such large trader and all accounts in or through which such large trader effects such transactions; and

(B) identify, in accordance with such rules or regulations as the Commission may prescribe as necessary or appropriate, to any registered broker or dealer by or through whom such large trader directly or indirectly effects securities transactions, such large trader and all accounts directly or indirectly maintained with such broker or dealer by such large trader in or through which such transactions are effected.

(2) RECORDKEEPING AND REPORTING REQUIREMENTS FOR BROKERS AND DEALERS.—Every registered broker or dealer shall make and keep for prescribed periods such records as the Commission by rule or regulation prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title, with respect to securities transactions that equal or exceed the reporting activity level effected directly or indirectly by or through such registered broker or dealer of or for any person that such broker or dealer knows is a large trader, or any person that such broker or dealer has reason to know is a large trader on the basis of transactions in securities effected by or through such broker or dealer. Such records shall be available for reporting to the Commission, or any self-regulatory organization that the Commission shall designate to receive such reports, on the morning of the day following the day the transactions were effected, and shall be reported to the Commission or a self-regulatory organization designated by the Commission immediately upon request by the Commission or such a self-regulatory organization. Such records and reports shall be in a format and transmitted in a manner prescribed by the Commission (including, but not limited to, machine readable form).

(3) AGGREGATION RULES.—The Commission may prescribe rules or regulations governing the manner in which transactions and accounts shall be aggregated for the purpose of this subsection, including aggregation on the basis of common ownership or control.

(4) EXAMINATION OF BROKER AND DEALER RECORDS.—All records required to be made and kept by registered brokers and dealers pursuant to this subsection with respect to transactions effected by large traders are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission as the Commission deems necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title.

(5) FACTORS TO BE CONSIDERED IN COMMISSION ACTIONS.—In exercising its authority under this subsection, the Commission shall take into account—

(A) existing reporting systems;

(B) the costs associated with maintaining information with respect to transactions effected by large traders and reporting such information to the Commission or self-regulatory organizations; and

(C) the relationship between the United States and international securities markets.

(6) EXEMPTIONS.—The Commission, by rule, regulation, or order, consistent with the purposes of this title, may exempt any person or class of persons or any transaction or class of transactions, either conditionally or upon specified terms and conditions or for stated periods, from the operation of this subsection, and the rules and regulations thereunder.

(7) AUTHORITY OF COMMISSION TO LIMIT DISCLOSURE OF INFORMATION.—Notwithstanding any other provision of law, the Commission shall not be compelled to disclose any information required to be kept or reported under this subsection. Nothing in this subsection shall authorize the Commission to withhold information from Congress, or prevent the Commission from complying with a request for information from any other Federal department or agency requesting information for purposes within the scope of its jurisdiction, or complying with an order of a court of the United States in an action brought by the United States or the Commission. For purposes of section 552 of title 5, United States Code, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552.

(8) DEFINITIONS.—For purposes of this subsection—

(A) the term "large trader" means every person who, for his own account or an account for which he exercises investment discretion, effects transactions for the purchase or sale of any publicly traded security or securities by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of a national securities exchange, directly or indirectly by or through a registered broker or dealer in an aggregate amount equal to or in excess of the identifying activity level;

(B) the term "publicly traded security" means any equity security (including an option on individual equity securities, and an option on a group or index of such securities) listed, or admitted to unlisted trading privileges, on a national securities exchange, or quoted in an automated interdealer quotation system;

(C) the term "identifying activity level" means transactions in publicly traded securities at or above a level of volume, fair market value, or exercise value as shall be fixed from time to time by the Commission by rule or regulation, specifying the time interval during which such transactions shall be aggregated;

(D) the term "reporting activity level" means transactions in publicly traded securities at or above a level of

volume, fair market value, or exercise value as shall be fixed from time to time by the Commission by rule, regulation, or order, specifying the time interval during which such transactions shall be aggregated; and

(E) the term "person" has the meaning given in section 3(a)(9) of this title and also includes two or more persons acting as a partnership, limited partnership, syndicate, or other group, but does not include a foreign central bank.

(i) ACCURACY OF FINANCIAL REPORTS.—Each financial report that contains financial statements, and that is required to be prepared in accordance with (or reconciled to) generally accepted accounting principles under this title and filed with the Commission shall reflect all material correcting adjustments that have been identified by a registered public accounting firm in accordance with generally accepted accounting principles and the rules and regulations of the Commission.

(j) OFF-BALANCE SHEET TRANSACTIONS.—Not later than 180 days after the date of enactment of the Sarbanes-Oxley Act of 2002, the Commission shall issue final rules providing that each annual and quarterly financial report required to be filed with the Commission shall disclose all material off-balance sheet transactions, arrangements, obligations (including contingent obligations), and other relationships of the issuer with unconsolidated entities or other persons, that may have a material current or future effect on financial condition, changes in financial condition, results of operations, liquidity, capital expenditures, capital resources, or significant components of revenues or expenses.

(k) PROHIBITION ON PERSONAL LOANS TO EXECUTIVES.—

(1) IN GENERAL.—It shall be unlawful for any issuer (as defined in section 2 of the Sarbanes-Oxley Act of 2002), directly or indirectly, including through any subsidiary, to extend or maintain credit, to arrange for the extension of credit, or to renew an extension of credit, in the form of a personal loan to or for any director or executive officer (or equivalent thereof) of that issuer. An extension of credit maintained by the issuer on the date of enactment of this subsection shall not be subject to the provisions of this subsection, provided that there is no material modification to any term of any such extension of credit or any renewal of any such extension of credit on or after that date of enactment.

(2) LIMITATION.—Paragraph (1) does not preclude any home improvement and manufactured home loans (as that term is defined in section 5 of the Home Owners' Loan Act (12 U.S.C. 1464)), consumer credit (as defined in section 103 of the Truth in Lending Act (15 U.S.C. 1602)), or any extension of credit under an open end credit plan (as defined in section 103 of the Truth in Lending Act (15 U.S.C. 1602)), or a charge card (as defined in section 127(c)(4)(e) of the Truth in Lending Act (15 U.S.C. 1637(c)(4)(e)), or any extension of credit by a broker or dealer registered under section 15 of this title to an employee of that broker or dealer to buy, trade, or carry securities, that is permitted under rules or regulations of the Board of Governors of the Federal Reserve System pursuant to sec-

tion 7 of this title (other than an extension of credit that would be used to purchase the stock of that issuer), that is—

(A) made or provided in the ordinary course of the consumer credit business of such issuer;

(B) of a type that is generally made available by such issuer to the public; and

(C) made by such issuer on market terms, or terms that are no more favorable than those offered by the issuer to the general public for such extensions of credit.

(3) RULE OF CONSTRUCTION FOR CERTAIN LOANS.—Paragraph (1) does not apply to any loan made or maintained by an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), if the loan is subject to the insider lending restrictions of section 22(h) of the Federal Reserve Act (12 U.S.C. 375b).

(l) REAL TIME ISSUER DISCLOSURES.—Each issuer reporting under section 13(a) or 15(d) shall disclose to the public on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer, in plain English, which may include trend and qualitative information and graphic presentations, as the Commission determines, by rule, is necessary or useful for the protection of investors and in the public interest.

(m) PUBLIC AVAILABILITY OF SECURITY-BASED SWAP TRANSACTION DATA.—

(1) IN GENERAL.—

(A) DEFINITION OF REAL-TIME PUBLIC REPORTING.—In this paragraph, the term "real-time public reporting" means to report data relating to a security-based swap transaction, including price and volume, as soon as technologically practicable after the time at which the security-based swap transaction has been executed.

(B) PURPOSE.—The purpose of this subsection is to authorize the Commission to make security-based swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery.

(C) GENERAL RULE.—The Commission is authorized to provide by rule for the public availability of security-based swap transaction, volume, and pricing data as follows:

(i) With respect to those security-based swaps that are subject to the mandatory clearing requirement described in section 3C(a)(1) (including those security-based swaps that are excepted from the requirement pursuant to section 3C(g)), the Commission shall require real-time public reporting for such transactions.

(ii) With respect to those security-based swaps that are not subject to the mandatory clearing requirement described in section 3C(a)(1), but are cleared at a registered clearing agency, the Commission shall require real-time public reporting for such transactions.

(iii) With respect to security-based swaps that are not cleared at a registered clearing agency and which are reported to a security-based swap data repository

or the Commission under section 3C(a)(6), the Commission shall require real-time public reporting for such transactions, in a manner that does not disclose the business transactions and market positions of any person.

(iv) With respect to security-based swaps that are determined to be required to be cleared under section 3C(b) but are not cleared, the Commission shall require real-time public reporting for such transactions.

(D) REGISTERED ENTITIES AND PUBLIC REPORTING.—The Commission may require registered entities to publicly disseminate the security-based swap transaction and pricing data required to be reported under this paragraph.

(E) RULEMAKING REQUIRED.—With respect to the rule providing for the public availability of transaction and pricing data for security-based swaps described in clauses (i) and (ii) of subparagraph (C), the rule promulgated by the Commission shall contain provisions—

(i) to ensure such information does not identify the participants;

(ii) to specify the criteria for determining what constitutes a large notional security-based swap transaction (block trade) for particular markets and contracts;

(iii) to specify the appropriate time delay for reporting large notional security-based swap transactions (block trades) to the public; and

(iv) that take into account whether the public disclosure will materially reduce market liquidity.

(F) TIMELINESS OF REPORTING.—Parties to a security-based swap (including agents of the parties to a security-based swap) shall be responsible for reporting security-based swap transaction information to the appropriate registered entity in a timely manner as may be prescribed by the Commission.

(G) REPORTING OF SWAPS TO REGISTERED SECURITY-BASED SWAP DATA REPOSITORIES.—Each security-based swap (whether cleared or uncleared) shall be reported to a registered security-based swap data repository.

(H) REGISTRATION OF CLEARING AGENCIES.—A clearing agency may register as a security-based swap data repository.

(2) SEMIANNUAL AND ANNUAL PUBLIC REPORTING OF AGGREGATE SECURITY-BASED SWAP DATA.—

(A) IN GENERAL.—In accordance with subparagraph (B), the Commission shall issue a written report on a semiannual and annual basis to make available to the public information relating to—

(i) the trading and clearing in the major security-based swap categories; and

(ii) the market participants and developments in new products.

(B) USE; CONSULTATION.—In preparing a report under subparagraph (A), the Commission shall—

(i) use information from security-based swap data repositories and clearing agencies; and

(ii) consult with the Office of the Comptroller of the Currency, the Bank for International Settlements, and such other regulatory bodies as may be necessary.

(C) AUTHORITY OF COMMISSION.—The Commission may, by rule, regulation, or order, delegate the public reporting responsibilities of the Commission under this paragraph in accordance with such terms and conditions as the Commission determines to be appropriate and in the public interest.

(n) SECURITY-BASED SWAP DATA REPOSITORIES.—

(1) REGISTRATION REQUIREMENT.—It shall be unlawful for any person, unless registered with the Commission, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a security-based swap data repository.

(2) INSPECTION AND EXAMINATION.—Each registered security-based swap data repository shall be subject to inspection and examination by any representative of the Commission.

(3) COMPLIANCE WITH CORE PRINCIPLES.—

(A) IN GENERAL.—To be registered, and maintain registration, as a security-based swap data repository, the security-based swap data repository shall comply with—

(i) the requirements and core principles described in this subsection; and

(ii) any requirement that the Commission may impose by rule or regulation.

(B) REASONABLE DISCRETION OF SECURITY-BASED SWAP DATA REPOSITORY.—Unless otherwise determined by the Commission, by rule or regulation, a security-based swap data repository described in subparagraph (A) shall have reasonable discretion in establishing the manner in which the security-based swap data repository complies with the core principles described in this subsection.

(4) STANDARD SETTING.—

(A) DATA IDENTIFICATION.—

(i) IN GENERAL.—In accordance with clause (ii), the Commission shall prescribe standards that specify the data elements for each security-based swap that shall be collected and maintained by each registered security-based swap data repository.

(ii) REQUIREMENT.—In carrying out clause (i), the Commission shall prescribe consistent data element standards applicable to registered entities and reporting counterparties.

(B) DATA COLLECTION AND MAINTENANCE.—The Commission shall prescribe data collection and data maintenance standards for security-based swap data repositories.

(C) COMPARABILITY.—The standards prescribed by the Commission under this subsection shall be comparable to the data standards imposed by the Commission on clearing agencies in connection with their clearing of security-based swaps.

(5) DUTIES.—A security-based swap data repository shall—

(A) accept data prescribed by the Commission for each security-based swap under subsection (b);

(B) confirm with both counterparties to the security-based swap the accuracy of the data that was submitted;

(C) maintain the data described in subparagraph (A) in such form, in such manner, and for such period as may be required by the Commission;

(D)(i) provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity); and

(ii) provide the information described in subparagraph (A) in such form and at such frequency as the Commission may require to comply with the public reporting requirements set forth in subsection (m);

(E) at the direction of the Commission, establish automated systems for monitoring, screening, and analyzing security-based swap data;

(F) maintain the privacy of any and all security-based swap transaction information that the security-based swap data repository receives from a security-based swap dealer, counterparty, or any other registered entity; and

(G) on a confidential basis pursuant to section 24, upon request, and after notifying the Commission of the request, make available security-based swap data obtained by the security-based swap data repository, including individual counterparty trade and position data, to—

(i) each appropriate prudential regulator;

(ii) the Financial Stability Oversight Council;

(iii) the Commodity Futures Trading Commission;

(iv) the Department of Justice; and

(v) any other person that the Commission determines to be appropriate, including—

(I) foreign financial supervisors (including foreign futures authorities);

(II) foreign central banks;

(III) foreign ministries; and

(IV) other foreign authorities.

(H) CONFIDENTIALITY AGREEMENT.—Before the security-based swap data repository may share information with any entity described in subparagraph (G), the security-based swap data repository shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 24 relating to the information on security-based swap transactions that is provided.

(6) DESIGNATION OF CHIEF COMPLIANCE OFFICER.—

(A) IN GENERAL.—Each security-based swap data repository shall designate an individual to serve as a chief compliance officer.

(B) DUTIES.—The chief compliance officer shall—

(i) report directly to the board or to the senior officer of the security-based swap data repository;

(ii) review the compliance of the security-based swap data repository with respect to the requirements and core principles described in this subsection;

(iii) in consultation with the board of the security-based swap data repository, a body performing a function similar to the board of the security-based swap data repository, or the senior officer of the security-based swap data repository, resolve any conflicts of interest that may arise;

(iv) be responsible for administering each policy and procedure that is required to be established pursuant to this section;

(v) ensure compliance with this title (including regulations) relating to agreements, contracts, or transactions, including each rule prescribed by the Commission under this section;

(vi) establish procedures for the remediation of noncompliance issues identified by the chief compliance officer through any—

(I) compliance office review;

(II) look-back;

(III) internal or external audit finding;

(IV) self-reported error; or

(V) validated complaint; and

(vii) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

(C) ANNUAL REPORTS.—

(i) IN GENERAL.—In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—

(I) the compliance of the security-based swap data repository of the chief compliance officer with respect to this title (including regulations); and

(II) each policy and procedure of the security-based swap data repository of the chief compliance officer (including the code of ethics and conflict of interest policies of the security-based swap data repository).

(ii) REQUIREMENTS.—A compliance report under clause (i) shall—

(I) accompany each appropriate financial report of the security-based swap data repository that is required to be furnished to the Commission pursuant to this section; and

(II) include a certification that, under penalty of law, the compliance report is accurate and complete.

(7) CORE PRINCIPLES APPLICABLE TO SECURITY-BASED SWAP DATA REPOSITORIES.—

(A) ANTITRUST CONSIDERATIONS.—Unless necessary or appropriate to achieve the purposes of this title, the swap data repository shall not—

(i) adopt any rule or take any action that results in any unreasonable restraint of trade; or

(ii) impose any material anticompetitive burden on the trading, clearing, or reporting of transactions.

(B) GOVERNANCE ARRANGEMENTS.—Each security-based swap data repository shall establish governance arrangements that are transparent—

(i) to fulfill public interest requirements; and

(ii) to support the objectives of the Federal Government, owners, and participants.

(C) CONFLICTS OF INTEREST.—Each security-based swap data repository shall—

(i) establish and enforce rules to minimize conflicts of interest in the decision-making process of the security-based swap data repository; and

(ii) establish a process for resolving any conflicts of interest described in clause (i).

(D) ADDITIONAL DUTIES DEVELOPED BY COMMISSION.—

(i) IN GENERAL.—The Commission may develop 1 or more additional duties applicable to security-based swap data repositories.

(ii) CONSIDERATION OF EVOLVING STANDARDS.—In developing additional duties under subparagraph (A), the Commission may take into consideration any evolving standard of the United States or the international community.

(iii) ADDITIONAL DUTIES FOR COMMISSION DESIGNEES.—The Commission shall establish additional duties for any registrant described in section 13(m)(2)(C) in order to minimize conflicts of interest, protect data, ensure compliance, and guarantee the safety and security of the security-based swap data repository.

(8) REQUIRED REGISTRATION FOR SECURITY-BASED SWAP DATA REPOSITORIES.—Any person that is required to be registered as a security-based swap data repository under this subsection shall register with the Commission, regardless of whether that person is also licensed under the Commodity Exchange Act as a swap data repository.

(9) RULES.—The Commission shall adopt rules governing persons that are registered under this subsection.

(o) BENEFICIAL OWNERSHIP.—For purposes of this section and section 16, a person shall be deemed to acquire beneficial ownership of an equity security based on the purchase or sale of a security-based swap, only to the extent that the Commission, by rule, determines after consultation with the prudential regulators and the Secretary of the Treasury, that the purchase or sale of the security-based swap, or class of security-based swap, provides incidents of ownership comparable to direct ownership of the equity security, and that it is necessary to achieve the purposes of this section that the purchase or sale of the security-based swaps, or class of security-based swap, be deemed the acquisition of beneficial ownership of the equity security.

(p) DISCLOSURES RELATING TO CONFLICT MINERALS ORIGINATING IN THE DEMOCRATIC REPUBLIC OF THE CONGO.—

(1) REGULATIONS.—

(A) IN GENERAL.—Not later than 270 days after the date of the enactment of this subsection, the Commission shall promulgate regulations requiring any person described in paragraph (2) to disclose annually, beginning with the person's first full fiscal year that begins after the date of promulgation of such regulations, whether conflict minerals that are necessary as described in paragraph (2)(B), in the year for which such reporting is required, did originate in the Democratic Republic of the Congo or an adjoining country and, in cases in which such conflict minerals did originate in any such country, submit to the Commission a report that includes, with respect to the period covered by the report—

(i) a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an independent private sector audit of such report submitted through the Commission that is conducted in accordance with standards established by the Comptroller General of the United States, in accordance with rules promulgated by the Commission, in consultation with the Secretary of State; and

(ii) a description of the products manufactured or contracted to be manufactured that are not DRC conflict free ("DRC conflict free" is defined to mean the products that do not contain minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country), the entity that conducted the independent private sector audit in accordance with clause (i), the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.

(B) CERTIFICATION.—The person submitting a report under subparagraph (A) shall certify the audit described in clause (i) of such subparagraph that is included in such report. Such a certified audit shall constitute a critical component of due diligence in establishing the source and chain of custody of such minerals.

(C) UNRELIABLE DETERMINATION.—If a report required to be submitted by a person under subparagraph (A) relies on a determination of an independent private sector audit, as described under subparagraph (A)(i), or other due diligence processes previously determined by the Commission to be unreliable, the report shall not satisfy the requirements of the regulations promulgated under subparagraph (A)(i).

(D) DRC CONFLICT FREE.—For purposes of this paragraph, a product may be labeled as "DRC conflict free" if the product does not contain conflict minerals that directly

or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country.

(E) INFORMATION AVAILABLE TO THE PUBLIC.—Each person described under paragraph (2) shall make available to the public on the Internet website of such person the information disclosed by such person under subparagraph (A).

(2) PERSON DESCRIBED.—A person is described in this paragraph if—

(A) the person is required to file reports with the Commission pursuant to paragraph (1)(A); and

(B) conflict minerals are necessary to the functionality or production of a product manufactured by such person.

(3) REVISIONS AND WAIVERS.—The Commission shall revise or temporarily waive the requirements described in paragraph (1) if the President transmits to the Commission a determination that—

(A) such revision or waiver is in the national security interest of the United States and the President includes the reasons therefor; and

(B) establishes a date, not later than 2 years after the initial publication of such exemption, on which such exemption shall expire.

(4) TERMINATION OF DISCLOSURE REQUIREMENTS.—The requirements of paragraph (1) shall terminate on the date on which the President determines and certifies to the appropriate congressional committees, but in no case earlier than the date that is one day after the end of the 5-year period beginning on the date of the enactment of this subsection, that no armed groups continue to be directly involved and benefitting from commercial activity involving conflict minerals.

(5) DEFINITIONS.—For purposes of this subsection, the terms "adjoining country", "appropriate congressional committees", "armed group", and "conflict mineral" have the meaning given those terms under section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(q) DISCLOSURE OF PAYMENTS BY RESOURCE EXTRACTION ISSUERS.—

(1) DEFINITIONS.—In this subsection—

(A) the term "commercial development of oil, natural gas, or minerals" includes exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity, as determined by the Commission;

(B) the term "foreign government" means a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government, as determined by the Commission;

(C) the term "payment"—

(i) means a payment that is—

(I) made to further the commercial development of oil, natural gas, or minerals; and

(II) not de minimis; and

(ii) includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the Commission, consistent with the guidelines of the Extractive Industries Transparency Initiative (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals;

(D) the term "resource extraction issuer" means an issuer that—

(i) is required to file an annual report with the Commission; and

(ii) engages in the commercial development of oil, natural gas, or minerals;

(E) the term "interactive data format" means an electronic data format in which pieces of information are identified using an interactive data standard; and

(F) the term "interactive data standard" means standardized list of electronic tags that mark information included in the annual report of a resource extraction issuer.

(2) DISCLOSURE.—

(A) INFORMATION REQUIRED.—Not later than 270 days after the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Commission shall issue final rules that require each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals, including—

(i) the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals; and

(ii) the type and total amount of such payments made to each government.

(B) CONSULTATION IN RULEMAKING.—In issuing rules under subparagraph (A), the Commission may consult with any agency or entity that the Commission determines is relevant.

(C) INTERACTIVE DATA FORMAT.—The rules issued under subparagraph (A) shall require that the information included in the annual report of a resource extraction issuer be submitted in an interactive data format.

(D) INTERACTIVE DATA STANDARD.—

(i) IN GENERAL.—The rules issued under subparagraph (A) shall establish an interactive data standard for the information included in the annual report of a resource extraction issuer.

(ii) ELECTRONIC TAGS.—The interactive data standard shall include electronic tags that identify, for

any payments made by a resource extraction issuer to a foreign government or the Federal Government—

(I) the total amounts of the payments, by category;

(II) the currency used to make the payments;

(III) the financial period in which the payments were made;

(IV) the business segment of the resource extraction issuer that made the payments;

(V) the government that received the payments, and the country in which the government is located;

(VI) the project of the resource extraction issuer to which the payments relate; and

(VII) such other information as the Commission may determine is necessary or appropriate in the public interest or for the protection of investors.

(E) INTERNATIONAL TRANSPARENCY EFFORTS.—To the extent practicable, the rules issued under subparagraph (A) shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.

(F) EFFECTIVE DATE.—With respect to each resource extraction issuer, the final rules issued under subparagraph (A) shall take effect on the date on which the resource extraction issuer is required to submit an annual report relating to the fiscal year of the resource extraction issuer that ends not earlier than 1 year after the date on which the Commission issues final rules under subparagraph (A).

(3) PUBLIC AVAILABILITY OF INFORMATION.—

(A) IN GENERAL.—To the extent practicable, the Commission shall make available online, to the public, a compilation of the information required to be submitted under the rules issued under paragraph (2)(A).

(B) OTHER INFORMATION.—Nothing in this paragraph shall require the Commission to make available online information other than the information required to be submitted under the rules issued under paragraph (2)(A).

(4) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Commission such sums as may be necessary to carry out this subsection.

(r) DISCLOSURE OF CERTAIN ACTIVITIES RELATING TO IRAN.—

(1) IN GENERAL.—Each issuer required to file an annual or quarterly report under subsection (a) shall disclose in that report the information required by paragraph (2) if, during the period covered by the report, the issuer or any affiliate of the issuer—

(A) knowingly engaged in an activity described in subsection (a) or (b) of section 5 of the Iran Sanctions Act of 1996 (Public Law 104–172; 50 U.S.C. 1701 note);

(B) knowingly engaged in an activity described in subsection (c)(2) of section 104 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (22 U.S.C. 8513) or a transaction described in subsection (d)(1) of that section;

(C) knowingly engaged in an activity described in section 105A(b)(2) of that Act; or

(D) knowingly conducted any transaction or dealing with—

(i) any person the property and interests in property of which are blocked pursuant to Executive Order No. 13224 (66 Fed. Reg. 49079; relating to blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism);

(ii) any person the property and interests in property of which are blocked pursuant to Executive Order No. 13382 (70 Fed. Reg. 38567; relating to blocking of property of weapons of mass destruction proliferators and their supporters); or

(iii) any person or entity identified under section 560.304 of title 31, Code of Federal Regulations (relating to the definition of the Government of Iran) without the specific authorization of a Federal department or agency.

(2) INFORMATION REQUIRED.—If an issuer or an affiliate of the issuer has engaged in any activity described in paragraph (1), the issuer shall disclose a detailed description of each such activity, including—

(A) the nature and extent of the activity;

(B) the gross revenues and net profits, if any, attributable to the activity; and

(C) whether the issuer or the affiliate of the issuer (as the case may be) intends to continue the activity.

(3) NOTICE OF DISCLOSURES.—If an issuer reports under paragraph (1) that the issuer or an affiliate of the issuer has knowingly engaged in any activity described in that paragraph, the issuer shall separately file with the Commission, concurrently with the annual or quarterly report under subsection (a), a notice that the disclosure of that activity has been included in that annual or quarterly report that identifies the issuer and contains the information required by paragraph (2).

(4) PUBLIC DISCLOSURE OF INFORMATION.—Upon receiving a notice under paragraph (3) that an annual or quarterly report includes a disclosure of an activity described in paragraph (1), the Commission shall promptly—

(A) transmit the report to—

(i) the President;

(ii) the Committee on Foreign Affairs and the Committee on Financial Services of the House of Representatives; and

(iii) the Committee on Foreign Relations and the Committee on Banking, Housing, and Urban Affairs of the Senate; and

(B) make the information provided in the disclosure and the notice available to the public by posting the information on the Internet website of the Commission.

(5) INVESTIGATIONS.—Upon receiving a report under paragraph (4) that includes a disclosure of an activity described in paragraph (1) (other than an activity described in subparagraph (D)(iii) of that paragraph), the President shall—

(A) initiate an investigation into the possible imposition of sanctions under the Iran Sanctions Act of 1996 (Public Law 104–172; 50 U.S.C. 1701 note), section 104 or 105A of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, an Executive order specified in clause (i) or (ii) of paragraph (1)(D), or any other provision of law relating to the imposition of sanctions with respect to Iran, as applicable; and

(B) not later than 180 days after initiating such an investigation, make a determination with respect to whether sanctions should be imposed with respect to the issuer or the affiliate of the issuer (as the case may be).

(6) SUNSET.—The provisions of this subsection shall terminate on the date that is 30 days after the date on which the President makes the certification described in section 401(a) of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (22 U.S.C. 8551(a)).

(s) DATA STANDARDS.—

(1) REQUIREMENT.—The Commission shall, by rule, adopt data standards for all collections of information with respect to periodic and current reports required to be filed or furnished under this section or under section 15(d), except that the Commission may exempt exhibits, signatures, and certifications from those data standards.

(2) CONSISTENCY.—The data standards required under paragraph (1) shall incorporate, and ensure compatibility with (to the extent feasible), all applicable data standards established in the rules promulgated under section 124 of the Financial Stability Act of 2010, including, to the extent practicable, by having the characteristics described in clauses (i) through (vi) of subsection (c)(1)(B) of such section 124.

SEC. 13A. [78m–1] REPORTING AND RECORDKEEPING FOR CERTAIN SECURITY-BASED SWAPS.

(a) REQUIRED REPORTING OF SECURITY-BASED SWAPS NOT ACCEPTED BY ANY CLEARING AGENCY OR DERIVATIVES CLEARING ORGANIZATION.—

(1) IN GENERAL.—Each security-based swap that is not accepted for clearing by any clearing agency or derivatives clearing organization shall be reported to—

(A) a security-based swap data repository described in section 13(n); or

(B) in the case in which there is no security-based swap data repository that would accept the security-based swap, to the Commission pursuant to this section within such time period as the Commission may by rule or regulation prescribe.

(2) TRANSITION RULE FOR PREENACTMENT SECURITY-BASED SWAPS.—

(A) SECURITY-BASED SWAPS ENTERED INTO BEFORE THE DATE OF ENACTMENT OF THE WALL STREET TRANSPARENCY AND ACCOUNTABILITY ACT OF 2010.—Each security-based swap entered into before the date of enactment of the Wall Street Transparency and Accountability Act of 2010, the terms of which have not expired as of the date of enactment of that Act, shall be reported to a registered security-based swap data repository or the Commission by a date that is not later than—

(i) 30 days after issuance of the interim final rule; or

(ii) such other period as the Commission determines to be appropriate.

(B) COMMISSION RULEMAKING.—The Commission shall promulgate an interim final rule within 90 days of the date of enactment of this section providing for the reporting of each security-based swap entered into before the date of enactment as referenced in subparagraph (A).

(C) EFFECTIVE DATE.—The reporting provisions described in this section shall be effective upon the date of the enactment of this section.

(3) REPORTING OBLIGATIONS.—

(A) SECURITY-BASED SWAPS IN WHICH ONLY 1 COUNTERPARTY IS A SECURITY-BASED SWAP DEALER OR MAJOR SECURITY-BASED SWAP PARTICIPANT.—With respect to a security-based swap in which only 1 counterparty is a security-based swap dealer or major security-based swap participant, the security-based swap dealer or major security-based swap participant shall report the security-based swap as required under paragraphs (1) and (2).

(B) SECURITY-BASED SWAPS IN WHICH 1 COUNTERPARTY IS A SECURITY-BASED SWAP DEALER AND THE OTHER A MAJOR SECURITY-BASED SWAP PARTICIPANT.—With respect to a security-based swap in which 1 counterparty is a security-based swap dealer and the other a major security-based swap participant, the security-based swap dealer shall report the security-based swap as required under paragraphs (1) and (2).

(C) OTHER SECURITY-BASED SWAPS.—With respect to any other security-based swap not described in subparagraph (A) or (B), the counterparties to the security-based swap shall select a counterparty to report the security-based swap as required under paragraphs (1) and (2).

(b) DUTIES OF CERTAIN INDIVIDUALS.—Any individual or entity that enters into a security-based swap shall meet each requirement described in subsection (c) if the individual or entity did not—

(1) clear the security-based swap in accordance with section 3C(a)(1); or

(2) have the data regarding the security-based swap accepted by a security-based swap data repository in accordance with rules (including timeframes) adopted by the Commission under this title.

(c) REQUIREMENTS.—An individual or entity described in subsection (b) shall—

(1) upon written request from the Commission, provide reports regarding the security-based swaps held by the individual or entity to the Commission in such form and in such manner as the Commission may request; and

(2) maintain books and records pertaining to the security-based swaps held by the individual or entity in such form, in such manner, and for such period as the Commission may require, which shall be open to inspection by—

(A) any representative of the Commission;

(B) an appropriate prudential regulator;

(C) the Commodity Futures Trading Commission;

(D) the Financial Stability Oversight Council; and

(E) the Department of Justice.

(d) IDENTICAL DATA.—In prescribing rules under this section, the Commission shall require individuals and entities described in subsection (b) to submit to the Commission a report that contains data that is not less comprehensive than the data required to be collected by security-based swap data repositories under this title.

PROXIES

SEC. 14. [78n] (a)(1) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title. [39]

(2) The rules and regulations prescribed by the Commission under paragraph (1) may include—

(A) a requirement that a solicitation of proxy, consent, or authorization by (or on behalf of) an issuer include a nominee submitted by a shareholder to serve on the board of directors of the issuer; and

(B) a requirement that an issuer follow a certain procedure in relation to a solicitation described in subparagraph (A).

(b)(1) It shall be unlawful for any member of a national securities exchange, or any broker or dealer registered under this title, or any bank, association, or other entity that exercises fiduciary powers, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to give, or to refrain from giving a proxy, consent, authorization, or information statement in respect of any security registered pursuant to section 12 of this title, or any security issued by an investment company registered under the Investment Company Act of 1940, and carried for the account of a customer.

(2) With respect to banks, the rules and regulations prescribed by the Commission under paragraph (1) shall not require the dis-

[39] See 49 U.S.C. 11367(a) for exemption. [Printed in appendix to this volume.]

closure of the names of beneficial owners of securities in an account held by the bank on the date of enactment of this paragraph unless the beneficial owner consents to the disclosure. The provisions of this paragraph shall not apply in the case of a bank which the Commission finds has not made a good faith effort to obtain such consent from such beneficial owners.

(c) Unless proxies, consents, or authorizations in respect of a security registered pursuant to section 12 of this title, or a security issued by an investment company registered under the Investment Company Act of 1940, are solicited by or on behalf of the management of the issuer from the holders of record of such security in accordance with the rules and regulations prescribed under subsection (a) of this section, prior to any annual or other meeting of the holders of such security, such issuer shall, in accordance with rules and regulations prescribed by the Commission, file with the Commission and transmit to all holders of record of such security information substantially equivalent to the information which would be required to be transmitted if a solicitation were made, but no information shall be required to be filed or transmitted pursuant to this subsection before July 1, 1964.

(d)(1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 12 of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 13(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders, of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders.

(2) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for purposes of this subsection.

(3) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(5) Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.

(6) Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

(8) The provisions of this subsection shall not apply to any offer for, or request or invitation for tenders of, any security—

(A) if the acquisition of such security, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 per centum of that class;

(B) by the issuer of such security; or

(C) which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect

of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

(f) If, pursuant to any arrangement or understanding with the person or persons acquiring securities in a transaction subject to subsection (d) of this section or subsection (d) of section 13 of this title, any persons are to be elected or designated as directors of the issuer, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors of the issuer, then, prior to the time any such person takes office as a director, and in accordance with rules and regulations prescribed by the Commission, the issuer shall file with the Commission, and transmit to all holders of record of securities of the issuer who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by subsection (a) or (c) of this section to be transmitted if such person or persons were nominees for election as directors at a meeting of such security holders.

(g)(1)(A) At the time of filing such preliminary proxy solicitation material as the Commission may require by rule pursuant to subsection (a) of this section that concerns an acquisition, merger, consolidation, or proposed sale or other disposition of substantially all the assets of a company, the person making such filing, other than a company registered under the Investment Company Act of 1940, shall pay to the Commission the following fees:

(i) for preliminary proxy solicitation material involving an acquisition, merger, or consolidation, if there is a proposed payment of cash or transfer of securities or property to shareholders, a fee at a rate that, subject to paragraph (4), is equal to $92 per $1,000,000 of such proposed payment, or of the value of such securities or other property proposed to be transferred; and

(ii) for preliminary proxy solicitation material involving a proposed sale or other disposition of substantially all of the assets of a company, a fee at a rate that, subject to paragraph (4), is equal to $92 per $1,000,000 of the cash or of the value of any securities or other property proposed to be received upon such sale or disposition.

(B) The fee imposed under subparagraph (A) shall be reduced with respect to securities in an amount equal to any fee paid to the Commission with respect to such securities in connection with the proposed transaction under section 6(b) of the Securities Act of

1933 (15 U.S.C. 77f(b)), or the fee paid under that section shall be reduced in an amount equal to the fee paid to the Commission in connection with such transaction under this subsection. Where two or more companies involved in an acquisition, merger, consolidation, sale, or other disposition of substantially all the assets of a company must file such proxy material with the Commission, each shall pay a proportionate share of such fee.

(2) At the time of filing such preliminary information statement as the Commission may require by rule pursuant to subsection (c) of this section, the issuer shall pay to the Commission the same fee as required for preliminary proxy solicitation material under paragraph (1) of this subsection.

(3) At the time of filing such statement as the Commission may require by rule pursuant to subsection (d)(1) of this section, the person making the filing shall pay to the Commission a fee at a rate that, subject to paragraph (4), is equal to $92 per $1,000,000 of the aggregate amount of cash or of the value of securities or other property proposed to be offered. The fee shall be reduced with respect to securities in an amount equal to any fee paid with respect to such securities in connection with the proposed transaction under section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)), or the fee paid under that section shall be reduced in an amount equal to the fee paid to the Commission in connection with such transaction under this subsection.

(4) ANNUAL ADJUSTMENT.—For each fiscal year, the Commission shall by order adjust the rate required by paragraphs (1) and (3) for such fiscal year to a rate that is equal to the rate (expressed in dollars per million) that is applicable under section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)) for such fiscal year.

(5) FEE COLLECTION.—Fees collected pursuant to this subsection for fiscal year 2012 and each fiscal year thereafter shall be deposited and credited as general revenue of the Treasury and shall not be available for obligation.

(6) REVIEW; EFFECTIVE DATE; PUBLICATION.—In exercising its authority under this subsection, the Commission shall not be required to comply with the provisions of section 553 of title 5, United States Code. An adjusted rate prescribed under paragraph (4) shall be published and take effect in accordance with section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)).

(7) PRO RATA APPLICATION.—The rates per $1,000,000 required by this subsection shall be applied pro rata to amounts and balances of less than $1,000,000.

(8) Notwithstanding any other provision of law, the Commission may impose fees, charges, or prices for matters not involving any acquisition, merger, consolidation, sale, or other disposition of assets described in this subsection, as authorized by section 9701 of title 31, United States Code, or otherwise.

(h)[40] PROXY SOLICITATIONS AND TENDER OFFERS IN CONNECTION WITH LIMITED PARTNERSHIP ROLLUP TRANSACTIONS.—

[40] Subsection (h) was added by section 302(a) of P.L. 103–202. That Public Law also contained the following provisions:

(1) PROXY RULES TO CONTAIN SPECIAL PROVISIONS.—It shall be unlawful for any person to solicit any proxy, consent, or authorization concerning a limited partnership rollup transaction, or to make any tender offer in furtherance of a limited partnership rollup transaction, unless such transaction is conducted in accordance with rules prescribed by the Commission under subsections (a) and (d) as required by this subsection. Such rules shall—

(A) permit any holder of a security that is the subject of the proposed limited partnership rollup transaction to engage in preliminary communications for the purpose of determining whether to solicit proxies, consents, or authorizations in opposition to the proposed limited partnership rollup transaction, without regard to whether any such communication would otherwise be considered a solicitation of proxies, and without being required to file soliciting material with the Commission prior to making that determination, except that—

(i) nothing in this subparagraph shall be construed to limit the application of any provision of this

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SEC. 302. REVISION OF PROXY SOLICITATION RULES WITH RESPECT TO LIMITED PARTNERSHIP ROLLUP TRANSACTIONS.

(a) * * *

(b) [15 U.S.C. 78n note] SCHEDULE FOR REGULATIONS.—The Securities and Exchange Commission shall conduct rulemaking proceedings and prescribe final regulations under the Securities Act of 1933 and the Securities Exchange Act of 1934 to implement the requirements of section 14(h) of the Securities Exchange Act of 1934, as amended by subsection (a), and such regulations shall become effective not later than 12 months after the date of enactment of this Act.

(c) [15 U.S.C. 78n note] EVALUATION OF FAIRNESS OPINION PREPARATION, DISCLOSURE, AND USE.—

(1) EVALUATION REQUIRED.—The Comptroller General of the United States shall, within 18 months after the date of enactment of this Act, conduct a study of—

(A) the use of fairness opinions in limited partnership rollup transactions;

(B) the standards which preparers use in making determinations of fairness;

(C) the scope of review, quality of analysis, qualifications and methods of selection of preparers, costs of preparation, and any limitations imposed by issuers on such preparers;

(D) the nature and quality of disclosures provided with respect to such opinions;

(E) any conflicts of interest with respect to the preparation of such opinions; and

(F) the usefulness of such opinions to limited partners.

(2) REPORT REQUIRED.—Not later than the end of the 18-month period referred to in paragraph (1), the Comptroller General of the United States shall submit to the Congress a report on the evaluation required by paragraph (1).

* * * * * * *

SEC. 304. [15 U.S.C. 78f note] EFFECTIVE DATE; EFFECT ON EXISTING AUTHORITY.

(a) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by section 303 shall become effective 12 months after the date of enactment of this Act.

(2) RULEMAKING AUTHORITY.—Notwithstanding paragraph (1), the authority of the Securities and Exchange Commission, a registered securities association, and a national securities exchange to commence rulemaking proceedings for the purpose of issuing rules pursuant to the amendments made by section 303 is effective on the date of enactment of this Act.

(3) REVIEW OF FILINGS PRIOR TO EFFECTIVE DATE.—Prior to the effective date of regulations promulgated pursuant to this title, the Securities and Exchange Commission shall continue to review and declare effective registration statements and amendments thereto relating to limited partnership rollup transactions in accordance with applicable regulations then in effect.

(b) EFFECT ON EXISTING AUTHORITY.—The amendments made by this title shall not limit the authority of the Securities and Exchange Commission, a registered securities association, or a national securities exchange under any provision of the Securities Exchange Act of 1934, or preclude the Commission or such association or exchange from imposing, under any other such provision, a remedy or procedure required to be imposed under such amendments.

title prohibiting, or reasonably designed to prevent, fraudulent, deceptive, or manipulative acts or practices under this title; and

(ii) any holder of not less than 5 percent of the outstanding securities that are the subject of the proposed limited partnership rollup transaction who engages in the business of buying and selling limited partnership interests in the secondary market shall be required to disclose such ownership interests and any potential conflicts of interests in such preliminary communications;

(B) require the issuer to provide to holders of the securities that are the subject of the limited partnership rollup transaction such list of the holders of the issuer's securities as the Commission may determine in such form and subject to such terms and conditions as the Commission may specify;

(C) prohibit compensating any person soliciting proxies, consents, or authorizations directly from security holders concerning such a limited partnership rollup transaction—

(i) on the basis of whether the solicited proxy, consent, or authorization either approves or disapproves the proposed limited partnership rollup transaction; or

(ii) contingent on the approval, disapproval, or completion of the limited partnership rollup transaction;

(D) set forth disclosure requirements for soliciting material distributed in connection with a limited partnership rollup transaction, including requirements for clear, concise, and comprehensible disclosure with respect to—

(i) any changes in the business plan, voting rights, form of ownership interest, or the compensation of the general partner in the proposed limited partnership rollup transaction from each of the original limited partnerships;

(ii) the conflicts of interest, if any, of the general partner;

(iii) whether it is expected that there will be a significant difference between the exchange values of the limited partnerships and the trading price of the securities to be issued in the limited partnership rollup transaction;

(iv) the valuation of the limited partnerships and the method used to determine the value of the interests of the limited partners to be exchanged for the securities in the limited partnership rollup transaction;

(v) the differing risks and effects of the limited partnership rollup transaction for investors in different limited partnerships proposed to be included, and the risks and effects of completing the limited partnership rollup transaction with less than all limited partnerships;

(vi) the statement by the general partner required under subparagraph (E);

(vii) such other matters deemed necessary or appropriate by the Commission;

(E) require a statement by the general partner as to whether the proposed limited partnership rollup transaction is fair or unfair to investors in each limited partnership, a discussion of the basis for that conclusion, and an evaluation and a description by the general partner of alternatives to the limited partnership rollup transaction, such as liquidation;

(F) provide that, if the general partner or sponsor has obtained any opinion (other than an opinion of counsel), appraisal, or report that is prepared by an outside party and that is materially related to the limited partnership rollup transaction, such soliciting materials shall contain or be accompanied by clear, concise, and comprehensible disclosure with respect to—

(i) the analysis of the transaction, scope of review, preparation of the opinion, and basis for and methods of arriving at conclusions, and any representations and undertakings with respect thereto;

(ii) the identity and qualifications of the person who prepared the opinion, the method of selection of such person, and any material past, existing, or contemplated relationships between the person or any of its affiliates and the general partner, sponsor, successor, or any other affiliate;

(iii) any compensation of the preparer of such opinion, appraisal, or report that is contingent on the transaction's approval or completion; and

(iv) any limitations imposed by the issuer on the access afforded to such preparer to the issuer's personnel, premises, and relevant books and records;

(G) provide that, if the general partner or sponsor has obtained any opinion, appraisal, or report as described in subparagraph (F) from any person whose compensation is contingent on the transaction's approval or completion or who has not been given access by the issuer to its personnel and premises and relevant books and records, the general partner or sponsor shall state the reasons therefor;

(H) provide that, if the general partner or sponsor has not obtained any opinion on the fairness of the proposed limited partnership rollup transaction to investors in each of the affected partnerships, such soliciting materials shall contain or be accompanied by a statement of such partner's or sponsor's reasons for concluding that such an opinion is not necessary in order to permit the limited partners to make an informed decision on the proposed transaction;

(I) require that the soliciting material include a clear, concise, and comprehensible summary of the limited partnership rollup transaction (including a summary of the matters referred to in clauses (i) through (vii) of subparagraph (D) and a summary of the matter referred to in sub-

paragraphs (F), (G), and (H)), with the risks of the limited partnership rollup transaction set forth prominently in the fore part thereof;

(J) provide that any solicitation or offering period with respect to any proxy solicitation, tender offer, or information statement in a limited partnership rollup transaction shall be for not less than the lesser of 60 calendar days or the maximum number of days permitted under applicable State law; and

(K) contain such other provisions as the Commission determines to be necessary or appropriate for the protection of investors in limited partnership rollup transactions.

(2) EXEMPTIONS.—The Commission may, consistent with the public interest, the protection of investors, and the purposes of this title, exempt by rule or order any security or class of securities, any transaction or class of transactions, or any person or class of persons, in whole or in part, conditionally or unconditionally, from the requirements imposed pursuant to paragraph (1) or from the definition contained in paragraph (4).

(3) EFFECT ON COMMISSION AUTHORITY.—Nothing in this subsection limits the authority of the Commission under subsection (a) or (d) or any other provision of this title or precludes the Commission from imposing, under subsection (a) or (d) or any other provision of this title, a remedy or procedure required to be imposed under this subsection.

(4) DEFINITION OF LIMITED PARTNERSHIP ROLLUP TRANSACTION.—Except as provided in paragraph (5), as used in this subsection, the term "limited partnership rollup transaction" means a transaction involving the combination or reorganization of one or more limited partnerships, directly or indirectly, in which—

(A) some or all of the investors in any of such limited partnerships will receive new securities, or securities in another entity, that will be reported under a transaction reporting plan declared effective before the date of enactment of this subsection by the Commission under section 11A;

(B) any of the investors' limited partnership securities are not, as of the date of filing, reported under a transaction reporting plan declared effective before the date of enactment of this subsection by the Commission under section 11A;

(C) investors in any of the limited partnerships involved in the transaction are subject to a significant adverse change with respect to voting rights, the term of existence of the entity, management compensation, or investment objectives; and

(D) any of such investors are not provided an option to receive or retain a security under substantially the same terms and conditions as the original issue.

(5) EXCLUSIONS FROM DEFINITION.—Notwithstanding paragraph (4), the term "limited partnership rollup transaction" does not include—

(A) a transaction that involves only a limited partnership or partnerships having an operating policy or practice of retaining cash available for distribution and reinvesting proceeds from the sale, financing, or refinancing of assets in accordance with such criteria as the Commission determines appropriate;

(B) a transaction involving only limited partnerships wherein the interests of the limited partners are repurchased, recalled, or exchanged in accordance with the terms of the preexisting limited partnership agreements for securities in an operating company specifically identified at the time of the formation of the original limited partnership;

(C) a transaction in which the securities to be issued or exchanged are not required to be and are not registered under the Securities Act of 1933;

(D) a transaction that involves only issuers that are not required to register or report under section 12, both before and after the transaction;

(E) a transaction, except as the Commission may otherwise provide by rule for the protection of investors, involving the combination or reorganization of one or more limited partnerships in which a non-affiliated party succeeds to the interests of a general partner or sponsor, if—

(i) such action is approved by not less than 66⅔ percent of the outstanding units of each of the participating limited partnerships; and

(ii) as a result of the transaction, the existing general partners will receive only compensation to which they are entitled as expressly provided for in the preexisting limited partnership agreements; or

(F) a transaction, except as the Commission may otherwise provide by rule for the protection of investors, in which the securities offered to investors are securities of another entity that are reported under a transaction reporting plan declared effective before the date of enactment of this subsection by the Commission under section 11A, if—

(i) such other entity was formed, and such class of securities was reported and regularly traded, not less than 12 months before the date on which soliciting material is mailed to investors; and

(ii) the securities of that entity issued to investors in the transaction do not exceed 20 percent of the total outstanding securities of the entity, exclusive of any securities of such class held by or for the account of the entity or a subsidiary of the entity.

(i) DISCLOSURE OF PAY VERSUS PERFORMANCE.—The Commission shall, by rule, require each issuer to disclose in any proxy or consent solicitation material for an annual meeting of the shareholders of the issuer a clear description of any compensation required to be disclosed by the issuer under section 229.402 of title 17, Code of Federal Regulations (or any successor thereto), including, for any issuer other than an emerging growth company, infor-

mation that shows the relationship between executive compensation actually paid and the financial performance of the issuer, taking into account any change in the value of the shares of stock and dividends of the issuer and any distributions. The disclosure under this subsection may include a graphic representation of the information required to be disclosed.

(j) DISCLOSURE OF HEDGING BY EMPLOYEES AND DIRECTORS.—The Commission shall, by rule, require each issuer to disclose in any proxy or consent solicitation material for an annual meeting of the shareholders of the issuer whether any employee or member of the board of directors of the issuer, or any designee of such employee or member, is permitted to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds) that are designed to hedge or offset any decrease in the market value of equity securities—

(1) granted to the employee or member of the board of directors by the issuer as part of the compensation of the employee or member of the board of directors; or

(2) held, directly or indirectly, by the employee or member of the board of directors.

(k) DATA STANDARDS FOR PROXY AND CONSENT SOLICITATION MATERIALS.—

(1) REQUIREMENT.—The Commission shall, by rule, adopt data standards for all information contained in any proxy or consent solicitation material prepared by an issuer for an annual meeting of the shareholders of the issuer, except that the Commission may exempt exhibits, signatures, and certifications from those data standards.

(2) CONSISTENCY.—The data standards required under paragraph (1) shall incorporate, and ensure compatibility with (to the extent feasible), all applicable data standards established in the rules promulgated under section 124 of the Financial Stability Act of 2010, including, to the extent practicable, by having the characteristics described in clauses (i) through (vi) of subsection (c)(1)(B) of such section 124.

SEC. 14A. [78n–1] SHAREHOLDER APPROVAL OF EXECUTIVE COMPENSATION.

(a) SEPARATE RESOLUTION REQUIRED.—

(1) IN GENERAL.—Not less frequently than once every 3 years, a proxy or consent or authorization for an annual or other meeting of the shareholders for which the proxy solicitation rules of the Commission require compensation disclosure shall include a separate resolution subject to shareholder vote to approve the compensation of executives, as disclosed pursuant to section 229.402 of title 17, Code of Federal Regulations, or any successor thereto.

(2) FREQUENCY OF VOTE.—Not less frequently than once every 6 years, a proxy or consent or authorization for an annual or other meeting of the shareholders for which the proxy solicitation rules of the Commission require compensation disclosure shall include a separate resolution subject to shareholder vote to determine whether votes on the resolutions required under paragraph (1) will occur every 1, 2, or 3 years.

(3) EFFECTIVE DATE.—The proxy or consent or authorization for the first annual or other meeting of the shareholders occurring after the end of the 6-month period beginning on the date of enactment of this section shall include—

(A) the resolution described in paragraph (1); and

(B) a separate resolution subject to shareholder vote to determine whether votes on the resolutions required under paragraph (1) will occur every 1, 2, or 3 years.

(b) SHAREHOLDER APPROVAL OF GOLDEN PARACHUTE COMPENSATION.—

(1) DISCLOSURE.—In any proxy or consent solicitation material (the solicitation of which is subject to the rules of the Commission pursuant to subsection (a)) for a meeting of the shareholders occurring after the end of the 6-month period beginning on the date of enactment of this section, at which shareholders are asked to approve an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all the assets of an issuer, the person making such solicitation shall disclose in the proxy or consent solicitation material, in a clear and simple form in accordance with regulations to be promulgated by the Commission, any agreements or understandings that such person has with any named executive officers of such issuer (or of the acquiring issuer, if such issuer is not the acquiring issuer) concerning any type of compensation (whether present, deferred, or contingent) that is based on or otherwise relates to the acquisition, merger, consolidation, sale, or other disposition of all or substantially all of the assets of the issuer and the aggregate total of all such compensation that may (and the conditions upon which it may) be paid or become payable to or on behalf of such executive officer.

(2) SHAREHOLDER APPROVAL.—Any proxy or consent or authorization relating to the proxy or consent solicitation material containing the disclosure required by paragraph (1) shall include a separate resolution subject to shareholder vote to approve such agreements or understandings and compensation as disclosed, unless such agreements or understandings have been subject to a shareholder vote under subsection (a).

(c) RULE OF CONSTRUCTION.—The shareholder vote referred to in subsections (a) and (b) shall not be binding on the issuer or the board of directors of an issuer, and may not be construed—

(1) as overruling a decision by such issuer or board of directors;

(2) to create or imply any change to the fiduciary duties of such issuer or board of directors;

(3) to create or imply any additional fiduciary duties for such issuer or board of directors; or

(4) to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation.

(d) DISCLOSURE OF VOTES.—Every institutional investment manager subject to section 13(f) shall report at least annually how it voted on any shareholder vote pursuant to subsections (a) and

(b), unless such vote is otherwise required to be reported publicly by rule or regulation of the Commission.

(e) EXEMPTION.—

(1) IN GENERAL.— The Commission may, by rule or order, exempt any other issuer or class of issuers from the requirement under subsection (a) or (b). In determining whether to make an exemption under this subsection, the Commission shall take into account, among other considerations, whether the requirements under subsections (a) and (b) disproportionately burdens small issuers.

(2) TREATMENT OF EMERGING GROWTH COMPANIES.—

(A) IN GENERAL.—An emerging growth company shall be exempt from the requirements of subsections (a) and (b).

(B) COMPLIANCE AFTER TERMINATION OF EMERGING GROWTH COMPANY TREATMENT.—An issuer that was an emerging growth company but is no longer an emerging growth company shall include the first separate resolution described under subsection (a)(1) not later than the end of—

(i) in the case of an issuer that was an emerging growth company for less than 2 years after the date of first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act of 1933, the 3-year period beginning on such date; and

(ii) in the case of any other issuer, the 1-year period beginning on the date the issuer is no longer an emerging growth company.

SEC. 14B. [78n–2] CORPORATE GOVERNANCE.

Not later than 180 days after the date of enactment of this subsection, the Commission shall issue rules that require an issuer to disclose in the annual proxy sent to investors the reasons why the issuer has chosen—

(1) the same person to serve as chairman of the board of directors and chief executive officer (or in equivalent positions); or

(2) different individuals to serve as chairman of the board of directors and chief executive officer (or in equivalent positions of the issuer).

REGISTRATION AND REGULATION OF BROKERS AND DEALERS

SEC. 15. **[**78*o***]** (a)(1) It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) 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, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial

bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

(2) The Commission, by rule or order, as it deems consistent with the public interest and the protection of investors, may conditionally or unconditionally exempt from paragraph (1) of this subsection any broker or dealer or class of brokers or dealers specified in such rule or order.

(b)(1) A broker or dealer may be registered by filing with the Commission an application for registration in such form and containing such information and documents concerning such broker or dealer and any persons associated with such broker or dealer as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Within forty-five days of the date of the filing of such application (or within such longer period as to which the applicant consents), the Commission shall—

(A) by order grant registration, or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred twenty days of the date of the filing of the application for registration. At the conclusion of such proceedings, the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if the Commission finds that the requirements of this section are satisfied. The order granting registration shall not be effective until such broker or dealer has become a member of a registered securities association, or until such broker or dealer has become a member of a national securities exchange, if such broker or dealer effects transactions solely on that exchange, unless the Commission has exempted such broker or dealer, by rule or order, from such membership. The Commission shall deny such registration if it does not make such a finding or if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under paragraph (4) of this subsection.

(2)(A) An application for registration of a broker or dealer to be formed or organized may be made by a broker or dealer to which the broker or dealer to be formed or organized is to be the successor. Such application, in such form as the Commission, by rule, may prescribe, shall contain such information and documents concerning the applicant, the successor, and any persons associated with the applicant or the successor, as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. The grant or denial of registration to such an applicant shall be in accordance with the procedures set forth in paragraph (1) of this subsection. If the Commission grants such registration, the registration shall terminate on the forty-fifth day after the effective date thereof, unless prior thereto the successor shall, in accordance with such rules and regulations as the

Commission may prescribe, adopt the application for registration as its own.

(B) Any person who is a broker or dealer solely by reason of acting as a municipal securities dealer or municipal securities broker, who so acts through a separately identifiable department or division, and who so acted in such a manner on the date of enactment of the Securities Acts Amendments of 1975, may, in accordance with such terms and conditions as the Commission, by rule, prescribes as necessary and appropriate in the public interest and for the protection of investors, register such separately identifiable department or division in accordance with this subsection. If any such department or division is so registered, the department or division and not such person himself shall be the broker or dealer for purposes of this title.

(C) Within six months of the date of the granting of registration to a broker or dealer, the Commission, or upon the authorization and direction of the Commission, a registered securities association or national securities exchange of which such broker or dealer is a member, shall conduct an inspection of the broker or dealer to determine whether it is operating in conformity with the provisions of this title and the rules and regulations thereunder: *Provided, however,* That the Commission may delay such inspection of any class of brokers or dealers for a period not to exceed six months.

(3) Any provision of this title (other than section 5 and subsection (a) of this section) which prohibits any act, practice, or course of business if the mails or any means or instrumentality of interstate commerce is used in connection therewith shall also prohibit any such act, practice, or course of business by any registered broker or dealer or any person acting on behalf of such a broker or dealer, irrespective of any use of the mails or any means or instrumentality of interstate commerce in connection therewith.

(4) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated—

(A) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission or with any other appropriate regulatory agency under this title, or in any proceeding before the Commission with respect to registration, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein. [41]

[41] So in law. The period at the end of subparagraphs (A) through (E) probably should be semicolons.

(B) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor or of a substantially equivalent crime by a foreign court of competent jurisdiction which the Commission finds—

(i) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, any substantially equivalent activity however denominated by the laws of the relevant foreign government, or conspiracy to commit any such offense;

(ii) arises out of the conduct of the business of a broker, dealer, municipal securities dealer municipal advisor,,[42] government securities broker, government securities dealer, investment adviser, bank, insurance company, fiduciary, transfer agent, nationally recognized statistical rating organization, foreign person performing a function substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act (7 U.S.C. 1 et seq.) or any substantially equivalent foreign statute or regulation;

(iii) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds, or securities, or substantially equivalent activity however denominated by the laws of the relevant foreign government; or

(iv) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of title 18, United States Code, or a violation of a substantially equivalent foreign statute.

(C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer, municipal securities dealer municipal advisor,,[42] government securities broker, government securities dealer, security-based swap dealer, major security-based swap participant, transfer agent, nationally recognized statistical rating organization, foreign person performing a function substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent foreign statute or regulation, or as an affiliated person or employee of any investment company, bank, insurance company, foreign entity substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent foreign statute or regulation, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(D) has willfully violated any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, this title, the rules or regulations under any of such statutes, or the

[42] Two commas so in law.

rules of the Municipal Securities Rulemaking Board, or is unable to comply with any such provision.

(E) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, this title, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this subparagraph (E) no person shall be deemed to have failed reasonably to supervise any other person, if—

(i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

(F) is subject to any order of the Commission barring or suspending the right of the person to be associated with a broker, dealer, security-based swap dealer, or a major security-based swap participant;

(G) has been found by a foreign financial regulatory authority to have—

(i) made or caused to be made in any application for registration or report required to be filed with a foreign financial regulatory authority, or in any proceeding before a foreign financial regulatory authority with respect to registration, any statement that was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any application or report to the foreign financial regulatory authority any material fact that is required to be stated therein;

(ii) violated any foreign statute or regulation regarding transactions in securities, or contracts of sale of a commodity for future delivery, traded on or subject to the rules of a contract market or any board of trade;

(iii) aided, abetted, counseled, commanded, induced, or procured the violation by any person of any provision of any statutory provisions enacted by a foreign government, or rules or regulations thereunder, empowering a foreign financial regulatory authority regarding transactions in securities, or contracts of sale of a commodity for future delivery, traded on or subject to the rules of a contract market or any board of trade, or has been found, by a foreign financial regulatory authority, to have failed reasonably to supervise, with a view to preventing violations of such

statutory provisions, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision; or

(H) is subject to any final order of a State securities commission (or any agency or officer performing like functions), State authority that supervises or examines banks, savings associations, or credit unions, State insurance commission (or any agency or office performing like functions), an appropriate Federal banking agency (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q))), or the National Credit Union Administration, that—

(i) bars such person from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or

(ii) constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct.

(5) Pending final determination whether any registration under this subsection shall be revoked, the Commission, by order, may suspend such registration, if such suspension appears to the Commission, after notice and opportunity for hearing, to be necessary or appropriate in the public interest or for the protection of investors. Any registered broker or dealer may, upon such terms and conditions as the Commission deems necessary or appropriate in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any registered broker or dealer is no longer in existence or has ceased to do business as a broker or dealer, the Commission, by order, shall cancel the registration of such broker or dealer.

(6)(A) With respect to any person who is associated, who is seeking to become associated, or, at the time of the alleged misconduct, who was associated or was seeking to become associated with a broker or dealer, or any person participating, or, at the time of the alleged misconduct, who was participating, in an offering of any penny stock, the Commission, by order, shall censure, place limitations on the activities or functions of such person, or suspend for a period not exceeding 12 months, or bar any such person from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock, if the Commission finds, on the record after notice and opportunity for a hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person—

(i) has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), (E), (H), or (G) of paragraph (4) of this subsection;

[casterkx: Clause (i) reflects amendments made by PLs' 101-429, 101-550, and 107-204. The second PL listed attempts to amend clause (i) as amended by PL 101-429, but the issue is that

the earlier amendment was not yet in effect. Therefore, technically that amendment and the amendment proposed by PL 107-204 could not be executed. Our version as it appears now reflects all three amendments by these laws.]

(ii) has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within 10 years of the commencement of the proceedings under this paragraph; or

(iii) is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4).

(B) It shall be unlawful—

(i) for any person as to whom an order under subparagraph (A) is in effect, without the consent of the Commission, willfully to become, or to be, associated with a broker or dealer in contravention of such order, or to participate in an offering of penny stock in contravention of such order;

(ii) for any broker or dealer to permit such a person, without the consent of the Commission, to become or remain, a person associated with the broker or dealer in contravention of such order, if such broker or dealer knew, or in the exercise of reasonable care should have known, of such order; or

(iii) for any broker or dealer to permit such a person, without the consent of the Commission, to participate in an offering of penny stock in contravention of such order, if such broker or dealer knew, or in the exercise of reasonable care should have known, of such order and of such participation.

(C) For purposes of this paragraph, the term "person participating in an offering of penny stock" includes any person acting as any 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. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from such term.

(7) No registered broker or dealer or government securities broker or government securities dealer registered (or required to register) under section 15C(a)(1)(A) shall effect any transaction in, or induce the purchase or sale of, any security unless such broker or dealer meets such standards of operational capability and such broker or dealer and all natural persons associated with such broker or dealer meet such standards of training, experience, competence, and such other qualifications as the Commission finds necessary or appropriate in the public interest or for the protection of investors. The Commission shall establish such standards by rules and regulations, which may—

(A) specify that all or any portion of such standards shall be applicable to any class of brokers and dealers and persons associated with brokers and dealers;

(B) require persons in any such class to pass tests prescribed in accordance with such rules and regulations, which tests shall, with respect to any class of partners, officers, or supervisory employees (which latter term may be defined by the

Commission's rules and regulations and as so defined shall include branch managers of brokers or dealers) engaged in the management of the broker or dealer, include questions relating to bookkeeping, accounting, internal control over cash and securities, supervision of employees, maintenance of records, and other appropriate matters; and

(C) provide that persons in any such class other than brokers and dealers and partners, officers, and supervisory employees of brokers or dealers, may be qualified solely on the basis of compliance with such standards of training and such other qualifications as the Commission finds appropriate.

The Commission, by rule, may prescribe reasonable fees and charges to defray its costs in carrying out this paragraph, including, but not limited to, fees for any test administered by it or under its direction. The Commission may cooperate with registered securities associations and national securities exchanges in devising and administering tests and may require registered brokers and dealers and persons associated with such brokers and dealers to pass tests administered by or on behalf of any such association or exchange and to pay such association or exchange reasonable fees or charges to defray the costs incurred by such association or exchange in administering such tests.

(8) It shall be unlawful for any registered broker or dealer to effect any transaction in, or induce or attempt to induce the purchase or sale of, any security (other than or[43] commercial paper, bankers' acceptances, or commercial bills), unless such broker or dealer is a member of a securities association registered pursuant to section 15A of this title or effects transactions in securities solely on a national securities exchange of which it is a member.

(9) The Commission by rule or order, as it deems consistent with the public interest and the protection of investors, may conditionally or unconditionally exempt from paragraph (8) of this subsection any broker or dealer or class of brokers or dealers specified in such rule or order.

(10) For the purposes of determining whether a person is subject to a statutory disqualification under section 6(c)(2), 15A(g)(2), or 17A(b)(4)(A) of this title, the term "Commission" in paragraph (4)(B) of this subsection shall mean "exchange", "association", or "clearing agency", respectively.

(11)[44] BROKER/DEALER REGISTRATION WITH RESPECT TO TRANSACTIONS IN SECURITY FUTURES PRODUCTS.—

(A) NOTICE REGISTRATION.—

(i) CONTENTS OF NOTICE.—Notwithstanding paragraphs (1) and (2), a broker or dealer required to register only because it effects transactions in security futures products on an exchange registered pursuant to section 6(g) may register for purposes of this section by filing with the Commission a written notice in such form and containing such information concerning such broker or dealer and any persons associated with such broker or dealer as the Commission, by rule, may pre-

[43] So in original. The word "or" probably should not appear.
[44] Margins so in law.

scribe as necessary or appropriate in the public interest or for the protection of investors. A broker or dealer may not register under this paragraph unless that broker or dealer is a member of a national securities association registered under section 15A(k).

(ii) IMMEDIATE EFFECTIVENESS.—Such registration shall be effective contemporaneously with the submission of notice, in written or electronic form, to the Commission, except that such registration shall not be effective if the registration would be subject to suspension or revocation under paragraph (4).

(iii) SUSPENSION.—Such registration shall be suspended immediately if a national securities association registered pursuant to section 15A(k) of this title suspends the membership of that broker or dealer.

(iv) TERMINATION.—Such registration shall be terminated immediately if any of the above stated conditions for registration set forth in this paragraph are no longer satisfied.

(B) EXEMPTIONS FOR REGISTERED BROKERS AND DEALERS.—A broker or dealer registered pursuant to the requirements of subparagraph (A) shall be exempt from the following provisions of this title and the rules thereunder with respect to transactions in security futures products:

(i) Section 8.

(ii) Section 11.

(iii) Subsections (c)(3) and (c)(5) of this section.

(iv) Section 15B.

(v) Section 15C.

(vi) Subsections (d), (e), (f), (g), (h), and (i) of section 17.

(12) EXEMPTION FOR SECURITY FUTURES PRODUCT EXCHANGE MEMBERS.—

(A) REGISTRATION EXEMPTION.—A natural person shall be exempt from the registration requirements of this section if such person—

(i) is a member of a designated contract market registered with the Commission as an exchange pursuant to section 6(g);

(ii) effects transactions only in securities on the exchange of which such person is a member; and

(iii) does not directly accept or solicit orders from public customers or provide advice to public customers in connection with the trading of security futures products.

(B) OTHER EXEMPTIONS.—A natural person exempt from registration pursuant to subparagraph (A) shall also be exempt from the following provisions of this title and the rules thereunder:

(i) Section 8.

(ii) Section 11.

(iii) Subsections (c)(3), (c)(5), and (e) of this section.

(iv) Section 15B.

(v) Section 15C.

(vi) Subsections (d), (e), (f), (g), (h), and (i) of section 17.

(13) REGISTRATION EXEMPTION FOR MERGER AND ACQUISITION BROKERS.—

(A) IN GENERAL.—Except as provided in subparagraph (B), an M&A broker shall be exempt from registration under this section.

(B) EXCLUDED ACTIVITIES.—An M&A broker is not exempt from registration under this paragraph if such broker does any of the following:

(i) Directly or indirectly, in connection with the transfer of ownership of an eligible privately held company, receives, holds, transmits, or has custody of the funds or securities to be exchanged by the parties to the transaction.

(ii) Engages on behalf of an issuer in a public offering of any class of securities that is registered, or is required to be registered, with the Commission under section 12 or with respect to which the issuer files, or is required to file, periodic information, documents, and reports under subsection (d).

(iii) Engages on behalf of any party in a transaction involving a shell company, other than a business combination related shell company.

(iv) Directly, or indirectly through any of its affiliates, provides financing related to the transfer of ownership of an eligible privately held company.

(v) Assists any party to obtain financing from an unaffiliated third party without—

(I) complying with all other applicable laws in connection with such assistance, including, if applicable, Regulation T (12 C.F.R. 220 et seq.); and

(II) disclosing any compensation in writing to the party.

(vi) Represents both the buyer and the seller in the same transaction without providing clear written disclosure as to the parties the broker represents and obtaining written consent from both parties to the joint representation.

(vii) Facilitates a transaction with a group of buyers formed with the assistance of the M&A broker to acquire the eligible privately held company.

(viii) Engages in a transaction involving the transfer of ownership of an eligible privately held company to a passive buyer or group of passive buyers.

(ix) Binds a party to a transfer of ownership of an eligible privately held company.

(C) DISQUALIFICATION.—An M&A broker is not exempt from registration under this paragraph if such broker (and if and as applicable, including any officer, director, member, manager, partner, or employee of such broker)—

(i) has been barred from association with a broker or dealer by the Commission, any State, or any self-regulatory organization; or

(ii) is suspended from association with a broker or dealer.

(D) RULE OF CONSTRUCTION.—Nothing in this paragraph shall be construed to limit any other authority of the Commission to exempt any person, or any class of persons, from any provision of this title, or from any provision of any rule or regulation thereunder.

(E) DEFINITIONS.—In this paragraph:

(i) BUSINESS COMBINATION RELATED SHELL COMPANY.—The term "business combination related shell company" means a shell company that is formed by an entity that is not a shell company—

(I) solely for the purpose of changing the corporate domicile of that entity solely within the United States; or

(II) solely for the purpose of completing a business combination transaction (as defined under section 230.165(f) of title 17, Code of Federal Regulations) among one or more entities other than the company itself, none of which is a shell company.

(ii) CONTROL.—The term "control" means the power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. There is a presumption of control if, upon completion of a transaction, the buyer or group of buyers—

(I) has the right to vote 25 percent or more of a class of voting securities or the power to sell or direct the sale of 25 percent or more of a class of voting securities; or

(II) in the case of a partnership or limited liability company, has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital.

(iii) ELIGIBLE PRIVATELY HELD COMPANY.—The term "eligible privately held company" means a privately held company that meets both of the following conditions:

(I) The company does not have any class of securities registered, or required to be registered, with the Commission under section 12 or with respect to which the company files, or is required to file, periodic information, documents, and reports under subsection (d).

(II) In the fiscal year ending immediately before the fiscal year in which the services of the M&A broker are initially engaged with respect to the securities transaction, the company meets either or both of the following conditions (deter-

mined in accordance with the historical financial accounting records of the company):

(aa) The earnings of the company before interest, taxes, depreciation, and amortization are less than $25,000,000.

(bb) The gross revenues of the company are less than $250,000,000.

For purposes of this subclause, the Commission may by rule modify the dollar figures if the Commission determines that such a modification is necessary or appropriate in the public interest or for the protection of investors.

(iv) M&A BROKER.—The term "M&A broker" means a broker, and any person associated with a broker, engaged in the business of effecting securities transactions solely in connection with the transfer of ownership of an eligible privately held company, regardless of whether the broker acts on behalf of a seller or buyer, through the purchase, sale, exchange, issuance, repurchase, or redemption of, or a business combination involving, securities or assets of the eligible privately held company, if the broker reasonably believes that—

(I) upon consummation of the transaction, any person acquiring securities or assets of the eligible privately held company, acting alone or in concert—

(aa) will control the eligible privately held company or the business conducted with the assets of the eligible privately held company; and

(bb) directly or indirectly, will be active in the management of the eligible privately held company or the business conducted with the assets of the eligible privately held company, including without limitation, for example, by—

(AA) electing executive officers;

(BB) approving the annual budget;

(CC) serving as an executive or other executive manager; or

(DD) carrying out such other activities as the Commission may, by rule, determine to be in the public interest; and

(II) if any person is offered securities in exchange for securities or assets of the eligible privately held company, such person will, prior to becoming legally bound to consummate the transaction, receive or have reasonable access to the most recent fiscal year-end financial statements of the issuer of the securities as customarily prepared by the management of the issuer in the normal course of operations and, if the financial statements of the issuer are audited, reviewed, or

compiled, any related statement by the independent accountant, a balance sheet dated not more than 120 days before the date of the offer, and information pertaining to the management, business, results of operations for the period covered by the foregoing financial statements, and material loss contingencies of the issuer.

(v) SHELL COMPANY.—The term "shell company" means a company that at the time of a transaction with an eligible privately held company—

(I) has no or nominal operations; and

(II) has—

(aa) no or nominal assets;

(bb) assets consisting solely of cash and cash equivalents; or

(cc) assets consisting of any amount of cash and cash equivalents and nominal other assets.

(F) INFLATION ADJUSTMENT.—

(i) IN GENERAL.—On the date that is 5 years after the date of the enactment of this paragraph, and every 5 years thereafter, each dollar amount in subparagraph (E)(iii)(II) shall be adjusted by—

(I) dividing the annual value of the Employment Cost Index For Wages and Salaries, Private Industry Workers (or any successor index), as published by the Bureau of Labor Statistics, for the calendar year preceding the calendar year in which the adjustment is being made by the annual value of such index (or successor) for the calendar year ending December 31, 2020; and

(II) multiplying such dollar amount by the quotient obtained under subclause (I).

(ii) ROUNDING.—Each dollar amount determined under clause (i) shall be rounded to the nearest multiple of $100,000.

(c)(1)(A) No 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 or attempt to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills), or any security-based swap agreement by means of any manipulative, deceptive, or other fraudulent device or contrivance.

(B) No broker, dealer, or municipal securities dealer shall make 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 municipal security or any security-based swap agreement involving a municipal security by means of any manipulative, deceptive, or other fraudulent device or contrivance.

(C) No government securities broker or government securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or to attempt to induce the purchase or sale of, any government secu-

rity or any security-based swap agreement involving a government security by means of any manipulative, deceptive, or other fraudulent device or contrivance.

(2)(A) No 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 or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange of which it is a member, in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation.

(B) No broker, dealer, or municipal securities dealer shall make 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 municipal security in connection with which such broker, dealer, or municipal securities dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation.

(C) No government securities broker or government securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or induce or attempt to induce the purchase or sale of, any government security in connection with which such government securities broker or government securities dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation.

(D) The Commission shall, for the purposes of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative and such quotations as are fictitious.

(E) The Commission shall, prior to adopting any rule or regulation under subparagraph (C), consult with and consider the views of the Secretary of the Treasury and each appropriate regulatory agency. If the Secretary of the Treasury or any appropriate regulatory agency comments in writing on a proposed rule or regulation of the Commission under such subparagraph (C) that has been published for comment, the Commission shall respond in writing to such written comment before adopting the proposed rule. If the Secretary of the Treasury determines, and notifies the Commission, that such rule or regulation, if implemented, would, or as applied does (i) adversely affect the liquidity or efficiency of the market for government securities; or (ii) impose any burden on competition not necessary or appropriate in furtherance of the purposes of this section, the Commission shall, prior to adopting the proposed rule or regulation, find that such rule or regulation is necessary and appropriate in furtherance of the purposes of this section notwithstanding the Secretary's determination.

(3)(A) No broker or dealer (other than a government securities broker or government securities dealer, except a registered 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 or attempt to induce the purchase or sale of, any security (other than an exempted security (except a government security) or commercial paper, bankers' acceptances, or commercial bills) in

contravention of such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest or for the protection of investors to provide safeguards with respect to the financial responsibility and related practices of brokers and dealers including, but not limited to, the acceptance of custody and use of customers' securities and the carrying and use of customers' deposits or credit balances. Such rules and regulations shall (A) require the maintenance of reserves with respect to customers' deposits or credit balances, and (B) no later than September 1, 1975, establish minimum financial responsibility requirements for all brokers and dealers.

(B) Consistent with this title, the Commission, in consultation with the Commodity Futures Trading Commission, shall issue such rules, regulations, or orders as are necessary to avoid duplicative or conflicting regulations applicable to any broker or dealer registered with the Commission pursuant to section 15(b) (except paragraph (11) thereof), that is also registered with the Commodity Futures Trading Commission pursuant to section 4f(a) of the Commodity Exchange Act (except paragraph (2) thereof), with respect to the application of: (i) the provisions of section 8, section 15(c)(3), and section 17 of this title and the rules and regulations thereunder related to the treatment of customer funds, securities, or property, maintenance of books and records, financial reporting, or other financial responsibility rules, involving security futures products; and (ii) similar provisions of the Commodity Exchange Act and rules and regulations thereunder involving security futures products.

(C) Notwithstanding any provision of sections 2(a)(1)(C)(i) or 4d(a)(2) of the Commodity Exchange Act and the rules and regulations thereunder, and pursuant to an exemption granted by the Commission under section 36 of this title or pursuant to a rule or regulation, cash and securities may be held by a broker or dealer registered pursuant to subsection (b)(1) and also registered as a futures commission merchant pursuant to section 4f(a)(1) of the Commodity Exchange Act, in a portfolio margining account carried as a futures account subject to section 4d of the Commodity Exchange Act and the rules and regulations thereunder, pursuant to a portfolio margining program approved by the Commodity Futures Trading Commission, and subject to subchapter IV of chapter 7 of title 11 of the United States Code and the rules and regulations thereunder. The Commission shall consult with the Commodity Futures Trading Commission to adopt rules to ensure that such transactions and accounts are subject to comparable requirements to the extent practicable for similar products.

(4) If the Commission finds, after notice and opportunity for a hearing, that any person subject to the provisions of section 12, 13, 14, or subsection (d) of section 15 of this title or any rule or regulation thereunder has failed to comply with any such provision, rule, or regulation in any material respect, the Commission may publish its findings and issue an order requiring such person, and any person who was a cause of the failure to comply due to an act or omis-

sion the person knew or should have known would contribute to the failure to comply, to comply, or to take steps to effect compliance, with such provision or such rule or regulation thereunder upon such terms and conditions and within such time as the Commission may specify in such order.

(5) No dealer (other than a specialist registered on a national securities exchange) acting in the capacity of market maker or otherwise shall make 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 (other than an exempted security or a municipal security) in contravention of such specified and appropriate standards with respect to dealing as the Commission, by rule, shall prescribe as necessary or appropriate in the public interest and for the protection of investors, to maintain fair and orderly markets, or to remove impediments to and perfect the mechanism of a national market system. Under the rules of the Commission a dealer in a security may be prohibited from acting as broker in that security.

(6) No 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 or attempt to induce the purchase or sale of, any security (other than an exempted security, municipal security, commercial paper, bankers' acceptances, or commercial bills) in contravention of such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest and for the protection of investors or to perfect or remove impediments to a national system for the prompt and accurate clearance and settlement of securities transactions, with respect to the time and method of, and the form and format of documents used in connection with, making settlements of and payments for transactions in securities, making transfers and deliveries of securities, and closing accounts. Nothing in this paragraph shall be construed (A) to affect the authority of the Board of Governors of the Federal Reserve System, pursuant to section 7 of this title, to prescribe rules and regulations for the purpose of preventing the excessive use of credit for the purchase or carrying of securities, or (B) to authorize the Commission to prescribe rules or regulations for such purpose.

(7) In connection with any bid for or purchase of a government security related to an offering of government securities by or on behalf of an issuer, no government securities broker, government securities dealer, or bidder for or purchaser of securities in such offering shall knowingly or willfully make any false or misleading written statement or omit any fact necessary to make any written statement made not misleading.

(8) PROHIBITION OF REFERRAL FEES.—No broker or dealer, or person associated with a broker or dealer, may solicit or accept, directly or indirectly, remuneration for assisting an attorney in obtaining the representation of any person in any private action arising under this title or under the Securities Act of 1933.

(d) SUPPLEMENTARY AND PERIODIC INFORMATION.—

(1) IN GENERAL.—Each issuer which has filed a registration statement containing an undertaking which is or becomes operative under this subsection as in effect prior to the date of

enactment of the Securities Acts Amendments of 1964, and each issuer which shall after such date file a registration statement which has become effective pursuant to the Securities Act of 1933, as amended, shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 13 of this title in respect of a security registered pursuant to section 12 of this title. The duty to file under this subsection shall be automatically suspended if and so long as any issue of securities of such issuer is registered pursuant to section 12 of this title. The duty to file under this subsection shall also be automatically suspended as to any fiscal year, other than the fiscal year within which such registration statement became effective, if, at the beginning of such fiscal year, the securities of each class, other than any class of asset-backed securities, to which the registration statement relates are held of record by less than 300 persons, or, in the case of a bank, a savings and loan holding company (as defined in section 10 of the Home Owners' Loan Act), or a bank holding company, as such term is defined in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841), 1,200 persons persons [45]. For the purposes of this subsection, the term "class" shall be construed to include all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges. The Commission may, for the purpose of this subsection, define by rules and regulations the term "held of record" as it deems necessary or appropriate in the public interest or for the protection of investors in order to prevent circumvention of the provisions of this subsection. Nothing in this subsection shall apply to securities issued by a foreign government or political subdivision thereof.

(2) ASSET-BACKED SECURITIES.—

(A) SUSPENSION OF DUTY TO FILE.—The Commission may, by rule or regulation, provide for the suspension or termination of the duty to file under this subsection for any class of asset-backed security, on such terms and conditions and for such period or periods as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

(B) CLASSIFICATION OF ISSUERS.—The Commission may, for purposes of this subsection, classify issuers and prescribe requirements appropriate for each class of issuers of asset-backed securities.

(e) NOTICES TO CUSTOMERS REGARDING SECURITIES LENDING.—Every registered broker or dealer shall provide notice to its customers that they may elect not to allow their fully paid securities to be used in connection with short sales. If a broker or dealer uses a customer's securities in connection with short sales, the broker

[45] The second occurence of the word "persons" in the third sentence of subsection (d)(1) probably should not appear. See amendment made by section 601(b) of Public Law 112–106.

or dealer shall provide notice to its customer that the broker or dealer may receive compensation in connection with lending the customer's securities. The Commission, by rule, as it deems necessary or appropriate in the public interest and for the protection of investors, may prescribe the form, content, time, and manner of delivery of any notice required under this paragraph.

(f) The Commission, by rule, as it deems necessary or appropriate in the public interest and for the protection of investors or to assure equal regulation, may require any member of a national securities exchange not required to register under section 15 of this title and any person associated with any such member to comply with any provision of this title (other than section 15(a)) or the rules or regulations thereunder which by its terms regulates or prohibits any act, practice, or course of business by a "broker or dealer" or "registered broker or dealer" or a "person associated with a broker or dealer," respectively.

(g) Every registered broker or dealer shall establish, maintain, and enforce written policies and procedures reasonably designed, taking into consideration the nature of such broker's or dealer's business, to prevent the misuse in violation of this title, or the rules or regulations thereunder, of material, nonpublic information by such broker or dealer or any person associated with such broker or dealer. The Commission, as it deems necessary or appropriate in the public interest or for the protection of investors, shall adopt rules or regulations to require specific policies or procedures reasonably designed to prevent misuse in violation of this title (or the rules or regulations thereunder) of material, nonpublic information.

(h) REQUIREMENTS FOR TRANSACTIONS IN PENNY STOCKS.—

(1) IN GENERAL.—No 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 or attempt to induce the purchase or sale of, any penny stock by any customer except in accordance with the requirements of this subsection and the rules and regulations prescribed under this subsection.

(2) RISK DISCLOSURE WITH RESPECT TO PENNY STOCKS.—Prior to effecting any transaction in any penny stock, a broker or dealer shall give the customer a risk disclosure document that—

(A) contains a description of the nature and level of risk in the market for penny stocks in both public offerings and secondary trading;

(B) contains a description of the broker's or dealer's duties to the customer and of the rights and remedies available to the customer with respect to violations of such duties or other requirements of Federal securities laws;

(C) contains a brief, clear, narrative description of a dealer market, including "bid" and "ask" prices for penny stocks and the significance of the spread between the bid and ask prices;

(D) contains the toll free telephone number for inquiries on disciplinary actions established pursuant to section 15A(i) of this title;

(E) defines significant terms used in the disclosure document or in the conduct of trading in penny stocks; and

(F) contains such other information, and is in such form (including language, type size, and format), as the Commission shall require by rule or regulation.

(3) COMMISSION RULES RELATING TO DISCLOSURE.—The Commission shall adopt rules setting forth additional standards for the disclosure by brokers and dealers to customers of information concerning transactions in penny stocks. Such rules—

(A) shall require brokers and dealers to disclose to each customer, prior to effecting any transaction in, and at the time of confirming any transaction with respect to any penny stock, in accordance with such procedures and methods as the Commission may require consistent with the public interest and the protection of investors—

(i) the bid and ask prices for penny stock, or such other information as the Commission may, by rule, require to provide customers with more useful and reliable information relating to the price of such stock;

(ii) the number of shares to which such bid and ask prices apply, or other comparable information relating to the depth and liquidity of the market for such stock; and

(iii) the amount and a description of any compensation that the broker or dealer and the associated person thereof will receive or has received in connection with such transaction;

(B) shall require brokers and dealers to provide, to each customer whose account with the broker or dealer contains penny stocks, a monthly statement indicating the market value of the penny stocks in that account or indicating that the market value of such stock cannot be determined because of the unavailability of firm quotes; and

(C) may, as the Commission finds necessary or appropriate in the public interest or for the protection of investors, require brokers and dealers to disclose to customers additional information concerning transactions in penny stocks.

(4) EXEMPTIONS.—The Commission, as it determines consistent with the public interest and the protection of investors, may by rule, regulation, or order exempt in whole or in part, conditionally or unconditionally, any person or class of persons, or any transaction or class of transactions, from the requirements of this subsection. Such exemptions shall include an exemption for brokers and dealers based on the minimal percentage of the broker's or dealer's commissions, commission-equivalents, and markups received from transactions in penny stocks.

(5) REGULATIONS.—It shall be unlawful for any person to violate such rules and regulations as the Commission shall prescribe in the public interest or for the protection of investors or to maintain fair and orderly markets—

(A) as necessary or appropriate to carry out this subsection; or

(B) as reasonably designed to prevent fraudulent, deceptive, or manipulative acts and practices with respect to penny stocks.

(i) LIMITATIONS ON STATE LAW.—

(1) CAPITAL, MARGIN, BOOKS AND RECORDS, BONDING, AND REPORTS.—No law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof shall establish capital, custody, margin, financial responsibility, making and keeping records, bonding, or financial or operational reporting requirements for brokers, dealers, municipal securities dealers, government securities brokers, or government securities dealers that differ from, or are in addition to, the requirements in those areas established under this title. The Commission shall consult periodically the securities commissions (or any agency or office performing like functions) of the States concerning the adequacy of such requirements as established under this title.

(2) FUNDING PORTALS.—

(A) LIMITATION ON STATE LAWS.—Except as provided in subparagraph (B), no State or political subdivision thereof may enforce any law, rule, regulation, or other administrative action against a registered funding portal with respect to its business as such.

(B) EXAMINATION AND ENFORCEMENT AUTHORITY.—Subparagraph (A) does not apply with respect to the examination and enforcement of any law, rule, regulation, or administrative action of a State or political subdivision thereof in which the principal place of business of a registered funding portal is located, provided that such law, rule, regulation, or administrative action is not in addition to or different from the requirements for registered funding portals established by the Commission.

(C) DEFINITION.—For purposes of this paragraph, the term "State" includes the District of Columbia and the territories of the United States.

(3) DE MINIMIS TRANSACTIONS BY ASSOCIATED PERSONS.—No law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof may prohibit an associated person of a broker or dealer from effecting a transaction described in paragraph (3) for a customer in such State if—

(A) such associated person is not ineligible to register with such State for any reason other than such a transaction;

(B) such associated person is registered with a registered securities association and at least one State; and

(C) the broker or dealer with which such person is associated is registered with such State.

(4) DESCRIBED TRANSACTIONS.—

(A) IN GENERAL.—A transaction is described in this paragraph if—

(i) such transaction is effected—

(I) on behalf of a customer that, for 30 days prior to the day of the transaction, maintained an account with the broker or dealer; and

(II) by an associated person of the broker or dealer—

(aa) to which the customer was assigned for 14 days prior to the day of the transaction; and

(bb) who is registered with a State in which the customer was a resident or was present for at least 30 consecutive days during the 1-year period prior to the day of the transaction; or

(ii) the transaction is effected—

(I) on behalf of a customer that, for 30 days prior to the day of the transaction, maintained an account with the broker or dealer; and

(II) during the period beginning on the date on which such associated person files an application for registration with the State in which the transaction is effected and ending on the earlier of—

(aa) 60 days after the date on which the application is filed; or

(bb) the date on which such State notifies the associated person that it has denied the application for registration or has stayed the pendency of the application for cause.

(B) RULES OF CONSTRUCTION.—For purposes of subparagraph (A)(i)(II)—

(i) each of up to 3 associated persons of a broker or dealer who are designated to effect transactions during the absence or unavailability of the principal associated person for a customer may be treated as an associated person to which such customer is assigned; and

(ii) if the customer is present in another State for 30 or more consecutive days or has permanently changed his or her residence to another State, a transaction is not described in this paragraph, unless the associated person of the broker or dealer files an application for registration with such State not later than 10 business days after the later of the date of the transaction, or the date of the discovery of the presence of the customer in the other State for 30 or more consecutive days or the change in the customer's residence.

(j) RULEMAKING TO EXTEND REQUIREMENTS TO NEW HYBRID PRODUCTS.—

(1) CONSULTATION.—Prior to commencing a rulemaking under this subsection, the Commission shall consult with and seek the concurrence of the Board concerning the imposition of broker or dealer registration requirements with respect to any new hybrid product. In developing and promulgating rules

under this subsection, the Commission shall consider the views of the Board, including views with respect to the nature of the new hybrid product; the history, purpose, extent, and appropriateness of the regulation of the new product under the Federal banking laws; and the impact of the proposed rule on the banking industry.

(2) LIMITATION.—The Commission shall not—

(A) require a bank to register as a broker or dealer under this section because the bank engages in any transaction in, or buys or sells, a new hybrid product; or

(B) bring an action against a bank for a failure to comply with a requirement described in subparagraph (A),

unless the Commission has imposed such requirement by rule or regulation issued in accordance with this section.

(3) CRITERIA FOR RULEMAKING.—The Commission shall not impose a requirement under paragraph (2) of this subsection with respect to any new hybrid product unless the Commission determines that—

(A) the new hybrid product is a security; and

(B) imposing such requirement is necessary and appropriate in the public interest and for the protection of investors.

(4) CONSIDERATIONS.—In making a determination under paragraph (3), the Commission shall consider—

(A) the nature of the new hybrid product; and

(B) the history, purpose, extent, and appropriateness of the regulation of the new hybrid product under the Federal securities laws and under the Federal banking laws.

(5) OBJECTION TO COMMISSION REGULATION.—

(A) FILING OF PETITION FOR REVIEW.—The Board may obtain review of any final regulation described in paragraph (2) in the United States Court of Appeals for the District of Columbia Circuit by filing in such court, not later than 60 days after the date of publication of the final regulation, a written petition requesting that the regulation be set aside. Any proceeding to challenge any such rule shall be expedited by the Court of Appeals.

(B) TRANSMITTAL OF PETITION AND RECORD.—A copy of a petition described in subparagraph (A) shall be transmitted as soon as possible by the Clerk of the Court to an officer or employee of the Commission designated for that purpose. Upon receipt of the petition, the Commission shall file with the court the regulation under review and any documents referred to therein, and any other relevant materials prescribed by the court.

(C) EXCLUSIVE JURISDICTION.—On the date of the filing of the petition under subparagraph (A), the court has jurisdiction, which becomes exclusive on the filing of the materials set forth in subparagraph (B), to affirm and enforce or to set aside the regulation at issue.

(D) STANDARD OF REVIEW.—The court shall determine to affirm and enforce or set aside a regulation of the Commission under this subsection, based on the determination of the court as to whether—

(i) the subject product is a new hybrid product, as defined in this subsection;

(ii) the subject product is a security; and

(iii) imposing a requirement to register as a broker or dealer for banks engaging in transactions in such product is appropriate in light of the history, purpose, and extent of regulation under the Federal securities laws and under the Federal banking laws, giving deference neither to the views of the Commission nor the Board.

(E) JUDICIAL STAY.—The filing of a petition by the Board pursuant to subparagraph (A) shall operate as a judicial stay, until the date on which the determination of the court is final (including any appeal of such determination).

(F) OTHER AUTHORITY TO CHALLENGE.—Any aggrieved party may seek judicial review of the Commission's rulemaking under this subsection pursuant to section 25 of this title.

(6) DEFINITIONS.—For purposes of this subsection:

(A) NEW HYBRID PRODUCT.—The term "new hybrid product" means a product that—

(i) was not subjected to regulation by the Commission as a security prior to the date of the enactment of the Gramm-Leach-Bliley Act[46];

(ii) is not an identified banking product as such term is defined in section 206 of such Act; and

(iii) is not an equity swap within the meaning of section 206(a)(6) of such Act.

(B) BOARD.—The term "Board" means the Board of Governors of the Federal Reserve System.

(j)[47] The authority of the Commission under this section with respect to security-based swap agreements shall be subject to the restrictions and limitations of section 3A(b) of this title.

(l) TERMINATION OF A UNITED STATES BROKER OR DEALER.—For a foreign person or an affiliate of a foreign person that presents such a risk to the stability of the United States financial system, the Commission may determine to terminate the registration of such foreign person or an affiliate of such foreign person as a broker or dealer in the United States, if the Commission determines that the home country of the foreign person has not adopted,

[46] The Gramm-Leach-Bliley Act was enacted on November 12, 1999 (P.L. 106–102; 113 Stat. 1338).

[47] Two subsection (j)s' so in law. Section 762(d)(4)(C) and (D) of Public Law 111–203 amends section 15 by redesignating subsection (i), as added by section 303(f) of the Commodity Futures Modernization Act of 2000 (Public Law 106–554; 114 Stat. 2763A–455)), as subsection (j), and in subsection (j), as redesignated by subparagraph (C), by striking "(as defined in section 206B of the Gramm-Leach-Bliley Act)".

(k) REGISTRATION OR SUCCESSION TO A UNITED STATES BROKER OR DEALER.—In determining whether to permit a foreign person or an affiliate of a foreign person to register as a United States broker or dealer, or succeed to the registration of a United States broker or dealer, the Commission may consider whether, for a foreign person, or an affiliate of a foreign person that presents a risk to the stability of the United States financial system, the home country of the foreign person has adopted, or made demonstrable progress toward adopting, an appropriate system of financial regulation to mitigate such risk.

or made demonstrable progress toward adopting, an appropriate system of financial regulation to mitigate such risk.

(k)[48] STANDARD OF CONDUCT.—

(1) IN GENERAL.—Notwithstanding any other provision of this Act or the Investment Advisers Act of 1940, the Commission may promulgate rules to provide that, with respect to a broker or dealer, when providing personalized investment advice about securities to a retail customer (and such other customers as the Commission may by rule provide), the standard of conduct for such broker or dealer with respect to such customer shall be the same as the standard of conduct applicable to an investment adviser under section 211 of the Investment Advisers Act of 1940. The receipt of compensation based on commission or other standard compensation for the sale of securities shall not, in and of itself, be considered a violation of such standard applied to a broker or dealer. Nothing in this section shall require a broker or dealer or registered representative to have a continuing duty of care or loyalty to the customer after providing personalized investment advice about securities.

(2) DISCLOSURE OF RANGE OF PRODUCTS OFFERED.—Where a broker or dealer sells only proprietary or other limited range of products, as determined by the Commission, the Commission may by rule require that such broker or dealer provide notice to each retail customer and obtain the consent or acknowledgment of the customer. The sale of only proprietary or other limited range of products by a broker or dealer shall not, in and of itself, be considered a violation of the standard set forth in paragraph (1).

(l) OTHER MATTERS.—The Commission shall—

(1) facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers, and investment advisers, including any material conflicts of interest; and

(2) examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors.

(m) HARMONIZATION OF ENFORCEMENT.—The enforcement authority of the Commission with respect to violations of the standard of conduct applicable to a broker or dealer providing personalized investment advice about securities to a retail customer shall include—

(1) the enforcement authority of the Commission with respect to such violations provided under this Act; and

(2) the enforcement authority of the Commission with respect to violations of the standard of conduct applicable to an investment adviser under the Investment Advisers Act of 1940, including the authority to impose sanctions for such violations, and

[48] So in law. Sections 173(c) and 913(g)(1) of Public Law 111–203 adds new subsections (k)–(l) at the end of section 15.

the Commission shall seek to prosecute and sanction violators of the standard of conduct applicable to a broker or dealer providing personalized investment advice about securities to a retail customer under this Act to same extent as the Commission prosecutes and sanctions violators of the standard of conduct applicable to an investment advisor under the Investment Advisers Act of 1940.

(n) DISCLOSURES TO RETAIL INVESTORS.—

(1) IN GENERAL.—Notwithstanding any other provision of the securities laws, the Commission may issue rules designating documents or information that shall be provided by a broker or dealer to a retail investor before the purchase of an investment product or service by the retail investor.

(2) CONSIDERATIONS.—In developing any rules under paragraph (1), the Commission shall consider whether the rules will promote investor protection, efficiency, competition, and capital formation.

(3) FORM AND CONTENTS OF DOCUMENTS AND INFORMATION.—Any documents or information designated under a rule promulgated under paragraph (1) shall—

(A) be in a summary format; and

(B) contain clear and concise information about—

(i) investment objectives, strategies, costs, and risks; and

(ii) any compensation or other financial incentive received by a broker, dealer, or other intermediary in connection with the purchase of retail investment products.

(o) AUTHORITY TO RESTRICT MANDATORY PRE-DISPUTE ARBITRATION.—The Commission, by rule, may prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any broker, dealer, or municipal securities dealer to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors.

REGISTERED SECURITIES ASSOCIATIONS

SEC. 15A. [78*o*–3] (a) An association of brokers and dealers may be registered as a national securities association pursuant to subsection (b), or as an affiliated securities association pursuant to subsection (d), under the terms and conditions hereinafter provided in this section and in accordance with the provisions of section 19(a) of this title, by filing with the Commission an application for registration in such form as the Commission, by rule, may prescribe containing the rules of the association and such other information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) An association of brokers and dealers shall not be registered as a national securities association unless the Commission determines that—

(1) By reason of the number and geographical distribution of its members and the scope of their transactions, such association will be able to carry out the purposes of this section.

(2) Such association is so organized and has the capacity to be able to carry out the purposes of this title and to comply, and (subject to any rule or order of the Commission pursuant to section 17(d) or 19(g)(2) of this title) to enforce compliance by its members and persons associated with its members, with the provisions of this title, the rules and regulations thereunder, the rules of the Municipal Securities Rulemaking Board, and the rules of the association.

(3) Subject to the provisions of subsection (g) of this section, the rules of the association provide that any registered broker or dealer may become a member of such association and any person may become associated with a member thereof.

(4) The rules of the association assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the association, broker, or dealer.

(5) The rules of the association provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the association operates or controls.

(6) The rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, to fix minimum profits, to impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the association.

(7) The rules of the association provide that (subject to any rule or order of the Commission pursuant to section 17(d) or 19(g)(2) of this title) its members and persons associated with its members shall be appropriately disciplined for violation of any provision of this title, the rules or regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or the rules of the association, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.

(8) The rules of the association are in accordance with the provisions of subsection (h) of this section, and, in general, provide a fair procedure for the disciplining of members and persons associated with members, the denial of membership to any person seeking membership therein, the barring of any

person from becoming associated with a member thereof, and the prohibition or limitation by the association of any person with respect to access to services offered by the association or a member thereof.

(9) The rules of the association do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title.

(10) The requirements of subsection (c), insofar as these may be applicable, are satisfied.

(11) The rules of the association include provisions governing the form and content of quotations relating to securities sold otherwise than on a national securities exchange which may be distributed or published by any member or person associated with a member, and the persons to whom such quotations may be supplied. Such rules relating to quotations shall be designed to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting, distributing, and publishing quotations.

(12) The rules of the association to promote just and equitable principles of trade, as required by paragraph (6), include rules to prevent members of the association from participating in any limited partnership rollup transaction (as such term is defined in paragraphs (4) and (5) of section 14(h)) unless such transaction was conducted in accordance with procedures designed to protect the rights of limited partners, including—

(A) the right of dissenting limited partners to one of the following:

(i) an appraisal and compensation;

(ii) retention of a security under substantially the same terms and conditions as the original issue;

(iii) approval of the limited partnership rollup transaction by not less than 75 percent of the outstanding securities of each of the participating limited partnerships;

(iv) the use of a committee that is independent, as determined in accordance with rules prescribed by the association, of the general partner or sponsor, that has been approved by a majority of the outstanding securities of each of the participating partnerships, and that has such authority as is necessary to protect the interest of limited partners, including the authority to hire independent advisors, to negotiate with the general partner or sponsor on behalf of the limited partners, and to make a recommendation to the limited partners with respect to the proposed transaction; or

(v) other comparable rights that are prescribed by rule by the association and that are designed to protect dissenting limited partners;

(B) the right not to have their voting power unfairly reduced or abridged;

(C) the right not to bear an unfair portion of the costs of a proposed limited partnership rollup transaction that is rejected; and

(D) restrictions on the conversion of contingent interests or fees into non-contingent interests or fees and restrictions on the receipt of a non-contingent equity interest in exchange for fees for services which have not yet been provided.

As used in this paragraph, the term "dissenting limited partner" means a person who, on the date on which soliciting material is mailed to investors, is a holder of a beneficial interest in a limited partnership that is the subject of a limited partnership rollup transaction, and who casts a vote against the transaction and complies with procedures established by the association, except that for purposes of an exchange or tender offer, such person shall file an objection in writing under the rules of the association during the period in which the offer is outstanding.

(13) The rules of the association prohibit the authorization for quotation on an automated interdealer quotation system sponsored by the association of any security designated by the Commission as a national market system security resulting from a limited partnership rollup transaction (as such term is defined in paragraphs (4) and (5) of section 14(h)), unless such transaction was conducted in accordance with procedures designed to protect the rights of limited partners, including—

(A) the right of dissenting limited partners to one of the following:

(i) an appraisal and compensation;

(ii) retention of a security under substantially the same terms and conditions as the original issue;

(iii) approval of the limited partnership rollup transaction by not less than 75 percent of the outstanding securities of each of the participating limited partnerships;

(iv) the use of a committee that is independent, as determined in accordance with rules prescribed by the association, of the general partner or sponsor, that has been approved by a majority of the outstanding securities of each of the participating partnerships, and that has such authority as is necessary to protect the interest of limited partners, including the authority to hire independent advisors, to negotiate with the general partner or sponsor on behalf of the limited partners, and to make a recommendation to the limited partners with respect to the proposed transaction; or

(v) other comparable rights that are prescribed by rule by the association and that are designed to protect dissenting limited partners;

(B) the right not to have their voting power unfairly reduced or abridged;

(C) the right not to bear an unfair portion of the costs of a proposed limited partnership rollup transaction that is rejected; and

(D) restrictions on the conversion of contingent interests or fees into non-contingent interests or fees and restrictions on the receipt of a non-contingent equity interest

in exchange for fees for services which have not yet been provided.

As used in this paragraph, the term "dissenting limited partner" means a person who, on the date on which soliciting material is mailed to investors, is a holder of a beneficial interest in a limited partnership that is the subject of a limited partnership rollup transaction, and who casts a vote against the transaction and complies with procedures established by the association, except that for purposes of an exchange or tender offer, such person shall file an objection in writing under the rules of the association during the period during which the offer is outstanding.

(14) The rules of the association include provisions governing the sales, or offers of sales, of securities on the premises of any military installation to any member of the Armed Forces or a dependent thereof, which rules require—

(A) the broker or dealer performing brokerage services to clearly and conspicuously disclose to potential investors—

(i) that the securities offered are not being offered or provided by the broker or dealer on behalf of the Federal Government, and that its offer is not sanctioned, recommended, or encouraged by the Federal Government; and

(ii) the identity of the registered broker-dealer offering the securities;

(B) such broker or dealer to perform an appropriate suitability determination, including consideration of costs and knowledge about securities, prior to making a recommendation of a security to a member of the Armed Forces or a dependent thereof; and

(C) that no person receive any referral fee or incentive compensation in connection with a sale or offer of sale of securities, unless such person is an associated person of a registered broker or dealer and is qualified pursuant to the rules of a self-regulatory organization.

(15) The rules of the association provide that the association shall—

(A) request guidance from the Municipal Securities Rulemaking Board in interpretation of the rules of the Municipal Securities Rulemaking Board; and

(B) provide information to the Municipal Securities Rulemaking Board about the enforcement actions and examinations of the association under section 15B(b)(2)(E), so that the Municipal Securities Rulemaking Board may—

(i) assist in such enforcement actions and examinations; and

(ii) evaluate the ongoing effectiveness of the rules of the Board.

(c) The Commission may permit or require the rules of an association applying for registration pursuant to subsection (b) of this section, to provide for the admission of an association registered as an affiliated securities association pursuant to subsection (d) of this section, to participation in said applicant association as an affiliate

thereof, under terms permitting such powers and responsibilities to such affiliate, and under such other appropriate terms and conditions, as may be provided by the rules of said applicant association, if such rules appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors and to carry out the purposes of this section. The duties and powers of the Commission with respect to any national securities association or any affiliated securities association shall in no way be limited by reason of any such affiliation.

(d) An applicant association shall not be registered as an affiliated securities association unless it appears to the Commission that—

(1) such association, notwithstanding that it does not satisfy the requirements set forth in paragraph (1) of subsection (b) of this section, will, forthwith upon the registration thereof, be admitted to affiliation with an association registered as a national securities association pursuant to subsection (b) of this section, in the manner and under the terms and conditions provided by the rules of said national securities association in accordance with subsection (c) of this section; and

(2) such association and its rules satisfy the requirements set forth in paragraphs (2) to (10), inclusive, and paragraph (12), of subsection (b) of this section; except that in the case of any such association any restrictions upon membership therein of the type authorized by paragraph (3) of subsection (b) of this section shall not be less stringent than in the case of the national securities association with which such association is to be affiliated.

(e)(1) The rules of a registered securities association may provide that no member thereof shall deal with any nonmember professional (as defined in paragraph (2) of this subsection) except at the same prices, for the same commissions or fees, and on the same terms and conditions as are by such member accorded to the general public.

(2) For the purposes of this subsection, the term "nonmember professional" shall include (A) with respect to transactions in securities other than municipal securities, any registered broker or dealer who is not a member of any registered securities association, except such a broker or dealer who deals exclusively in commercial paper, bankers' acceptances, and commercial bills, and (B) with respect to transactions in municipal securities, any municipal securities dealer (other than a bank or division or department of a bank) who is not a member of any registered securities association and any municipal securities broker who is not a member of any such association.

(3) Nothing in this subsection shall be so construed or applied as to prevent (A) any member of any registered securities association from granting to any other member of any registered securities association any dealer's discount, allowance, commission, or special terms, in connection with the purchase or sale of securities, or (B) any member of a registered securities association or any municipal securities dealer which is a bank or a division or department of a bank from granting to any member of any registered securities association or any such municipal securities dealer any dealer's dis-

count, allowance, commission, or special terms in connection with the purchase or sale of municipal securities: *Provided, however,* That the granting of any such discount, allowance, commission, or special terms in connection with the purchase or sale of municipal securities shall be subject to rules of the Municipal Securities Rulemaking Board adopted pursuant to section 15B(b)(2)(K) of this title.

(f) Nothing in subsection (b)(6) or (b)(11) of this section shall be construed to permit a registered securities association to make rules concerning any transaction by a registered broker or dealer in a municipal security.

(g)(1) A registered securities association shall deny membership to any person who is not a registered broker or dealer.

(2) A registered securities association may, and in cases in which the Commission, by order, directs as necessary or appropriate in the public interest or for the protection of investors shall, deny membership to any registered broker or dealer, and bar from becoming associated with a member any person, who is subject to a statutory disqualification. A registered securities association shall file notice with the Commission not less than thirty days prior to admitting any registered broker or dealer to membership or permitting any person to become associated with a member, if the association knew, or in the exercise of reasonable care should have known, that such broker or dealer or person was subject to a statutory disqualification. The notice shall be in such form and contain such information as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3)(A) A registered securities association may deny membership to, or condition the membership of, a registered broker or dealer if (i) such broker or dealer does not meet such standards of financial responsibility or operational capability or such broker or dealer or any natural person associated with such broker or dealer does not meet such standards of training, experience, and competence as are prescribed by the rules of the association or (ii) such broker or dealer or person associated with such broker or dealer has engaged and there is a reasonable likelihood he will again engage in acts or practices inconsistent with just and equitable principles of trade. A registered securities association may examine and verify the qualifications of an applicant to become a member and the natural persons associated with such an applicant in accordance with procedures established by the rules of the association.

(B) A registered securities association may bar a natural person from becoming associated with a member or condition the association of a natural person with a member if such natural person (i) does not meet such standards of training, experience, and competence as are prescribed by the rules of the association or (ii) has engaged and there is a reasonable likelihood he will again engage in acts or practices inconsistent with just and equitable principles of trade. A registered securities association may examine and verify the qualifications of an applicant to become a person associated with a member in accordance with procedures established by the rules of the association and require a natural person associated with a member, or any class of such natural persons, to be reg-

istered with the association in accordance with procedures so established.

(C) A registered securities association may bar any person from becoming associated with a member if such person does not agree (i) to supply the association with such information with respect to its relationship and dealings with the member as may be specified in the rules of the association and (ii) to permit examination of its books and records to verify the accuracy of any information so supplied.

(D) Nothing in subparagraph (A), (B), or (C) of this paragraph shall be construed to permit a registered securities association to deny membership to or condition the membership of, or bar any person from becoming associated with or condition the association of any person with, a broker or dealer that engages exclusively in transactions in municipal securities.

(4) A registered securities association may deny membership to a registered broker or dealer not engaged in a type of business in which the rules of the association require members to be engaged: *Provided, however,* That no registered securities association may deny membership to a registered broker or dealer by reason of the amount of such type of business done by such broker or dealer or the other types of business in which he is engaged.

(h)(1) In any proceeding by a registered securities association to determine whether a member or person associated with a member should be disciplined (other than a summary proceeding pursuant to paragraph (3) of this subsection) the association shall bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record. A determination by the association to impose a disciplinary sanction shall be supported by a statement setting forth—

(A) any act or practice in which such member or person associated with a member has been found to have engaged, or which such member or person has been found to have omitted;

(B) the specific provision of this title, the rules or regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or the rules of the association which any such act or practice, or omission to act, is deemed to violate; and

(C) the sanction imposed and the reason therefor.

(2) In any proceeding by a registered securities association to determine whether a person shall be denied membership, barred from becoming associated with a member, or prohibited or limited with respect to access to services offered by the association or a member thereof (other than a summary proceeding pursuant to paragraph (3) of this subsection), the association shall notify such person of and give him an opportunity to be heard upon, the specific grounds for denial, bar, or prohibition or limitation under consideration and keep a record. A determination by the association to deny membership, bar a person from becoming associated with a member, or prohibit or limit a person with respect to access to services offered by the association or a member thereof shall be supported by a statement setting forth the specific grounds on which the denial, bar, or prohibition or limitation is based.

(3) A registered securities association may summarily (A) suspend a member or person associated with a member who has been

and is expelled or suspended from any self-regulatory organization or barred or suspended from being associated with a member of any self-regulatory organization, (B) suspend a member who is in such financial or operating difficulty that the association determines and so notifies the Commission that the member cannot be permitted to continue to do business as a member with safety to investors, creditors, other members, or the association, or (C) limit or prohibit any person with respect to access to services offered by the association if subparagraph (A) or (B) of this paragraph is applicable to such person or, in the case of a person who is not a member, if the association determines that such person does not meet the qualification requirements or other prerequisites for such access and such person cannot be permitted to continue to have such access with safety to investors, creditors, members, or the association. Any person aggrieved by any such summary action shall be promptly afforded an opportunity for a hearing by the association in accordance with the provisions of paragraph (1) or (2) of this subsection. The Commission, by order, may stay any such summary action on its own motion or upon application by any person aggrieved thereby, if the Commission determines summarily or after notice and opportunity for hearing (which hearing may consist solely of the submission of affidavits or presentation of oral arguments) that such stay is consistent with the public interest and the protection of investors.

(i) OBLIGATION TO MAINTAIN REGISTRATION, DISCIPLINARY, AND OTHER DATA.—

(1) MAINTENANCE OF SYSTEM TO RESPOND TO INQUIRIES.—A registered securities association shall—

(A) establish and maintain a system for collecting and retaining registration information;

(B) establish and maintain a toll-free telephone listing, and a readily accessible electronic or other process, to receive and promptly respond to inquiries regarding—

(i) registration information on its members and their associated persons; and

(ii) registration information on the members and their associated persons of any registered national securities exchange that uses the system described in subparagraph (A) for the registration of its members and their associated persons; and

(C) adopt rules governing the process for making inquiries and the type, scope, and presentation of information to be provided in response to such inquiries in consultation with any registered national securities exchange providing information pursuant to subparagraph (B)(ii).

(2) RECOVERY OF COSTS.—A registered securities association may charge persons making inquiries described in paragraph (1)(B), other than individual investors, reasonable fees for responses to such inquiries.

(3) PROCESS FOR DISPUTED INFORMATION.—Each registered securities association shall adopt rules establishing an administrative process for disputing the accuracy of information provided in response to inquiries under this subsection in con-

sultation with any registered national securities exchange providing information pursuant to paragraph (1)(B)(ii).

(4) LIMITATION ON LIABILITY.—A registered securities association, or an exchange reporting information to such an association, shall not have any liability to any person for any actions taken or omitted in good faith under this subsection.

(5) DEFINITION.—For purposes of this subsection, the term "registration information" means the information reported in connection with the registration or licensing of brokers and dealers and their associated persons, including disciplinary actions, regulatory, judicial, and arbitration proceedings, and other information required by law, or exchange or association rule, and the source and status of such information.

(j) REGISTRATION FOR SALES OF PRIVATE SECURITIES OFFERINGS.—A registered securities association shall create a limited qualification category for any associated person of a member who effects sales as part of a primary offering of securities not involving a public offering, pursuant to section 3(b), 4(2), or 4(6) of the Securities Act of 1933 and the rules and regulations thereunder, and shall deem qualified in such limited qualification category, without testing, any bank employee who, in the six month period preceding the date of the enactment of the Gramm-Leach-Bliley Act[49], engaged in effecting such sales.

(k) LIMITED PURPOSE NATIONAL SECURITIES ASSOCIATION.—

(1) REGULATION OF MEMBERS WITH RESPECT TO SECURITY FUTURES PRODUCTS.—A futures association registered under section 17 of the Commodity Exchange Act shall be a registered national securities association for the limited purpose of regulating the activities of members who are registered as brokers or dealers in security futures products pursuant to section 15(b)(11).

(2) REQUIREMENTS FOR REGISTRATION.—Such a securities association shall—

(A) be so organized and have the capacity to carry out the purposes of the securities laws applicable to security futures products and to comply, and (subject to any rule or order of the Commission pursuant to section 19(g)(2)) to enforce compliance by its members and persons associated with its members, with the provisions of the securities laws applicable to security futures products, the rules and regulations thereunder, and its rules;

(B) have rules that—

(i) are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, including rules governing sales practices and the advertising of security futures products reasonably comparable to those of other national securities associations registered pursuant to subsection (a) that are applicable to security futures products; and

[49] The Gramm-Leach-Bliley Act was enacted on November 12, 1999 (P.L. 106–102; 113 Stat. 1338).

(ii) are not designed to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the association;

(C) have rules that provide that (subject to any rule or order of the Commission pursuant to section 19(g)(2)) its members and persons associated with its members shall be appropriately disciplined for violation of any provision of the securities laws applicable to security futures products, the rules or regulations thereunder, or the rules of the association, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction; and

(D) have rules that ensure that members and natural persons associated with members meet such standards of training, experience, and competence necessary to effect transactions in security futures products and are tested for their knowledge of securities and security futures products.

(3) EXEMPTION FROM RULE CHANGE SUBMISSION.—Such a securities association shall be exempt from submitting proposed rule changes pursuant to section 19(b) of this title, except that—

(A) the association shall file proposed rule changes related to higher margin levels, fraud or manipulation, recordkeeping, reporting, listing standards, or decimal pricing for security futures products, sales practices for, advertising of, or standards of training, experience, competence, or other qualifications for security futures products for persons who effect transactions in security futures products, or rules effectuating the association's obligation to enforce the securities laws pursuant to section 19(b)(7);

(B) the association shall file pursuant to sections 19(b)(1) and 19(b)(2) proposed rule changes related to margin, except for changes resulting in higher margin levels; and

(C) the association shall file pursuant to section 19(b)(1) proposed rule changes that have been abrogated by the Commission pursuant to section 19(b)(7)(C).

(4) OTHER EXEMPTIONS.—Such a securities association shall be exempt from and shall not be required to enforce compliance by its members, and its members shall not, solely with respect to their transactions effected in security futures products, be required to comply, with the following provisions of this title and the rules thereunder:

(A) Section 8.

(B) Subsections (b)(1), (b)(3), (b)(4), (b)(5), (b)(8), (b)(10), (b)(11), (b)(12), (b)(13), (c), (d), (e), (f), (g), (h), and (i) of this section.

(C) Subsections (d), (f), and (k) of section 17.

(D) Subsections (a), (f), and (h) of section 19.

(l) Consistent with this title, each national securities association registered pursuant to subsection (a) of this section shall issue

such rules as are necessary to avoid duplicative or conflicting rules applicable to any broker or dealer registered with the Commission pursuant to section 15(b) (except paragraph (11) thereof), that is also registered with the Commodity Futures Trading Commission pursuant to section 4f(a) of the Commodity Exchange Act (except paragraph (2) thereof), with respect to the application of—

(1) rules of such national securities association of the type specified in section 15(c)(3)(B) involving security futures products; and

(2) similar rules of national securities associations registered pursuant to subsection (k) of this section and national securities exchanges registered pursuant to section 6(g) involving security futures products.

(m) PROCEDURES AND RULES FOR SECURITY FUTURE PRODUCTS.—A national securities association registered pursuant to subsection (a) shall, not later than 8 months after the date of the enactment of the Commodity Futures Modernization Act of 2000, implement the procedures specified in section 6(h)(5)(A) of this title and adopt the rules specified in subparagraphs (B) and (C) of section 6(h)(5) of this title.

(n) DATA STANDARDS.—

(1) REQUIREMENT.—A national securities association registered pursuant to subsection (a) shall adopt data standards for all information that is regularly filed with or submitted to the association.

(2) CONSISTENCY.—The data standards required under paragraph (1) shall incorporate, and ensure compatibility with (to the extent feasible), all applicable data standards established in the rules promulgated under section 124 of the Financial Stability Act of 2010, including, to the extent practicable, by having the characteristics described in clauses (i) through (vi) of subsection (c)(1)(B) of such section 124.

MUNICIPAL SECURITIES

SEC. 15B. [78*o*–4] (a)(1)(A) It shall be unlawful for any municipal securities dealer (other than one registered as a broker or dealer under section 15 of this title) to make 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 municipal security unless such municipal securities dealer is registered in accordance with this subsection.

(B)[50] It shall be unlawful for a municipal advisor to provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, unless the municipal advisor is registered in accordance with this subsection.

(2) A municipal securities dealer or municipal advisor may be registered by filing with the Commission an application for registration in such form and containing such information and documents concerning such municipal securities dealer or municipal ad-

[50] Margin so in law.

visor and any person associated with such municipal securities dealer or municipal advisor as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Within forty-five days of the date of the filing of such application (or within such longer period as to which the applicant consents), the Commission shall—

(A) by order grant registration, or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred twenty days of the date of the filing of the application for registration. At the conclusion of such proceedings the Commission, by order, shall grant or deny such registration. The Commission may extend the time for the conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant the registration of a municipal securities dealer or municipal advisor if the Commission finds that the requirements of this section are satisfied. The Commission shall deny such registration if it does not make such a finding or if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under subsection (c) of this section.

(3) Any provision of this title (other than section 5 or paragraph (1) of this subsection) which prohibits any act, practice, or course of business if the mails or any means or instrumentality of interstate commerce is used in connection therewith shall also prohibit any such act, practice, or course of business by any registered municipal securities dealer or municipal advisor or any person acting on behalf of such municipal securities dealer or municipal advisor, irrespective of any use of the mails or any means or instrumentality of interstate commerce in connection therewith.

(4) The Commission, by rule or order, upon its own motion or upon application, may conditionally or unconditionally exempt any broker, dealer, municipal securities dealer, or municipal advisor, or class of brokers, dealers, municipal securities dealers, or municipal advisors from any provision of this section or the rules or regulations thereunder, if the Commission finds that such exemption is consistent with the public interest, the protection of investors, and the purposes of this section.

(5)[51] No municipal advisor shall make use of the mails or any means or instrumentality of interstate commerce to provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products, the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, in connection with which such municipal advisor engages in any fraudulent, deceptive, or manipulative act or practice.

(b)(1) The Municipal Securities Rulemaking Board shall be composed of 15 members, or such other number of members as

[51] Margin so in law.

specified by rules of the Board pursuant to paragraph (2)(B),,[52] which shall perform the duties set forth in this section. The members of the Board shall serve as members for a term of 3 years or for such other terms as specified by rules of the Board pursuant to paragraph (2)(B), and shall consist of (A) 8 individuals who are independent of any municipal securities broker, municipal securities dealer, or municipal advisor, at least 1 of whom shall be representative of institutional or retail investors in municipal securities, at least 1 of whom shall be representative of municipal entities, and at least 1 of whom shall be a member of the public with knowledge of or experience in the municipal industry (which members are hereinafter referred to as "public representatives"); and (B) 7 individuals who are associated with a broker, dealer, municipal securities dealer, or municipal advisor, including at least 1 individual who is associated with and representative of brokers, dealers, or municipal securities dealers that are not banks or subsidiaries or departments or divisions of banks (which members are hereinafter referred to as "broker-dealer representatives"), at least 1 individual who is associated with and representative of municipal securities dealers which are banks or subsidiaries or departments or divisions of banks (which members are hereinafter referred to as "bank representatives"), and at least 1 individual who is associated with a municipal advisor (which members are hereinafter referred to as "advisor representatives" and, together with the broker-dealer representatives and the bank representatives, are referred to as "regulated representatives"). Each member of the board shall be knowledgeable of matters related to the municipal securities markets. Prior to the expiration of the terms of office of the initial[53] members of the Board, an election shall be held under rules adopted by the Board (pursuant to subsection (b)(2)(B) of this section) of the members to succeed such initial[53] members.

(2) The Board shall propose and adopt rules to effect the purposes of this title with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors. The rules of the Board, as a minimum, shall:

(A) provide that no municipal securities broker or municipal securities dealer shall effect any transaction in, or induce or attempt to induce the purchase or sale of, any municipal security, and no broker, dealer, municipal securities dealer, or municipal advisor shall provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, unless such municipal securities broker or municipal securities dealer meets such standards of operational capability and such mu-

[52] Two commas so in law.

[53] Section 975(b)(1)(C) of Public Law 111–203 provides for an amendment in the third sentence, by striking "initial". The amendment could not be executed because the word "initial" appears more than one time in the third sentence.

nicipal securities broker or municipal securities dealer and every natural person associated with such municipal securities broker or municipal securities dealer meets such standards of training, experience, competence, and such other qualifications as the Board finds necessary or appropriate in the public interest or for the protection of investors and municipal entities or obligated persons. In connection with the definition and application of such standards the Board may—

(i) appropriately classify municipal securities brokers, municipal securities dealers, and municipal advisors (taking into account relevant matters, including types of business done, nature of securities other than municipal securities sold, and character of business organization), and persons associated with municipal securities brokers, municipal securities dealers, and municipal advisors;

(ii) specify that all or any portion of such standards shall be applicable to any such class; and

(iii) require persons in any such class to pass tests administered in accordance with subsection (c)(7) of this section.

(B) establish fair procedures for the nomination and election of members of the Board and assure fair representation in such nominations and elections of public representatives, broker dealer representatives, bank representatives, and advisor representatives. Such rules—

(i) shall provide that the number of public representatives of the Board shall at all times exceed the total number of regulated representatives and that the membership shall at all times be as evenly divided in number as possible between public representatives and regulated representatives;

(ii) shall specify the length or lengths of terms members shall serve;

(iii) may increase the number of members which shall constitute the whole Board, provided that such number is an odd number; and

(iv) shall establish requirements regarding the independence of public representatives.

(C) be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest; and not be designed to permit unfair discrimination among customers, municipal entities, obligated persons, municipal securities brokers, municipal securities dealers, or municipal advisors, to fix minimum profits, to impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by municipal securities brokers, municipal securities dealers, or municipal advisors, to

regulate by virtue of any authority conferred by this title matters not related to the purpose of this title or the administration of the Board, or to impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title.

(D) if the Board deems appropriate, provide for the arbitration of claims, disputes, and controversies relating to transactions in municipal securities and advice concerning municipal financial products: *Provided, however,* that no person other than a municipal securities broker, municipal securities dealer, municipal advisor, or person associated with such a municipal securities broker, municipal securities dealer, or municipal advisor may be compelled to submit to such arbitration except at his instance and in accordance with section 29 of this title.

(E) provide for the periodic examination in accordance with subsection (c)(7) of this section of municipal securities brokers, municipal securities dealers, and municipal advisors to determine compliance with applicable provisions of this title, the rules and regulations thereunder, and the rules of the Board. Such rules shall specify the minimum scope and frequency of such examinations and shall be designed to avoid unnecessary regulatory duplication or undue regulatory burdens for any such municipal securities broker, municipal securities dealer, or municipal advisor.

(F) include provisions governing the form and content of quotations relating to municipal securities which may be distributed or published by any municipal securities broker, municipal securities dealer, or person associated with such a municipal securities broker or municipal securities dealer, and the persons to whom such quotations may be supplied. Such rules relating to quotations shall be designed to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting, distributing, and publishing quotations.

(G) prescribe records to be made and kept by municipal securities brokers, municipal securities dealers, and municipal advisors and the periods for which such records shall be preserved.

(H) define the term "separately identifiable department or division", as that term is used in section 3(a)(30) of this title, in accordance with specified and appropriate standards to assure that a bank is not deemed to be engaged in the business of buying and selling municipal securities through a separately identifiable department or division unless such department or division is organized and administered so as to permit independent examination and enforcement of applicable provisions of this title, the rules and regulations thereunder, and the rules of the Board. A separately identifiable department or division of a bank may be engaged in activities other than those relating to municipal securities. [54]

[54] The definition promulgated pursuant to this provision is printed in the appendix to this compilation.

(I) provide for the operation and administration of the Board, including the selection of a Chairman from among the members of the Board, the compensation of the members of the Board, and the appointment and compensation of such employees, attorneys, and consultants as may be necessary or appropriate to carry out the Board's functions under this section.

(J) provide that each municipal securities broker, municipal securities dealer, and municipal advisor shall pay to the Board such reasonable fees and charges as may be necessary or appropriate to defray the costs and expenses of operating and administering the Board. Such rules shall specify the amount of such fees and charges, which may include charges for failure to submit to the Board, or to any information system operated by the Board, within the prescribed timeframes, any items of information or documents required to be submitted under any rule issued by the Board.

(K) establish the terms and conditions under which any broker, dealer, or municipal securities dealer may sell, or prohibit any broker, dealer, or municipal securities dealer from selling, any part of a new issue of municipal securities to a related account of a broker, dealer, or municipal securities dealer during the underwriting period.

(L)[55] with respect to municipal advisors—

(i) prescribe means reasonably designed to prevent acts, practices, and courses of business as are not consistent with a municipal advisor's fiduciary duty to its clients;

(ii) provide continuing education requirements for municipal advisors;

(iii) provide professional standards; and

(iv) not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud.

(3)[56] The Board, in conjunction with or on behalf of any Federal financial regulator or self-regulatory organization, may—

(A) establish information systems; and

(B) assess such reasonable fees and charges for the submission of information to, or the receipt of information from, such systems from any persons which systems may be developed for the purposes of serving as a repository of information from municipal market participants or otherwise in furtherance of the purposes of the Board, a Federal financial regulator, or a self-regulatory organization, except that the Board—

(i) may not charge a fee to municipal entities or obligated persons to submit documents or other information to the Board or charge a fee to any person to

[55] Margin so in law.
[56] Margins of paragraphs (3) through (5) so in law.

obtain, directly from the Internet site of the Board, documents or information submitted by municipal entities, obligated persons, brokers, dealers, municipal securities dealers, or municipal advisors, including documents submitted under the rules of the Board or the Commission; and

(ii) shall not be prohibited from charging commercially reasonable fees for automated subscription-based feeds or similar services, or for charging for other data or document-based services customized upon request of any person, made available to commercial enterprises, municipal securities market professionals, or the general public, whether delivered through the Internet or any other means, that contain all or part of the documents or information, subject to approval of the fees by the Commission under section 19(b).

(4) The Board may provide guidance and assistance in the enforcement of, and examination for, compliance with the rules of the Board to the Commission, a registered securities association under section 15A, or any other appropriate regulatory agency, as applicable.

(5) The Board, the Commission, and a registered securities association under section 15A, or the designees of the Board, the Commission, or such association, shall meet not less frequently than 2 times a year—

(A) to describe the work of the Board, the Commission, and the registered securities association involving the regulation of municipal securities; and

(B) to share information about—

(i) the interpretation of the Board, the Commission, and the registered securities association of Board rules; and

(ii) examination and enforcement of compliance with Board rules.

(7)[57] Nothing in this section shall be construed to impair or limit the power of the Commission under this title.

(8)(A) The Commission shall adopt data standards for information submitted to the Board.

(B) Any data standards adopted under subparagraph (A) shall incorporate, and ensure compatibility with (to the extent feasible), all applicable data standards established in the rules promulgated under section 124 of the Financial Stability Act of 2010, including, to the extent practicable, by having the characteristics described in clauses (i) through (vi) of subsection (c)(1)(B) of such section 124.

(C) The Commission shall consult market participants in establishing data standards under subparagraph (A).

(D) Nothing in this paragraph may be construed to affect the operation of paragraph (1) or (2) of subsection (d).

(c)(1) No broker, dealer, or municipal securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt

[57] There is no paragraph (6) in law.

to induce the purchase or sale of, any municipal security, and no broker, dealer, municipal securities dealer, or municipal advisor shall make use of the mails or any means or instrumentality of interstate commerce to provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products, the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, in contravention of any rule of the Board. A municipal advisor and any person associated with such municipal advisor shall be deemed to have a fiduciary duty to any municipal entity for whom such municipal advisor acts as a municipal advisor, and no municipal advisor may engage in any act, practice, or course of business which is not consistent with a municipal advisor's fiduciary duty or that is in contravention of any rule of the Board.

(2) The Commission, by order, shall censure, place limitations on the activities, functions, or operations, suspend for a period not exceeding twelve months, or revoke the registration of any municipal securities dealer or municipal advisor, if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, denial, suspension, or revocation, is in the public interest and that such municipal securities dealer or municipal advisor has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), (E), (H), or (G) of paragraph (4) of section 15(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within ten years of the commencement of the proceedings under this paragraph, or is enjoined from any action, conduct, or practice specified in subparagraph (C) or such paragraph (4).

(3) Pending final determination whether any registration under this section shall be revoked, the Commission, by order, may suspend such registration, if such suspension appears to the Commission, after notice and opportunity for hearing, to be necessary or appropriate in the public interest or for the protection of investors or municipal entities or obligated person. Any registered municipal securities dealer or municipal advisor may, upon such terms and conditions as the Commission may deem necessary in the public interest or for the protection of investors or municipal entities or obligated person, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any registered municipal securities dealer or municipal advisor is no longer in existence or has ceased to do business as a municipal securities dealer or municipal advisor, the Commission, by order, shall cancel the registration of such municipal securities dealer or municipal advisor.

(4)[58] The Commission, by order, shall censure or place limitations on the activities or functions of any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with a municipal securities dealer, or suspend for a period not exceeding 12 months or bar any such person from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor,

[58] Section 975(c)(5) of Public Law 111–203 provides for an amendment in paragraph (4), by inserting "or municipal advisor" after "municipal securities dealer or obligated person" each place that term appears. The amendment was not executed because the phrase does not appear.

transfer agent, or nationally recognized statistical rating organization, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), (E), (H), or (G) of paragraph (4) of section 15(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within 10 years of the commencement of the proceedings under this paragraph, or is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4). It shall be unlawful for any person as to whom an order entered pursuant to this paragraph or paragraph (5) of this subsection suspending or barring him from being associated with a municipal securities dealer is in effect willfully to become, or to be, associated with a municipal securities dealer without the consent of the Commission, and it shall be unlawful for any municipal securities dealer to permit such a person to become, or remain, a person associated with him without the consent of the Commission, if such municipal securities dealer knew, or, in the exercise of reasonable care should have known, of such order.

(5) With respect to any municipal securities dealer for which the Commission is not the appropriate regulatory agency, the appropriate regulatory agency for such municipal securities dealer may sanction any such municipal securities dealer in the manner and for the reasons specified in paragraph (2) of this subsection and any person associated with such municipal securities dealer in the manner and for the reasons specified in paragraph (4) of this subsection. In addition, such appropriate regulatory agency may, in accordance with section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), enforce compliance by such municipal securities dealer or any person associated with such municipal securities dealer with the provisions of this section, section 17 of this title, the rules of the Board, and the rules of the Commission pertaining to municipal securities dealers, persons associated with municipal securities dealers, and transactions in municipal securities. For purposes of the preceding sentence, any violation of any such provision shall constitute adequate basis for the issuance of any order under section 8(b) or 8(c) of the Federal Deposit Insurance Act, and the customers of any such municipal securities dealer shall be deemed to be "depositors" as that term is used in section 8(c) of that Act. Nothing in this paragraph shall be construed to affect in any way the powers of such appropriate regulatory agency to proceed against such municipal securities dealer under any other provision of law.

(6)(A) The Commission, prior to the entry of an order of investigation, or commencement of any proceedings, against any municipal securities dealer, or person associated with any municipal securities dealer, for which the Commission is not the appropriate regulatory agency, for violation of any provision of this section, section 15(c)(1) or 15(c)(2) of this title, any rule or regulation under any such section or any rule of the Board, shall (i) give notice to the appropriate regulatory agency for such municipal securities dealer of the identity of such municipal securities dealer or person associated with such municipal securities dealer, the nature of and

basis for such proposed action, and whether the Commission is seeking a monetary penalty against such municipal securities dealer or such associated person pursuant to section 21B of this title; and (ii) consult with such appropriate regulatory agency concerning the effect of such proposed action on sound banking practices and the feasibility and desirability of coordinating such action with any proceeding or proposed proceeding by such appropriate regulatory agency against such municipal securities dealer or associated person.

(B) The appropriate regulatory agency for a municipal securities dealer (if other than the Commission), prior to the entry of an order of investigation, or commencement of any proceedings, against such municipal securities dealer or person associated with such municipal securities dealer, for violation of any provision of this section, the rules of the Board, or the rules or regulations of the Commission pertaining to municipal securities dealers, persons associated with municipal securities dealers, or transactions in municipal securities shall (i) give notice to the Commission of the identity of such municipal securities dealer or person associated with such municipal securities dealer and the nature of and basis for such proposed action and (ii) consult with the Commission concerning the effect of such proposed action on the protection of investors or municipal entities or obligated person and the feasibility and desirability of coordinating such action with any proceeding or proposed proceeding by the Commission against such municipal securities dealer or associated person.

(C) Nothing in this paragraph shall be construed to impair or limit (other than by the requirement of prior consultation) the power of the Commission or the appropriate regulatory agency for a municipal securities dealer to initiate any action of a class described in this paragraph or to affect in any way the power of the Commission or such appropriate regulatory agency to initiate any other action pursuant to this title or any other provision of law.

(7)(A) Tests required pursuant to subsection (b)(2)(A)(iii) of this section shall be administered by or on behalf of and periodic examinations pursuant to subsection (b)(2)(E) of this section shall be conducted by—

(i) a registered securities association, in the case of municipal securities brokers and municipal securities dealers who are members of such association;

(ii) the appropriate regulatory agency for any municipal securities broker or municipal securities dealer, in the case of all other municipal securities brokers and municipal securities dealers; and

(iii)[59] the Commission, or its designee, in the case of municipal advisors.

(B) A registered securities association shall make a report of any examination conducted pursuant to subsection (b)(2)(E) of this section and promptly furnish the Commission a copy thereof and any data supplied to it in connection with such examination. Subject to such limitations as the Commission, by rule, determines to be necessary or appropriate in the public interest or for the protec-

[59] Margin so in law.

tion of investors or municipal entities or obligated person, the Commission shall, on request, make available to the Board a copy of any report of an examination of a municipal securities broker or municipal securities dealer made by or furnished to the Commission pursuant to this paragraph or section 17(c)(3) of this title.

(8) The Commission is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise, in furtherance of the purposes of this title, to remove from office or censure any person who is, or at the time of the alleged violation or abuse was, a member or employee of the Board, who, the Commission finds, on the record after notice and opportunity for hearing, has willfully (A) violated any provision of this title, the rules and regulations thereunder, or the rules of the Board or (B) abused his authority.

(9)(A)[60] Fines collected by the Commission for violations of the rules of the Board shall be equally divided between the Commission and the Board.

(B) Fines collected by a registered securities association under section 15A(7) with respect to violations of the rules of the Board shall be accounted for by such registered securities association separately from other fines collected under section 15A(7) and shall be allocated between such registered securities association and the Board, and such allocation shall require the registered securities association to pay to the Board ⅓ of all fines collected by the registered securities association reasonably allocable to violations of the rules of the Board, or such other portion of such fines as may be directed by the Commission upon agreement between the registered securities association and the Board.

(d)(1) Neither the Commission nor the Board is authorized under this title, by rule or regulation, to require any issuer of municipal securities, directly or indirectly through a purchaser or prospective purchaser of securities from the issuer, to file with the Commission or the Board prior to the sale of such securities by the issuer any application, report, or document in connection with the issuance, sale, or distribution of such securities.

(2) The Board is not authorized under this title to require any issuer of municipal securities, directly or indirectly through a municipal securities broker, municipal securities dealer, municipal advisor, or otherwise, or municipal advisors to furnish to the Board or to a purchaser or a prospective purchaser of such securities any application, report, document, or information with respect to such issuer: *Provided, however,* That the Board may require municipal securities brokers and municipal securities dealers to furnish to the Board or purchasers or prospective purchasers of municipal securities applications, reports, documents, and information with respect to the issuer thereof which is generally available from a source other than such issuer. Nothing in this paragraph shall be construed to impair or limit the power of the Commission under any provision of this title.

(e) DEFINITIONS.—For purposes of this section—

[60] Margin so in law.

(1) the term "Board" means the Municipal Securities Rulemaking Board established under subsection (b)(1);

(2) the term "guaranteed investment contract" includes any investment that has specified withdrawal or reinvestment provisions and a specifically negotiated or bid interest rate, and also includes any agreement to supply investments on 2 or more future dates, such as a forward supply contract;

(3) the term "investment strategies" includes plans or programs for the investment of the proceeds of municipal securities that are not municipal derivatives, guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments;

(4) the term "municipal advisor"—

(A) means a person (who is not a municipal entity or an employee of a municipal entity) that—

(i) provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or

(ii) undertakes a solicitation of a municipal entity;

(B) includes financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors, if such persons are described in any of clauses (i) through (iii) of subparagraph (A); and

(C) does not include a broker, dealer, or municipal securities dealer serving as an underwriter (as defined in section 2(a)(11) of the Securities Act of 1933) (15 U.S.C. 77b(a)(11)), any investment adviser registered under the Investment Advisers Act of 1940, or persons associated with such investment advisers who are providing investment advice, any commodity trading advisor registered under the Commodity Exchange Act or persons associated with a commodity trading advisor who are providing advice related to swaps, attorneys offering legal advice or providing services that are of a traditional legal nature, or engineers providing engineering advice;

(5) the term "municipal financial product" means municipal derivatives, guaranteed investment contracts, and investment strategies;

(6) the term "rules of the Board" means the rules proposed and adopted by the Board under subsection (b)(2);

(7) the term "person associated with a municipal advisor" or "associated person of an advisor" means—

(A) any partner, officer, director, or branch manager of such municipal advisor (or any person occupying a similar status or performing similar functions);

(B) any other employee of such municipal advisor who is engaged in the management, direction, supervision, or performance of any activities relating to the provision of advice to or on behalf of a municipal entity or obligated

person with respect to municipal financial products or the issuance of municipal securities; and

(C) any person directly or indirectly controlling, controlled by, or under common control with such municipal advisor;

(8) the term "municipal entity" means any State, political subdivision of a State, or municipal corporate instrumentality of a State, including—

(A) any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality;

(B) any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and

(C) any other issuer of municipal securities;

(9) the term "solicitation of a municipal entity or obligated person" means a direct or indirect communication with a municipal entity or obligated person made by a person, for direct or indirect compensation, on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser (as defined in section 202 of the Investment Advisers Act of 1940) that does not control, is not controlled by, or is not under common control with the person undertaking such solicitation for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of a broker, dealer, municipal securities dealer, or municipal advisor for or in connection with municipal financial products, the issuance of municipal securities, or of an investment adviser to provide investment advisory services to or on behalf of a municipal entity; and

(10) the term "obligated person" means any person, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person, committed by contract or other arrangement to support the payment of all or part of the obligations on the municipal securities to be sold in an offering of municipal securities.

GOVERNMENT SECURITIES BROKERS AND DEALERS[61], [62]

SEC. 15C. [78o–5] (a)(1)(A) It shall be unlawful for any government securities broker or government securities dealer (other

[61] P.L. 99–571, which added section 15C, also contained the following:

SEC. 1. (a) * * *

(b) [15 U.S.C. 78o-5 note]FINDINGS.—The Congress finds that transactions in government securities are affected with a public interest which makes it necessary—

(1) to provide for the integrity, stability, and efficiency of such transactions and of matters and practices related thereto;

(2) to impose adequate regulation of government securities brokers and government securities dealers generally; and

(3) to require appropriate financial responsibility, recordkeeping, reporting, and related regulatory requirements;

in order to protect investors and to insure the maintenance of fair, honest, and liquid markets in such securities.

[62] Title I of P.L. 103–202 which added subsections (a)(4), (b)(3), (d)(3), and (f) of section 15C and contained other amendments to that section and sections 3(a), 15(b), 15(c), 15A(f), and 23(b) of the Act, also contained the following provision:

SEC. 111. [15 U.S.C. 78o-5 note] RULE OF CONSTRUCTION.

Continued

than a registered broker or dealer or a financial institution) to make 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 government security unless such government securities broker or government securities dealer is registered in accordance with paragraph (2) of this subsection.

(B)(i) It shall be unlawful for any government securities broker or government securities dealer that is a registered broker or dealer or a financial institution to make 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 government security unless such government securities broker or government securities dealer has filed with the appropriate regulatory agency written notice that it is a government securities broker or government securities dealer. When such a government securities broker or government securities dealer ceases to act as such it shall file with the appropriate regulatory agency a written notice that it is no longer acting as a government securities broker or government securities dealer.

(ii) Such notices shall be in such form and contain such information concerning a government securities broker or government securities dealer that is a financial institution and any persons associated with such government securities broker or government securities dealer as the Board of Governors of the Federal Reserve System shall, by rule, after consultation with each appropriate regulatory agency (including the Commission), prescribe as necessary or appropriate in the public interest or for the protection of investors. Such notices shall be in such form and contain such information concerning a government securities broker or government securities dealer that is a registered broker or dealer and any persons associated with such government securities broker or government securities dealer as the Commission shall, by rule, prescribe as necessary or appropriate in the public interest or for the protection of investors.

(iii) Each appropriate regulatory agency (other than the Commission) shall make available to the Commission the notices which have been filed with it under this subparagraph, and the Commission shall maintain and make available to the public such notices and the notices it receives under this subparagraph.

(2) A government securities broker or a government securities dealer subject to the registration requirement of paragraph (1)(A) of this subsection may be registered by filing with the Commission an application for registration in such form and containing such information and documents concerning such government securities broker or government securities dealer and any persons associated with such government securities broker or government securities dealer as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(a) IN GENERAL.—No provision of, or amendment made by, this title may be construed—

(b) EXCEPTION.—Subsection (a) of this section shall not apply to the amendment made by section 110 of this Act.

(c) PUBLIC DEBT OBLIGATION.—For purposes of this section, the term "public debt obligation" means an obligation subject to the public debt limit established in section 3101 of title 31, United States Code.

Within 45 days of the date of filing of such application (or within such longer period as to which the applicant consents), the Commission shall—

(A) by order grant registration, or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within 120 days of the date of the filing of the application for registration. At the conclusion of such proceedings, the Commission, by order, shall grant or deny such registration. The Commission may extend the time for the conclusion of such proceedings for up to 90 days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant the registration of a government securities broker or a government securities dealer if the Commission finds that the requirements of this section are satisfied. The order granting registration shall not be effective until such government securities broker or government securities dealer has become a member of a national securities exchange registered under section 6 of this title, or a securities association registered under section 15A of this title, unless the Commission has exempted such government securities broker or government securities dealer, by rule or order, from such membership. The Commission shall deny such registration if it does not make such a finding or if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under subsection (c) of this section.

(3) Any provision of this title (other than section 5 or paragraph (1) of this subsection) which prohibits any act, practice, or course of business if the mails or any means or instrumentality of interstate commerce is used in connection therewith shall also prohibit any such act, practice, or course of business by any government securities broker or government securities dealer registered or having filed notice under paragraph (1) of this subsection or any person acting on behalf of such government securities broker or government securities dealer, irrespective of any use of the mails or any means or instrumentality of interstate commerce in connection therewith.

(4) No government securities broker or government securities dealer that is required to register under paragraph (1)(A) and that is not a member of the Securities Investor Protection Corporation shall effect any transaction in any security in contravention of such rules as the Commission shall prescribe pursuant to this subsection to assure that its customers receive complete, accurate, and timely disclosure of the inapplicability of Securities Investor Protection Corporation coverage to their accounts.

(5) The Secretary of the Treasury (hereinafter in this section referred to as the "Secretary"), by rule or order, upon the Secretary's own motion or upon application, may conditionally or unconditionally exempt any government securities broker or government securities dealer, or class of government securities brokers or government securities dealers, from any provision of subsection (a), (b), or (d) of this section, other than subsection (d)(3), or the rules

thereunder, if the Secretary finds that such exemption is consistent with the public interest, the protection of investors, and the purposes of this title.

(b)(1) The Secretary shall propose and adopt rules to effect the purposes of this title with respect to transactions in government securities effected by government securities brokers and government securities dealers as follows:

(A) Such rules shall provide safeguards with respect to the financial responsibility and related practices of government securities brokers and government securities dealers including, but not limited to, capital adequacy standards, the acceptance of custody and use of customers' securities, the carrying and use of customers' deposits or credit balances, and the transfer and control of government securities subject to repurchase agreements and in similar transactions.

(B) Such rules shall require every government securities broker and government securities dealer to make reports to and furnish copies of records to the appropriate regulatory agency, and to file with the appropriate regulatory agency, annually or more frequently, a balance sheet and income statement certified by an independent public accountant, prepared on a calendar or fiscal year basis, and such other financial statements (which shall, as the Secretary specifies, be certified) and information concerning its financial condition as required by such rules.

(C) Such rules shall require records to be made and kept by government securities brokers and government securities dealers and shall specify the periods for which such records shall be preserved.

(2) RISK ASSESSMENT FOR HOLDING COMPANY SYSTEMS.—

(A) OBLIGATIONS TO OBTAIN, MAINTAIN, AND REPORT INFORMATION.—Every person who is registered as a government securities broker or government securities dealer under this section shall obtain such information and make and keep such records as the Secretary by rule prescribes concerning the registered person's policies, procedures, or systems for monitoring and controlling financial and operational risks to it resulting from the activities of any of its associated persons, other than a natural person. Such records shall describe, in the aggregate, each of the financial and securities activities conducted by, and customary sources of capital and funding of, those of its associated persons whose business activities are reasonably likely to have a material impact on the financial or operational condition of such registered person, including its capital, its liquidity, or its ability to conduct or finance its operations. The Secretary, by rule, may require summary reports of such information to be filed with the registered person's appropriate regulatory agency no more frequently than quarterly.

(B) AUTHORITY TO REQUIRE ADDITIONAL INFORMATION.—If, as a result of adverse market conditions or based on reports provided pursuant to subparagraph (A) of this paragraph or other available information, the appropriate regulatory agency reasonably concludes that it has concerns regarding the financial or operational condition of any government securities

broker or government securities dealer registered under this section, such agency may require the registered person to make reports concerning the financial and securities activities of any of such person's associated persons, other than a natural person, whose business activities are reasonably likely to have a material impact on the financial or operational condition of such registered person. The appropriate regulatory agency, in requiring reports pursuant to this subparagraph, shall specify the information required, the period for which it is required, the time and date on which the information must be furnished, and whether the information is to be furnished directly to the appropriate regulatory agency or to a self-regulatory organization with primary responsibility for examining the registered person's financial and operational condition.

(C) SPECIAL PROVISIONS WITH RESPECT TO ASSOCIATED PERSONS SUBJECT TO FEDERAL BANKING AGENCY REGULATION.—

(i) COOPERATION IN IMPLEMENTATION.—In developing and implementing reporting requirements pursuant to subparagraph (A) of this paragraph with respect to associated persons subject to examination by or reporting requirements of a Federal banking agency, the Secretary shall consult with and consider the views of each such Federal banking agency. If a Federal banking agency comments in writing on a proposed rule of the Secretary under this paragraph that has been published for comment, the Secretary shall respond in writing to such written comment before adopting the proposed rule. The Secretary shall, at the request of a Federal banking agency, publish such comment and response in the Federal Register at the time of publishing the adopted rule.

(ii) USE OF BANKING AGENCY REPORTS.—A registered government securities broker or government securities dealer shall be in compliance with any recordkeeping or reporting requirement adopted pursuant to subparagraph (A) of this paragraph concerning an associated person that is subject to examination by or reporting requirements of a Federal banking agency if such government securities broker or government securities dealer utilizes for such recordkeeping or reporting requirement copies of reports filed by the associated person with the Federal banking agency pursuant to section 5211 of the Revised Statutes, section 9 of the Federal Reserve Act, section 7(a) of the Federal Deposit Insurance Act, section 10(b) of the Home Owners' Loan Act, or section 8 of the Bank Holding Company Act of 1956. The Secretary may, however, by rule adopted pursuant to subparagraph (A), require any registered government securities broker or government securities dealer filing such reports with the appropriate regulatory agency to obtain, maintain, or report supplemental information if the Secretary makes an explicit finding, based on information provided by the appropriate regulatory agency, that such supplemental information is necessary to inform the appropriate regulatory agency regarding potential risks to such government securities broker or

government securities dealer. Prior to requiring any such supplemental information, the Secretary shall first request the Federal banking agency to expand its reporting requirements to include such information.

(iii) PROCEDURE FOR REQUIRING ADDITIONAL INFORMATION.—Prior to making a request pursuant to subparagraph (B) of this paragraph for information with respect to an associated person that is subject to examination by or reporting requirements of a Federal banking agency, the appropriate regulatory agency shall—

(I) notify such banking agency of the information required with respect to such associated person; and

(II) consult with such agency to determine whether the information required is available from such agency and for other purposes, unless the appropriate regulatory agency determines that any delay resulting from such consultation would be inconsistent with ensuring the financial and operational condition of the government securities broker or government securities dealer or the stability or integrity of the securities markets.

(iv) EXCLUSION FOR EXAMINATION REPORTS.—Nothing in this subparagraph shall be construed to permit the Secretary or an appropriate regulatory agency to require any registered government securities broker or government securities dealer to obtain, maintain, or furnish any examination report of any Federal banking agency or any supervisory recommendations or analysis contained therein.

(v) CONFIDENTIALITY OF INFORMATION PROVIDED.—No information provided to or obtained by an appropriate regulatory agency from any Federal banking agency pursuant to a request under clause (iii) of this subparagraph regarding any associated person which is subject to examination by or reporting requirements of a Federal banking agency may be disclosed to any other person (other than a self-regulatory organization), without the prior written approval of the Federal banking agency. Nothing in this clause shall authorize the Secretary or any appropriate regulatory agency to withhold information from Congress, or prevent the Secretary or any appropriate regulatory agency from complying with a request for information from any other Federal department or agency requesting the information for purposes within the scope of its jurisdiction, or complying with an order of a court of the United States in an action brought by the United States or the Commission.

(vi) NOTICE TO BANKING AGENCIES CONCERNING FINANCIAL AND OPERATIONAL CONDITION CONCERNS.—The Secretary or appropriate regulatory agency shall notify the Federal banking agency of any concerns of the Secretary or the appropriate regulatory agency regarding significant financial or operational risks resulting from the activities of any government securities broker or government securities dealer to any associated person thereof which is subject to

examination by or reporting requirements of the Federal banking agency.

(vii) DEFINITION.—For purposes of this subparagraph, the term "Federal banking agency" shall have the same meaning as the term "appropriate Federal banking agency" in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)).

(D) EXEMPTIONS.—The Secretary by rule or order may exempt any person or class of persons, under such terms and conditions and for such periods as the Secretary shall provide in such rule or order, from the provisions of this paragraph, and the rules thereunder. In granting such exemptions, the Secretary shall consider, among other factors—

(i) whether information of the type required under this paragraph is available from a supervisory agency (as defined in section 1101(6) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401(6))), a State insurance commission or similar State agency, the Commodity Futures Trading Commission, or a similar foreign regulator;

(ii) the primary business of any associated person;

(iii) the nature and extent of domestic or foreign regulation of the associated person's activities;

(iv) the nature and extent of the registered person's securities transactions; and

(v) with respect to the registered person and its associated persons, on a consolidated basis, the amount and proportion of assets devoted to, and revenues derived from, activities in the United States securities markets.

(E) CONFORMITY WITH REQUIREMENTS UNDER SECTION 17(h).—In exercising authority pursuant to subparagraph (A) of this paragraph concerning information with respect to associated persons of government securities brokers and government securities dealers who are also associated persons of registered brokers or dealers reporting to the Commission pursuant to section 17(h) of this title, the requirements relating to such associated persons shall conform, to the greatest extent practicable, to the requirements under section 17(h).

(F) AUTHORITY TO LIMIT DISCLOSURE OF INFORMATION.—Notwithstanding any other provision of law, the Secretary and any appropriate regulatory agency shall not be compelled to disclose any information required to be reported under this paragraph, or any information supplied to the Secretary or any appropriate regulatory agency by any domestic or foreign regulatory agency that relates to the financial or operational condition of any associated person of a registered government securities broker or a government securities dealer. Nothing in this paragraph shall authorize the Secretary or any appropriate regulatory agency to withhold information from Congress, or prevent the Secretary or any appropriate regulatory agency from complying with a request for information from any other Federal department or agency requesting the information for purposes within the scope of its jurisdiction, or complying with an order of a court of the United States in an action brought by the United States or the Commission. For purposes of sec-

tion 552 of title 5, United States Code, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section 552.

(3)(A) With respect to any financial institution that has filed notice as a government securities broker or government securities dealer or that is required to file notice under subsection (a)(1)(B), the appropriate regulatory agency for such government securities broker or government securities dealer may issue such rules and regulations with respect to transactions in government securities as may be necessary to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade. If the Secretary of the Treasury determines, and notifies the appropriate regulatory agency, that such rule or regulation, if implemented, would, or as applied does (i) adversely affect the liquidity or efficiency of the market for government securities; or (ii) impose any burden on competition not necessary or appropriate in furtherance of the purposes of this section, the appropriate regulatory agency shall, prior to adopting the proposed rule or regulation, find that such rule or regulation is necessary and appropriate in furtherance of the purposes of this section notwithstanding the Secretary's determination.

(B) The appropriate regulatory agency shall consult with and consider the views of the Secretary prior to approving or amending a rule or regulation under this paragraph, except where the appropriate regulatory agency determines that an emergency exists requiring expeditious and summary action and publishes its reasons therefor. If the Secretary comments in writing to the appropriate regulatory agency on a proposed rule or regulation that has been published for comment, the appropriate regulatory agency shall respond in writing to such written comment before approving the proposed rule or regulation.

(C) In promulgating rules under this section, the appropriate regulatory agency shall consider the sufficiency and appropriateness of then existing laws and rules applicable to government securities brokers, government securities dealers, and persons associated with government securities brokers and government securities dealers.

(4) Rules promulgated and orders issued under this section shall—

(A) be designed to prevent fraudulent and manipulative acts and practices and to protect the integrity, liquidity, and efficiency of the market for government securities, investors, and the public interest; and

(B) not be designed to permit unfair discrimination between customers, issuers, government securities brokers, or government securities dealers, or to impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title.

(5) In promulgating rules and issuing orders under this section, the Secretary—

(A) may appropriately classify government securities brokers and government securities dealers (taking into account relevant matters, including types of business done, nature of securities other than government securities purchased or sold,

and character of business organization) and persons associated with government securities brokers and government securities dealers;

(B) may determine, to the extent consistent with paragraph (2) of this subsection and with the public interest, the protection of investors, and the purposes of this title, not to apply, in whole or in part, certain rules under this section, or to apply greater, lesser, or different standards, to certain classes of government securities brokers, government securities dealers, or persons associated with government securities brokers or government securities dealers;

(C) shall consider the sufficiency and appropriateness of then existing laws and rules applicable to government securities brokers, government securities dealers, and persons associated with government securities brokers and government securities dealers; and

(D) shall consult with and consider the views of the Commission and the Board of Governors of the Federal Reserve System, except where the Secretary determines that an emergency exists requiring expeditious or summary action and publishes its reasons for such determination.

(6) If the Commission or the Board of Governors of the Federal Reserve System comments in writing on a proposed rule of the Secretary that has been published for comment, the Secretary shall respond in writing to such written comment before approving the proposed rule.

(7) No government securities broker or government securities dealer shall make 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 government security in contravention of any rule under this section.

(c)(1) With respect to any government securities broker or government securities dealer registered or required to register under subsection (a)(1)(A) of this section—

(A) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding 12 months, or revoke the registration of such government securities broker or government securities dealer, if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such government securities broker or government securities dealer, or any person associated with such government securities broker or government securities dealer (whether prior or subsequent to becoming so associated), has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), (E), (H), or (G) of paragraph (4) of section 15(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within 10 years of the commencement of the proceedings under this paragraph, or is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4).

(B) Pending final determination whether registration of any government securities broker or government securities

dealer shall be revoked, the Commission, by order, may suspend such registration, if such suspension appears to the Commission, after notice and opportunity for hearing, to be necessary or appropriate in the public interest or for the protection of investors. Any registered government securities broker or registered government securities dealer may, upon such terms and conditions as the Commission may deem necessary in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any registered government securities broker or registered government securities dealer is no longer in existence or has ceased to do business as a government securities broker or government securities dealer, the Commission, by order, shall cancel the registration of such government securities broker or government securities dealer.

(C) The Commission, by order, shall censure or place limitations on the activities or functions of any person who is, or at the time of the alleged misconduct was, associated or seeking to become associated with a government securities broker or government securities dealer registered or required to register under subsection (a)(1)(A) of this section or suspend for a period not exceeding 12 months or bar any such person from being associated with such a government securities broker or government securities dealer, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), (E), (H), or (G) of paragraph (4) of section 15(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within 10 years of the commencement of the proceedings under this paragraph, or is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4).

(2)(A) With respect to any government securities broker or government securities dealer which is not registered or required to register under subsection (a)(1)(A) of this section, the appropriate regulatory agency for such government securities broker or government securities dealer may, in the manner and for the reasons specified in paragraph (1)(A) of this subsection, censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding 12 months, or bar from acting as a government securities broker or government securities dealer any such government securities broker or government securities dealer, and may sanction any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with such government securities broker or government securities dealer in the manner and for the reasons specified in paragraph (1)(C) of this subsection.

(B) In addition, where applicable, such appropriate regulatory agency may, in accordance with section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), section 5 of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464), or section 407 of the National Hous-

ing Act (12 U.S.C. 1730), enforce compliance by such government securities broker or government securities dealer or any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with such government securities broker or government securities dealer with the provisions of this section and the rules thereunder.

(C) For purposes of subparagraph (B) of this paragraph, any violation of any such provision shall constitute adequate basis for the issuance of any order under section 8(b) or 8(c) of the Federal Deposit Insurance Act, section 5(d)(2) or 5(d)(3) of the Home Owners' Loan Act of 1933, or section 407(e) or 407(f) of the National Housing Act, and the customers of any such government securities broker or government securities dealer shall be deemed, respectively, "depositors" as that term is used in section 8(c) of the Federal Deposit Insurance Act, "savings account holders" as that term is used in section 5(d)(3) of the Home Owners' Loan Act of 1933, or "insured members" as that term is used in section 407(f) of the National Housing Act.

(D) Nothing in this paragraph shall be construed to affect in any way the powers of such appropriate regulatory agency to proceed against such government securities broker or government securities dealer under any other provision of law.

(E) Each appropriate regulatory agency (other than the Commission) shall promptly notify the Commission after it has imposed any sanction under this paragraph on a government securities broker or government securities dealer, or a person associated with a government securities broker or government securities dealer, and the Commission shall maintain, and make available to the public, a record of such sanctions and any sanctions imposed by it under this subsection.

(3) It shall be unlawful for any person as to whom an order entered pursuant to paragraph (1) or (2) of this subsection suspending or barring him from being associated with a government securities broker or government securities dealer is in effect willfully to become, or to be, associated with a government securities broker or government securities dealer without the consent of the appropriate regulatory agency, and it shall be unlawful for any government securities broker or government securities dealer to permit such a person to become, or remain, a person associated with it without the consent of the appropriate regulatory agency, if such government securities broker or government securities dealer knew, or, in the exercise of reasonable care should have known, of such order.

(d)(1) All records of a government securities broker or government securities dealer are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the appropriate regulatory agency for such government securities broker or government securities dealer as such appropriate regulatory agency deems necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title.

(2) Information received by an appropriate regulatory agency, the Secretary, or the Commission from or with respect to any government securities broker, government securities dealer, any per-

son associated with a government securities broker or government securities dealer, or any other person subject to this section or rules promulgated thereunder, may be made available by the Secretary or the recipient agency to the Commission, the Secretary, the Department of Justice, the Commodity Futures Trading Commission, any appropriate regulatory agency, any self-regulatory organization, or any Federal Reserve Bank.

(3) GOVERNMENT SECURITIES TRADE RECONSTRUCTION.—

(A) FURNISHING RECORDS.—Every government securities broker and government securities dealer shall furnish to the Commission on request such records of government securities transactions, including records of the date and time of execution of trades, as the Commission may require to reconstruct trading in the course of a particular inquiry or investigation being conducted by the Commission for enforcement or surveillance purposes. In requiring information pursuant to this paragraph, the Commission shall specify the information required, the period for which it is required, the time and date on which the information must be furnished, and whether the information is to be furnished directly to the Commission, to the Federal Reserve Bank of New York, or to an appropriate regulatory agency or self-regulatory organization with responsibility for examining the government securities broker or government securities dealer. The Commission may require that such information be furnished in machine readable form notwithstanding any limitation in subparagraph (B). In utilizing its authority to require information in machine readable form, the Commission shall minimize the burden such requirement may place on small government securities brokers and dealers.

(B) LIMITATION; CONSTRUCTION.—The Commission shall not utilize its authority under this paragraph to develop regular reporting requirements, except that the Commission may require information to be furnished under this paragraph as frequently as necessary for particular inquiries or investigations for enforcement or surveillance purposes. This paragraph shall not be construed as requiring, or as authorizing the Commission to require, any government securities broker or government securities dealer to obtain or maintain any information for purposes of this paragraph which is not otherwise maintained by such broker or dealer in accordance with any other provision of law or usual and customary business practice. The Commission shall, where feasible, avoid requiring any information to be furnished under this paragraph that the Commission may obtain from the Federal Reserve Bank of New York.

(C) PROCEDURES FOR REQUIRING INFORMATION.—At the time the Commission requests any information pursuant to subparagraph (A) with respect to any government securities broker or government securities dealer for which the Commission is not the appropriate regulatory agency, the Commission shall notify the appropriate regulatory agency for such government securities broker or government securities dealer and, upon request, furnish to the appropriate regulatory agency any information supplied to the Commission.

(D) CONSULTATION.—Within 90 days after the date of enactment of this paragraph, and annually thereafter, or upon the request of any other appropriate regulatory agency, the Commission shall consult with the other appropriate regulatory agencies to determine the availability of records that may be required to be furnished under this paragraph and, for those records available directly from the other appropriate regulatory agencies, to develop a procedure for furnishing such records expeditiously upon the Commission's request.

(E) EXCLUSION FOR EXAMINATION REPORTS.—Nothing in this paragraph shall be construed so as to permit the Commission to require any government securities broker or government securities dealer to obtain, maintain, or furnish any examination report of any appropriate regulatory agency other than the Commission or any supervisory recommendations or analysis contained in any such examination report.

(F) AUTHORITY TO LIMIT DISCLOSURE OF INFORMATION.—Notwithstanding any other provision of law, the Commission and the appropriate regulatory agencies shall not be compelled to disclose any information required or obtained under this paragraph. Nothing in this paragraph shall authorize the Commission or any appropriate regulatory agency to withhold information from Congress, or prevent the Commission or any appropriate regulatory agency from complying with a request for information from any other Federal department or agency requesting information for purposes within the scope of its jurisdiction, or from complying with an order of a court of the United States in an action brought by the United States, the Commission, or the appropriate regulatory agency. For purposes of section 552 of title 5, United States Code, this subparagraph shall be considered a statute described in subsection (b)(3)(B) of such section 552.

(e)(1) It shall be unlawful for any government securities broker or government securities dealer registered or required to register with the Commission under subsection (a)(1)(A) to effect any transaction in, or induce or attempt to induce the purchase or sale of, any government security, unless such government securities broker or government securities dealer is a member of a national securities exchange registered under section 6 of this title or a securities association registered under section 15A of this title.

(2) The Commission, after consultation with the Secretary, by rule or order, as it deems consistent with the public interest and the protection of investors, may conditionally or unconditionally exempt from paragraph (1) of this subsection any government securities broker or government securities dealer or class of government securities brokers or government securities dealers specified in such rule or order.

(f) LARGE POSITION REPORTING.—

(1) REPORTING REQUIREMENTS.—The Secretary may adopt rules to require specified persons holding, maintaining, or controlling large positions in to-be-issued or recently issued Treasury securities to file such reports regarding such positions as the Secretary determines to be necessary and appropriate for the purpose of monitoring the impact in the Treasury securi-

ties market of concentrations of positions in Treasury securities and for the purpose of otherwise assisting the Commission in the enforcement of this title, taking into account any impact of such rules on the efficiency and liquidity of the Treasury securities market and the cost to taxpayers of funding the Federal debt. Unless otherwise specified by the Secretary, reports required under this subsection shall be filed with the Federal Reserve Bank of New York, acting as agent for the Secretary. Such reports shall, on a timely basis, be provided directly to the Commission by the person with whom they are filed.

(2) RECORDKEEPING REQUIREMENTS.—Rules under this subsection may require persons holding, maintaining, or controlling large positions in Treasury securities to make and keep for prescribed periods such records as the Secretary determines are necessary or appropriate to ensure that such persons can comply with reporting requirements under this subsection.

(3) AGGREGATION RULES.—Rules under this subsection—

(A) may prescribe the manner in which positions and accounts shall be aggregated for the purpose of this subsection, including aggregation on the basis of common ownership or control; and

(B) may define which persons (individually or as a group) hold, maintain, or control large positions.

(4) DEFINITIONAL AUTHORITY; DETERMINATION OF REPORTING THRESHOLD.—

(A) In prescribing rules under this subsection, the Secretary may, consistent with the purpose of this subsection, define terms used in this subsection that are not otherwise defined in section 3 of this title.

(B) Rules under this subsection shall specify—

(i) the minimum size of positions subject to reporting under this subsection, which shall be no less than the size that provides the potential for manipulation or control of the supply or price, or the cost of financing arrangements, of an issue or the portion thereof that is available for trading;

(ii) the types of positions (which may include financing arrangements) to be reported;

(iii) the securities to be covered; and

(iv) the form and manner in which reports shall be transmitted, which may include transmission in machine readable form.

(5) EXEMPTIONS.—Consistent with the public interest and the protection of investors, the Secretary by rule or order may exempt in whole or in part, conditionally or unconditionally, any person or class of persons, or any transaction or class of transactions, from the requirements of this subsection.

(6) LIMITATION ON DISCLOSURE OF INFORMATION.—Notwithstanding any other provision of law, the Secretary and the Commission shall not be compelled to disclose any information required to be kept or reported under this subsection. Nothing in this subsection shall authorize the Secretary or the Commission to withhold information from Congress, or prevent the Secretary or the Commission from complying with a request for

information from any other Federal department or agency requesting information for purposes within the scope of its jurisdiction, or from complying with an order of a court of the United States in an action brought by the United States, the Secretary, or the Commission. For purposes of section 552 of title 5, United States Code, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section 552.

(g)(1) Nothing in this section except paragraph (2) of this subsection shall be construed to impair or limit the authority under any other provision of law of the Commission, the Secretary of the Treasury, the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Secretary of Housing and Urban Development, and the Government National Mortgage Association.

(2) Notwithstanding any other provision of this title, the Commission shall not have any authority to make investigations of, require the filing of a statement by, or take any other action under this title against a government securities broker or government securities dealer, or any person associated with a government securities broker or government securities dealer, for any violation or threatened violation of the provisions of this section, other than subsection (d)(3) or the rules or regulations thereunder, unless the Commission is the appropriate regulatory agency for such government securities broker or government securities dealer. Nothing in the preceding sentence shall be construed to limit the authority of the Commission with respect to violations or threatened violations of any provision of this title other than this section (except subsection (d)(3)), the rules or regulations under any such other provision, or investigations pursuant to section 21(a)(2) of this title to assist a foreign securities authority.

(h) EMERGENCY AUTHORITY.—The Secretary may, by order, take any action with respect to a matter or action subject to regulation by the Secretary under this section, or the rules of the Secretary under this section, involving a government security or a market therein (or significant portion or segment of that market), that the Commission may take under section 12(k)(2) with respect to transactions in securities (other than exempted securities) or a market therein (or significant portion or segment of that market).

SEC. 15D. [78o–6] SECURITIES ANALYSTS AND RESEARCH REPORTS.

(a) ANALYST PROTECTIONS.—The Commission, or upon the authorization and direction of the Commission, a registered securities association or national securities exchange, shall have adopted, not later than 1 year after the date of enactment of this section, rules reasonably designed to address conflicts of interest that can arise when securities analysts recommend equity securities in research reports and public appearances, in order to improve the objectivity of research and provide investors with more useful and reliable information, including rules designed—

(1) to foster greater public confidence in securities research, and to protect the objectivity and independence of securities analysts, by—

(A) restricting the prepublication clearance or approval of research reports by persons employed by the broker or

dealer who are engaged in investment banking activities, or persons not directly responsible for investment research, other than legal or compliance staff;

(B) limiting the supervision and compensatory evaluation of securities analysts to officials employed by the broker or dealer who are not engaged in investment banking activities; and

(C) requiring that a broker or dealer and persons employed by a broker or dealer who are involved with investment banking activities may not, directly or indirectly, retaliate against or threaten to retaliate against any securities analyst employed by that broker or dealer or its affiliates as a result of an adverse, negative, or otherwise unfavorable research report that may adversely affect the present or prospective investment banking relationship of the broker or dealer with the issuer that is the subject of the research report, except that such rules may not limit the authority of a broker or dealer to discipline a securities analyst for causes other than such research report in accordance with the policies and procedures of the firm;

(2) to define periods during which brokers or dealers who have participated, or are to participate, in a public offering of securities as underwriters or dealers should not publish or otherwise distribute research reports relating to such securities or to the issuer of such securities;

(3) to establish structural and institutional safeguards within registered brokers or dealers to assure that securities analysts are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of those whose involvement in investment banking activities might potentially bias their judgment or supervision; and

(4) to address such other issues as the Commission, or such association or exchange, determines appropriate.

(b) DISCLOSURE.—The Commission, or upon the authorization and direction of the Commission, a registered securities association or national securities exchange, shall have adopted, not later than 1 year after the date of enactment of this section, rules reasonably designed to require each securities analyst to disclose in public appearances, and each registered broker or dealer to disclose in each research report, as applicable, conflicts of interest that are known or should have been known by the securities analyst or the broker or dealer, to exist at the time of the appearance or the date of distribution of the report, including—

(1) the extent to which the securities analyst has debt or equity investments in the issuer that is the subject of the appearance or research report;

(2) whether any compensation has been received by the registered broker or dealer, or any affiliate thereof, including the securities analyst, from the issuer that is the subject of the appearance or research report, subject to such exemptions as the Commission may determine appropriate and necessary to prevent disclosure by virtue of this paragraph of material nonpublic information regarding specific potential future investment banking transactions of such issuer, as is appropriate in

the public interest and consistent with the protection of investors;

(3) whether an issuer, the securities of which are recommended in the appearance or research report, currently is, or during the 1-year period preceding the date of the appearance or date of distribution of the report has been, a client of the registered broker or dealer, and if so, stating the types of services provided to the issuer;

(4) whether the securities analyst received compensation with respect to a research report, based upon (among any other factors) the investment banking revenues (either generally or specifically earned from the issuer being analyzed) of the registered broker or dealer; and

(5) such other disclosures of conflicts of interest that are material to investors, research analysts, or the broker or dealer as the Commission, or such association or exchange, determines appropriate.

(c) LIMITATION.—Notwithstanding subsection (a) or any other provision of law, neither the Commission nor any national securities association registered under section 15A may adopt or maintain any rule or regulation in connection with an initial public offering of the common equity of an emerging growth company—

(1) restricting, based on functional role, which associated persons of a broker, dealer, or member of a national securities association, may arrange for communications between a securities analyst and a potential investor; or

(2) restricting a securities analyst from participating in any communications with the management of an emerging growth company that is also attended by any other associated person of a broker, dealer, or member of a national securities association whose functional role is other than as a securities analyst.

(d) DEFINITIONS.—In this section—

(1) the term "securities analyst" means any associated person of a registered broker or dealer that is principally responsible for, and any associated person who reports directly or indirectly to a securities analyst in connection with, the preparation of the substance of a research report, whether or not any such person has the job title of "securities analyst"; and

(2) the term "research report" means a written or electronic communication that includes an analysis of equity securities of individual companies or industries, and that provides information reasonably sufficient upon which to base an investment decision.

SEC. 15E. [78o–7] REGISTRATION OF NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATIONS.

(a) REGISTRATION PROCEDURES.—

(1) APPLICATION FOR REGISTRATION.—

(A) IN GENERAL.—A credit rating agency that elects to be treated as a nationally recognized statistical rating organization for purposes of this title (in this section referred to as the "applicant"), shall furnish to the Commission an application for registration, in such form as the Commission shall require, by rule or regulation issued in accord-

ance with subsection (n), and containing the information described in subparagraph (B).

(B) REQUIRED INFORMATION.—An application for registration under this section shall contain information regarding—

(i) credit ratings performance measurement statistics over short-term, mid-term, and long-term periods (as applicable) of the applicant;

(ii) the procedures and methodologies that the applicant uses in determining credit ratings;

(iii) policies or procedures adopted and implemented by the applicant to prevent the misuse, in violation of this title (or the rules and regulations hereunder), of material, nonpublic information;

(iv) the organizational structure of the applicant;

(v) whether or not the applicant has in effect a code of ethics, and if not, the reasons therefor;

(vi) any conflict of interest relating to the issuance of credit ratings by the applicant;

(vii) the categories described in any of clauses (i) through (v) of section 3(a)(62)(B) with respect to which the applicant intends to apply for registration under this section;

(viii) on a confidential basis, a list of the 20 largest issuers and subscribers that use the credit rating services of the applicant, by amount of net revenues received therefrom in the fiscal year immediately preceding the date of submission of the application;

(ix) on a confidential basis, as to each applicable category of obligor described in any of clauses (i) through (v) of section 3(a)(62)(B), written certifications described in subparagraph (C), except as provided in subparagraph (D); and

(x) any other information and documents concerning the applicant and any person associated with such applicant as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(C) WRITTEN CERTIFICATIONS.—Written certifications required by subparagraph (B)(ix)—

(i) shall be provided from not fewer than 10 qualified institutional buyers, none of which is affiliated with the applicant;

(ii) may address more than one category of obligors described in any of clauses (i) through (v) of section 3(a)(62)(B);

(iii) shall include not fewer than 2 certifications for each such category of obligor; and

(iv) shall state that the qualified institutional buyer—

(I) meets the definition of a qualified institutional buyer under section 3(a)(64); and

(II) has used the credit ratings of the applicant for at least the 3 years immediately pre-

ceding the date of the certification in the subject category or categories of obligors.

(D) EXEMPTION FROM CERTIFICATION REQUIREMENT.—A written certification under subparagraph (B)(ix) is not required with respect to any credit rating agency which has received, or been the subject of, a no-action letter from the staff of the Commission prior to August 2, 2006, stating that such staff would not recommend enforcement action against any broker or dealer that considers credit ratings issued by such credit rating agency to be ratings from a nationally recognized statistical rating organization.

(E) LIMITATION ON LIABILITY OF QUALIFIED INSTITUTIONAL BUYERS.—No qualified institutional buyer shall be liable in any private right of action for any opinion or statement expressed in a certification made pursuant to subparagraph (B)(ix).

(2) REVIEW OF APPLICATION.—

(A) INITIAL DETERMINATION.—Not later than 90 days after the date on which the application for registration is furnished to the Commission under paragraph (1) (or within such longer period as to which the applicant consents) the Commission shall—

(i) by order, grant such registration for ratings in the subject category or categories of obligors, as described in clauses (i) through (v) of section 3(a)(62)(B); or

(ii) institute proceedings to determine whether registration should be denied.

(B) CONDUCT OF PROCEEDINGS.—

(i) CONTENT.—Proceedings referred to in subparagraph (A)(ii) shall—

(I) include notice of the grounds for denial under consideration and an opportunity for hearing; and

(II) be concluded not later than 120 days after the date on which the application for registration is furnished to the Commission under paragraph (1).

(ii) DETERMINATION.—At the conclusion of such proceedings, the Commission, by order, shall grant or deny such application for registration.

(iii) EXTENSION AUTHORIZED.—The Commission may extend the time for conclusion of such proceedings for not longer than 90 days, if it finds good cause for such extension and publishes its reasons for so finding, or for such longer period as to which the applicant consents.

(C) GROUNDS FOR DECISION.—The Commission shall grant registration under this subsection—

(i) if the Commission finds that the requirements of this section are satisfied; and

(ii) unless the Commission finds (in which case the Commission shall deny such registration) that—

(I) the applicant does not have adequate financial and managerial resources to consistently produce credit ratings with integrity and to materially comply with the procedures and methodologies disclosed under paragraph (1)(B) and with subsections (g), (h), (i), and (j); or

(II) if the applicant were so registered, its registration would be subject to suspension or revocation under subsection (d).

(3) PUBLIC AVAILABILITY OF INFORMATION.—Subject to section 24, the Commission shall, by rule, require a nationally recognized statistical rating organization, upon the granting of registration under this section, to make the information and documents submitted to the Commission in its completed application for registration, or in any amendment submitted under paragraph (1) or (2) of subsection (b), publicly available on its website, or through another comparable, readily accessible means, except as provided in clauses (viii) and (ix) of paragraph (1)(B).

(b) UPDATE OF REGISTRATION.—

(1) UPDATE.—Each nationally recognized statistical rating organization shall promptly amend its application for registration under this section if any information or document provided therein becomes materially inaccurate, except that a nationally recognized statistical rating organization is not required to amend—

(A) the information required to be filed under subsection (a)(1)(B)(i) by filing information under this paragraph, but shall amend such information in the annual submission of the organization under paragraph (2) of this subsection; or

(B) the certifications required to be provided under subsection (a)(1)(B)(ix) by filing information under this paragraph.

(2) CERTIFICATION.—Not later than 90 days after the end of each calendar year, each nationally recognized statistical rating organization shall file with the Commission an amendment to its registration, in such form as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) certifying that the information and documents in the application for registration of such nationally recognized statistical rating organization (other than the certifications required under subsection (a)(1)(B)(ix)) continue to be accurate; and

(B) listing any material change that occurred to such information or documents during the previous calendar year.

(c) ACCOUNTABILITY FOR RATINGS PROCEDURES.—

(1) AUTHORITY.—The Commission shall have exclusive authority to enforce the provisions of this section in accordance with this title with respect to any nationally recognized statistical rating organization, if such nationally recognized statistical rating organization issues credit ratings in material con-

travention of those procedures relating to such nationally recognized statistical rating organization, including procedures relating to the prevention of misuse of nonpublic information and conflicts of interest, that such nationally recognized statistical rating organization—

(A) includes in its application for registration under subsection (a)(1)(B)(ii); or

(B) makes and disseminates in reports pursuant to section 17(a) or the rules and regulations thereunder.

(2) LIMITATION.—The rules and regulations that the Commission may prescribe pursuant to this title, as they apply to nationally recognized statistical rating organizations, shall be narrowly tailored to meet the requirements of this title applicable to nationally recognized statistical rating organizations. Notwithstanding any other provision of this section, or any other provision of law, neither the Commission nor any State (or political subdivision thereof) may regulate the substance of credit ratings or the procedures and methodologies by which any nationally recognized statistical rating organization determines credit ratings. Nothing in this paragraph may be construed to afford a defense against any action or proceeding brought by the Commission to enforce the antifraud provisions of the securities laws.

(3) INTERNAL CONTROLS OVER PROCESSES FOR DETERMINING CREDIT RATINGS.—

(A) IN GENERAL.—Each nationally recognized statistical rating organization shall establish, maintain, enforce, and document an effective internal control structure governing the implementation of and adherence to policies, procedures, and methodologies for determining credit ratings, taking into consideration such factors as the Commission may prescribe, by rule.

(B) ATTESTATION REQUIREMENT.—The Commission shall prescribe rules requiring each nationally recognized statistical rating organization to submit to the Commission an annual internal controls report, which shall contain—

(i) a description of the responsibility of the management of the nationally recognized statistical rating organization in establishing and maintaining an effective internal control structure under subparagraph (A);

(ii) an assessment of the effectiveness of the internal control structure of the nationally recognized statistical rating organization; and

(iii) the attestation of the chief executive officer, or equivalent individual, of the nationally recognized statistical rating organization.

(d) CENSURE, DENIAL, OR SUSPENSION OF REGISTRATION; NOTICE AND HEARING.—

(1) IN GENERAL.—The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding 12 months, or revoke the registration of any nationally recognized statistical rating organization, or with respect to any person who is associated with,

who is seeking to become associated with, or, at the time of the alleged misconduct, who was associated or was seeking to become associated with a nationally recognized statistical rating organization, the Commission, by order, shall censure, place limitations on the activities or functions of such person, suspend for a period not exceeding 1 year, or bar such person from being associated with a nationally recognized statistical rating organization, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, bar or revocation is necessary for the protection of investors and in the public interest and that such nationally recognized statistical rating organization, or any person associated with such an organization, whether prior to or subsequent to becoming so associated—

(A) has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), (E), (H), or (G) of section 15(b)(4), has been convicted of any offense specified in section 15(b)(4)(B), or is enjoined from any action, conduct, or practice specified in subparagraph (C) of section 15(b)(4), during the 10-year period preceding the date of commencement of the proceedings under this subsection, or at any time thereafter;

(B) has been convicted during the 10-year period preceding the date on which an application for registration is filed with the Commission under this section, or at any time thereafter, of—

(i) any crime that is punishable by imprisonment for 1 or more years, and that is not described in section 15(b)(4)(B); or

(ii) a substantially equivalent crime by a foreign court of competent jurisdiction;

(C) is subject to any order of the Commission barring or suspending the right of the person to be associated with a nationally recognized statistical rating organization;

(D) fails to file the certifications required under subsection (b)(2);

(E) fails to maintain adequate financial and managerial resources to consistently produce credit ratings with integrity;

(F) has failed reasonably to supervise, with a view to preventing a violation of the securities laws, an individual who commits such a violation, if the individual is subject to the supervision of that person.

(2) SUSPENSION OR REVOCATION FOR PARTICULAR CLASS OF SECURITIES.—

(A) IN GENERAL.—The Commission may temporarily suspend or permanently revoke the registration of a nationally recognized statistical rating organization with respect to a particular class or subclass of securities, if the Commission finds, on the record after notice and opportunity for hearing, that the nationally recognized statistical rating organization does not have adequate financial and managerial resources to consistently produce credit ratings with integrity.

(B) CONSIDERATIONS.—In making any determination under subparagraph (A), the Commission shall consider—

(i) whether the nationally recognized statistical rating organization has failed over a sustained period of time, as determined by the Commission, to produce ratings that are accurate for that class or subclass of securities; and

(ii) such other factors as the Commission may determine.

(e) TERMINATION OF REGISTRATION.—

(1) VOLUNTARY WITHDRAWAL.—A nationally recognized statistical rating organization may, upon such terms and conditions as the Commission may establish as necessary in the public interest or for the protection of investors, withdraw from registration by furnishing a written notice of withdrawal to the Commission.

(2) COMMISSION AUTHORITY.—In addition to any other authority of the Commission under this title, if the Commission finds that a nationally recognized statistical rating organization is no longer in existence or has ceased to do business as a credit rating agency, the Commission, by order, shall cancel the registration under this section of such nationally recognized statistical rating organization.

(f) REPRESENTATIONS.—

(1) BAN ON REPRESENTATIONS OF SPONSORSHIP BY UNITED STATES OR AGENCY THEREOF.—It shall be unlawful for any nationally recognized statistical rating organization to represent or imply in any manner whatsoever that such nationally recognized statistical rating organization has been designated, sponsored, recommended, or approved, or that the abilities or qualifications thereof have in any respect been passed upon, by the United States or any agency, officer, or employee thereof.

(2) BAN ON REPRESENTATION AS NRSRO OF UNREGISTERED CREDIT RATING AGENCIES.—It shall be unlawful for any credit rating agency that is not registered under this section as a nationally recognized statistical rating organization to state that such credit rating agency is a nationally recognized statistical rating organization registered under this title.

(3) STATEMENT OF REGISTRATION UNDER SECURITIES EXCHANGE ACT OF 1934 PROVISIONS.—No provision of paragraph (1) shall be construed to prohibit a statement that a nationally recognized statistical rating organization is a nationally recognized statistical rating organization under this title, if such statement is true in fact and if the effect of such registration is not misrepresented.

(g) PREVENTION OF MISUSE OF NONPUBLIC INFORMATION.—

(1) ORGANIZATION POLICIES AND PROCEDURES.—Each nationally recognized statistical rating organization shall establish, maintain, and enforce written policies and procedures reasonably designed, taking into consideration the nature of the business of such nationally recognized statistical rating organization, to prevent the misuse in violation of this title, or the rules or regulations hereunder, of material, nonpublic information by such nationally recognized statistical rating organiza-

tion or any person associated with such nationally recognized statistical rating organization.

(2) COMMISSION AUTHORITY.—The Commission shall issue final rules in accordance with subsection (n) to require specific policies or procedures that are reasonably designed to prevent misuse in violation of this title (or the rules or regulations hereunder) of material, nonpublic information.

(h) MANAGEMENT OF CONFLICTS OF INTEREST.—

(1) ORGANIZATION POLICIES AND PROCEDURES.—Each nationally recognized statistical rating organization shall establish, maintain, and enforce written policies and procedures reasonably designed, taking into consideration the nature of the business of such nationally recognized statistical rating organization and affiliated persons and affiliated companies thereof, to address and manage any conflicts of interest that can arise from such business.

(2) COMMISSION AUTHORITY.—The Commission shall issue final rules in accordance with subsection (n) to prohibit, or require the management and disclosure of, any conflicts of interest relating to the issuance of credit ratings by a nationally recognized statistical rating organization, including, without limitation, conflicts of interest relating to—

(A) the manner in which a nationally recognized statistical rating organization is compensated by the obligor, or any affiliate of the obligor, for issuing credit ratings or providing related services;

(B) the provision of consulting, advisory, or other services by a nationally recognized statistical rating organization, or any person associated with such nationally recognized statistical rating organization, to the obligor, or any affiliate of the obligor;

(C) business relationships, ownership interests, or any other financial or personal interests between a nationally recognized statistical rating organization, or any person associated with such nationally recognized statistical rating organization, and the obligor, or any affiliate of the obligor;

(D) any affiliation of a nationally recognized statistical rating organization, or any person associated with such nationally recognized statistical rating organization, with any person that underwrites the securities or money market instruments that are the subject of a credit rating; and

(E) any other potential conflict of interest, as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

(3) SEPARATION OF RATINGS FROM SALES AND MARKETING.—

(A) RULES REQUIRED.—The Commission shall issue rules to prevent the sales and marketing considerations of a nationally recognized statistical rating organization from influencing the production of ratings by the nationally recognized statistical rating organization.

(B) CONTENTS OF RULES.—The rules issued under subparagraph (A) shall provide for—

(i) exceptions for small nationally recognized statistical rating organizations with respect to which the Commission determines that the separation of the production of ratings and sales and marketing activities is not appropriate; and

(ii) suspension or revocation of the registration of a nationally recognized statistical rating organization, if the Commission finds, on the record, after notice and opportunity for a hearing, that—

(I) the nationally recognized statistical rating organization has committed a violation of a rule issued under this subsection; and

(II) the violation of a rule issued under this subsection affected a rating.

(4) LOOK-BACK REQUIREMENT.—

(A) REVIEW BY THE NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATION.—Each nationally recognized statistical rating organization shall establish, maintain, and enforce policies and procedures reasonably designed to ensure that, in any case in which an employee of a person subject to a credit rating of the nationally recognized statistical rating organization or the issuer, underwriter, or sponsor of a security or money market instrument subject to a credit rating of the nationally recognized statistical rating organization was employed by the nationally recognized statistical rating organization and participated in any capacity in determining credit ratings for the person or the securities or money market instruments during the 1-year period preceding the date an action was taken with respect to the credit rating, the nationally recognized statistical rating organization shall—

(i) conduct a review to determine whether any conflicts of interest of the employee influenced the credit rating; and

(ii) take action to revise the rating if appropriate, in accordance with such rules as the Commission shall prescribe.

(B) REVIEW BY COMMISSION.—

(i) IN GENERAL.—The Commission shall conduct periodic reviews of the policies described in subparagraph (A) and the implementation of the policies at each nationally recognized statistical rating organization to ensure they are reasonably designed and implemented to most effectively eliminate conflicts of interest.

(ii) TIMING OF REVIEWS.—The Commission shall review the code of ethics and conflict of interest policy of each nationally recognized statistical rating organization—

(I) not less frequently than annually; and

(II) whenever such policies are materially modified or amended.

(5) REPORT TO COMMISSION ON CERTAIN EMPLOYMENT TRANSITIONS.—

(A) REPORT REQUIRED.—Each nationally recognized statistical rating organization shall report to the Commission any case such organization knows or can reasonably be expected to know where a person associated with such organization within the previous 5 years obtains employment with any obligor, issuer, underwriter, or sponsor of a security or money market instrument for which the organization issued a credit rating during the 12-month period prior to such employment, if such employee—

(i) was a senior officer of such organization;

(ii) participated in any capacity in determining credit ratings for such obligor, issuer, underwriter, or sponsor; or

(iii) supervised an employee described in clause (ii).

(B) PUBLIC DISCLOSURE.—Upon receiving such a report, the Commission shall make such information publicly available.

(i) PROHIBITED CONDUCT.—

(1) PROHIBITED ACTS AND PRACTICES.—The Commission shall issue final rules in accordance with subsection (n) to prohibit any act or practice relating to the issuance of credit ratings by a nationally recognized statistical rating organization that the Commission determines to be unfair, coercive, or abusive, including any act or practice relating to—

(A) conditioning or threatening to condition the issuance of a credit rating on the purchase by the obligor or an affiliate thereof of other services or products, including pre-credit rating assessment products, of the nationally recognized statistical rating organization or any person associated with such nationally recognized statistical rating organization;

(B) lowering or threatening to lower a credit rating on, or refusing to rate, securities or money market instruments issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction, unless a portion of the assets within such pool or part of such transaction, as applicable, also is rated by the nationally recognized statistical rating organization; or

(C) modifying or threatening to modify a credit rating or otherwise departing from its adopted systematic procedures and methodologies in determining credit ratings, based on whether the obligor, or an affiliate of the obligor, purchases or will purchase the credit rating or any other service or product of the nationally recognized statistical rating organization or any person associated with such organization.

(2) RULE OF CONSTRUCTION.—Nothing in paragraph (1), or in any rules or regulations adopted thereunder, may be construed to modify, impair, or supersede the operation of any of the antitrust laws (as defined in the first section of the Clayton Act, except that such term includes section 5 of the Federal Trade Commission Act, to the extent that such section 5 applies to unfair methods of competition).

(j) DESIGNATION OF COMPLIANCE OFFICER.—

(1) IN GENERAL.—Each nationally recognized statistical rating organization shall designate an individual responsible for administering the policies and procedures that are required to be established pursuant to subsections (g) and (h), and for ensuring compliance with the securities laws and the rules and regulations thereunder, including those promulgated by the Commission pursuant to this section.

(2) LIMITATIONS.—

(A) IN GENERAL.—Except as provided in subparagraph (B), an individual designated under paragraph (1) may not, while serving in the designated capacity—

(i) perform credit ratings;

(ii) participate in the development of ratings methodologies or models;

(iii) perform marketing or sales functions; or

(iv) participate in establishing compensation levels, other than for employees working for that individual.

(B) EXCEPTION.—The Commission may exempt a small nationally recognized statistical rating organization from the limitations under this paragraph, if the Commission finds that compliance with such limitations would impose an unreasonable burden on the nationally recognized statistical rating organization.

(3) OTHER DUTIES.—Each individual designated under paragraph (1) shall establish procedures for the receipt, retention, and treatment of—

(A) complaints regarding credit ratings, models, methodologies, and compliance with the securities laws and the policies and procedures developed under this section; and

(B) confidential, anonymous complaints by employees or users of credit ratings.

(4) COMPENSATION.—The compensation of each compliance officer appointed under paragraph (1) shall not be linked to the financial performance of the nationally recognized statistical rating organization and shall be arranged so as to ensure the independence of the officer's judgment.

(5) ANNUAL REPORTS REQUIRED.—

(A) ANNUAL REPORTS REQUIRED.—Each individual designated under paragraph (1) shall submit to the nationally recognized statistical rating organization an annual report on the compliance of the nationally recognized statistical rating organization with the securities laws and the policies and procedures of the nationally recognized statistical rating organization that includes—

(i) a description of any material changes to the code of ethics and conflict of interest policies of the nationally recognized statistical rating organization; and

(ii) a certification that the report is accurate and complete.

(B) SUBMISSION OF REPORTS TO THE COMMISSION.—Each nationally recognized statistical rating organization shall file the reports required under subparagraph (A) to-

gether with the financial report that is required to be submitted to the Commission under this section.

(k) STATEMENTS OF FINANCIAL CONDITION.—Each nationally recognized statistical rating organization shall, on a confidential basis, file with the Commission, at intervals determined by the Commission, such financial statements, certified (if required by the rules or regulations of the Commission) by an independent public accountant, and information concerning its financial condition, as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(l) SOLE METHOD OF REGISTRATION.—

(1) IN GENERAL.—On and after the effective date of this section, a credit rating agency may only be registered as a nationally recognized statistical rating organization for any purpose in accordance with this section.

(2) PROHIBITION ON RELIANCE ON NO-ACTION RELIEF.—On and after the effective date of this section—

(A) an entity that, before that date, received advice, approval, or a no-action letter from the Commission or staff thereof to be treated as a nationally recognized statistical rating organization pursuant to the Commission rule at section 240.15c3–1 of title 17, Code of Federal Regulations, may represent itself or act as a nationally recognized statistical rating organization only—

(i) during Commission consideration of the application, if such entity has filed an application for registration under this section; and

(ii) on and after the date of approval of its application for registration under this section; and

(B) the advice, approval, or no-action letter described in subparagraph (A) shall be void.

(3) NOTICE TO OTHER AGENCIES.—Not later than 30 days after the date of enactment of this section, the Commission shall give notice of the actions undertaken pursuant to this section to each Federal agency which employs in its rules and regulations the term "nationally recognized statistical rating organization" (as that term is used under Commission rule 15c3–1 (17 C.F.R. 240.15c3–1), as in effect on the date of enactment of this section).

(m) ACCOUNTABILITY.—

(1) IN GENERAL.—The enforcement and penalty provisions of this title shall apply to statements made by a credit rating agency in the same manner and to the same extent as such provisions apply to statements made by a registered public accounting firm or a securities analyst under the securities laws, and such statements shall not be deemed forward-looking statements for the purposes of section 21E.

(2) RULEMAKING.—The Commission shall issue such rules as may be necessary to carry out this subsection.

(n) REGULATIONS.—

(1) NEW PROVISIONS.—Such rules and regulations as are required by this section or are otherwise necessary to carry out this section, including the application form required under subsection (a)—

(A) shall be issued by the Commission in final form, not later than 270 days after the date of enactment of this section; and

(B) shall become effective not later than 270 days after the date of enactment of this section.

(2) REVIEW OF EXISTING REGULATIONS.—Not later than 270 days after the date of enactment of this section, the Commission shall—

(A) review its existing rules and regulations which employ the term "nationally recognized statistical rating organization" or "NRSRO"; and

(B) amend or revise such rules and regulations in accordance with the purposes of this section, as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(o) NRSROs SUBJECT TO COMMISSION AUTHORITY.—

(1) IN GENERAL.—No provision of the laws of any State or political subdivision thereof requiring the registration, licensing, or qualification as a credit rating agency or a nationally recognized statistical rating organization shall apply to any nationally recognized statistical rating organization or person employed by or working under the control of a nationally recognized statistical rating organization.

(2) LIMITATION.—Nothing in this subsection prohibits the securities commission (or any agency or office performing like functions) of any State from investigating and bringing an enforcement action with respect to fraud or deceit against any nationally recognized statistical rating organization or person associated with a nationally recognized statistical rating organization.

(p) REGULATION OF NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATIONS.—

(1) ESTABLISHMENT OF OFFICE OF CREDIT RATINGS.—

(A) OFFICE ESTABLISHED.—The Commission shall establish within the Commission an Office of Credit Ratings (referred to in this subsection as the "Office") to administer the rules of the Commission—

(i) with respect to the practices of nationally recognized statistical rating organizations in determining ratings, for the protection of users of credit ratings and in the public interest;

(ii) to promote accuracy in credit ratings issued by nationally recognized statistical rating organizations; and

(iii) to ensure that such ratings are not unduly influenced by conflicts of interest.

(B) DIRECTOR OF THE OFFICE.—The head of the Office shall be the Director, who shall report to the Chairman.

(2) STAFFING.—The Office established under this subsection shall be staffed sufficiently to carry out fully the requirements of this section. The staff shall include persons with knowledge of and expertise in corporate, municipal, and structured debt finance.

(3) COMMISSION EXAMINATIONS.—

(A) ANNUAL EXAMINATIONS REQUIRED.—The Office shall conduct an examination of each nationally recognized statistical rating organization at least annually.

(B) CONDUCT OF EXAMINATIONS.—Each examination under subparagraph (A) shall include a review of—

(i) whether the nationally recognized statistical rating organization conducts business in accordance with the policies, procedures, and rating methodologies of the nationally recognized statistical rating organization;

(ii) the management of conflicts of interest by the nationally recognized statistical rating organization;

(iii) implementation of ethics policies by the nationally recognized statistical rating organization;

(iv) the internal supervisory controls of the nationally recognized statistical rating organization;

(v) the governance of the nationally recognized statistical rating organization;

(vi) the activities of the individual designated by the nationally recognized statistical rating organization under subsection (j)(1);

(vii) the processing of complaints by the nationally recognized statistical rating organization; and

(viii) the policies of the nationally recognized statistical rating organization governing the post-employment activities of former staff of the nationally recognized statistical rating organization.

(C) INSPECTION REPORTS.—The Commission shall make available to the public, in an easily understandable format, an annual report summarizing—

(i) the essential findings of all examinations conducted under subparagraph (A), as deemed appropriate by the Commission;

(ii) the responses by the nationally recognized statistical rating organizations to any material regulatory deficiencies identified by the Commission under clause (i); and

(iii) whether the nationally recognized statistical rating organizations have appropriately addressed the recommendations of the Commission contained in previous reports under this subparagraph.

(4) RULEMAKING AUTHORITY.—The Commission shall—

(A) establish, by rule, fines, and other penalties applicable to any nationally recognized statistical rating organization that violates the requirements of this section and the rules thereunder; and

(B) issue such rules as may be necessary to carry out this section.

(q) TRANSPARENCY OF RATINGS PERFORMANCE.—

(1) RULEMAKING REQUIRED.—The Commission shall, by rule, require that each nationally recognized statistical rating organization publicly disclose information on the initial credit ratings determined by the nationally recognized statistical rating organization for each type of obligor, security, and money

market instrument, and any subsequent changes to such credit ratings, for the purpose of allowing users of credit ratings to evaluate the accuracy of ratings and compare the performance of ratings by different nationally recognized statistical rating organizations.

(2) CONTENT.—The rules of the Commission under this subsection shall require, at a minimum, disclosures that—

(A) are comparable among nationally recognized statistical rating organizations, to allow users of credit ratings to compare the performance of credit ratings across nationally recognized statistical rating organizations;

(B) are clear and informative for investors having a wide range of sophistication who use or might use credit ratings;

(C) include performance information over a range of years and for a variety of types of credit ratings, including for credit ratings withdrawn by the nationally recognized statistical rating organization;

(D) are published and made freely available by the nationally recognized statistical rating organization, on an easily accessible portion of its website, and in writing, when requested;

(E) are appropriate to the business model of a nationally recognized statistical rating organization; and

(F) each nationally recognized statistical rating organization include an attestation with any credit rating it issues affirming that no part of the rating was influenced by any other business activities, that the rating was based solely on the merits of the instruments being rated, and that such rating was an independent evaluation of the risks and merits of the instrument.

(r) CREDIT RATINGS METHODOLOGIES.—The Commission shall prescribe rules, for the protection of investors and in the public interest, with respect to the procedures and methodologies, including qualitative and quantitative data and models, used by nationally recognized statistical rating organizations that require each nationally recognized statistical rating organization—

(1) to ensure that credit ratings are determined using procedures and methodologies, including qualitative and quantitative data and models, that are—

(A) approved by the board of the nationally recognized statistical rating organization, a body performing a function similar to that of a board; and

(B) in accordance with the policies and procedures of the nationally recognized statistical rating organization for the development and modification of credit rating procedures and methodologies;

(2) to ensure that when material changes to credit rating procedures and methodologies (including changes to qualitative and quantitative data and models) are made, that—

(A) the changes are applied consistently to all credit ratings to which the changed procedures and methodologies apply;

(B) to the extent that changes are made to credit rating surveillance procedures and methodologies, the changes are applied to then-current credit ratings by the nationally recognized statistical rating organization within a reasonable time period determined by the Commission, by rule; and

(C) the nationally recognized statistical rating organization publicly discloses the reason for the change; and

(3) to notify users of credit ratings—

(A) of the version of a procedure or methodology, including the qualitative methodology or quantitative inputs, used with respect to a particular credit rating;

(B) when a material change is made to a procedure or methodology, including to a qualitative model or quantitative inputs;

(C) when a significant error is identified in a procedure or methodology, including a qualitative or quantitative model, that may result in credit rating actions; and

(D) of the likelihood of a material change described in subparagraph (B) resulting in a change in current credit ratings.

(s) TRANSPARENCY OF CREDIT RATING METHODOLOGIES AND INFORMATION REVIEWED.—

(1) FORM FOR DISCLOSURES.—The Commission shall require, by rule, each nationally recognized statistical rating organization to prescribe a form to accompany the publication of each credit rating that discloses—

(A) information relating to—

(i) the assumptions underlying the credit rating procedures and methodologies;

(ii) the data that was relied on to determine the credit rating; and

(iii) if applicable, how the nationally recognized statistical rating organization used servicer or remittance reports, and with what frequency, to conduct surveillance of the credit rating; and

(B) information that can be used by investors and other users of credit ratings to better understand credit ratings in each class of credit rating issued by the nationally recognized statistical rating organization.

(2) FORMAT.—The form developed under paragraph (1) shall—

(A) be easy to use and helpful for users of credit ratings to understand the information contained in the report;

(B) require the nationally recognized statistical rating organization to provide the content described in paragraph (3)(B) in a manner that is directly comparable across types of securities; and

(C) be made readily available to users of credit ratings, in electronic or paper form, as the Commission may, by rule, determine.

(3) CONTENT OF FORM.—

(A) QUALITATIVE CONTENT.—Each nationally recognized statistical rating organization shall disclose on the form developed under paragraph (1)—

(i) the credit ratings produced by the nationally recognized statistical rating organization;

(ii) the main assumptions and principles used in constructing procedures and methodologies, including qualitative methodologies and quantitative inputs and assumptions about the correlation of defaults across underlying assets used in rating structured products;

(iii) the potential limitations of the credit ratings, and the types of risks excluded from the credit ratings that the nationally recognized statistical rating organization does not comment on, including liquidity, market, and other risks;

(iv) information on the uncertainty of the credit rating, including—

(I) information on the reliability, accuracy, and quality of the data relied on in determining the credit rating; and

(II) a statement relating to the extent to which data essential to the determination of the credit rating were reliable or limited, including—

(aa) any limits on the scope of historical data; and

(bb) any limits in accessibility to certain documents or other types of information that would have better informed the credit rating;

(v) whether and to what extent third party due diligence services have been used by the nationally recognized statistical rating organization, a description of the information that such third party reviewed in conducting due diligence services, and a description of the findings or conclusions of such third party;

(vi) a description of the data about any obligor, issuer, security, or money market instrument that were relied upon for the purpose of determining the credit rating;

(vii) a statement containing an overall assessment of the quality of information available and considered in producing a rating for an obligor, security, or money market instrument, in relation to the quality of information available to the nationally recognized statistical rating organization in rating similar issuances;

(viii) information relating to conflicts of interest of the nationally recognized statistical rating organization; and

(ix) such additional information as the Commission may require.

(B) QUANTITATIVE CONTENT.—Each nationally recognized statistical rating organization shall disclose on the form developed under this subsection—

(i) an explanation or measure of the potential volatility of the credit rating, including—

(I) any factors that might lead to a change in the credit ratings; and

(II) the magnitude of the change that a user can expect under different market conditions;

(ii) information on the content of the rating, including—

(I) the historical performance of the rating; and

(II) the expected probability of default and the expected loss in the event of default;

(iii) information on the sensitivity of the rating to assumptions made by the nationally recognized statistical rating organization, including—

(I) 5 assumptions made in the ratings process that, without accounting for any other factor, would have the greatest impact on a rating if the assumptions were proven false or inaccurate; and

(II) an analysis, using specific examples, of how each of the 5 assumptions identified under subclause (I) impacts a rating;

(iv) such additional information as may be required by the Commission.

(4) DUE DILIGENCE SERVICES FOR ASSET-BACKED SECURITIES.—

(A) FINDINGS.—The issuer or underwriter of any asset-backed security shall make publicly available the findings and conclusions of any third-party due diligence report obtained by the issuer or underwriter.

(B) CERTIFICATION REQUIRED.—In any case in which third-party due diligence services are employed by a nationally recognized statistical rating organization, an issuer, or an underwriter, the person providing the due diligence services shall provide to any nationally recognized statistical rating organization that produces a rating to which such services relate, written certification, as provided in subparagraph (C).

(C) FORMAT AND CONTENT.—The Commission shall establish the appropriate format and content for the written certifications required under subparagraph (B), to ensure that providers of due diligence services have conducted a thorough review of data, documentation, and other relevant information necessary for a nationally recognized statistical rating organization to provide an accurate rating.

(D) DISCLOSURE OF CERTIFICATION.—The Commission shall adopt rules requiring a nationally recognized statistical rating organization, at the time at which the nationally recognized statistical rating organization produces a rating, to disclose the certification described in subparagraph (B) to the public in a manner that allows the public to determine the adequacy and level of due diligence services provided by a third party.

(t) CORPORATE GOVERNANCE, ORGANIZATION, AND MANAGEMENT OF CONFLICTS OF INTEREST.—

(1) BOARD OF DIRECTORS.—Each nationally recognized statistical rating organization shall have a board of directors.

(2) INDEPENDENT DIRECTORS.—

(A) IN GENERAL.—At least ½ of the board of directors, but not fewer than 2 of the members thereof, shall be independent of the nationally recognized statistical rating agency. A portion of the independent directors shall include users of ratings from a nationally recognized statistical rating organization.

(B) INDEPENDENCE DETERMINATION.—In order to be considered independent for purposes of this subsection, a member of the board of directors of a nationally recognized statistical rating organization—

(i) may not, other than in his or her capacity as a member of the board of directors or any committee thereof—

(I) accept any consulting, advisory, or other compensatory fee from the nationally recognized statistical rating organization; or

(II) be a person associated with the nationally recognized statistical rating organization or with any affiliated company thereof; and

(ii) shall be disqualified from any deliberation involving a specific rating in which the independent board member has a financial interest in the outcome of the rating.

(C) COMPENSATION AND TERM.—The compensation of the independent members of the board of directors of a nationally recognized statistical rating organization shall not be linked to the business performance of the nationally recognized statistical rating organization, and shall be arranged so as to ensure the independence of their judgment. The term of office of the independent directors shall be for a pre-agreed fixed period, not to exceed 5 years, and shall not be renewable.

(3) DUTIES OF BOARD OF DIRECTORS.—In addition to the overall responsibilities of the board of directors, the board shall oversee—

(A) the establishment, maintenance, and enforcement of policies and procedures for determining credit ratings;

(B) the establishment, maintenance, and enforcement of policies and procedures to address, manage, and disclose any conflicts of interest;

(C) the effectiveness of the internal control system with respect to policies and procedures for determining credit ratings; and

(D) the compensation and promotion policies and practices of the nationally recognized statistical rating organization.

(4) TREATMENT OF NRSRO SUBSIDIARIES.—If a nationally recognized statistical rating organization is a subsidiary of a parent entity, the board of the directors of the parent entity may satisfy the requirements of this subsection by assigning to

a committee of such board of directors the duties under paragraph (3), if—

(A) at least ½ of the members of the committee (including the chairperson of the committee) are independent, as defined in this section; and

(B) at least 1 member of the committee is a user of ratings from a nationally recognized statistical rating organization.

(5) EXCEPTION AUTHORITY.—If the Commission finds that compliance with the provisions of this subsection present an unreasonable burden on a small nationally recognized statistical rating organization, the Commission may permit the nationally recognized statistical rating organization to delegate such responsibilities to a committee that includes at least one individual who is a user of ratings of a nationally recognized statistical rating organization.

(u) DUTY TO REPORT TIPS ALLEGING MATERIAL VIOLATIONS OF LAW.—

(1) DUTY TO REPORT.—Each nationally recognized statistical rating organization shall refer to the appropriate law enforcement or regulatory authorities any information that the nationally recognized statistical rating organization receives from a third party and finds credible that alleges that an issuer of securities rated by the nationally recognized statistical rating organization has committed or is committing a material violation of law that has not been adjudicated by a Federal or State court.

(2) RULE OF CONSTRUCTION.—Nothing in paragraph (1) may be construed to require a nationally recognized statistical rating organization to verify the accuracy of the information described in paragraph (1).

(v) INFORMATION FROM SOURCES OTHER THAN THE ISSUER.—In producing a credit rating, a nationally recognized statistical rating organization shall consider information about an issuer that the nationally recognized statistical rating organization has, or receives from a source other than the issuer or underwriter, that the nationally recognized statistical rating organization finds credible and potentially significant to a rating decision.

(w) DATA STANDARDS FOR INFORMATION REQUIRED TO BE SUBMITTED OR PUBLISHED UNDER THIS SECTION.—

(1) REQUIREMENT.—The Commission shall, by rule, adopt data standards for all collections of information required to be submitted or published by a nationally recognized statistical rating organization under this section.

(2) CONSISTENCY.—The data standards required under paragraph (1) shall incorporate, and ensure compatibility with (to the extent feasible), all applicable data standards established in the rules promulgated under section 124 of the Financial Stability Act of 2010, including, to the extent practicable, by having the characteristics described in clauses (i) through (vi) of subsection (c)(1)(B) of such section 124.

SEC. 15F. [78o–10] REGISTRATION AND REGULATION OF SECURITY-BASED SWAP DEALERS AND MAJOR SECURITY-BASED SWAP PARTICIPANTS.

(a) REGISTRATION.—

(1) SECURITY-BASED SWAP DEALERS.—It shall be unlawful for any person to act as a security-based swap dealer unless the person is registered as a security-based swap dealer with the Commission.

(2) MAJOR SECURITY-BASED SWAP PARTICIPANTS.—It shall be unlawful for any person to act as a major security-based swap participant unless the person is registered as a major security-based swap participant with the Commission.

(b) REQUIREMENTS.—

(1) IN GENERAL.—A person shall register as a security-based swap dealer or major security-based swap participant by filing a registration application with the Commission.

(2) CONTENTS.—

(A) IN GENERAL.—The application shall be made in such form and manner as prescribed by the Commission, and shall contain such information, as the Commission considers necessary concerning the business in which the applicant is or will be engaged.

(B) CONTINUAL REPORTING.—A person that is registered as a security-based swap dealer or major security-based swap participant shall continue to submit to the Commission reports that contain such information pertaining to the business of the person as the Commission may require.

(3) EXPIRATION.—Each registration under this section shall expire at such time as the Commission may prescribe by rule or regulation.

(4) RULES.—Except as provided in subsections (d) and (e), the Commission may prescribe rules applicable to security-based swap dealers and major security-based swap participants, including rules that limit the activities of non-bank security-based swap dealers and major security-based swap participants.

(5) TRANSITION.—Not later than 1 year after the date of enactment of the Wall Street Transparency and Accountability Act of 2010, the Commission shall issue rules under this section to provide for the registration of security-based swap dealers and major security-based swap participants.

(6) STATUTORY DISQUALIFICATION.—Except to the extent otherwise specifically provided by rule, regulation, or order of the Commission, it shall be unlawful for a security-based swap dealer or a major security-based swap participant to permit any person associated with a security-based swap dealer or a major security-based swap participant who is subject to a statutory disqualification to effect or be involved in effecting security-based swaps on behalf of the security-based swap dealer or major security-based swap participant, if the security-based swap dealer or major security-based swap participant knew, or in the exercise of reasonable care should have known, of the statutory disqualification.

(c) DUAL REGISTRATION.—

(1) SECURITY-BASED SWAP DEALER.—Any person that is required to be registered as a security-based swap dealer under this section shall register with the Commission, regardless of whether the person also is registered with the Commodity Futures Trading Commission as a swap dealer.

(2) MAJOR SECURITY-BASED SWAP PARTICIPANT.—Any person that is required to be registered as a major security-based swap participant under this section shall register with the Commission, regardless of whether the person also is registered with the Commodity Futures Trading Commission as a major swap participant.

(d) RULEMAKING.—

(1) IN GENERAL.—The Commission shall adopt rules for persons that are registered as security-based swap dealers or major security-based swap participants under this section.

(2) EXCEPTION FOR PRUDENTIAL REQUIREMENTS.—

(A) IN GENERAL.—The Commission may not prescribe rules imposing prudential requirements on security-based swap dealers or major security-based swap participants for which there is a prudential regulator.

(B) APPLICABILITY.—Subparagraph (A) does not limit the authority of the Commission to prescribe rules as directed under this section.

(e) CAPITAL AND MARGIN REQUIREMENTS.—

(1) IN GENERAL.—

(A) SECURITY-BASED SWAP DEALERS AND MAJOR SECURITY-BASED SWAP PARTICIPANTS THAT ARE BANKS.—Each registered security-based swap dealer and major security-based swap participant for which there is not a prudential regulator shall meet such minimum capital requirements and minimum initial and variation margin requirements as the prudential regulator shall by rule or regulation prescribe under paragraph (2)(A).

(B) SECURITY-BASED SWAP DEALERS AND MAJOR SECURITY-BASED SWAP PARTICIPANTS THAT ARE NOT BANKS.—Each registered security-based swap dealer and major security-based swap participant for which there is not a prudential regulator shall meet such minimum capital requirements and minimum initial and variation margin requirements as the Commission shall by rule or regulation prescribe under paragraph (2)(B).

(2) RULES.—

(A) SECURITY-BASED SWAP DEALERS AND MAJOR SECURITY-BASED SWAP PARTICIPANTS THAT ARE BANKS.—The prudential regulators, in consultation with the Commission and the Commodity Futures Trading Commission, shall adopt rules for security-based swap dealers and major security-based swap participants, with respect to their activities as a swap dealer or major swap participant, for which there is a prudential regulator imposing—

(i) capital requirements; and

(ii) both initial and variation margin requirements on all security-based swaps that are not cleared by a registered clearing agency.

(B) SECURITY-BASED SWAP DEALERS AND MAJOR SECURITY-BASED SWAP PARTICIPANTS THAT ARE NOT BANKS.—The Commission shall adopt rules for security-based swap dealers and major security-based swap participants, with respect to their activities as a swap dealer or major swap participant, for which there is not a prudential regulator imposing—

(i) capital requirements; and

(ii) both initial and variation margin requirements on all swaps that are not cleared by a registered clearing agency.

(C) CAPITAL.—In setting capital requirements for a person that is designated as a security-based swap dealer or a major security-based swap participant for a single type or single class or category of security-based swap or activities, the prudential regulator and the Commission shall take into account the risks associated with other types of security-based swaps or classes of security-based swaps or categories of security-based swaps engaged in and the other activities conducted by that person that are not otherwise subject to regulation applicable to that person by virtue of the status of the person.

(3) STANDARDS FOR CAPITAL AND MARGIN.—

(A) IN GENERAL.—To offset the greater risk to the security-based swap dealer or major security-based swap participant and the financial system arising from the use of security-based swaps that are not cleared, the requirements imposed under paragraph (2) shall —

(i) help ensure the safety and soundness of the security-based swap dealer or major security-based swap participant; and

(ii) be appropriate for the risk associated with the non-cleared security-based swaps held as a security-based swap dealer or major security-based swap participant.

(B) RULE OF CONSTRUCTION.—

(i) IN GENERAL.—Nothing in this section shall limit, or be construed to limit, the authority—

(I) of the Commission to set financial responsibility rules for a broker or dealer registered pursuant to section 15(b) (except for section 15(b)(11) thereof) in accordance with section 15(c)(3); or

(II) of the Commodity Futures Trading Commission to set financial responsibility rules for a futures commission merchant or introducing broker registered pursuant to section 4f(a) of the Commodity Exchange Act (except for section 4f(a)(3) thereof) in accordance with section 4f(b) of the Commodity Exchange Act.

(ii) FUTURES COMMISSION MERCHANTS AND OTHER DEALERS.—A futures commission merchant, intro-

ducing broker, broker, or dealer shall maintain sufficient capital to comply with the stricter of any applicable capital requirements to which such futures commission merchant, introducing broker, broker, or dealer is subject to under this title or the Commodity Exchange Act.

(C) MARGIN REQUIREMENTS.—In prescribing margin requirements under this subsection, the prudential regulator with respect to security-based swap dealers and major security-based swap participants that are depository institutions, and the Commission with respect to security-based swap dealers and major security-based swap participants that are not depository institutions shall permit the use of noncash collateral, as the regulator or the Commission determines to be consistent with—

(i) preserving the financial integrity of markets trading security-based swaps; and

(ii) preserving the stability of the United States financial system.

(D) COMPARABILITY OF CAPITAL AND MARGIN REQUIREMENTS.—

(i) IN GENERAL.—The prudential regulators, the Commission, and the Securities and Exchange Commission shall periodically (but not less frequently than annually) consult on minimum capital requirements and minimum initial and variation margin requirements.

(ii) COMPARABILITY.—The entities described in clause (i) shall, to the maximum extent practicable, establish and maintain comparable minimum capital requirements and minimum initial and variation margin requirements, including the use of noncash collateral, for—

(I) security-based swap dealers; and

(II) major security-based swap participants.

(4) APPLICABILITY WITH RESPECT TO COUNTERPARTIES.—The requirements of paragraphs (2)(A)(ii) and (2)(B)(ii) shall not apply to a security-based swap in which a counterparty qualifies for an exception under section 3C(g)(1) or satisfies the criteria in section 3C(g)(4).

(f) REPORTING AND RECORDKEEPING.—

(1) IN GENERAL.—Each registered security-based swap dealer and major security-based swap participant—

(A) shall make such reports as are required by the Commission, by rule or regulation, regarding the transactions and positions and financial condition of the registered security-based swap dealer or major security-based swap participant;

(B)(i) for which there is a prudential regulator, shall keep books and records of all activities related to the business as a security-based swap dealer or major security-based swap participant in such form and manner and for such period as may be prescribed by the Commission by rule or regulation; and

(ii) for which there is no prudential regulator, shall keep books and records in such form and manner and for such period as may be prescribed by the Commission by rule or regulation; and

(C) shall keep books and records described in subparagraph (B) open to inspection and examination by any representative of the Commission.

(2) RULES.—The Commission shall adopt rules governing reporting and recordkeeping for security-based swap dealers and major security-based swap participants.

(g) DAILY TRADING RECORDS.—

(1) IN GENERAL.—Each registered security-based swap dealer and major security-based swap participant shall maintain daily trading records of the security-based swaps of the registered security-based swap dealer and major security-based swap participant and all related records (including related cash or forward transactions) and recorded communications, including electronic mail, instant messages, and recordings of telephone calls, for such period as may be required by the Commission by rule or regulation.

(2) INFORMATION REQUIREMENTS.—The daily trading records shall include such information as the Commission shall require by rule or regulation.

(3) COUNTERPARTY RECORDS.—Each registered security-based swap dealer and major security-based swap participant shall maintain daily trading records for each counterparty in a manner and form that is identifiable with each security-based swap transaction.

(4) AUDIT TRAIL.—Each registered security-based swap dealer and major security-based swap participant shall maintain a complete audit trail for conducting comprehensive and accurate trade reconstructions.

(5) RULES.—The Commission shall adopt rules governing daily trading records for security-based swap dealers and major security-based swap participants.

(h) BUSINESS CONDUCT STANDARDS.—

(1) IN GENERAL.—Each registered security-based swap dealer and major security-based swap participant shall conform with such business conduct standards as prescribed in paragraph (3) and as may be prescribed by the Commission by rule or regulation that relate to—

(A) fraud, manipulation, and other abusive practices involving security-based swaps (including security-based swaps that are offered but not entered into);

(B) diligent supervision of the business of the registered security-based swap dealer and major security-based swap participant;

(C) adherence to all applicable position limits; and

(D) such other matters as the Commission determines to be appropriate.

(2) RESPONSIBILITIES WITH RESPECT TO SPECIAL ENTITIES.—

(A) ADVISING SPECIAL ENTITIES.—A security-based swap dealer or major security-based swap participant that acts as an advisor to special entity regarding a security-

based swap shall comply with the requirements of paragraph (4) with respect to such special entity.

(B) ENTERING OF SECURITY-BASED SWAPS WITH RESPECT TO SPECIAL ENTITIES.—A security-based swap dealer that enters into or offers to enter into security-based swap with a special entity shall comply with the requirements of paragraph (5) with respect to such special entity.

(C) SPECIAL ENTITY DEFINED.—For purposes of this subsection, the term "special entity" means—

(i) a Federal agency;

(ii) a State, State agency, city, county, municipality, or other political subdivision of a State or;

(iii) any employee benefit plan, as defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);

(iv) any governmental plan, as defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002); or

(v) any endowment, including an endowment that is an organization described in section 501(c)(3) of the Internal Revenue Code of 1986.

(3) BUSINESS CONDUCT REQUIREMENTS.—Business conduct requirements adopted by the Commission shall—

(A) establish a duty for a security-based swap dealer or major security-based swap participant to verify that any counterparty meets the eligibility standards for an eligible contract participant;

(B) require disclosure by the security-based swap dealer or major security-based swap participant to any counterparty to the transaction (other than a security-based swap dealer, major security-based swap participant, security-based swap dealer, or major security-based swap participant) of—

(i) information about the material risks and characteristics of the security-based swap;

(ii) any material incentives or conflicts of interest that the security-based swap dealer or major security-based swap participant may have in connection with the security-based swap; and

(iii)(I) for cleared security-based swaps, upon the request of the counterparty, receipt of the daily mark of the transaction from the appropriate derivatives clearing organization; and

(II) for uncleared security-based swaps, receipt of the daily mark of the transaction from the security-based swap dealer or the major security-based swap participant;

(C) establish a duty for a security-based swap dealer or major security-based swap participant to communicate in a fair and balanced manner based on principles of fair dealing and good faith; and

(D) establish such other standards and requirements as the Commission may determine are appropriate in the

public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act.

(4) SPECIAL REQUIREMENTS FOR SECURITY-BASED SWAP DEALERS ACTING AS ADVISORS.—

(A) IN GENERAL.—It shall be unlawful for a security-based swap dealer or major security-based swap participant—

(i) to employ any device, scheme, or artifice to defraud any special entity or prospective customer who is a special entity;

(ii) to engage in any transaction, practice, or course of business that operates as a fraud or deceit on any special entity or prospective customer who is a special entity; or

(iii) to engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative.

(B) DUTY.—Any security-based swap dealer that acts as an advisor to a special entity shall have a duty to act in the best interests of the special entity.

(C) REASONABLE EFFORTS.—Any security-based swap dealer that acts as an advisor to a special entity shall make reasonable efforts to obtain such information as is necessary to make a reasonable determination that any security-based swap recommended by the security-based swap dealer is in the best interests of the special entity, including information relating to—

(i) the financial status of the special entity;

(ii) the tax status of the special entity;

(iii) the investment or financing objectives of the special entity; and

(iv) any other information that the Commission may prescribe by rule or regulation.

(5) SPECIAL REQUIREMENTS FOR SECURITY-BASED SWAP DEALERS AS COUNTERPARTIES TO SPECIAL ENTITIES.—

(A) IN GENERAL.—Any security-based swap dealer or major security-based swap participant that offers to or enters into a security-based swap with a special entity shall—

(i) comply with any duty established by the Commission for a security-based swap dealer or major security-based swap participant, with respect to a counterparty that is an eligible contract participant within the meaning of subclause (I) or (II) of clause (vii) of section 1a(18) of the Commodity Exchange Act, that requires the security-based swap dealer or major security-based swap participant to have a reasonable basis to believe that the counterparty that is a special entity has an independent representative that—

(I) has sufficient knowledge to evaluate the transaction and risks;

(II) is not subject to a statutory disqualification;

(III) is independent of the security-based swap dealer or major security-based swap participant;

(IV) undertakes a duty to act in the best interests of the counterparty it represents;

(V) makes appropriate disclosures;

(VI) will provide written representations to the special entity regarding fair pricing and the appropriateness of the transaction; and

(VII) in the case of employee benefit plans subject to the Employee Retirement Income Security act of 1974, is a fiduciary as defined in section 3 of that Act (29 U.S.C. 1002); and

(ii) before the initiation of the transaction, disclose to the special entity in writing the capacity in which the security-based swap dealer is acting.

(B) COMMISSION AUTHORITY.—The Commission may establish such other standards and requirements under this paragraph as the Commission may determine are appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act.

(6) RULES.—The Commission shall prescribe rules under this subsection governing business conduct standards for security-based swap dealers and major security-based swap participants.

(7) APPLICABILITY.—This subsection shall not apply with respect to a transaction that is—

(A) initiated by a special entity on an exchange or security-based swaps execution facility; and

(B) the security-based swap dealer or major security-based swap participant does not know the identity of the counterparty to the transaction."

(i) DOCUMENTATION STANDARDS.—

(1) IN GENERAL.—Each registered security-based swap dealer and major security-based swap participant shall conform with such standards as may be prescribed by the Commission, by rule or regulation, that relate to timely and accurate confirmation, processing, netting, documentation, and valuation of all security-based swaps.

(2) RULES.—The Commission shall adopt rules governing documentation standards for security-based swap dealers and major security-based swap participants.

(j) DUTIES.—Each registered security-based swap dealer and major security-based swap participant shall, at all times, comply with the following requirements:

(1) MONITORING OF TRADING.—The security-based swap dealer or major security-based swap participant shall monitor its trading in security-based swaps to prevent violations of applicable position limits.

(2) RISK MANAGEMENT PROCEDURES.—The security-based swap dealer or major security-based swap participant shall establish robust and professional risk management systems adequate for managing the day-to-day business of the security-based swap dealer or major security-based swap participant.

(3) DISCLOSURE OF GENERAL INFORMATION.—The security-based swap dealer or major security-based swap participant shall disclose to the Commission and to the prudential regulator for the security-based swap dealer or major security-based swap participant, as applicable, information concerning—

(A) terms and conditions of its security-based swaps;

(B) security-based swap trading operations, mechanisms, and practices;

(C) financial integrity protections relating to security-based swaps; and

(D) other information relevant to its trading in security-based swaps.

(4) ABILITY TO OBTAIN INFORMATION.—The security-based swap dealer or major security-based swap participant shall—

(A) establish and enforce internal systems and procedures to obtain any necessary information to perform any of the functions described in this section; and

(B) provide the information to the Commission and to the prudential regulator for the security-based swap dealer or major security-based swap participant, as applicable, on request.

(5) CONFLICTS OF INTEREST.—The security-based swap dealer and major security-based swap participant shall implement conflict-of-interest systems and procedures that—

(A) establish structural and institutional safeguards to ensure that the activities of any person within the firm relating to research or analysis of the price or market for any security-based swap or acting in a role of providing clearing activities or making determinations as to accepting clearing customers are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of persons whose involvement in pricing, trading, or clearing activities might potentially bias their judgment or supervision and contravene the core principles of open access and the business conduct standards described in this title; and

(B) address such other issues as the Commission determines to be appropriate.

(6) ANTITRUST CONSIDERATIONS.—Unless necessary or appropriate to achieve the purposes of this title, the security-based swap dealer or major security-based swap participant shall not—

(A) adopt any process or take any action that results in any unreasonable restraint of trade; or

(B) impose any material anticompetitive burden on trading or clearing.

(7) RULES.—The Commission shall prescribe rules under this subsection governing duties of security-based swap dealers and major security-based swap participants.

(k) DESIGNATION OF CHIEF COMPLIANCE OFFICER.—

(1) IN GENERAL.—Each security-based swap dealer and major security-based swap participant shall designate an individual to serve as a chief compliance officer.

(2) DUTIES.—The chief compliance officer shall—

(A) report directly to the board or to the senior officer of the security-based swap dealer or major security-based swap participant;

(B) review the compliance of the security-based swap dealer or major security-based swap participant with respect to the security-based swap dealer and major security-based swap participant requirements described in this section;

(C) in consultation with the board of directors, a body performing a function similar to the board, or the senior officer of the organization, resolve any conflicts of interest that may arise;

(D) be responsible for administering each policy and procedure that is required to be established pursuant to this section;

(E) ensure compliance with this title (including regulations) relating to security-based swaps, including each rule prescribed by the Commission under this section;

(F) establish procedures for the remediation of noncompliance issues identified by the chief compliance officer through any—

(i) compliance office review;

(ii) look-back;

(iii) internal or external audit finding;

(iv) self-reported error; or

(v) validated complaint; and

(G) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

(3) ANNUAL REPORTS.—

(A) IN GENERAL.—In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—

(i) the compliance of the security-based swap dealer or major swap participant with respect to this title (including regulations); and

(ii) each policy and procedure of the security-based swap dealer or major security-based swap participant of the chief compliance officer (including the code of ethics and conflict of interest policies).

(B) REQUIREMENTS.—A compliance report under subparagraph (A) shall—

(i) accompany each appropriate financial report of the security-based swap dealer or major security-based swap participant that is required to be furnished to the Commission pursuant to this section; and

(ii) include a certification that, under penalty of law, the compliance report is accurate and complete.

(l) ENFORCEMENT AND ADMINISTRATIVE PROCEEDING AUTHORITY.—

(1) PRIMARY ENFORCEMENT AUTHORITY.—

(A) SECURITIES AND EXCHANGE COMMISSION.—Except as provided in subparagraph (B), (C), or (D), the Commission shall have primary authority to enforce subtitle B, and the amendments made by subtitle B of the Wall Street Transparency and Accountability Act of 2010, with respect to any person.

(B) PRUDENTIAL REGULATORS.—The prudential regulators shall have exclusive authority to enforce the provisions of subsection (e) and other prudential requirements of this title (including risk management standards), with respect to security-based swap dealers or major security-based swap participants for which they are the prudential regulator.

(C) REFERRAL.—

(i) VIOLATIONS OF NONPRUDENTIAL REQUIREMENTS.—If the appropriate Federal banking agency for security-based swap dealers or major security-based swap participants that are depository institutions has cause to believe that such security-based swap dealer or major security-based swap participant may have engaged in conduct that constitutes a violation of the nonprudential requirements of this section or rules adopted by the Commission thereunder, the agency may recommend in writing to the Commission that the Commission initiate an enforcement proceeding as authorized under this title. The recommendation shall be accompanied by a written explanation of the concerns giving rise to the recommendation.

(ii) VIOLATIONS OF PRUDENTIAL REQUIREMENTS.—If the Commission has cause to believe that a securities-based swap dealer or major securities-based swap participant that has a prudential regulator may have engaged in conduct that constitute a violation of the prudential requirements of subsection (e) or rules adopted thereunder, the Commission may recommend in writing to the prudential regulator that the prudential regulator initiate an enforcement proceeding as authorized under this title. The recommendation shall be accompanied by a written explanation of the concerns giving rise to the recommendation.

(D) BACKSTOP ENFORCEMENT AUTHORITY.—

(i) INITIATION OF ENFORCEMENT PROCEEDING BY PRUDENTIAL REGULATOR.—If the Commission does not initiate an enforcement proceeding before the end of the 90-day period beginning on the date on which the Commission receives a written report under subsection (C)(i), the prudential regulator may initiate an enforcement proceeding.

(ii) INITIATION OF ENFORCEMENT PROCEEDING BY COMMISSION.—If the prudential regulator does not initiate an enforcement proceeding before the end of the 90-day period beginning on the date on which the prudential regulator receives a written report under sub-

section (C)(ii), the Commission may initiate an enforcement proceeding.

(2) CENSURE, DENIAL, SUSPENSION; NOTICE AND HEARING.—The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, or revoke the registration of any security-based swap dealer or major security-based swap participant that has registered with the Commission pursuant to subsection (b) if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, or revocation is in the public interest and that such security-based swap dealer or major security-based swap participant, or any person associated with such security-based swap dealer or major security-based swap participant effecting or involved in effecting transactions in security-based swaps on behalf of such security-based swap dealer or major security-based swap participant, whether prior or subsequent to becoming so associated—

(A) has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), or (E) of paragraph (4) of section 15(b);

(B) has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within 10 years of the commencement of the proceedings under this subsection;

(C) is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4);

(D) is subject to an order or a final order specified in subparagraph (F) or (H), respectively, of such paragraph (4); or

(E) has been found by a foreign financial regulatory authority to have committed or omitted any act, or violated any foreign statute or regulation, enumerated in subparagraph (G) of such paragraph (4).

(3) ASSOCIATED PERSONS.—With respect to any person who is associated, who is seeking to become associated, or, at the time of the alleged misconduct, who was associated or was seeking to become associated with a security-based swap dealer or major security-based swap participant for the purpose of effecting or being involved in effecting security-based swaps on behalf of such security-based swap dealer or major security-based swap participant, the Commission, by order, shall censure, place limitations on the activities or functions of such person, or suspend for a period not exceeding 12 months, or bar such person from being associated with a security-based swap dealer or major security-based swap participant, if the Commission finds, on the record after notice and opportunity for a hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person—

(A) has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), or (E) of paragraph (4) of section 15(b);

(B) has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within 10 years of the commencement of the proceedings under this subsection;

(C) is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4);

(D) is subject to an order or a final order specified in subparagraph (F) or (H), respectively, of such paragraph (4); or

(E) has been found by a foreign financial regulatory authority to have committed or omitted any act, or violated any foreign statute or regulation, enumerated in subparagraph (G) of such paragraph (4).

(4) UNLAWFUL CONDUCT.—It shall be unlawful—

(A) for any person as to whom an order under paragraph (3) is in effect, without the consent of the Commission, willfully to become, or to be, associated with a security-based swap dealer or major security-based swap participant in contravention of such order; or

(B) for any security-based swap dealer or major security-based swap participant to permit such a person, without the consent of the Commission, to become or remain a person associated with the security-based swap dealer or major security-based swap participant in contravention of such order, if such security-based swap dealer or major security-based swap participant knew, or in the exercise of reasonable care should have known, of such order.

SEC. 15G. [78o–11] CREDIT RISK RETENTION.

(a) DEFINITIONS.—In this section—

(1) the term "Federal banking agencies" means the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation;

(2) the term "insured depository institution" has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c));

(3) the term "securitizer" means—

(A) an issuer of an asset-backed security; or

(B) a person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer; and

(4) the term "originator" means a person who—

(A) through the extension of credit or otherwise, creates a financial asset that collateralizes an asset-backed security; and

(B) sells an asset directly or indirectly to a securitizer.

(b) REGULATIONS REQUIRED.—

(1) IN GENERAL.—Not later than 270 days after the date of enactment of this section, the Federal banking agencies and the Commission shall jointly prescribe regulations to require any securitizer to retain an economic interest in a portion of the credit risk for any asset that the securitizer, through the issuance of an asset-backed security, transfers, sells, or conveys to a third party.

(2) RESIDENTIAL MORTGAGES.—Not later than 270 days after the date of the enactment of this section, the Federal

banking agencies, the Commission, the Secretary of Housing and Urban Development, and the Federal Housing Finance Agency, shall jointly prescribe regulations to require any securitizer to retain an economic interest in a portion of the credit risk for any residential mortgage asset that the securitizer, through the issuance of an asset-backed security, transfers, sells, or conveys to a third party.

(c) STANDARDS FOR REGULATIONS.—

(1) STANDARDS.—The regulations prescribed under subsection (b) shall—

(A) prohibit a securitizer from directly or indirectly hedging or otherwise transferring the credit risk that the securitizer is required to retain with respect to an asset;

(B) require a securitizer to retain—

(i) not less than 5 percent of the credit risk for any asset—

(I) that is not a qualified residential mortgage that is transferred, sold, or conveyed through the issuance of an asset-backed security by the securitizer; or

(II) that is a qualified residential mortgage that is transferred, sold, or conveyed through the issuance of an asset-backed security by the securitizer, if 1 or more of the assets that collateralize the asset-backed security are not qualified residential mortgages; or

(ii) less than 5 percent of the credit risk for an asset that is not a qualified residential mortgage that is transferred, sold, or conveyed through the issuance of an asset-backed security by the securitizer, if the originator of the asset meets the underwriting standards prescribed under paragraph (2)(B);

(C) specify—

(i) the permissible forms of risk retention for purposes of this section;

(ii) the minimum duration of the risk retention required under this section; and

(iii) that a securitizer is not required to retain any part of the credit risk for an asset that is transferred, sold or conveyed through the issuance of an asset-backed security by the securitizer, if all of the assets that collateralize the asset-backed security are qualified residential mortgages;

(D) apply, regardless of whether the securitizer is an insured depository institution;

(E) with respect to a commercial mortgage, specify the permissible types, forms, and amounts of risk retention that would meet the requirements of subparagraph (B), which in the determination of the Federal banking agencies and the Commission may include—

(i) retention of a specified amount or percentage of the total credit risk of the asset;

(ii) retention of the first-loss position by a third-party purchaser that specifically negotiates for the

purchase of such first loss position, holds adequate financial resources to back losses, provides due diligence on all individual assets in the pool before the issuance of the asset-backed securities, and meets the same standards for risk retention as the Federal banking agencies and the Commission require of the securitizer;

(iii) a determination by the Federal banking agencies and the Commission that the underwriting standards and controls for the asset are adequate; and

(iv) provision of adequate representations and warranties and related enforcement mechanisms; and

(F) establish appropriate standards for retention of an economic interest with respect to collateralized debt obligations, securities collateralized by collateralized debt obligations, and similar instruments collateralized by other asset-backed securities; and

(G) provide for—

(i) a total or partial exemption of any securitization, as may be appropriate in the public interest and for the protection of investors;

(ii) a total or partial exemption for the securitization of an asset issued or guaranteed by the United States, or an agency of the United States, as the Federal banking agencies and the Commission jointly determine appropriate in the public interest and for the protection of investors, except that, for purposes of this clause, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation are not agencies of the United States;

(iii) a total or partial exemption for any asset-backed security that is a security issued or guaranteed by any State of the United States, or by any political subdivision of a State or territory, or by any public instrumentality of a State or territory that is exempt from the registration requirements of the Securities Act of 1933 by reason of section 3(a)(2) of that Act (15 U.S.C. 77c(a)(2)), or a security defined as a qualified scholarship funding bond in section 150(d)(2) of the Internal Revenue Code of 1986, as may be appropriate in the public interest and for the protection of investors; and

(iv) the allocation of risk retention obligations between a securitizer and an originator in the case of a securitizer that purchases assets from an originator, as the Federal banking agencies and the Commission jointly determine appropriate.

(2) ASSET CLASSES.—

(A) ASSET CLASSES.—The regulations prescribed under subsection (b) shall establish asset classes with separate rules for securitizers of different classes of assets, including residential mortgages, commercial mortgages, commercial loans, auto loans, and any other class of assets that

the Federal banking agencies and the Commission deem appropriate.

(B) CONTENTS.—For each asset class established under subparagraph (A), the regulations prescribed under subsection (b) shall include underwriting standards established by the Federal banking agencies that specify the terms, conditions, and characteristics of a loan within the asset class that indicate a low credit risk with respect to the loan.

(d) ORIGINATORS.—In determining how to allocate risk retention obligations between a securitizer and an originator under subsection (c)(1)(E)(iv), the Federal banking agencies and the Commission shall—

(1) reduce the percentage of risk retention obligations required of the securitizer by the percentage of risk retention obligations required of the originator; and

(2) consider—

(A) whether the assets sold to the securitizer have terms, conditions, and characteristics that reflect low credit risk;

(B) whether the form or volume of transactions in securitization markets creates incentives for imprudent origination of the type of loan or asset to be sold to the securitizer; and

(C) the potential impact of the risk retention obligations on the access of consumers and businesses to credit on reasonable terms, which may not include the transfer of credit risk to a third party.

(e) EXEMPTIONS, EXCEPTIONS, AND ADJUSTMENTS.—

(1) IN GENERAL.—The Federal banking agencies and the Commission may jointly adopt or issue exemptions, exceptions, or adjustments to the rules issued under this section, including exemptions, exceptions, or adjustments for classes of institutions or assets relating to the risk retention requirement and the prohibition on hedging under subsection (c)(1).

(2) APPLICABLE STANDARDS.—Any exemption, exception, or adjustment adopted or issued by the Federal banking agencies and the Commission under this paragraph shall—

(A) help ensure high quality underwriting standards for the securitizers and originators of assets that are securitized or available for securitization; and

(B) encourage appropriate risk management practices by the securitizers and originators of assets, improve the access of consumers and businesses to credit on reasonable terms, or otherwise be in the public interest and for the protection of investors.

(3) CERTAIN INSTITUTIONS AND PROGRAMS EXEMPT.—

(A) FARM CREDIT SYSTEM INSTITUTIONS.—Notwithstanding any other provision of this section, the requirements of this section shall not apply to any loan or other financial asset made, insured, guaranteed, or purchased by any institution that is subject to the supervision of the Farm Credit Administration, including the Federal Agricultural Mortgage Corporation.

(B) OTHER FEDERAL PROGRAMS.—This section shall not apply to any residential, multifamily, or health care facility mortgage loan asset, or securitization based directly or indirectly on such an asset, which is insured or guaranteed by the United States or an agency of the United States. For purposes of this subsection, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Federal home loan banks shall not be considered an agency of the United States.

(4) EXEMPTION FOR QUALIFIED RESIDENTIAL MORTGAGES.—

(A) IN GENERAL.—The Federal banking agencies, the Commission, the Secretary of Housing and Urban Development, and the Director of the Federal Housing Finance Agency shall jointly issue regulations to exempt qualified residential mortgages from the risk retention requirements of this subsection.

(B) QUALIFIED RESIDENTIAL MORTGAGE.—The Federal banking agencies, the Commission, the Secretary of Housing and Urban Development, and the Director of the Federal Housing Finance Agency shall jointly define the term "qualified residential mortgage" for purposes of this subsection, taking into consideration underwriting and product features that historical loan performance data indicate result in a lower risk of default, such as—

(i) documentation and verification of the financial resources relied upon to qualify the mortgagor;

(ii) standards with respect to—

(I) the residual income of the mortgagor after all monthly obligations;

(II) the ratio of the housing payments of the mortgagor to the monthly income of the mortgagor;

(III) the ratio of total monthly installment payments of the mortgagor to the income of the mortgagor;

(iii) mitigating the potential for payment shock on adjustable rate mortgages through product features and underwriting standards;

(iv) mortgage guarantee insurance or other types of insurance or credit enhancement obtained at the time of origination, to the extent such insurance or credit enhancement reduces the risk of default; and

(v) prohibiting or restricting the use of balloon payments, negative amortization, prepayment penalties, interest-only payments, and other features that have been demonstrated to exhibit a higher risk of borrower default.

(C) LIMITATION ON DEFINITION.—The Federal banking agencies, the Commission, the Secretary of Housing and Urban Development, and the Director of the Federal Housing Finance Agency in defining the term "qualified residential mortgage", as required by subparagraph (B), shall define that term to be no broader than the definition "qualified mortgage" as the term is defined under section

129C(c)(2) of the Truth in Lending Act, as amended by the Consumer Financial Protection Act of 2010, and regulations adopted thereunder.

(5) CONDITION FOR QUALIFIED RESIDENTIAL MORTGAGE EXEMPTION.—The regulations issued under paragraph (4) shall provide that an asset-backed security that is collateralized by tranches of other asset-backed securities shall not be exempt from the risk retention requirements of this subsection.

(6) CERTIFICATION.—The Commission shall require an issuer to certify, for each issuance of an asset-backed security collateralized exclusively by qualified residential mortgages, that the issuer has evaluated the effectiveness of the internal supervisory controls of the issuer with respect to the process for ensuring that all assets that collateralize the asset-backed security are qualified residential mortgages.

(f) ENFORCEMENT.—The regulations issued under this section shall be enforced by—

(1) the appropriate Federal banking agency, with respect to any securitizer that is an insured depository institution; and

(2) the Commission, with respect to any securitizer that is not an insured depository institution.

(g) AUTHORITY OF COMMISSION.—The authority of the Commission under this section shall be in addition to the authority of the Commission to otherwise enforce the securities laws.

(h) AUTHORITY TO COORDINATE ON RULEMAKING.—The Chairperson of the Financial Stability Oversight Council shall coordinate all joint rulemaking required under this section.

(i) EFFECTIVE DATE OF REGULATIONS.—The regulations issued under this section shall become effective—

(1) with respect to securitizers and originators of asset-backed securities backed by residential mortgages, 1 year after the date on which final rules under this section are published in the Federal Register; and

(2) with respect to securitizers and originators of all other classes of asset-backed securities, 2 years after the date on which final rules under this section are published in the Federal Register.

SEC. 16. [78p] DIRECTORS, OFFICERS, AND PRINCIPAL STOCKHOLDERS.

(a) DISCLOSURES REQUIRED.—

(1) DIRECTORS, OFFICERS, AND PRINCIPAL STOCKHOLDERS REQUIRED TO FILE.—Every person who is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security (other than an exempted security) which is registered pursuant to section 12, or who is a director or an officer of the issuer of such security, shall file the statements required by this subsection with the Commission.

(2) TIME OF FILING.—The statements required by this subsection shall be filed—

(A) at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement filed pursuant to section 12(g);

(B) within 10 days after he or she becomes such beneficial owner, director, or officer, or within such shorter time as the Commission may establish by rule;

(C) if there has been a change in such ownership, or if such person shall have purchased or sold a security-based swap agreement involving such equity security, before the end of the second business day following the day on which the subject transaction has been executed, or at such other time as the Commission shall establish, by rule, in any case in which the Commission determines that such 2-day period is not feasible.

(3) CONTENTS OF STATEMENTS.—A statement filed—

(A) under subparagraph (A) or (B) of paragraph (2) shall contain a statement of the amount of all equity securities of such issuer of which the filing person is the beneficial owner; and

(B) under subparagraph (C) of such paragraph shall indicate ownership by the filing person at the date of filing, any such changes in such ownership, and such purchases and sales of the security-based swap agreements or security-based swaps [63] as have occurred since the most recent such filing under such subparagraph.

(4) ELECTRONIC FILING AND AVAILABILITY.—Beginning not later than 1 year after the date of enactment of the Sarbanes-Oxley Act of 2002—

(A) a statement filed under subparagraph (C) of paragraph (2) shall be filed electronically;

(B) the Commission shall provide each such statement on a publicly accessible Internet site not later than the end of the business day following that filing; and

(C) the issuer (if the issuer maintains a corporate website) shall provide that statement on that corporate website, not later than the end of the business day following that filing.

(b) [64] For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) or a security-based swap agreement involving any such equity security within any period of less than six months, unless such security or security-based swap agreement was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security or security-based swap agreement purchased or of not repurchasing the security or security-based swap agreement sold for a period exceeding

[63] Section 762(d)(5)(B) of Public Law 111–203 amends section 16(a)(3)(B) by inserting "or security-based swaps" after "security-based swap agreement". The amendment probably should have been to insert such language after "security-based swap agreements" but was executed here to reflect the probable intent of Congress..

[64] The amendment made by suparagraph (D) of section 762(d)(5) of Public Law 111-203 was carried out below to reflect the probable intent of Congress. A hyphen between the words ″Leach″ and ″Bliley″ in the matter proposed to be struck is missing.

six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security or security-based swap agreement involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

(c) It shall be unlawful for any such beneficial owner, director, or officer, directly or indirectly, to sell any equity security of such issuer (other than an exempted security), if the person selling the security or his principal (1) does not own the security sold, or (2) if owning the security, does not deliver it against such sale within twenty days thereafter, or does not within five days after such sale deposit it in the mails or other usual channels of transportation; but no person shall be deemed to have violated this subsection if he proves that notwithstanding the exercise of good faith he was unable to make such delivery or deposit within such time, or that to do so would cause undue inconvenience or expense.

(d) The provisions of subsection (b) of this section shall not apply to any purchase and sale, or sale and purchase, and the provisions of subsection (c) of this section shall not apply to any sale, of an equity security not then or theretofore held by him in an investment account, by a dealer in the ordinary course of his business and incident to the establishment or maintenance by him of a primary or secondary market (otherwise than on a national securities exchange or an exchange exempted from registration under section 5 of this title) for such security. The Commission may, by such rules and regulations as it deems necessary or appropriate in the public interest, define and prescribe terms and conditions with respect to securities held in an investment account and transactions made in the ordinary course of business and incident to the establishment or maintenance of a primary or secondary market.

(e) The provisions of this section shall not apply to foreign or domestic arbitrage transactions unless made in contravention of such rules and regulations as the Commission may adopt in order to carry out the purposes of this section.

(f) TREATMENT OF TRANSACTIONS IN SECURITY FUTURES PRODUCTS.—The provisions of this section shall apply to ownership of and transactions in security futures products.

(g) The authority of the Commission under this section with respect to security-based swap agreements shall be subject to the restrictions and limitations of section 3A(b) of this title.

ACCOUNTS AND RECORDS, EXAMINATIONS OF EXCHANGES, MEMBERS, AND OTHERS

SEC. 17. [78q] (a)(1)[65] Every national securities exchange, member thereof, broker or dealer who transacts a business in securities through the medium of any such member, registered securities association, registered broker or dealer, registered municipal securities dealer municipal advisor,[66], registered securities information processor, registered transfer agent, nationally recognized statistical rating organization, and registered clearing agency and the Municipal Securities Rulemaking Board shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title. Any report that a nationally recognized statistical rating organization is required by Commission rules under this paragraph to make and disseminate to the Commission shall be deemed furnished to the Commission.

(2) Every registered clearing agency shall also make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports, as the appropriate regulatory agency for such clearing agency, by rule, prescribes as necessary or appropriate for the safeguarding of securities and funds in the custody or control of such clearing agency or for which it is responsible.

(3) Every registered transfer agent shall also make and keep for prescribed periods such records, furnish such copies thereof, and make such reports as the appropriate regulatory agency for such transfer agent, by rule, prescribes as necessary or appropriate in furtherance of the purposes of section 17A of this title.

(b) RECORDS SUBJECT TO EXAMINATION.—

(1) PROCEDURES FOR COOPERATION WITH OTHER AGENCIES.—All records of persons described in subsection (a) of this section are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission and the appropriate regulatory agency for such persons as the Commission or the appropriate regulatory agency for such persons deems necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title: *Provided, however,* That the Commission shall, prior to conducting any such examination of a—

(A) registered clearing agency, registered transfer agent, or registered municipal securities dealer for which it is not the appropriate regulatory agency, give notice to the appropriate regulatory agency for such clearing agency, transfer agent, or municipal securities dealer of such proposed examination and consult with such appropriate regulatory agency concerning the feasibility and desir-

[65] For applicability of this provision to the Public Company Accounting Oversight Board, see section 107 of the Sarbanes-Oxley Act of 2002, printed elsewhere in this volume.

[66] So in law. The amendment by section 975(h) of Public Law 111–203 to insert "municipal advisor," after "municipal securities dealer", probably should have been to insert such text after "municipal securities dealer,".

ability of coordinating such examination with examinations conducted by such appropriate regulatory agency with a view to avoiding unnecessary regulatory duplication or undue regulatory burdens for such clearing agency, transfer agent, or municipal securities dealer; or

(B) broker or dealer registered pursuant to section 15(b)(11), exchange registered pursuant to section 6(g), or national securities association registered pursuant to section 15A(k), give notice to the Commodity Futures Trading Commission of such proposed examination and consults with the Commodity Futures Trading Commission concerning the feasibility and desirability of coordinating such examination with examinations conducted by the Commodity Futures Trading Commission in order to avoid unnecessary regulatory duplication or undue regulatory burdens for such broker or dealer or exchange.

(2) FURNISHING DATA AND REPORTS TO CFTC.—The Commission shall notify the Commodity Futures Trading Commission of any examination conducted of any broker or dealer registered pursuant to section 15(b)(11), exchange registered pursuant to section 6(g), or national securities association registered pursuant to section 15A(k) and, upon request, furnish to the Commodity Futures Trading Commission any examination report and data supplied to, or prepared by, the Commission in connection with such examination.

(3) USE OF CFTC REPORTS.—Prior to conducting an examination under paragraph (1), the Commission shall use the reports of examinations, if the information available therein is sufficient for the purposes of the examination, of—

(A) any broker or dealer registered pursuant to section 15(b)(11);

(B) exchange registered pursuant to section 6(g); or

(C) national securities association registered pursuant to section 15A(k);

that is made by the Commodity Futures Trading Commission, a national securities association registered pursuant to section 15A(k), or an exchange registered pursuant to section 6(g).

(4) RULES OF CONSTRUCTION.—

(A) Notwithstanding any other provision of this subsection, the records of a broker or dealer registered pursuant to section 15(b)(11), an exchange registered pursuant to section 6(g), or a national securities association registered pursuant to section 15A(k) described in this subparagraph shall not be subject to routine periodic examinations by the Commission.

(B) Any recordkeeping rules adopted under this subsection for a broker or dealer registered pursuant to section 15(b)(11), an exchange registered pursuant to section 6(g), or a national securities association registered pursuant to section 15A(k) shall be limited to records with respect to persons, accounts, agreements, contracts, and transactions involving security futures products.

(C)[67] Nothing in the proviso in paragraph (1) shall be construed to impair or limit (other than by the requirement of prior consultation) the power of the Commission under this subsection to examine any clearing agency, transfer agent, or municipal securities dealer or to affect in any way the power of the Commission under any other provision of this title or otherwise to inspect, examine, or investigate any such clearing agency, transfer agent, or municipal securities dealer.

(c)(1) Every clearing agency, transfer agent, and municipal securities dealer for which the Commission is not the appropriate regulatory agency shall (A) file with the appropriate regulatory agency for such clearing agency, transfer agent, or municipal securities dealer a copy of any application, notice, proposal, report, or document filed with the Commission by reason of its being a clearing agency, transfer agent, or municipal securities dealer and (B) file with the Commission a copy of any application, notice, proposal, report, or document filed with such appropriate regulatory agency by reason of its being a clearing agency, transfer agent, or municipal securities dealer. The Municipal Securities Rulemaking Board shall file with each agency enumerated in section 3(a)(34)(A) of this title copies of every proposed rule change filed with the Commission pursuant to section 19(b) of this title.

(2) The appropriate regulatory agency for a clearing agency, transfer agent, or municipal securities dealer for which the Commission is not the appropriate regulatory agency shall file with the Commission notice of the commencement of any proceeding and a copy of any order entered by such appropriate regulatory agency against any clearing agency, transfer agent, municipal securities dealer, or person associated with a transfer agent or municipal securities dealer, and the Commission shall file with such appropriate regulatory agency, if any, notice of the commencement of any proceeding and a copy of any order entered by the Commission against the clearing agency, transfer agent, or municipal securities dealer, or against any person associated with a transfer agent or municipal securities dealer for which the agency is the appropriate regulatory agency.

(3) The Commission and the appropriate regulatory agency for a clearing agency, transfer agent, or municipal securities dealer for which the Commission is not the appropriate regulatory agency shall each notify the other and make a report of any examination conducted by it of such clearing agency, transfer agent, or municipal securities dealer, and, upon request, furnish to the other a copy of such report and any data supplied to it in connection with such examination.

(4) The Commission or the appropriate regulatory agency may specify that documents required to be filed pursuant to this subsection with the Commission or such agency, respectively, may be retained by the originating clearing agency, transfer agent, or municipal securities dealer, or filed with another appropriate regu-

[67] This compilation reflects the apparent intention with respect to the location and indentation of section 17(b)(4)(C) of this Act. See section 204(3) and (5) of the Commodity Futures Modernization Act of 2000 (114 Stat. 2763A–424, 425), as enacted in to law by section 1(a)(5) of Public Law 106–554.

latory agency. The Commission or the appropriate regulatory agency (as the case may be) making such a specification shall continue to have access to the document on request.

(d)(1) The Commission, by rule or order, as it deems necessary or appropriate in the public interest and for the protection of investors, to foster cooperation and coordination among self-regulatory organizations, or to remove impediments to and foster the development of a national market system and national system for the clearance and settlement of securities transactions, may—

(A) with respect to any person who is a member of or participant in more than one self-regulatory organization, relieve any such self-regulatory organization of any responsibility under this title (i) to receive regulatory reports from such person, (ii) to examine such person for compliance, or to enforce compliance by such person, with specified provisions of this title, the rules and regulations thereunder, and its own rules, or (iii) to carry out other specified regulatory functions with respect to such person, and

(B) allocate among self-regulatory organizations the authority to adopt rules with respect to matters as to which, in the absence of such allocation, such self-regulatory organizations share authority under this title.

In making any such rule or entering any such order, the Commission shall take into consideration the regulatory capabilities and procedures of the self-regulatory organizations, availability of staff, convenience of location, unnecessary regulatory duplication, and such other factors as the Commission may consider germane to the protection of investors, cooperation and coordination among self-regulatory organizations, and the development of a national market system and a national system for the clearance and settlement of securities transactions. The Commission, by rule or order, as it deems necessary or appropriate in the public interest and for the protection of investors, may require any self-regulatory organization relieved of any responsibility pursuant to this paragraph, and any person with respect to whom such responsibility relates, to take such steps as are specified in any such rule or order to notify customers of, and persons doing business with, such person of the limited nature of such self-regulatory organization's responsibility for such person's acts, practices, and course of business.

(2) A self-regulatory organization shall furnish copies of any report of examination of any person who is a member of or a participant in such self-regulatory organization to any other self-regulatory organization of which such person is a member or in which such person is a participant upon the request of such person, such other self-regulatory organization, or the Commission.

(e)(1)(A) Every registered broker or dealer shall annually file with the Commission a balance sheet and income statement certified by a independent public accounting firm, or by a registered public accounting firm if the firm is required to be registered under the Sarbanes-Oxley Act of 2002,, [68] prepared on a calendar or fiscal year basis, and such other financial statements (which shall, as the Commission specifies, be certified) and information concerning its

[68] So in law. See amendment made by section 982(e)(2) of Public Law 111–203.

financial condition as the Commission, by rule may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(B) Every registered broker and dealer shall annually send to its customers its certified balance sheet and such other financial statements and information concerning its financial condition as the Commission, by rule, may prescribe pursuant to subsection (a) of this section.

(C) The Commission, by rule or order, may conditionally or unconditionally exempt any registered broker or dealer, or class of such brokers or dealers, from any provision of this paragraph if the Commission determines that such exemption is consistent with the public interest and the protection of investors.

(2) The Commission, by rule, as it deems necessary or appropriate in the public interest or for the protection of investors, may prescribe the form and content of financial statements filed pursuant to this title and the accounting principles and accounting standards used in their preparation.

(f)(1) Every national securities exchange, member thereof, registered securities association, broker, dealer, municipal securities dealer, government securities broker, government securities dealer, registered transfer agent, registered clearing agency, participant therein, member of the Federal Reserve System, and bank whose deposits are insured by the Federal Deposit Insurance Corporation shall—

(A) report to the Commission or other person designated by the Commission and, in the case of securities issued pursuant to chapter 31 of title 31, United States Code, to the Secretary of the Treasury such information about securities that are missing, lost, counterfeit, stolen, or cancelled, in such form and within such time as the Commission, by rule, determines is necessary or appropriate in the public interest or for the protection of investors; such information shall be available on request for a reasonable fee, to any such exchange, member, association, broker, dealer, municipal securities dealer, transfer agent, clearing agency, participant, member of the Federal Reserve System, or insured bank, and such other persons as the Commission, by rule, designates; and

(B) make such inquiry with respect to information reported pursuant to this subsection as the Commission, by rule, prescribes as necessary or appropriate in the public interest or for the protection of investors, to determine whether securities in their custody or control, for which they are responsible, or in which they are effecting, clearing, or settling a transaction have been reported as missing, lost, counterfeit, stolen, cancelled, or reported in such other manner as the Commission, by rule, may prescribe.

(2) Every member of a national securities exchange, broker, dealer, registered transfer agent, registered clearing agency, registered securities information processor, national securities exchange, and national securities association shall require that each of its partners, directors, officers, and employees be fingerprinted and shall submit such fingerprints, or cause the same to be submitted, to the Attorney General of the United States for identifica-

tion and appropriate processing. The Commission, by rule, may exempt from the provisions of this paragraph upon specified terms, conditions, and periods, any class of partners, directors, officers, or employees of any such member, broker, dealer, transfer agent, clearing agency, securities information processor, national securities exchange, or national securities association, if the Commission finds that such action is not inconsistent with the public interest or the protection of investors. Notwithstanding any other provision of law, in providing identification and processing functions, the Attorney General shall provide the Commission and self-regulatory organizations designated by the Commission with access to all criminal history record information.

(3)(A) In order to carry out the authority under paragraph (1) above, the Commission or its designee may enter into agreement with the Attorney General to use the facilities of the National Crime Information Center ("NCIC") to receive, store, and disseminate information in regard to missing, lost, counterfeit, or stolen securities and to permit direct inquiry access to NCIC's file on such securities for the financial community.

(B) In order to carry out the authority under paragraph (1) of this subsection, the Commission or its designee and the Secretary of the Treasury shall enter into an agreement whereby the Commission or its designee will receive, store, and disseminate information in the possession, and which comes into the possession, of the Department of the Treasury in regard to missing, lost, counterfeit, or stolen securities.

(4) In regard to paragraphs (1), (2), and (3), above insofar as such paragraphs apply to any bank or member of the Federal Reserve System, the Commission may delegate its authority to:

(A) the Comptroller of the Currency as to national banks;

(B) the Federal Reserve Board in regard to any member of the Federal Reserve System which is not a national bank; and

(C) the Federal Deposit Insurance Corporation for any State bank which is insured by the Federal Deposit Insurance Corporation but which is not a member of the Federal Reserve System.

(5) The Commission shall encourage the insurance industry to require their insured to report expeditiously instances of missing, lost, counterfeit, or stolen securities to the Commission or to such other person as the Commission may, by rule, designate to receive such information.

(g) Any broker, dealer, or other person extending credit who is subject to the rules and regulations prescribed by the Board of Governors of the Federal Reserve System pursuant to this title shall make such reports to the Board as it may require as necessary or appropriate to enable it to perform the functions conferred upon it by this title. If any such broker, dealer, or other person shall fail to make any such report or fail to furnish full information therein, or, if in the judgment of the Board it is otherwise necessary, such broker, dealer, or other person shall permit such inspections to be made by the Board with respect to the business operations of such broker, dealer, or other person as the Board may deem necessary to enable it to obtain the required information.

(h) RISK ASSESSMENT FOR HOLDING COMPANY SYSTEMS.—

(1) OBLIGATIONS TO OBTAIN, MAINTAIN, AND REPORT INFORMATION.—Every person who is (A) a registered broker or dealer, or (B) a registered municipal securities dealer for which the Commission is the appropriate regulatory agency, shall obtain such information and make and keep such records as the Commission by rule prescribes concerning the registered person's policies, procedures, or systems for monitoring and controlling financial and operational risks to it resulting from the activities of any of its associated persons, other than a natural person. Such records shall describe, in the aggregate, each of the financial and securities activities conducted by, and the customary sources of capital and funding of, those of its associated persons whose business activities are reasonably likely to have a material impact on the financial or operational condition of such registered person, including its net capital, its liquidity, or its ability to conduct or finance its operations. The Commission, by rule, may require summary reports of such information to be filed with the Commission no more frequently than quarterly.

(2) AUTHORITY TO REQUIRE ADDITIONAL INFORMATION.—If, as a result of adverse market conditions or based on reports provided to the Commission pursuant to paragraph (1) of this subsection or other available information, the Commission reasonably concludes that it has concerns regarding the financial or operational condition of (A) any registered broker or dealer, or (B) any registered municipal securities dealer, government securities broker, or government securities dealer for which the Commission is the appropriate regulatory agency, the Commission may require the registered person to make reports concerning the financial and securities activities of any of such person's associated persons, other than a natural person, whose business activities are reasonably likely to have a material impact on the financial or operational condition of such registered person. The Commission, in requiring reports pursuant to this paragraph, shall specify the information required, the period for which it is required, the time and date on which the information must be furnished, and whether the information is to be furnished directly to the Commission or to a self-regulatory organization with primary responsibility for examining the registered person's financial and operational condition.

(3) SPECIAL PROVISIONS WITH RESPECT TO ASSOCIATED PERSONS SUBJECT TO FEDERAL BANKING AGENCY REGULATION.—

(A) COOPERATION IN IMPLEMENTATION.—In developing and implementing reporting requirements pursuant to paragraph (1) of this subsection with respect to associated persons subject to examination by or reporting requirements of a Federal banking agency, the Commission shall consult with and consider the views of each such Federal banking agency. If a Federal banking agency comments in writing on a proposed rule of the Commission under this subsection that has been published for comment, the Commission shall respond in writing to such written comment before adopting the proposed rule. The Commission shall,

at the request of the Federal banking agency, publish such comment and response in the Federal Register at the time of publishing the adopted rule.

(B) USE OF BANKING AGENCY REPORTS.—A registered broker, dealer, or municipal securities dealer shall be in compliance with any recordkeeping or reporting requirement adopted pursuant to paragraph (1) of this subsection concerning an associated person that is subject to examination by or reporting requirements of a Federal banking agency if such broker, dealer, or municipal securities dealer utilizes for such recordkeeping or reporting requirement copies of reports filed by the associated person with the Federal banking agency pursuant to section 5211 of the Revised Statutes, section 9 of the Federal Reserve Act, section 7(a) of the Federal Deposit Insurance Act, section 10(b) of the Home Owners' Loan Act, or section 8 of the Bank Holding Company Act of 1956. The Commission may, however, by rule adopted pursuant to paragraph (1), require any broker, dealer, or municipal securities dealer filing such reports with the Commission to obtain, maintain, or report supplemental information if the Commission makes an explicit finding that such supplemental information is necessary to inform the Commission regarding potential risks to such broker, dealer, or municipal securities dealer. Prior to requiring any such supplemental information, the Commission shall first request the Federal banking agency to expand its reporting requirements to include such information.

(C) PROCEDURE FOR REQUIRING ADDITIONAL INFORMATION.—Prior to making a request pursuant to paragraph (2) of this subsection for information with respect to an associated person that is subject to examination by or reporting requirements of a Federal banking agency, the Commission shall—

(i) notify such agency of the information required with respect to such associated person; and

(ii) consult with such agency to determine whether the information required is available from such agency and for other purposes, unless the Commission determines that any delay resulting from such consultation would be inconsistent with ensuring the financial and operational condition of the broker, dealer, municipal securities dealer, government securities broker, or government securities dealer or the stability or integrity of the securities markets.

(D) EXCLUSION FOR EXAMINATION REPORTS.—Nothing in this subsection shall be construed to permit the Commission to require any registered broker or dealer, or any registered municipal securities dealer, government securities broker, or government securities dealer for which the Commission is the appropriate regulatory agency, to obtain, maintain, or furnish any examination report of any Federal banking agency or any supervisory recommendations or analysis contained therein.

(E) CONFIDENTIALITY OF INFORMATION PROVIDED.—No information provided to or obtained by the Commission from any Federal banking agency pursuant to a request by the Commission under subparagraph (C) of this paragraph regarding any associated person which is subject to examination by or reporting requirements of a Federal banking agency may be disclosed to any other person (other than a self-regulatory organization), without the prior written approval of the Federal banking agency. Nothing in this subsection shall authorize the Commission to withhold information from Congress, or prevent the Commission from complying with a request for information from any other Federal department or agency requesting the information for purposes within the scope of its jurisdiction, or complying with an order of a court of the United States in an action brought by the United States or the Commission.

(F) NOTICE TO BANKING AGENCIES CONCERNING FINANCIAL AND OPERATIONAL CONDITION CONCERNS.—The Commission shall notify the Federal banking agency of any concerns of the Commission regarding significant financial or operational risks resulting from the activities of any registered broker or dealer, or any registered municipal securities dealer, government securities broker, or government securities dealer for which the Commission is the appropriate regulatory agency, to any associated person thereof which is subject to examination by or reporting requirements of the Federal banking agency.

(G) DEFINITION.—For purposes of this paragraph, the term "Federal banking agency" shall have the same meaning as the term "appropriate Federal bank agency" in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)).

(4) EXEMPTIONS.—The Commission by rule or order may exempt any person or class of persons, under such terms and conditions and for such periods as the Commission shall provide in such rule or order, from the provisions of this subsection, and the rules thereunder. In granting such exemptions, the Commission shall consider, among other factors—

(A) whether information of the type required under this subsection is available from a supervisory agency (as defined in section 1101(6) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401(6))), a State insurance commission or similar State agency, the Commodity Futures Trading Commission, or a similar foreign regulator;

(B) the primary business of any associated person;

(C) the nature and extent of domestic or foreign regulation of the associated person's activities;

(D) the nature and extent of the registered person's securities activities; and

(E) with respect to the registered person and its associated persons, on a consolidated basis, the amount and proportion of assets devoted to, and revenues derived from, activities in the United States securities markets.

(5) AUTHORITY TO LIMIT DISCLOSURE OF INFORMATION.—Notwithstanding any other provision of law, the Commission shall not be compelled to disclose any information required to be reported under this subsection, or any information supplied to the Commission by any domestic or foreign regulatory agency that relates to the financial or operational condition of any associated person of a registered broker, dealer, government securities broker, government securities dealer, or municipal securities dealer. Nothing in this subsection shall authorize the Commission to withhold information from Congress, or prevent the Commission from complying with a request for information from any other Federal department or agency requesting the information for purposes within the scope of its jurisdiction, or complying with an order of a court of the United States in an action brought by the United States or the Commission. For purposes of section 552 of title 5, United States Code, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552. In prescribing regulations to carry out the requirements of this subsection, the Commission shall designate information described in or obtained pursuant to subparagraph (B) or (C) of paragraph (3) of this subsection as confidential information for purposes of section 24(b)(2) of this title.

(i) AUTHORITY TO LIMIT DISCLOSURE OF INFORMATION.—Notwithstanding any other provision of law, the Commission shall not be compelled to disclose any information required to be reported under subsection (h) or (i) or any information supplied to the Commission by any domestic or foreign regulatory agency that relates to the financial or operational condition of any associated person of a broker or dealer, investment bank holding company, or any affiliate of an investment bank holding company. Nothing in this subsection shall authorize the Commission to withhold information from Congress, or prevent the Commission from complying with a request for information from any other Federal department or agency or any self-regulatory organization requesting the information for purposes within the scope of its jurisdiction, or complying with an order of a court of the United States in an action brought by the United States or the Commission. For purposes of section 552 of title 5, United States Code, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552. In prescribing regulations to carry out the requirements of this subsection, the Commission shall designate information described in or obtained pursuant to subparagraphs (A), (B), and (C) of subsection (i)(5) as confidential information for purposes of section 24(b)(2) of this title.

(j) COORDINATION OF EXAMINING AUTHORITIES.—

(1) ELIMINATION OF DUPLICATION.—The Commission and the examining authorities, through cooperation and coordination of examination and oversight activities, shall eliminate any unnecessary and burdensome duplication in the examination process.

(2) COORDINATION OF EXAMINATIONS.—The Commission and the examining authorities shall share such information, including reports of examinations, customer complaint informa-

tion, and other nonpublic regulatory information, as appropriate to foster a coordinated approach to regulatory oversight of brokers and dealers that are subject to examination by more than one examining authority.

(3) EXAMINATIONS FOR CAUSE.—At any time, any examining authority may conduct an examination for cause of any broker or dealer subject to its jurisdiction.

(4) CONFIDENTIALITY.—

(A) IN GENERAL.—Section 24 shall apply to the sharing of information in accordance with this subsection. The Commission shall take appropriate action under section 24(c) to ensure that such information is not inappropriately disclosed.

(B) APPROPRIATE DISCLOSURE NOT PROHIBITED.—Nothing in this paragraph authorizes the Commission or any examining authority to withhold information from the Congress, or prevent the Commission or any examining authority from complying with a request for information from any other Federal department or agency requesting the information for purposes within the scope of its jurisdiction, or complying with an order of a court of the United States in an action brought by the United States or the Commission.

(5) DEFINITION.—For purposes of this subsection, the term "examining authority" means a self-regulatory organization registered with the Commission under this title (other than a registered clearing agency) with the authority to examine, inspect, and otherwise oversee the activities of a registered broker or dealer.

NATIONAL SYSTEM FOR CLEARANCE AND SETTLEMENT OF SECURITIES TRANSACTIONS

SEC. 17A. [78q–1] (a)(1) The Congress finds that—

(A) The prompt and accurate clearance and settlement of securities transactions, including the transfer of record ownership and the safeguarding of securities and funds related thereto, are necessary for the protection of investors and persons facilitating transactions by and acting on behalf of investors.

(B) Inefficient procedures for clearance and settlement impose unnecessary costs on investors and persons facilitating transactions by and acting on behalf of investors.

(C) New data processing and communications techniques create the opportunity for more efficient, effective, and safe procedures for clearance and settlement.

(D) The linking of all clearance and settlement facilities and the development of uniform standards and procedures for clearance and settlement will reduce unnecessary costs and increase the protection of investors and persons facilitating transactions by and acting on behalf of investors.

(2)(A) The Commission is directed, therefore, having due regard for the public interest, the protection of investors, the safeguarding of securities and funds, and maintenance of fair competi-

tion among brokers and dealers, clearing agencies, and transfer agents, to use its authority under this title—

(i) to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of transactions in securities (other than exempt securities); and

(ii) to facilitate the establishment of linked or coordinated facilities for clearance and settlement of transactions in securities, securities options, contracts of sale for future delivery and options thereon, and commodity options;

in accordance with the findings and to carry out the objectives set forth in paragraph (1) of this subsection.

(B) The Commission shall use its authority under this title to assure equal regulation under this title of registered clearing agencies and registered transfer agents. In carrying out its responsibilities set forth in subparagraph (A)(ii) of this paragraph, the Commission shall coordinate with the Commodity Futures Trading Commission and consult with the Board of Governors of the Federal Reserve System.

(b)(1) Except as otherwise provided in this section, it shall be unlawful for any clearing agency, unless registered in accordance with this subsection, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a clearing agency with respect to any security (other than an exempted security). The Commission, by rule or order, upon its own motion or upon application, may conditionally or unconditionally exempt any clearing agency or security or any class of clearing agencies or securities from any provisions of this section or the rules or regulations thereunder, if the Commission finds that such exemption is consistent with the public interest, the protection of investors, and the purposes of this section, including the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds. A clearing agency or transfer agent shall not perform the functions of both a clearing agency and a transfer agent unless such clearing agency or transfer agent is registered in accordance with this subsection and subsection (c) of this section.

(2) A clearing agency may be registered under the terms and conditions hereinafter provided in this subsection and in accordance with the provisions of section 19(a) of this title, by filing with the Commission an application for registration in such form as the Commission, by rule, may prescribe containing the rules of the clearing agency and such other information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the prompt and accurate clearance and settlement of securities transactions.

(3) A clearing agency shall not be registered unless the Commission determines that—

(A) Such clearing agency is so organized and has the capacity to be able to facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions for which it is responsible, to safeguard securities and funds in its custody or control or for which it is responsible, to comply with the provisions of this title and the rules and regulations thereunder, to enforce

(subject to any rule or order of the Commission pursuant to section 17(d) or 19(g)(2) of this title) compliance by its participants with the rules of the clearing agency, and to carry out the purposes of this section.

(B) Subject to the provisions of paragraph (4) of this subsection, the rules of the clearing agency provide that any (i) registered broker or dealer, (ii) other registered clearing agency, (iii) registered investment company, (iv) bank, (v) insurance company, or (vi) other person or class of persons as the Commission, by rule, may from time to time designate as appropriate to the development of a national system or the prompt and accurate clearance and settlement of securities transactions may become a participant in such clearing agency.

(C) The rules of the clearing agency assure a fair representation of its shareholders (or members) and participants in the selection of its directors and administration of its affairs. (The Commission may determine that the representation of participants is fair if they are afforded a reasonable opportunity to acquire voting stock of the clearing agency, directly or indirectly, in reasonable proportion to their use of such clearing agency.)

(D) The rules of the clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants.

(E) The rules of the clearing agency do not impose any schedule of prices, or fix rates or other fees, for services rendered by its participants.

(F) The rules of the clearing agency are designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, to foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions, to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination in the admission of participants or among participants in the use of the clearing agency, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this section or the administration of the clearing agency.

(G) The rules of the clearing agency provide that (subject to any rule or order of the Commission pursuant to section 17(d) or 19(g)(2) of this title) its participants shall be appropriately disciplined for violation of any provision of the rules of the clearing agency by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, or any other fitting sanction.

(H) The rules of the clearing agency are in accordance with the provisions of paragraph (5) of this subsection, and, in general, provide a fair procedure with respect to the disciplining

of participants, the denial of participation to any persons seeking participation therein, and the prohibition or limitation by the clearing agency of any person with respect to access to services offered by the clearing agency.

(I) The rules of the clearing agency do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title.

(4)(A) A registered clearing agency may, and in cases in which the Commission, by order, directs as appropriate in the public interest shall, deny participation to any person subject to a statutory disqualification. A registered clearing agency shall file notice with the Commission not less than thirty days prior to admitting any person to participation, if the clearing agency knew, or in the exercise of reasonable care should have known, that such person was subject to a statutory disqualification. The notice shall be in such form and contain such information as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(B) A registered clearing agency may deny participation to, or condition the participation of, any person if such person does not meet such standards of financial responsibility, operational capability, experience, and competence as are prescribed by the rules of the clearing agency. A registered clearing agency may examine and verify the qualifications of an applicant to be a participant in accordance with procedures established by the rules of the clearing agency.

(5)(A) In any proceeding by a registered clearing agency to determine whether a participant should be disciplined (other than a summary proceeding pursuant to subparagraph (C) of this paragraph), the clearing agency shall bring specific charges, notify such participant of, and give him an opportunity to defend against such charges, and keep a record. A determination by the clearing agency to impose a disciplinary sanction shall be supported by a statement setting forth—

(i) any act or practice in which such participant has been found to have engaged, or which such participant has been found to have omitted;

(ii) the specific provisions of the rules of the clearing agency which any such act or practice, or omission to act, is deemed to violate; and

(iii) the sanction imposed and the reasons therefor.

(B) In any proceeding by a registered clearing agency to determine whether a person shall be denied participation or prohibited or limited with respect to access to services offered by the clearing agency, the clearing agency shall notify such person of, and give him an opportunity to be heard upon, the specific grounds for denial or prohibition or limitation under consideration and keep a record. A determination by the clearing agency to deny participation or prohibit or limit a person with respect to access to services offered by the clearing agency shall be supported by a statement setting forth the specific grounds on which the denial or prohibition or limitation is based.

(C) A registered clearing agency may summarily suspend and close the accounts of a participant who (i) has been and is expelled

or suspended from any self-regulatory organization, (ii) is in default of any delivery of funds or securities to the clearing agency, or (iii) is in such financial or operating difficulty that the clearing agency determines and so notifies the appropriate regulatory agency for such participant that such suspension and closing of accounts are necessary for the protection of the clearing agency, its participants, creditors, or investors. A participant so summarily suspended shall be promptly afforded an opportunity for a hearing by the clearing agency in accordance with the provisions of subparagraph (A) of this paragraph. The appropriate regulatory agency for such participant, by order, may stay any such summary suspension on its own motion or upon application by any person aggrieved thereby, if such appropriate regulatory agency determines summarily or after notice and opportunity for hearing (which hearing may consist solely of the submission of affidavits or presentation of oral arguments) that such stay is consistent with the public interest and protection of investors.

(6) No registered clearing agency shall prohibit or limit access by any person to services offered by any participant therein.

(7)(A) A clearing agency that is regulated directly or indirectly by the Commodity Futures Trading Commission through its association with a designated contract market for security futures products that is a national securities exchange registered pursuant to section 6(g), and that would be required to register pursuant to paragraph (1) of this subsection only because it performs the functions of a clearing agency with respect to security futures products effected pursuant to the rules of the designated contract market with which such agency is associated, is exempted from the provisions of this section and the rules and regulations thereunder, except that if such a clearing agency performs the functions of a clearing agency with respect to a security futures product that is not cash settled, it must have arrangements in place with a registered clearing agency to effect the payment and delivery of the securities underlying the security futures product.

(B) Any clearing agency that performs the functions of a clearing agency with respect to security futures products must coordinate with and develop fair and reasonable links with any and all other clearing agencies that perform the functions of a clearing agency with respect to security futures products, in order to permit, as of the compliance date (as defined in section 6(h)(6)(C)), security futures products to be purchased on one market and offset on another market that trades such products.

(8) A registered clearing agency shall be permitted to provide facilities for the clearance and settlement of any derivative agreements, contracts, or transactions that are excluded from the Commodity Exchange Act, subject to the requirements of this section and to such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title.

(c)(1) Except as otherwise provided in this section, it shall be unlawful for any transfer agent, unless registered in accordance with this section, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform

the function of a transfer agent with respect to any security registered under section 12 of this title or which would be required to be registered except for the exemption from registration provided by subsection (g)(2)(B) or (g)(2)(G) of that section. The appropriate regulatory agency, by rule or order, upon its own motion or upon application, may conditionally or unconditionally exempt any person or security or class of persons or securities from any provision of this section or any rule or regulation prescribed under this section, if the appropriate regulatory agency finds (A) that such exemption is in the public interest and consistent with the protection of investors and the purposes of this section, including the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds, and (B) the Commission does not object to such exemption.

(2) A transfer agent may be registered by filing with the appropriate regulatory agency for such transfer agent an application for registration in such form and containing such information and documents concerning such transfer agent and any persons associated with the transfer agent as such appropriate regulatory agency may prescribe as necessary or appropriate in furtherance of the purposes of this section. Except as hereinafter provided, such registration shall become effective 45 days after receipt of such application by such appropriate regulatory agency or within such shorter period of time as such appropriate regulatory agency may determine.

(3) The appropriate regulatory agency for a transfer agent, by order, shall deny registration to, censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding 12 months, or revoke the registration of such transfer agent, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such denial, censure, placing of limitations, suspension, or revocation is in the public interest and that such transfer agent, whether prior or subsequent to becoming such, or any person associated with such transfer agent, whether prior or subsequent to becoming so associated—

(A) has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), (E), (H), or (G) of paragraph (4) of section 15(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within ten years of the commencement of the proceedings under this paragraph, or is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4); or

(B) is subject to an order entered pursuant to subparagraph (C) of paragraph (4) of this subsection barring or suspending the right of such person to be associated with a transfer agent.

(4)(A) Pending final determination whether any registration by a transfer agent under this subsection shall be denied, the appropriate regulatory agency for such transfer agent, by order, may postpone the effective date of such registration for a period not to exceed fifteen days, but if, after notice and opportunity for hearing (which may consist solely of affidavits and oral arguments), it shall appear to such appropriate regulatory agency to be necessary or appropriate in the public interest or for the protection of investors

to postpone the effective date of such registration until final determination, such appropriate regulatory agency shall so order. Pending final determination whether any registration under this subsection shall be revoked, such appropriate regulatory agency, by order, may suspend such registration, if such suspension appears to such appropriate regulatory agency, after notice and opportunity for hearing, to be necessary or appropriate in the public interest or for the protection of investors.

(B) A registered transfer agent may, upon such terms and conditions as the appropriate regulatory agency for such transfer agent deems necessary or appropriate in the public interest, for the protection of investors, or in furtherance of the purposes of this section, withdraw from registration by filing a written notice of withdrawal with such appropriate regulatory agency. If such appropriate regulatory agency finds that any transfer agent for which it is the appropriate regulatory agency, is no longer in existence or has ceased to do business as a transfer agent, such appropriate regulatory agency, by order, shall cancel or deny the registration.

(C) The appropriate regulatory agency for a transfer agent, by order, shall censure or place limitations on the activities or functions of any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with the transfer agent, or suspend for a period not exceeding 12 months or bar any such person from being associated with any transfer agent, broker, dealer, investment adviser, municipal securities dealer, municipal advisor, or nationally recognized statistical rating organization, if the appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), (E), (H), or (G) or paragraph (4) of section 15(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within ten years of the commencement of the proceedings under this paragraph, or is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4). It shall be unlawful for any person as to whom such an order suspending or barring him from being associated with a transfer agent is in effect willfully to become, or to be, associated with a transfer agent without the consent of the appropriate regulatory agency that entered the order and the appropriate regulatory agency for that transfer agent. It shall be unlawful for any transfer agent to permit such a person to become, or remain, a person associated with it without the consent of such appropriate regulatory agencies, if the transfer agent knew, or in the exercise of reasonable care should have known, of such order. The Commission may establish, by rule, procedures by which a transfer agent reasonably can determine whether a person associated or seeking to become associated with it is subject to any such order, and may require, by rule, that any transfer agent comply with such procedures.

(d)(1) No registered clearing agency or registered transfer agent shall, directly or indirectly, engage in any activity as clearing agency or transfer agent in contravention of such rules and regula-

tions (A) as the Commission may prescribe as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title, or (B) as the appropriate regulatory agency for such clearing agency or transfer agent may prescribe as necessary or appropriate for the safeguarding of securities and funds.

(2) With respect to any clearing agency or transfer agent for which the Commission is not the appropriate regulatory agency, the appropriate regulatory agency for such clearing agency or transfer agent may, in accordance with section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), enforce compliance by such clearing agency or transfer agent with the provisions of this section, sections 17 and 19 of this title, and the rules and regulations thereunder. For purposes of the preceding sentence, any violation of any such provision shall constitute adequate basis for the issuance of an order under section 8(b) or 8(c) of the Federal Deposit Insurance Act, and the participants in any such clearing agency and the persons doing business with any such transfer agent shall be deemed to be "depositors" as that term is used in section 8(c) of that Act.

(3)(A) With respect to any clearing agency or transfer agent for which the Commission is not the appropriate regulatory agency, the Commission and the appropriate regulatory agency for such clearing agency or transfer agent shall consult and cooperate with each other, and, as may be appropriate, with State banking authorities having supervision over such clearing agency or transfer agent toward the end that, to the maximum extent practicable, their respective regulatory responsibilities may be fulfilled and the rules and regulations applicable to such clearing agency or transfer agent may be in accord with both sound banking practices and a national system for the prompt and accurate clearance and settlement of securities transactions. In accordance with this objective—

(i) the Commission and such appropriate regulatory agency shall, at least fifteen days prior to the issuance for public comment of any proposed rule or regulation or adoption of any rule or regulation concerning such clearing agency or transfer agent, consult and request the views of the other; and

(ii) such appropriate regulatory agency shall assume primary responsibility to examine and enforce compliance by such clearing agency or transfer agent with the provisions of this section and sections 17 and 19 of this title.

(B) Nothing in the preceding subparagraph or elsewhere in this title shall be construed to impair or limit (other than by the requirement of notification) the Commission's authority to make rules under any provision of this title or to enforce compliance pursuant to any provision of this title by any clearing agency, transfer agent, or person associated with a transfer agent with the provisions of this title and the rules and regulations thereunder.

(4) Nothing in this section shall be construed to impair the authority of any State banking authority or other State or Federal regulatory authority having jurisdiction over a person registered as a clearing agency, transfer agent, or person associated with a transfer agent, to make and enforce rules governing such person

which are not inconsistent with this title and the rules and regulations thereunder.

(5) A registered transfer agent may not, directly or indirectly, engage in any activity in connection with the guarantee of a signature of an endorser of a security, including the acceptance or rejection of such guarantee, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest, for the protection of investors, to facilitate the equitable treatment of financial institutions which issue such guarantees, or otherwise in furtherance of the purposes of this title.

(e) The Commission shall use its authority under this title to end the physical movement of securities certificates in connection with the settlement among brokers and dealers of transactions in securities consummated by means of the mails or any means or instrumentalities of interstate commerce.

(f)(1) Notwithstanding any provision of State law, except as provided in paragraph (3), if the Commission makes each of the findings described in paragraph (2)(A), the Commission may adopt rules concerning—

(A) the transfer of certificated or uncertificated securities (other than government securities issued pursuant to chapter 31 of title 31, United States Code, or securities otherwise processed within a book-entry system operated by the Federal Reserve banks pursuant to a Federal book-entry regulation) or limited interests (including security interests) therein; and

(B) rights and obligations of purchasers, sellers, owners, lenders, borrowers, and financial intermediaries (including brokers, dealers, banks, and clearing agencies) involved in or affected by such transfers, and the rights of third parties whose interests in such securities devolve from such transfers.

(2)(A) The findings described in this paragraph are findings by the Commission that—

(i) such rule is necessary or appropriate for the protection of investors or in the public interest and is reasonably designed to promote the prompt, accurate, and safe clearance and settlement of securities transactions;

(ii) in the absence of a uniform rule, the safe and efficient operation of the national system for clearance and settlement of securities transactions will be, or is, substantially impeded; and

(iii) to the extent such rule will impair or diminish, directly or indirectly, rights of persons specified in paragraph (1)(B) under State law concerning transfers of securities (or limited interests therein), the benefits of such rule outweigh such impairment or diminution of rights.

(B) In making the findings described in subparagraph (A), the Commission shall give consideration to the recommendations of the Advisory Committee established under paragraph (4), and it shall consult with and consider the views of the Secretary of the Treasury and the Board of Governors of the Federal Reserve System. If the Secretary of the Treasury objects, in writing, to any proposed rule of the Commission on the basis of the Secretary's view on the issues described in clauses (i), (ii), and (iii) of subparagraph (A), the

Commission shall consider all feasible alternatives to the proposed rule, and it shall not adopt any such rule unless the Commission makes an explicit finding that the rule is the most practicable method for achieving safe and efficient operation of the national clearance and settlement system.

(3) Any State may, prior to the expiration of 2 years after the Commission adopts a rule under this subsection, enact a statute that specifically refers to this subsection and the specific rule thereunder and establishes, prospectively from the date of enactment of the State statute, a provision that differs from that applicable under the Commission's rule.

(4)(A) Within 90 days after the date of enactment of this subsection, the Commission shall (and at such times thereafter as the Commission may determine, the Commission may), after consultation with the Secretary of the Treasury and the Board of Governors of the Federal Reserve System, establish an advisory committee under chapter 10 of title 5, United States Code. The Advisory Committee shall be directed to consider and report to the Commission on such matters as the Commission, after consultation with the Secretary of the Treasury and the Board of Governors of the Federal Reserve System, determines, including the areas, if any, in which State commercial laws and related Federal laws concerning the transfer of certificated or uncertificated securities, limited interests (including security interests) in such securities, or the creation or perfection of security interests in such securities do not provide the necessary certainty, uniformity, and clarity for purchasers, sellers, owners, lenders, borrowers, and financial intermediaries concerning their respective rights and obligations.

(B) The Advisory Committee shall consist of 15 members, of which—

(i) 11 shall be designated by the Commission in accordance with chapter 10 of title 5, United States Code; and

(ii) 2 each shall be designated by the Board of Governors of the Federal Reserve System and the Secretary of the Treasury.

(C) The Advisory Committee shall conduct its activities in accordance with chapter 10 of title 5, United States Code. Within 6 months of its designation, or such longer time as the Commission may designate, the Advisory Committee shall issue a report to the Commission, and shall cause copies of that report to be delivered to the Secretary of the Treasury and the Chairman of the Board of Governors of the Federal Reserve System.

(g) DUE DILIGENCE FOR THE DELIVERY OF DIVIDENDS, INTEREST, AND OTHER VALUABLE PROPERTY RIGHTS.—

(1) REVISION OF RULES REQUIRED.—The Commission shall revise its regulations in section 240.17Ad–17 of title 17, Code of Federal Regulations, as in effect on December 8, 1997, to extend the application of such section to brokers and dealers and to provide for the following:

(A) A requirement that the paying agent provide a single written notification to each missing security holder that the missing security holder has been sent a check that has not yet been negotiated. The written notification may be sent along with a check or other mailing subse-

quently sent to the missing security holder but must be provided no later than 7 months after the sending of the not yet negotiated check.

(B) An exclusion for paying agents from the notification requirements when the value of the not yet negotiated check is less than $25.

(C) A provision clarifying that the requirements described in subparagraph (A) shall have no effect on State escheatment laws.

(D) For purposes of such revised regulations—

(i) a security holder shall be considered a "missing security holder" if a check is sent to the security holder and the check is not negotiated before the earlier of the paying agent sending the next regularly scheduled check or the elapsing of 6 months after the sending of the not yet negotiated check; and

(ii) the term "paying agent" includes any issuer, transfer agent, broker, dealer, investment adviser, indenture trustee, custodian, or any other person that accepts payments from the issuer of a security and distributes the payments to the holders of the security.

(2) RULEMAKING.—The Commission shall adopt such rules, regulations, and orders necessary to implement this subsection no later than 1 year after the date of enactment of this subsection. In proposing such rules, the Commission shall seek to minimize disruptions to current systems used by or on behalf of paying agents to process payment to account holders and avoid requiring multiple paying agents to send written notification to a missing security holder regarding the same not yet negotiated check.

(g)[69] REGISTRATION REQUIREMENT.—It shall be unlawful for a clearing agency, unless registered with the Commission, directly or indirectly to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a clearing agency with respect to a security-based swap.

(h) VOLUNTARY REGISTRATION.—A person that clears agreements, contracts, or transactions that are not required to be cleared under this title may register with the Commission as a clearing agency.

(i) STANDARDS FOR CLEARING AGENCIES CLEARING SECURITY-BASED SWAP TRANSACTIONS.—To be registered and to maintain registration as a clearing agency that clears security-based swap transactions, a clearing agency shall comply with such standards as the Commission may establish by rule. In establishing any such standards, and in the exercise of its oversight of such a clearing agency pursuant to this title, the Commission may conform such standards or oversight to reflect evolving United States and international standards. Except where the Commission determines otherwise by rule or regulation, a clearing agency shall have reasonable discretion in establishing the manner in which it complies with any such standards.

[69] Two subsections designated as (g) so in law.

(j) RULES.—The Commission shall adopt rules governing persons that are registered as clearing agencies for security-based swaps under this title.

(k) EXEMPTIONS.—The Commission may exempt, conditionally or unconditionally, a clearing agency from registration under this section for the clearing of security-based swaps if the Commission determines that the clearing agency is subject to comparable, comprehensive supervision and regulation by the Commodity Futures Trading Commission or the appropriate government authorities in the home country of the agency. Such conditions may include, but are not limited to, requiring that the clearing agency be available for inspection by the Commission and make available all information requested by the Commission.

(l) EXISTING DEPOSITORY INSTITUTIONS AND DERIVATIVE CLEARING ORGANIZATIONS.—

(1) IN GENERAL.—A depository institution or derivative clearing organization registered with the Commodity Futures Trading Commission under the Commodity Exchange Act that is required to be registered as a clearing agency under this section is deemed to be registered under this section solely for the purpose of clearing security-based swaps to the extent that, before the date of enactment of this subsection—

(A) the depository institution cleared swaps as a multilateral clearing organization; or

(B) the derivative clearing organization cleared swaps pursuant to an exemption from registration as a clearing agency.

(2) CONVERSION OF DEPOSITORY INSTITUTIONS.—A depository institution to which this subsection applies may, by the vote of the shareholders owning not less than 51 percent of the voting interests of the depository institution, be converted into a State corporation, partnership, limited liability company, or similar legal form pursuant to a plan of conversion, if the conversion is not in contravention of applicable State law.

(3) SHARING OF INFORMATION.—The Commodity Futures Trading Commission shall make available to the Commission, upon request, all information determined to be relevant by the Commodity Futures Trading Commission regarding a derivatives clearing organization deemed to be registered with the Commission under paragraph (1).

(m) MODIFICATION OF CORE PRINCIPLES.—The Commission may conform the core principles established in this section to reflect evolving United States and international standards.

AUTOMATED QUOTATION SYSTEMS FOR PENNY STOCKS

SEC. 17B. [78q–2] (a) FINDINGS.—The Congress finds that—

(1) the market for penny stocks suffers from a lack of reliable and accurate quotation and last sale information available to investors and regulators;

(2) it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to improve significantly the information available to brokers, dealers, investors, and regulators with respect to quotations for and transactions in penny stocks; and

(3) a fully implemented automated quotation system for penny stocks would meet the information needs of investors and market participants and would add visibility and regulatory and surveillance data to that market.

(b) MANDATE TO FACILITATE THE ESTABLISHMENT OF AUTOMATED QUOTATION SYSTEMS.—

(1) IN GENERAL.—The Commission shall facilitate the widespread dissemination of reliable and accurate last sale and quotation information with respect to penny stocks in accordance with the findings set forth in subsection (a), with a view toward establishing, at the earliest feasible time, one or more automated quotation systems that will collect and disseminate information regarding all penny stocks.

(2) CHARACTERISTICS OF SYSTEMS.—Each such automated quotation system shall—

(A) be operated by a registered securities association or a national securities exchange in accordance with such rules as the Commission and these entities shall prescribe;

(B) collect and disseminate quotation and transaction information;

(C) except as provided in subsection (c), provide bid and ask quotations of participating brokers or dealers, or comparably accurate and reliable pricing information, which shall constitute firm bids or offers for at least such minimum numbers of shares or minimum dollar amounts as the Commission and the registered securities association or national securities exchange shall require; and

(D) provide for the reporting of the volume of penny stock transactions, including last sale reporting, when the volume reaches appropriate levels that the Commission shall specify by rule or order.

(c) EXEMPTIVE AUTHORITY.—The Commission may, by rule or order, grant such exemptions, in whole or in part, conditionally or unconditionally, to any penny stock or class of penny stocks from the requirements of subsection (b) as the Commission determines to be consistent with the public interest, the protection of investors, and the maintenance of fair and orderly markets.

(d) COMMISSION REPORTING REQUIREMENTS.—The Commission shall, in each of the first 5 annual reports (under section 23(b)(1) of this title) submitted more than 12 months after the date of enactment of this section, include a description of the status of the penny stock automated quotation system or systems required by subsection (b). Such description shall include—

(1) a review of the development, implementation, and progress of the project, including achievement of significant milestones and current project schedule; and

(2) a review of the activities of registered securities associations and national securities exchanges in the development of the system.

LIABILITY FOR MISLEADING STATEMENTS

SEC. 18. [78r] (a) Any person who shall make or cause to be made any statement in any application, report, or document filed

pursuant to this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

(b) Every person who becomes liable to make payment under this section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

(c) No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.

REGISTRATION, RESPONSIBILITIES, AND OVERSIGHT OF SELF-REGULATORY ORGANIZATIONS

SEC. 19. [78s] (a)(1) The Commission shall, upon the filing of an application for registration as a national securities exchange, registered securities association, or registered clearing agency, pursuant to section 6, 15A, or 17A of this title, respectively, publish notice of such filing and afford interested persons an opportunity to submit written data, views, and arguments concerning such application. Within ninety days of the date of publication of such notice (or within such longer period as to which the applicant consents), the Commission shall—

(A) by order grant such registration, or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred eighty days of the date of a publication of notice of the filing of the application for registration. At the conclusion of such proceedings the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if it finds that the requirements of this title and the rules and regulations thereunder with respect to the applicant are satisfied. The Commission shall deny such registration if it does not make such finding.

(2) With respect to an application for registration filed by a clearing agency for which the Commission is not the appropriate regulatory agency—

(A) The Commission shall not grant registration prior to the sixtieth day after the date of publication of notice of the filing of such application unless the appropriate regulatory agency for such clearing agency has notified the Commission of such appropriate regulatory agency's determination that such clearing agency is so organized and has the capacity to be able to safeguard securities and funds in its custody or control or for which it is responsible and that the rules of such clearing agency are designed to assure the safeguarding of such securities and funds.

(B) The Commission shall institute proceedings in accordance with paragraph (1)(B) of this subsection to determine whether registration should be denied if the appropriate regulatory agency for such clearing agency notifies the Commission within sixty days of the date of publication of notice of the filing of such application of such appropriate regulatory agency's (i) determination that such clearing agency may not be so organized or have the capacity to be able to safeguard securities or funds in its custody or control or for which it is responsible or that the rules of such clearing agency may not be designed to assure the safeguarding of such securities and funds and (ii) reasons for such determination.

(C) The Commission shall deny registration if the appropriate regulatory agency for such clearing agency notifies the Commission prior to the conclusion of proceedings instituted in accordance with paragraph (1)(B) of this subsection of such appropriate regulatory agency's (i) determination that such clearing agency is not so organized or does not have the capacity to be able to safeguard securities or funds in its custody or control or for which it is responsible or that the rules of such clearing agency are not designed to assure the safeguarding of such securities or funds and (ii) reasons for such determination.

(3) A self-regulatory organization may, upon such terms and conditions as the Commission, by rule, deems necessary or appropriate in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any self-regulatory organization is no longer in existence or has ceased to do business in the capacity specified in its application for registration, the Commission, by order, shall cancel its registration. Upon the withdrawal of a national securities association from registration or the cancellation, suspension, or revocation of the registration of a national securities association, the registration of any association affiliated therewith shall automatically terminate.

(b)(1)[70] Each self-regulatory organization shall file with the Commission, in accordance with such rules as the Commission may prescribe, copies of any proposed rule or any proposed change in,

[70] For applicability of this provision to the Public Company Accounting Oversight Board, see section 107 of the Sarbanes-Oxley Act of 2002, printed elsewhere in this volume.

addition to, or deletion from the rules of such self-regulatory organization (hereinafter in this subsection collectively referred to as a "proposed rule change") accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission shall, as soon as practicable after the date of the filing of any proposed rule change, publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved. The Commission shall give interested persons an opportunity to submit written data, views, and arguments concerning such proposed rule change. No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection.

(2) APPROVAL PROCESS.—

(A) APPROVAL PROCESS ESTABLISHED.—

(i) IN GENERAL.—Except as provided in clause (ii), not later than 45 days after the date of publication of a proposed rule change under paragraph (1), the Commission shall—

(I) by order, approve or disapprove the proposed rule change; or

(II) institute proceedings under subparagraph (B) to determine whether the proposed rule change should be disapproved.

(ii) EXTENSION OF TIME PERIOD.—The Commission may extend the period established under clause (i) by not more than an additional 45 days, if—

(I) the Commission determines that a longer period is appropriate and publishes the reasons for such determination; or

(II) the self-regulatory organization that filed the proposed rule change consents to the longer period.

(B) PROCEEDINGS.—

(i) NOTICE AND HEARING.—If the Commission does not approve or disapprove a proposed rule change under subparagraph (A), the Commission shall provide to the self-regulatory organization that filed the proposed rule change—

(I) notice of the grounds for disapproval under consideration; and

(II) opportunity for hearing, to be concluded not later than 180 days after the date of publication of notice of the filing of the proposed rule change.

(ii) ORDER OF APPROVAL OR DISAPPROVAL.—

(I) IN GENERAL.—Except as provided in subclause (II), not later than 180 days after the date of publication under paragraph (1), the Commission shall issue an order approving or disapproving the proposed rule change.

(II) EXTENSION OF TIME PERIOD.—The Commission may extend the period for issuance under clause (I) by not more than 60 days, if—

(aa) the Commission determines that a longer period is appropriate and publishes the reasons for such determination; or

(bb) the self-regulatory organization that filed the proposed rule change consents to the longer period.

(C) STANDARDS FOR APPROVAL AND DISAPPROVAL.—

(i) APPROVAL.—The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this title and the rules and regulations issued under this title that are applicable to such organization.

(ii) DISAPPROVAL.—The Commission shall disapprove a proposed rule change of a self-regulatory organization if it does not make a finding described in clause (i).

(iii) TIME FOR APPROVAL.—The Commission may not approve a proposed rule change earlier than 30 days after the date of publication under paragraph (1), unless the Commission finds good cause for so doing and publishes the reason for the finding.

(D) RESULT OF FAILURE TO INSTITUTE OR CONCLUDE PROCEEDINGS.—A proposed rule change shall be deemed to have been approved by the Commission, if—

(i) the Commission does not approve or disapprove the proposed rule change or begin proceedings under subparagraph (B) within the period described in subparagraph (A); or

(ii) the Commission does not issue an order approving or disapproving the proposed rule change under subparagraph (B) within the period described in subparagraph (B)(ii).

(E) PUBLICATION DATE BASED ON FEDERAL REGISTER PUBLISHING.—For purposes of this paragraph, if, after filing a proposed rule change with the Commission pursuant to paragraph (1), a self-regulatory organization publishes a notice of the filing of such proposed rule change, together with the substantive terms of such proposed rule change, on a publicly accessible website, the Commission shall thereafter send the notice to the Federal Register for publication thereof under paragraph (1) within 15 days of the date on which such website publication is made. If the Commission fails to send the notice for publication thereof within such 15 day period, then the date of publication shall be deemed to be the date on which such website publication was made.

(F) RULEMAKING.—

(i) IN GENERAL.—Not later than 180 days after the date of enactment of the Investor Protection and Securities Reform Act of 2010, after consultation with other regulatory agencies, the Commission shall promulgate rules setting forth the procedural require-

ments of the proceedings required under this paragraph.

(ii) NOTICE AND COMMENT NOT REQUIRED.—The rules promulgated by the Commission under clause (i) are not required to include republication of proposed rule changes or solicitation of public comment.

(3)(A) Notwithstanding the provisions of paragraph (2) of this subsection, a proposed rule change shall take effect upon filing with the Commission if designated by the self-regulatory organization as (i) constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization, (ii) establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization, or (iii) concerned solely with the administration of the self-regulatory organization or other matters which the Commission, by rule, consistent with the public interest and the purposes of this subsection, may specify as without the provisions of such paragraph (2).

(B) Notwithstanding any other provision of this subsection, a proposed rule change may be put into effect summarily if it appears to the Commission that such action is necessary for the protection of investors, the maintenance of fair and orderly markets, or the safeguarding of securities or funds. Any proposed rule change so put into effect shall be filed promptly thereafter in accordance with the provisions of paragraph (1) of this subsection.

(C) Any proposed rule change of a self-regulatory organization which has taken effect pursuant to subparagraph (A) or (B) of this paragraph may be enforced by such organization to the extent it is not inconsistent with the provisions of this title, the rules and regulations thereunder, and applicable Federal and State law. At any time within the 60-day period beginning on the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1), the Commission summarily may temporarily suspend the change in the rules of the self-regulatory organization made thereby, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title. If the Commission takes such action, the Commission shall institute proceedings under paragraph (2)(B) to determine whether the proposed rule should be approved or disapproved. Commission action pursuant to this subparagraph shall not affect the validity or force of the rule change during the period it was in effect and shall not be reviewable under section 25 of this title, nor deemed to be "final agency action" for purposes of section 704 of title 5, United States Code.

(4) With respect to a proposed rule changed filed by a registered clearing agency for which the Commission is not the appropriate regulatory agency—

(A) The Commission shall not approve any such proposed rule change prior to the thirtieth day after the date of publication of notice of the filing thereof unless the appropriate regulatory agency for such clearing agency has notified the Commission of such appropriate regulatory agency's determination

that the proposed rule change is consistent with the safeguarding of securities and funds in the custody or control of such clearing agency or for which it is responsible.

(B) The Commission shall institute proceedings in accordance with paragraph (2)(B) of this subsection to determine whether any such proposed rule change should be disapproved, if the appropriate regulatory agency for such clearing agency notifies the Commission within thirty days of the date of publication of notice of the filing of the proposed rule change of such appropriate regulatory agency's (i) determination that the proposed rule change may be inconsistent with the safeguarding of securities or funds in the custody or control of such clearing agency or for which it is responsible and (ii) reasons for such determination.

(C) The Commission shall disapprove any such proposed rule change if the appropriate regulatory agency for such clearing agency notifies the Commission prior to the conclusion of proceedings instituted in accordance with paragraph (2)(B) of this subsection of such appropriate regulatory agency's (i) determination that the proposed rule change is inconsistent with the safeguarding of securities or funds in the custody or control of such clearing agency or for which it is responsible and (ii) reasons for such determination.

(D)[71](i) The Commission shall order the temporary suspension of any change in the rules of a clearing agency made by a proposed rule change that has taken effect under paragraph (3), if the appropriate regulatory agency for the clearing agency notifies the Commission not later than 30 days after the date on which the proposed rule change was filed of—

(I) the determination by the appropriate regulatory agency that the rules of such clearing agency, as so changed, may be inconsistent with the safeguarding of securities or funds in the custody or control of such clearing agency or for which it is responsible; and

(II) the reasons for the determination described in subclause (I).

(ii) If the Commission takes action under clause (i), the Commission shall institute proceedings under paragraph (2)(B) to determine if the proposed rule change should be approved or disapproved.

(5) The Commission shall consult with and consider the views of the Secretary of the Treasury prior to approving a proposed rule filed by a registered securities association that primarily concerns conduct related to transactions in government securities, except where the Commission determines that an emergency exists requiring expeditious or summary action and publishes its reasons therefor. If the Secretary of the Treasury comments in writing to the Commission on a proposed rule that has been published for comment, the Commission shall respond in writing to such written comment before approving the proposed rule. If the Secretary of the

[71] Margin so in law.

Treasury determines, and notifies the Commission, that such rule, if implemented, would, or as applied does (i) adversely affect the liquidity or efficiency of the market for government securities; or (ii) impose any burden on competition not necessary or appropriate in furtherance of the purposes of this section, the Commission shall, prior to adopting the proposed rule, find that such rule is necessary and appropriate in furtherance of the purposes of this section notwithstanding the Secretary's determination.

(6) In approving rules described in paragraph (5), the Commission shall consider the sufficiency and appropriateness of then existing laws and rules applicable to government securities brokers, government securities dealers, and persons associated with government securities brokers and government securities dealers.

(7)[72] SECURITY FUTURES PRODUCT RULE CHANGES.—

(A) FILING REQUIRED.—A self-regulatory organization that is an exchange registered with the Commission pursuant to section 6(g) of this title or that is a national securities association registered pursuant to section 15A(k) of this title shall file with the Commission, in accordance with such rules as the Commission may prescribe, copies of any proposed rule change or any proposed change in, addition to, or deletion from the rules of such self-regulatory organization (hereinafter in this paragraph collectively referred to as a "proposed rule change") that relates to higher margin levels, fraud or manipulation, recordkeeping, reporting, listing standards, or decimal pricing for security futures products, sales practices for security futures products for persons who effect transactions in security futures products, or rules effectuating such self-regulatory organization's obligation to enforce the securities laws. Such proposed rule change shall be accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission shall, upon the filing of any proposed rule change, promptly publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved. The Commission shall give interested persons an opportunity to submit data, views, and arguments concerning such proposed rule change.

(B) FILING WITH CFTC.—A proposed rule change filed with the Commission pursuant to subparagraph (A) shall be filed concurrently with the Commodity Futures Trading Commission. Such proposed rule change may take effect upon filing of a written certification with the Commodity Futures Trading Commission under section 5c(c) of the Commodity Exchange Act, upon a determination by the Commodity Futures Trading Commission that review of the proposed rule change is not necessary, or upon approval of the proposed rule change by the Commodity Futures Trading Commission.

(C) ABROGATION OF RULE CHANGES.—Any proposed rule change of a self-regulatory organization that has

[72] Margin so in law.

taken effect pursuant to subparagraph (B) may be enforced by such self-regulatory organization to the extent such rule is not inconsistent with the provisions of this title, the rules and regulations thereunder, and applicable Federal law. At any time within 60 days of the date of the filing of a written certification with the Commodity Futures Trading Commission under section 5c(c) of the Commodity Exchange Act, the date the Commodity Futures Trading Commission determines that review of such proposed rule change is not necessary, or the date the Commodity Futures Trading Commission approves such proposed rule change, the Commission, after consultation with the Commodity Futures Trading Commission, may summarily abrogate the proposed rule change and require that the proposed rule change be refiled in accordance with the provisions of paragraph (1), if it appears to the Commission that such proposed rule change unduly burdens competition or efficiency, conflicts with the securities laws, or is inconsistent with the public interest and the protection of investors. Commission action pursuant to the preceding sentence shall not affect the validity or force of the rule change during the period it was in effect and shall not be reviewable under section 25 of this title nor deemed to be a final agency action for purposes of section 704 of title 5, United States Code.

(D) REVIEW OF RESUBMITTED ABROGATED RULES.—

(i) PROCEEDINGS.—Within 35 days of the date of publication of notice of the filing of a proposed rule change that is abrogated in accordance with subparagraph (C) and refiled in accordance with paragraph (1), or within such longer period as the Commission may designate up to 90 days after such date if the Commission finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall—

(I) by order approve such proposed rule change; or

(II) after consultation with the Commodity Futures Trading Commission, institute proceedings to determine whether the proposed rule change should be disapproved. Proceedings under subclause (II) shall include notice of the grounds for disapproval under consideration and opportunity for hearing and be concluded within 180 days after the date of publication of notice of the filing of the proposed rule change. At the conclusion of such proceedings, the Commission, by order, shall approve or disapprove such proposed rule change. The Commission may extend the time for conclusion of such proceedings for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so

finding or for such longer period as to which the self-regulatory organization consents.

(ii) GROUNDS FOR APPROVAL.—The Commission shall approve a proposed rule change of a self-regulatory organization under this subparagraph if the Commission finds that such proposed rule change does not unduly burden competition or efficiency, does not conflict with the securities laws, and is not inconsistent with the public interest or the protection of investors. The Commission shall disapprove such a proposed rule change of a self-regulatory organization if it does not make such finding. The Commission shall not approve any proposed rule change prior to the 30th day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for so finding.

(8) DECIMAL PRICING.—Not later than 9 months after the date on which trading in any security futures product commences under this title, all self-regulatory organizations listing or trading security futures products shall file proposed rule changes necessary to implement decimal pricing of security futures products. The Commission may not require such rules to contain equal minimum increments in such decimal pricing.

(9) CONSULTATION WITH CFTC.—

(A) CONSULTATION REQUIRED.—The Commission shall consult with and consider the views of the Commodity Futures Trading Commission prior to approving or disapproving a proposed rule change filed by a national securities association registered pursuant to section 15A(a) or a national securities exchange subject to the provisions of subsection (a) that primarily concerns conduct related to transactions in security futures products, except where the Commission determines that an emergency exists requiring expeditious or summary action and publishes its reasons therefor.

(B) RESPONSES TO CFTC COMMENTS AND FINDINGS.—If the Commodity Futures Trading Commission comments in writing to the Commission on a proposed rule that has been published for comment, the Commission shall respond in writing to such written comment before approving or disapproving the proposed rule. If the Commodity Futures Trading Commission determines, and notifies the Commission, that such rule, if implemented or as applied, would—

(i) adversely affect the liquidity or efficiency of the market for security futures products; or

(ii) impose any burden on competition not necessary or appropriate in furtherance of the purposes of this section,

the Commission shall, prior to approving or disapproving the proposed rule, find that such rule is necessary and appropriate in furtherance of the purposes of this section notwithstanding the Commodity Futures Trading Commission's determination.

(10) RULE OF CONSTRUCTION RELATING TO FILING DATE OF PROPOSED RULE CHANGES.—

(A) IN GENERAL.—For purposes of this subsection, the date of filing of a proposed rule change shall be deemed to be the date on which the Commission receives the proposed rule change.

(B) EXCEPTION.—A proposed rule change has not been received by the Commission for purposes of subparagraph (A) if, not later than 7 business days after the date of receipt by the Commission, the Commission notifies the self-regulatory organization that such proposed rule change does not comply with the rules of the Commission relating to the required form of a proposed rule change, except that if the Commission determines that the proposed rule change is unusually lengthy and is complex or raises novel regulatory issues, the Commission shall inform the self-regulatory organization of such determination not later than 7 business days after the date of receipt by the Commission and, for the purposes of subparagraph (A), a proposed rule change has not been received by the Commission, if, not later than 21 days after the date of receipt by the Commission, the Commission notifies the self-regulatory organization that such proposed rule change does not comply with the rules of the Commission relating to the required form of a proposed rule change.

(10)[73] Notwithstanding paragraph (2), the time period within which the Commission is required by order to approve a proposed rule change or institute proceedings to determine whether the proposed rule change should be disapproved is stayed pending a determination by the Commission upon the request of the Commodity Futures Trading Commission or its Chairman that the Commission issue a determination as to whether a product that is the subject of such proposed rule change is a security pursuant to section 718 of the Wall Street Transparency and Accountability Act of 2010.

(c)[74] The Commission, by rule, may abrogate, add to, and delete from (hereinafter in this subsection collectively referred to as "amend") the rules of a self-regulatory organization (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this title and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this title, in the following manner:

(1) The Commission shall notify the self-regulatory organization and publish notice of the proposed rulemaking in the Federal Register. The notice shall include the text of the proposed amendment to the rules of the self-regulatory organization and a statement of the Commission's reasons, including any pertinent facts, for commencing such proposed rulemaking.

[73] Two paragraph (10)s' so in law.

[74] For applicability of this provision to the Public Company Accounting Oversight Board, see section 107 of the Sarbanes-Oxley Act of 2002, printed elsewhere in this volume.

(2) The Commission shall give interested persons an opportunity for the oral presentation of data, views, and arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation.

(3) A rule adopted pursuant to this subsection shall incorporate the text of the amendment to the rules of the self-regulatory organization and a statement of the Commission's basis for and purpose in so amending such rules. This statement shall include an identification of any facts on which the Commission considers its determination so to amend the rules of the self-regulatory agency to be based, including the reasons for the Commission's conclusions as to any of such facts which were disputed in the rulemaking.

(4)(A) Except as provided in paragraphs (1) through (3) of this subsection, rulemaking under this subsection shall be in accordance with the procedures specified in section 553 of title 5, United States Code, for rulemaking not on the record.

(B) Nothing in this subsection shall be construed to impair or limit the Commission's power to make, or to modify or alter the procedures the Commission may follow in making, rules and regulations pursuant to any other authority under this title.

(C) Any amendment to the rules of a self-regulatory organization made by the Commission pursuant to this subsection shall be considered for all purposes of this title to be part of the rules of such self-regulatory organization and shall not be considered to be a rule of the Commission.

(5) With respect to rules described in subsection (b)(5), the Commission shall consult with and consider the views of the Secretary of the Treasury before abrogating, adding to, and deleting from such rules, except where the Commission determines that an emergency exists requiring expeditious or summary action and publishes its reasons therefor.

(d)(1) If any self-regulatory organization imposes any final disciplinary sanction on any member thereof or participant therein, denies membership or participation to any applicant, or prohibits or limits any person in respect to access to services offered by such organization or member thereof or if any self-regulatory organization (other than a registered clearing agency) imposes any final disciplinary sanction on any person associated with a member or bars any person from becoming associated with a member, the self-regulatory organization shall promptly file notice thereof with the appropriate regulatory agency for the self-regulatory organization and (if other than the appropriate regulatory agency for the self-regulatory organization) the appropriate regulatory agency for such member, participant, applicant, or other person. The notice shall be in such form and contain such information as the appropriate regulatory agency for the self-regulatory organization, by rule, may prescribe as necessary or appropriate in furtherance of the purposes of this title.

(2)[75] Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine. Application to such appropriate regulatory agency for review, or the institution of review by such appropriate regulatory agency on its own motion, shall not operate as a stay of such action unless such appropriate regulatory agency otherwise orders, summarily or after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of the submission of affidavits or presentation of oral arguments). Each appropriate regulatory agency shall establish for appropriate cases an expedited procedure for consideration and determination of the question of a stay.

(3) The provisions of this subsection shall apply to an exchange registered pursuant to section 6(g) of this title or a national securities association registered pursuant to section 15A(k) of this title only to the extent that such exchange or association imposes any final disciplinary sanction for—

(A) a violation of the Federal securities laws or the rules and regulations thereunder; or

(B) a violation of a rule of such exchange or association, as to which a proposed change would be required to be filed under section 19 of this title, except that, to the extent that the exchange or association rule violation relates to any account, agreement, contract, or transaction, this subsection shall apply only to the extent such violation involves a security futures product.

(e)(1)[76] In any proceeding to review a final disciplinary sanction imposed by a self-regulatory organization on a member thereof or participant therein or a person associated with such a member, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction)—

(A) if the appropriate regulatory agency for such member, participant, or person associated with a member finds that such member, participant, or person associated with a member has engaged in such acts or practices, or has omitted such acts, as the self-regulatory organization has found him to have engaged in or omitted, that such acts or practices, or omissions to act, are in violation of such provisions of this title, the rules or regulations thereunder, the rules of the self-regulatory organization, or, in the case of a registered securities association, the rules of the Municipal Securities Rulemaking Board as have been specified in the determination of the self-regulatory

[75] For applicability of this provision to the Public Company Accounting Oversight Board, see section 107 of the Sarbanes-Oxley Act of 2002, printed elsewhere in this volume.

[76] For applicability of this provision to the Public Company Accounting Oversight Board, see section 107 of the Sarbanes-Oxley Act of 2002, printed elsewhere in this volume.

organization, and that such provisions are, and were applied in a manner, consistent with the purposes of this title, such appropriate regulatory agency, by order, shall so declare and, as appropriate, affirm the sanction imposed by the self-regulatory organization, modify the sanction in accordance with paragraph (2) of this subsection, or remand to the self-regulatory organization for further proceedings; or

(B) if such appropriate regulatory agency does not make any such finding it shall, by order, set aside the sanction imposed by the self-regulatory organization and, if appropriate, remand to the self-regulatory organization for further proceedings.

(2) If the appropriate regulatory agency for a member, participant, or person associated with a member, having due regard for the public interest and the protection of investors, finds after a proceeding in accordance with paragraph (1) of this subsection that a sanction imposed by a self-regulatory organization upon such member, participant, or person associated with a member imposes any burden on competition not necessary or appropriate in furtherance of the proposes of this title or is excessive or oppressive, the appropriate regulatory agency may cancel, reduce, or require the remission of such sanction.

(f) In any proceeding to review the denial of membership or participation in a self-regulatory organization to any applicant, the barring of any person from becoming associated with a member of a self-regulatory organization, or the prohibition or limitation by a self-regulatory organization of any person with respect to access to services offered by the self-regulatory organization or any member thereof, if the appropriate regulatory agency for such applicant or person, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to dismiss the proceeding or set aside the action of the self-regulatory organization) finds that the specific grounds on which such denial, bar, or prohibition or limitation is based exist in fact, that such denial, bar, or prohibition or limitation is in accordance with the rules of the self-regulatory organization, and that such rules are, and were applied in a manner, consistent with the purposes of this title, such appropriate regulatory agency, by order, shall dismiss the proceeding. If such appropriate regulatory agency does not make any such finding or if it finds that such denial, bar, or prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this title, such appropriate regulatory agency, by order, shall set aside the action of the self-regulatory organization and require it to admit such applicant to membership or participation, permit such person to become associated with a member, or grant such person access to services offered by the self-regulatory organization or member thereof.

(g)(1) Every self-regulatory organization shall comply with the provisions of this title, the rules and regulations thereunder, and its own rules, and (subject to the provisions of section 17(d) of this title, paragraph (2) of this subsection, and the rules thereunder) absent reasonable justification or excuse enforce compliance—

(A) in the case of a national securities exchange, with such provisions by its members and persons associated with its members;

(B) in the case of a registered securities association, with such provisions and the provisions of the rules of the Municipal Securities Rulemaking Board by its members and persons associated with its members; and

(C) in the case of a registered clearing agency, with its own rules by its participants.

(2) The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this title, may relieve any self-regulatory organization of any responsibility under this title to enforce compliance with any specified provision of this title or the rules or regulations thereunder by any member of such organization or person associated with such a member, or any class of such members or persons associated with a member.

(h)(1) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title to suspend for a period not exceeding twelve months or revoke the registration of such self-regulatory organization, or to censure or impose limitations upon the activities, functions, and operations of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such self-regulatory organization has violated or is unable to comply with any provision of this title, the rules or regulations thereunder, or its own rules or without reasonable justification or excuse has failed to enforce compliance—

(A) in the case of a national securities exchange, with any such provision by a member thereof or a person associated with a member thereof;

(B) in the case of a registered securities association, with any such provision or any provision of the rules of the Municipal Securities Rulemaking Board by a member thereof or a person associated with a member thereof; or

(C) in the case of a registered clearing agency, with any provision of its own rules by a participant therein.

(2) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title, to suspend for a period not exceeding twelve months or expel from such self-regulatory organization any member thereof or participant therein, if such member or participant is subject to an order of the Commission pursuant to section 15(b)(4) of this title or if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such member or participant has willfully violated or has effected any transaction for any other person who, such member or participant had reason to believe, was violating with respect to such transaction—

(A) in the case of a national securities exchange, any provision of the Securities Act of 1933, the Investment Advisers Act

of 1940, the Investment Company Act of 1940, this title, or the rules or regulations under any of such statutes;

(B) in the case of a registered securities association, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this title, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board; or

(C) in the case of a registered clearing agency, any provision of the rules of the clearing agency.

(3) The appropriate regulatory agency for a national securities exchange or registered securities association is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title, to suspend for a period not exceeding twelve months or to bar any person from being associated with a member of such national securities exchange or registered securities association, if such person is subject to an order of the Commission pursuant to section 15(b)(6) or if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such person has willfully violated or has effected any transaction for any other person who, such person associated with a member had reason to believe, was violating with respect to such transaction—

(A) in the case of a national securities exchange, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this title, or the rules or regulations under any of such statutes; or

(B) in the case of a registered securities association, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this title, the rules or regulations under any of the statutes, or the rules of the Municipal Securities Rulemaking Board.

(4) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title, to remove from office or censure any person who is, or at the time of the alleged misconduct was, an officer or director of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such person has willfully violated any provision of this title, the rules or regulations thereunder, or the rules of such self-regulatory organization, willfully abused his authority, or without reasonable justification or excuse has failed to enforce compliance—

(A) in the case of a national securities exchange, with any such provision by any member or person associated with a member;

(B) in the case of a registered securities association, with any such provision or any provision of the rules of the Municipal Securities Rulemaking Board by any member or person associated with a member; or

(C) in the case of a registered clearing agency, with any provision of the rules of the clearing agency by any participant.

(i) If a proceeding under subsection (h)(1) of this section results in the suspension or revocation of the registration of a clearing agency, the appropriate regulatory agency for such clearing agency may, upon notice to such clearing agency, apply to any court of competent jurisdiction specified in section 21(d) or 27 of this title for the appointment of a trustee. In the event of such an application, the court may, to the extent it deems necessary or appropriate, take exclusive jurisdiction of such clearing agency and the records and assets thereof, wherever located; and the court shall appoint the appropriate regulatory agency for such clearing agency or a person designated by such appropriate regulatory agency as trustee with power to take possession and continue to operate or terminate the operations of such clearing agency in an orderly manner for the protection of participants and investors, subject to such terms and conditions as the court may prescribe.

LIABILITY OF CONTROLLING PERSONS AND PERSONS WHO AID AND ABET VIOLATIONS

SEC. 20. [78t] (a) Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable (including to the Commission in any action brought under paragraph (1) or (3) of section 21(d)), unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

(b) It shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of this title or any rule or regulation thereunder through or by means of any other person.

(c) It shall be unlawful for any director or officer of, or any owner of any securities issued by, any issuer required to file any document, report, or information under this title or any rule or regulation thereunder without just cause to hinder, delay, or obstruct the making or filing of any such document, report, or information.

(d) Wherever communicating, or purchasing or selling a security while in possession of, material nonpublic information would violate, or result in liability to any purchaser or seller of the security under any provisions of this title, or any rule or regulation thereunder, such conduct in connection with a purchase or sale of a put, call, straddle, option, privilege[77] or security-based swap agreement with respect to such security or with respect to a group or index of securities including such security, shall also violate and result in comparable liability to any purchaser or seller of that security under such provision, rule, or regulation.

[77] Sections 205(a)(3) and 303(i) of the Commodity Futures Modernization Act of 2000 (114 Stat. 2763A-426, 2763A-526), as enacted in to law by section 1(a)(5) of Public Law 106-554, both amended section 20(d) of the Securities Exchange Act of 1934. Section 203(a)(3) amended section 20(d) by striking ", or privilege" and inserting ", privilege, or security future product". Section 303(i) amended section 20(d) to read in the form in which it appears in this compilation. Apparent intention of the combined amendments would be to insert references to both securities futures products and security-based swap agreements after the reference to "privilege".

(e) PROSECUTION OF PERSONS WHO AID AND ABET VIOLATIONS.—For purposes of any action brought by the Commission under paragraph (1) or (3) of section 21(d), any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this title, or of any rule or regulation issued under this title, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.

(f) The authority of the Commission under this section with respect to security-based swap agreements shall be subject to the restrictions and limitations of section 3A(b) of this title.

LIABILITY TO CONTEMPORANEOUS TRADERS FOR INSIDER TRADING

SEC. 20A. [78t–1] (a) PRIVATE RIGHTS OF ACTION BASED ON CONTEMPORANEOUS TRADING.—Any person who violates any provision of this title or the rules or regulations thereunder by purchasing or selling a security while in possession of material, nonpublic information shall be liable in an action in any court of competent jurisdiction to any person who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased (where such violation is based on a sale of securities) or sold (where such violation is based on a purchase of securities) securities of the same class.

(b) LIMITATIONS ON LIABILITY.—

(1) CONTEMPORANEOUS TRADING ACTIONS LIMITED TO PROFIT GAINED OR LOSS AVOIDED.—The total amount of damages imposed under subsection (a) shall not exceed the profit gained or loss avoided in the transaction or transactions that are the subject of the violation.

(2) OFFSETTING DISGORGEMENTS AGAINST LIABILITY.—The total amount of damages imposed against any person under subsection (a) shall be diminished by the amounts, if any, that such person may be required to disgorge, pursuant to a court order obtained at the instance of the Commission, in a proceeding brought under section 21(d) of this title relating to the same transaction or transactions.

(3) CONTROLLING PERSON LIABILITY.—No person shall be liable under this section solely by reason of employing another person who is liable under this section, but the liability of a controlling person under this section shall be subject to section 20(a) of this title.

(4) STATUTE OF LIMITATIONS.—No action may be brought under this section more than 5 years after the date of the last transaction that is the subject of the violation.

(c) JOINT AND SEVERAL LIABILITY FOR COMMUNICATING.—Any person who violates any provision of this title or the rules or regulations thereunder by communicating material, nonpublic information shall be jointly and severally liable under subsection (a) with, and to the same extent as, any person or persons liable under subsection (a) to whom the communication was directed.

(d) AUTHORITY NOT TO RESTRICT OTHER EXPRESS OR IMPLIED RIGHTS OF ACTION.—Nothing in this section shall be construed to limit or condition the right of any person to bring an action to en-

force a requirement of this title or the availability of any cause of action implied from a provision of this title.

(e) PROVISIONS NOT TO AFFECT PUBLIC PROSECUTIONS.—This section shall not be construed to bar or limit in any manner any action by the Commission or the Attorney General under any other provision of this title, nor shall it bar or limit in any manner any action to recover penalties, or to seek any other order regarding penalties.

INVESTIGATIONS; INJUNCTIONS AND PROSECUTION OF OFFENSES

SEC. 21. [78u] (a)(1) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this title, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated, or, as to any act or practice, or omission to act, while associated with a member, formerly associated with a member, the rules of a registered clearing agency in which such person is a participant, or, as to any act or practice, or omission to act, while a participant, was a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm, a person associated with such a firm, or, as to any act, practice, or omission to act, while associated with such firm, a person formerly associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this title, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this title relates.

(2) On request from a foreign securities authority, the Commission may provide assistance in accordance with this paragraph if the requesting authority states that the requesting authority is conducting an investigation which it deems necessary to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces. The Commission may, in its discretion, conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance. Such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States. In deciding whether to provide such assistance, the Commission shall consider whether (A) the requesting authority has agreed to provide reciprocal assistance in securities matters to the Commission; and (B) compliance with the request would prejudice the public interest of the United States.

(b) For the purpose of any such investigation, or any other proceeding under this title, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

(c) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d)(1) Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this title, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this title or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this title.

(2) AUTHORITY OF A COURT TO PROHIBIT PERSONS FROM SERVING AS OFFICERS AND DIRECTORS.—In any proceeding under para-

graph (1) of this subsection, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 10(b) of this title or the rules or regulations thereunder from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 12 of this title or that is required to file reports pursuant to section 15(d) of this title if the person's conduct demonstrates unfitness to serve as an officer or director of any such issuer.

(3) CIVIL MONEY PENALTIES AND AUTHORITY TO SEEK DISGORGEMENT.—

(A) AUTHORITY OF COMMISSION.—Whenever it shall appear to the Commission that any person has violated any provision of this title, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 21C of this title, other than by committing a violation subject to a penalty pursuant to section 21A, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to—

(i)[78] impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation; and

(ii)[78] require disgorgement under paragraph (7) of any unjust enrichment by the person who received such unjust enrichment as a result of such violation.

(B) AMOUNT OF PENALTY.—

(i) FIRST TIER.—The amount of a civil penalty imposed under subparagraph (A)(i) shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (I) $5,000 for a natural person or $50,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation.

(ii) SECOND TIER.—Notwithstanding clause (i), the amount of a civil penalty imposed under subparagraph (A)(i) for each such violation shall not exceed the greater of (I) $50,000 for a natural person or $250,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(iii) THIRD TIER.—Notwithstanding clauses (i) and (ii), the amount of a civil penalty imposed under subparagraph (A)(i) for each violation described in that subparagraph shall not exceed the greater of (I) $100,000 for a natural person or $500,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

[78] Margins of clauses (i) and (ii) are so in law.

(aa) the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(bb) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

(C) PROCEDURES FOR COLLECTION.—

(i) PAYMENT OF PENALTY TO TREASURY.—A penalty imposed under this section shall be payable into the Treasury of the United States, except as otherwise provided in section 308 of the Sarbanes-Oxley Act of 2002 and section 21F of this title.

(ii) COLLECTION OF PENALTIES.—If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(iii) REMEDY NOT EXCLUSIVE.—The actions authorized by this paragraph may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring.

(iv) JURISDICTION AND VENUE.—For purposes of section 27 of this title, actions under this paragraph shall be actions to enforce a liability or a duty created by this title.

(D) SPECIAL PROVISIONS RELATING TO A VIOLATION OF A CEASE-AND-DESIST ORDER.—In an action to enforce a cease-and-desist order entered by the Commission pursuant to section 21C, each separate violation of such order shall be a separate offense, except that in the case of a violation through a continuing failure to comply with the order, each day of the failure to comply shall be deemed a separate offense.

(4) PROHIBITION OF ATTORNEYS' FEES PAID FROM COMMISSION DISGORGEMENT FUNDS.—Except as otherwise ordered by the court upon motion by the Commission, or, in the case of an administrative action, as otherwise ordered by the Commission, funds disgorged under paragraph (7) as the result of an action brought by the Commission in Federal court, or as a result of any Commission administrative action, shall not be distributed as payment for attorneys' fees or expenses incurred by private parties seeking distribution of the disgorged funds.

(5) EQUITABLE RELIEF.—In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.

(6) AUTHORITY OF A COURT TO PROHIBIT PERSONS FROM PARTICIPATING IN AN OFFERING OF PENNY STOCK.—

(A) IN GENERAL.—In any proceeding under paragraph (1) against any person participating in, or, at the time of the alleged misconduct who was participating in, an offering of penny stock, the court may prohibit that person from participating in an offering of penny stock, conditionally or uncondi-

tionally, and permanently or for such period of time as the court shall determine.

(B) DEFINITION.—For purposes of this paragraph, the term "person participating in an offering of penny stock" includes any person engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of, any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from inclusion in such term.

(7) DISGORGEMENT.—In any action or proceeding brought by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may order, disgorgement.

(8) LIMITATIONS PERIODS.—

(A) DISGORGEMENT.—The Commission may bring a claim for disgorgement under paragraph (7)—

(i) not later than 5 years after the latest date of the violation that gives rise to the action or proceeding in which the Commission seeks the claim occurs; or

(ii) not later than 10 years after the latest date of the violation that gives rise to the action or proceeding in which the Commission seeks the claim if the violation involves conduct that violates—

(I) section 10(b);

(II) section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1));

(III) section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–6(1)); or

(IV) any other provision of the securities laws for which scienter must be established.

(B) EQUITABLE REMEDIES.—The Commission may seek a claim for any equitable remedy, including for an injunction or for a bar, suspension, or cease and desist order, not later than 10 years after the latest date on which a violation that gives rise to the claim occurs.

(C) CALCULATION.—For the purposes of calculating any limitations period under this paragraph with respect to an action or claim, any time in which the person against which the action or claim, as applicable, is brought is outside of the United States shall not count towards the accrual of that period.

(9) RULE OF CONSTRUCTION.—Nothing in paragraph (7) may be construed as altering any right that any private party may have to maintain a suit for a violation of this Act.

(e) Upon application of the Commission the district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus, injunctions, and orders commanding (1) any person to comply with the provisions of this title, the rules, regulations, and orders thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or person associated with a

member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, the rules of the Municipal Securities Rulemaking Board, or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title, (2) any national securities exchange or registered securities association to enforce compliance by its members and persons associated with its members with the provisions of this title, the rules, regulations, and orders thereunder, and the rules of such exchange or association, or (3) any registered clearing agency to enforce compliance by its participants with the provisions of the rules of such clearing agency.

(f) Notwithstanding any other provision of this title, the Commission shall not bring any action pursuant to subsection (d) or (e) of this section against any person for violation of, or to command compliance with, the rules of a self-regulatory organization or the Public Company Accounting Oversight Board unless it appears to the Commission that (1) such self-regulatory organization or the Public Company Accounting Oversight Board is unable or unwilling to take appropriate action against such person in the public interest and for the protection of investors, or (2) such action is otherwise necessary or appropriate in the public interest or for the protection of investors.

(g) Notwithstanding the provisions of section 1407(a) of title 28, United States Code, or any other provision of law, no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission.

(h)(1) The Right to Financial Privacy Act of 1978 [79] shall apply with respect to the Commission, except as otherwise provided in this subsection.

(2) Notwithstanding section 1105 or 1107 of the Right to Financial Privacy Act of 1978, [80] the Commission may have access to and obtain copies of, or the information contained in financial records of a customer from a financial institution without prior notice to the customer upon an ex parte showing to an appropriate United States district court that the Commission seeks such financial records pursuant to a subpoena issued in conformity with the requirements of section 19(b) of the Securities Act of 1933, section 21(b) of the Securities Exchange Act of 1934, section 42(b) of the Investment Company Act of 1940, or section 209(b) of the Investment Advisers Act of 1940, and that the Commission has reason to believe that—

(A) delay in obtaining access to such financial records, or the required notice, will result in—

(i) flight from prosecution;

(ii) destruction of or tampering with evidence;

[79] 12 U.S.C. 3401–3422. [Printed in appendix to this volume.]
[80] 12 U.S.C. 3405, 3407. [Printed in appendix to this volume.]

(iii) transfer of assets or records outside the territorial limits of the United States;

(iv) improper conversion of investor assets; or

(v) impeding the ability of the Commission to identify or trace the source or disposition of funds involved in any securities transaction;

(B) such financial records are necessary to identify or trace the record or beneficial ownership interest in any security;

(C) the acts, practices or course of conduct under investigation involve—

(i) the dissemination of materially false or misleading information concerning any security, issuer, or market, or the failure to make disclosures required under the securities laws, which remain uncorrected; or

(ii) a financial loss to investors or other persons protected under the securities laws which remains substantially uncompensated; or

(D) the acts, practices or course of conduct under investigation—

(i) involve significant financial speculation in securities; or

(ii) endanger the stability of any financial or investment intermediary.

(3) Any application under paragraph (2) for a delay in notice shall be made with reasonable specificity.

(4)(A) Upon a showing described in paragraph (2), the presiding judge or magistrate shall enter an ex parte order granting the requested delay for a period not to exceed ninety days and an order prohibiting the financial institution involved from disclosing that records have been obtained or that a request for records has been made.

(B) Extensions of the period of delay of notice provided in subparagraph (A) of up to ninety days each may be granted by the court upon application, but only in accordance with this subsection or section 1109(a), (b)(1), or (b)(2) of the Right to Financial Privacy Act of 1978. [81]

(C) Upon expiration of the period of delay of notification ordered under subparagraph (A) or (B), the customer shall be served with or mailed a copy of the subpena insofar as it applies to the customer together with the following notice which shall describe with reasonable specificity the nature of the investigation for which the Commission sought the financial records:

"Records or information concerning your transactions which are held by the financial institution named in the attached subpena were supplied to the Securities and Exchange Commission on (date). Notification was withheld pursuant to a determination by the (title of court so ordering) under section 21(h) of the Securities Exchange Act of 1934 that (state reason). The purpose of the investigation or official proceeding was (state purpose)."

(5) Upon application by the Commission, all proceedings pursuant to paragraphs (2) and (4) shall be held in camera and the

[81] 12 U.S.C. 3409(a), (b)(1), (b)(2). [Printed in appendix to this volume.]

records thereof sealed until expiration of the period of delay or such other date as the presiding judge or magistrate may permit.

[Paragraph (6) was repealed by section 708 of division O of Public Law 114–113.]

(7)(A) Following the expiration of the period of delay of notification ordered by the court pursuant to paragraph (4) of this subsection, the customer may, upon motion, reopen the proceeding in the district court which issued the order. If the presiding judge or magistrate finds that the movant is the customer to whom the records obtained by the Commission pertain, and that the Commission has obtained financial records or information contained therein in violation of this subsection, other than paragraph (1), it may order that the customer be granted civil penalties against the Commission in an amount equal to the sum of—

(i) $100 without regard to the volume of records involved;

(ii) any out-of-pocket damages sustained by the customer as a direct result of the disclosure; and

(iii) if the violation is found to have been willful, intentional, and without good faith, such punitive damages as the court may allow, together with the costs of the action and reasonable attorney's fees as determined by the court.

(B) Upon a finding that the Commission has obtained financial records or information contained therein in violation of this subsection, other than paragraph (1), the court, in its discretion, may also or in the alternative issue injunctive relief to require the Commission to comply with this subsection with respect to any subpena which the Commission issues in the future for financial records of such customer for purposes of the same investigation.

(C) Whenever the court determines that the Commission has failed to comply with this subsection, other than paragraph (1), and the court finds that the circumstances raise questions of whether an officer or employee of the Commission acted in a willful and intentional manner and without good faith with respect to the violation, the Office of Personnel Management shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the agent or employee who was primarily responsible for the violation. After investigating and considering the evidence submitted, the Office of Personnel Management shall submit its findings and recommendations to the Commission and shall send copies of the findings and recommendations to the officer or employee or his representative. The Commission shall take the corrective action that the Office of Personnel Management recommends.

(8) The relief described in paragraphs (7) and (10) shall be the only remedies or sanctions available to a customer for a violation of this subsection, other than paragraph (1), and nothing herein or in the Right to Financial Privacy Act of 1978 shall be deemed to prohibit the use in any investigation or proceeding of financial records, or the information contained therein, obtained by a subpena issued by the Commission. In the case of an unsuccessful action under paragraph (7), the court shall award the costs of the action and attorney's fees to the Commission if the presiding judge or magistrate finds that the customer's claims were made in bad faith.

(9)(A) The Commission may transfer financial records or the information contained therein to any government authority if the Commission proceeds as a transferring agency in accordance with section 1112 of the Right to Financial Privacy Act of 1978, [82] except that the customer notice required under section 1112(b) or (c) of such Act may be delayed upon a showing by the Commission, in accordance with the procedure set forth in paragraphs (4) and (5), that one or more of subparagraphs (A) through (D) of paragraph (2) apply.

(B) The Commission may, without notice to the customer pursuant to section 1112 of the Right to Financial Privacy Act of 1978, transfer financial records or the information contained therein to a State securities agency or to the Department of Justice. Financial records or information transferred by the Commission to the Department of Justice or to a State securities agency pursuant to the provisions of this subparagraph may be disclosed or used only in an administrative, civil, or criminal action or investigation by the Department of Justice or the State securities agency which arises out of or relates to the acts, practices, or courses of conduct investigated by the Commission, except that if the Department of Justice or the State securities agency determines that the information should be disclosed or used for any other purpose, it may do so if it notifies the customer, except as otherwise provided in the Right to Financial Privacy Act of 1978, within 30 days of its determination, or complies with the requirements of section 1109 of such Act regarding delay of notice. [83]

(10) Any government authority violating paragraph (9) shall be subject to the procedures and penalties applicable to the Commission under paragraph (7)(A) with respect to a violation by the Commission in obtaining financial records.

(11) Notwithstanding the provisions of this subsection, the Commission may obtain financial records from a financial institution or transfer such records in accordance with provisions of the Right to Financial Privacy Act of 1978.

(12) Nothing in this subsection shall enlarge or restrict any rights of a financial institution to challenge requests for records made by the Commission under existing law. Nothing in this subsection shall entitle a customer to assert any rights of a financial institution.

(13) Unless the context otherwise requires, all terms defined in the Right to Financial Privacy Act of 1978 which are common to this subsection shall have the same meaning as in such Act.

(i) INFORMATION TO CFTC.—The Commission shall provide the Commodity Futures Trading Commission with notice of the commencement of any proceeding and a copy of any order entered by the Commission against any broker or dealer registered pursuant to section 15(b)(11), any exchange registered pursuant to section 6(g), or any national securities association registered pursuant to section 15A(k).

[82] 12 U.S.C. 3412. [Printed in appendix to this volume.]
[83] 12 U.S.C. 3409. [Printed in appendix to this volume.]

CIVIL PENALTIES FOR INSIDER TRADING [84]

SEC. 21A. (a) AUTHORITY TO IMPOSE CIVIL PENALTIES.—

(1) JUDICIAL ACTIONS BY COMMISSION AUTHORIZED.—Whenever it shall appear to the Commission that any person has violated any provision of this title or the rules or regulations thereunder by purchasing or selling a security or security-based swap agreement while in possession of material, nonpublic information in, or has violated any such provision by communicating such information in connection with, a transaction on or through the facilities of a national securities exchange or from or through a broker or dealer, and which is not part of a public offering by an issuer of securities other than standardized options or security futures products, the Commission—

(A) may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, a civil penalty to be paid by the person who committed such violation; and

(B) may, subject to subsection (b)(1), bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, a civil penalty to be paid by a person who, at the time of the violation, directly or indirectly controlled the person who committed such violation.

(2) AMOUNT OF PENALTY FOR PERSON WHO COMMITTED VIOLATION.—The amount of the penalty which may be imposed on the person who committed such violation shall be determined by the court in light of the facts and circumstances, but shall not exceed three times the profit gained or loss avoided as a result of such unlawful purchase, sale, or communication.

(3) AMOUNT OF PENALTY FOR CONTROLLING PERSON.—The amount of the penalty which may be imposed on any person

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[84] The Insider Trading and Securities Fraud Enforcement Act of 1988 (P.L. 100–704; 102 Stat. 4677), which added section 21A to the Securities Exchange Act of 1934, contained the following additional provisions:

SEC. 2. [15 U.S.C. 78u–1 note] FINDINGS.

The Congress finds that—

(1) the rules and regulations of the Securities and Exchange Commisison under the Securities Exchange Act of 1934 governing trading while in possession of material, nonpublic information are, as required by such Act, necessary and appropriate in the public interest and for the protection of investors;

(2) the Commission has, within the limits of accepted administrative and judicial construction of such rules and regulations, enforced such rules and regulations vigorously, effectively, and fairly; and

(3) nonetheless, additional methods are appropriate to deter and prosecute violations of such rules and regulations.

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SEC. 3. CIVIL PENALTIES OF CONTROLLING PERSONS FOR ILLEGAL INSIDER TRADING BY CONTROLLED PERSONS.

(a) AMENDMENT.— * * *

* * * * * * *

(c) COMMISSION RECOMMENDATIONS FOR ADDITIONAL CIVIL PENALTY AUTHORITY REQUIRED.—The Securities and Exchange Commission shall, within 60 days after the date of enactment of this Act, submit to each House of the Congress any recommendations the Commission considers appropriate with respect to the extension of the Commission's authority to seek civil penalties or impose administrative fines for violations other than those described in section 21A of the Securities Exchange Act of 1934 (as added by this section).

who, at the time of the violation, directly or indirectly controlled the person who committed such violation, shall be determined by the court in light of the facts and circumstances, but shall not exceed the greater of $1,000,000, or three times the amount of the profit gained or loss avoided as a result of such controlled person's violation. If such controlled person's violation was a violation by communication, the profit gained or loss avoided as a result of the violation shall, for purposes of this paragraph only, be deemed to be limited to the profit gained or loss avoided by the person or persons to whom the controlled person directed such communication.

(b) LIMITATIONS ON LIABILITY.—

(1) LIABILITY OF CONTROLLING PERSONS.—No controlling person shall be subject to a penalty under subsection (a)(1)(B) unless the Commission establishes that—

(A) such controlling person knew or recklessly disregarded the fact that such controlled person was likely to engage in the act or acts constituting the violation and failed to take appropriate steps to prevent such act or acts before they occurred; or

(B) such controlling person knowingly or recklessly failed to establish, maintain, or enforce any policy or procedure required under section 15(f) of this title or section 204A of the Investment Advisers Act of 1940 and such failure substantially contributed to or permitted the occurrence of the act or acts constituting the violation.

(2) ADDITIONAL RESTRICTIONS ON LIABILITY.—No person shall be subject to a penalty under subsection (a) solely by reason of employing another person who is subject to a penalty under such subsection, unless such employing person is liable as a controlling person under paragraph (1) of this subsection. Section 20(a) of this title shall not apply to actions under subsection (a) of this section.

(c) AUTHORITY OF COMMISSION.—the Commission, by such rules, regulations, and orders as it considers necessary or appropriate in the public interest or for the protection of investors, may exempt, in whole or in part, either unconditionally or upon specific terms and conditions, any person or transaction or class of persons or transactions from this section.

(d) PROCEDURES FOR COLLECTION.—

(1) PAYMENT OF PENALTY TO TREASURY.—A penalty imposed under this section shall be payable into the Treasury of the United States, except as otherwise provided in section 308 of the Sarbanes-Oxley Act of 2002 and section 21F of this title.

(2) COLLECTION OF PENALTIES.—If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(3) REMEDY NOT EXCLUSIVE.—The actions authorized by this section may be brought in addition to any other actions that the Commission or the Attorney General are entitled to bring.

(4) JURISDICTION AND VENUE.—For purposes of section 27 of this title, actions under this section shall be actions to enforce a liability or a duty created by this title.

(5) STATUTE OF LIMITATIONS.—No action may be brought under this section more than 5 years after the date of the purchase or sale. This section shall not be construed to bar or limit in any manner any action by the Commission or the Attorney General under any other provision of this title, nor shall it bar or limit in any manner any action to recover penalties, or to seek any other order regarding penalties, imposed in an action commenced within 5 years of such transaction.

(e) DEFINITION.—For purposes of this section, "profit gained" or "loss avoided" is the difference between the purchase or sale price of the security and the value of that security as measured by the trading price of the security a reasonable period after public dissemination of the nonpublic information.

(f) The authority of the Commission under this section with respect to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act)[85] shall be subject to the restrictions and limitations of section 3A(b) of this title.

(g) DUTY OF MEMBERS AND EMPLOYEES OF CONGRESS.—

(1) IN GENERAL.—Subject to the rule of construction under section 10 of the STOCK Act and solely for purposes of the insider trading prohibitions arising under this Act, including section 10(b) and Rule 10b–5 thereunder, each Member of Congress or employee of Congress owes a duty arising from a relationship of trust and confidence to the Congress, the United States Government, and the citizens of the United States with respect to material, nonpublic information derived from such person's position as a Member of Congress or employee of Congress or gained from the performance of such person's official responsibilities.

(2) DEFINITIONS.—In this subsection—

(A) the term "Member of Congress" means a member of the Senate or House of Representatives, a Delegate to the House of Representatives, and the Resident Commissioner from Puerto Rico; and

(B) the term "employee of Congress" means—

(i) any individual (other than a Member of Congress), whose compensation is disbursed by the Secretary of the Senate or the Chief Administrative Officer of the House of Representatives; and

(ii) any other officer or employee of the legislative branch (as defined in section 13101(11) of title 5, United States Code).

(3) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to impair or limit the construction of the existing antifraud provisions of the securities laws or the authority of the Commission under those provisions.

(h) DUTY OF OTHER FEDERAL OFFICIALS.—

[85] Effective on July 21, 2011, section 762(d)(7)(B) of Public Law 111–203 amends section 21A(g) by striking "(as defined in section 206B of the Gramm-Leach-Bliley Act)". However, effective July 21, 2010, section 923(b)(2)(C) of such Public Law redesignates subsection (g) as subsection (f) and results in the amendment made by section 762(d)(7)(B) unexecutable.

(1) IN GENERAL.—Subject to the rule of construction under section 10 of the STOCK Act and solely for purposes of the insider trading prohibitions arising under this Act, including section 10(b), and Rule 10b–5 thereunder, each executive branch employee, each judicial officer, and each judicial employee owes a duty arising from a relationship of trust and confidence to the United States Government and the citizens of the United States with respect to material, nonpublic information derived from such person's position as an executive branch employee, judicial officer, or judicial employee or gained from the performance of such person's official responsibilities.

(2) DEFINITIONS.—In this subsection—

(A) the term "executive branch employee"—

(i) has the meaning given the term "employee" under section 2105 of title 5, United States Code;

(ii) includes—

(I) the President;

(II) the Vice President; and

(III) an employee of the United States Postal Service or the Postal Regulatory Commission;

(B) the term "judicial employee" has the meaning given that term in section 13101(9) of title 5, United States Code; and

(C) the term "judicial officer" has the meaning given that term under section 13101(10) of title 5, United States Code.

(3) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to impair or limit the construction of the existing antifraud provisions of the securities laws or the authority of the Commission under those provisions.

(i) PARTICIPATION IN INITIAL PUBLIC OFFERINGS.—An individual described in section 13103(f) of title 5, United States Code, may not purchase securities that are the subject of an initial public offering (within the meaning given such term in section 12(f)(1)(G)(i)) in any manner other than is available to members of the public generally.

CIVIL REMEDIES IN ADMINISTRATIVE PROCEEDINGS

SEC. 21B. [78u–2] (a) COMMISSION AUTHORITY TO ASSESS MONEY PENALTIES.—

(1) IN GENERAL.—In any proceeding instituted pursuant to sections 15(b)(4), 15(b)(6), 15D, 15B, 15C, 15E, or 17A of this title against any person, the Commission or the appropriate regulatory agency may impose a civil penalty if it finds, on the record after notice and opportunity for hearing, that such penalty is in the public interest and that such person—

(A) has willfully violated any provision of the Securities Act of 1933, the Investment Company Act of 1940, the Investment Advisers Act of 1940, or this title, or the rules or regulations thereunder, or the rules of the Municipal Securities Rulemaking Board;

(B) has willfully aided, abetted, counseled, commanded, induced, or procured such a violation by any other person;

(C) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission or with any other appropriate regulatory agency under this title, or in any proceeding before the Commission with respect to registration, any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein; or

(D) has failed reasonably to supervise, within the meaning of section 15(b)(4)(E) of this title, with a view to preventing violations of the provisions of such statutes, rules and regulations, another person who commits such a violation, if such other person is subject to his supervision;[86]

(2) CEASE-AND-DESIST PROCEEDINGS.—In any proceeding instituted under section 21C against any person, the Commission may impose a civil penalty, if the Commission finds, on the record after notice and opportunity for hearing, that such person—

(A) is violating or has violated any provision of this title, or any rule or regulation issued under this title; or

(B) is or was a cause of the violation of any provision of this title, or any rule or regulation issued under this title.

(b) MAXIMUM AMOUNT OF PENALTY.—

(1) FIRST TIER.—The maximum amount of penalty for each act or omission described in subsection (a) shall be $5,000 for a natural person or $50,000 for any other person.

(2) SECOND TIER.—Notwithstanding paragraph (1), the maximum amount of penalty for each such act or omission shall be $50,000 for a natural person or $250,000 for any other person if the act or omission described in subsection (a) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(3) THIRD TIER.—Notwithstanding paragraphs (1) and (2), the maximum amount of penalty for each such act or omission shall be $100,000 for a natural person or $500,000 for any other person if—

(A) the act or omission described in subsection (a) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(B) such act or omission directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission.

(c) DETERMINATION OF PUBLIC INTEREST.—In considering under this section whether a penalty is in the public interest, the Commission or the appropriate regulatory agency may consider—

[86] So in law. The semicolon at the end of subparagraph (D) probably should be a period.

(1) whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement;

(2) the harm to other persons resulting either directly or indirectly from such act or omission;

(3) the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior;

(4) whether such person previously has been found by the Commission, another appropriate regulatory agency, or a self-regulatory organization to have violated the Federal securities laws, State securities laws, or the rules of a self-regulatory organization, has been enjoined by a court of competent jurisdiction from violations of such laws or rules, or has been convicted by a court of competent jurisdiction of violations of such laws or of any felony or misdemeanor described in section 15(b)(4)(B) of this title;

(5) the need to deter such person and other persons from committing such acts or omissions; and

(6) such other matters as justice may require.

(d) EVIDENCE CONCERNING ABILITY TO PAY.—In any proceeding in which the Commission or the appropriate regulatory agency may impose a penalty under this section, a respondent may present evidence of the respondent's ability to pay such penalty. The Commission or the appropriate regulatory agency may, in its discretion, consider such evidence in determining whether such penalty is in the public interest. Such evidence may relate to the extent of such person's ability to continue in business and the collectability of a penalty, taking into account any other claims of the United States or third parties upon such person's assets and the amount of such person's assets.

(e) AUTHORITY TO ENTER AN ORDER REQUIRING AN ACCOUNTING AND DISGORGEMENT.—In any proceeding in which the Commission or the appropriate regulatory agency may impose a penalty under this section, the Commission or the appropriate regulatory agency may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.

(f) SECURITY-BASED SWAPS.—

(1) CLEARING AGENCY.—Any clearing agency that knowingly or recklessly evades or participates in or facilitates an evasion of the requirements of section 3C shall be liable for a civil money penalty in twice the amount otherwise available for a violation of section 3C.

(2) SECURITY-BASED SWAP DEALER OR MAJOR SECURITY-BASED SWAP PARTICIPANT.—Any security-based swap dealer or major security-based swap participant that knowingly or recklessly evades or participates in or facilitates an evasion of the requirements of section 3C shall be liable for a civil money penalty in twice the amount otherwise available for a violation of section 3C.

CEASE-AND-DESIST PROCEEDINGS

SEC. 21C. [78u–3] (a) AUTHORITY OF THE COMMISSION.—If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this title, or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and 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 violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation. Such order may, in addition to requiring a person to cease and desist from committing or causing a violation, require such person to comply, or to take steps to effect compliance, with such provision, rule, or regulation, upon such terms and conditions and within such time as the Commission may specify in such order. Any such order may, as the Commission deems appropriate, require future compliance or steps to effect future compliance, either permanently or for such period of time as the Commission may specify, with such provision, rule, or regulation with respect to any security, any issuer, or any other person.

(b) HEARING.—The notice instituting proceedings pursuant to subsection (a) shall fix a hearing date not earlier than 30 days nor later than 60 days after service of the notice unless an earlier or a later date is set by the Commission with the consent of any respondent so served.

(c) TEMPORARY ORDER.—

(1) IN GENERAL.—Whenever the Commission determines that the alleged violation or threatened violation specified in the notice instituting proceedings pursuant to subsection (a), or the continuation thereof, is likely to result in significant dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest, including, but not limited to, losses to the Securities Investor Protection Corporation, prior to the completion of the proceedings, the Commission may enter a temporary order requiring the respondent to cease and desist from the violation or threatened violation and to take such action to prevent the violation or threatened violation and to prevent dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest as the Commission deems appropriate pending completion of such proceedings. Such an order shall be entered only after notice and opportunity for a hearing, unless the Commission determines that notice and hearing prior to entry would be impracticable or contrary to the public interest. A temporary order shall become effective upon service upon the respondent and, unless set aside, limited, or suspended by the Commission or a court of competent jurisdiction, shall remain effective and enforceable pending the completion of the proceedings.

(2) APPLICABILITY.—Paragraph (1) shall apply only to a respondent that acts, or, at the time of the alleged misconduct acted, as a broker, dealer, investment adviser, investment company, municipal securities dealer, government securities broker, government securities dealer, registered public account-

ing firm (as defined in section 2 of the Sarbanes-Oxley Act of 2002), or transfer agent, or is, or was at the time of the alleged misconduct, an associated person of, or a person seeking to become associated with, any of the foregoing.

(3) TEMPORARY FREEZE.—

(A) IN GENERAL.—

(i) ISSUANCE OF TEMPORARY ORDER.—Whenever, during the course of a lawful investigation involving possible violations of the Federal securities laws by an issuer of publicly traded securities or any of its directors, officers, partners, controlling persons, agents, or employees, it shall appear to the Commission that it is likely that the issuer will make extraordinary payments (whether compensation or otherwise) to any of the foregoing persons, the Commission may petition a Federal district court for a temporary order requiring the issuer to escrow, subject to court supervision, those payments in an interest-bearing account for 45 days.

(ii) STANDARD.—A temporary order shall be entered under clause (i), only after notice and opportunity for a hearing, unless the court determines that notice and hearing prior to entry of the order would be impracticable or contrary to the public interest.

(iii) EFFECTIVE PERIOD.—A temporary order issued under clause (i) shall—

(I) become effective immediately;

(II) be served upon the parties subject to it; and

(III) unless set aside, limited or suspended by a court of competent jurisdiction, shall remain effective and enforceable for 45 days.

(iv) EXTENSIONS AUTHORIZED.—The effective period of an order under this subparagraph may be extended by the court upon good cause shown for not longer than 45 additional days, provided that the combined period of the order shall not exceed 90 days.

(B) PROCESS ON DETERMINATION OF VIOLATIONS.—

(i) VIOLATIONS CHARGED.—If the issuer or other person described in subparagraph (A) is charged with any violation of the Federal securities laws before the expiration of the effective period of a temporary order under subparagraph (A) (including any applicable extension period), the order shall remain in effect, subject to court approval, until the conclusion of any legal proceedings related thereto, and the affected issuer or other person, shall have the right to petition the court for review of the order.

(ii) VIOLATIONS NOT CHARGED.—If the issuer or other person described in subparagraph (A) is not charged with any violation of the Federal securities laws before the expiration of the effective period of a temporary order under subparagraph (A) (including any applicable extension period), the escrow shall ter-

minate at the expiration of the 45-day effective period (or the expiration of any extension period, as applicable), and the disputed payments (with accrued interest) shall be returned to the issuer or other affected person.

(d) REVIEW OF TEMPORARY ORDERS.—

(1) COMMISSION REVIEW.—At any time after the respondent has been served with a temporary cease-and-desist order pursuant to subsection (c), the respondent may apply to the Commission to have the order set aside, limited, or suspended. If the respondent has been served with a temporary cease-and-desist order entered without a prior Commission hearing, the respondent may, within 10 days after the date on which the order was served, request a hearing on such application and the Commission shall hold a hearing and render a decision on such application at the earliest possible time.

(2) JUDICIAL REVIEW.—Within—

(A) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or

(B) 10 days after the Commission renders a decision on an application and hearing under paragraph (1), with respect to any temporary cease-and-desist order entered without a prior Commission hearing,

the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under paragraph (1) of this subsection.

(3) NO AUTOMATIC STAY OF TEMPORARY ORDER.—The commencement of proceedings under paragraph (2) of this subsection shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(4) EXCLUSIVE REVIEW.—Section 25 of this title shall not apply to a temporary order entered pursuant to this section.

(e) AUTHORITY TO ENTER AN ORDER REQUIRING AN ACCOUNTING AND DISGORGEMENT.—In any cease-and-desist proceeding under subsection (a), the Commission may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.

(f) AUTHORITY OF THE COMMISSION TO PROHIBIT PERSONS FROM SERVING AS OFFICERS OR DIRECTORS.—In any cease-and-desist proceeding under subsection (a), the Commission may issue an order to prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who has violated section 10(b) or the rules or regulations thereunder, from

acting as an officer or director of any issuer that has a class of securities registered pursuant to section 12, or that is required to file reports pursuant to section 15(d), if the conduct of that person demonstrates unfitness to serve as an officer or director of any such issuer.

SEC. 21D. [78u–4] PRIVATE SECURITIES LITIGATION.

(a) PRIVATE CLASS ACTIONS.—

(1) IN GENERAL.—The provisions of this subsection shall apply in each private action arising under this title that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.

(2) CERTIFICATION FILED WITH COMPLAINT.—

(A) IN GENERAL.—Each plaintiff seeking to serve as a representative party on behalf of a class shall provide a sworn certification, which shall be personally signed by such plaintiff and filed with the complaint, that—

(i) states that the plaintiff has reviewed the complaint and authorized its filing;

(ii) states that the plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel or in order to participate in any private action arising under this title;

(iii) states that the plaintiff is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary;

(iv) sets forth all of the transactions of the plaintiff in the security that is the subject of the complaint during the class period specified in the complaint;

(v) identifies any other action under this title, filed during the 3-year period preceding the date on which the certification is signed by the plaintiff, in which the plaintiff has sought to serve as a representative party on behalf of a class; and

(vi) states that the plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4).

(B) NONWAIVER OF ATTORNEY-CLIENT PRIVILEGE.—The certification filed pursuant to subparagraph (A) shall not be construed to be a waiver of the attorney-client privilege.

(3) APPOINTMENT OF LEAD PLAINTIFF.—

(A) EARLY NOTICE TO CLASS MEMBERS.—

(i) IN GENERAL.—Not later than 20 days after the date on which the complaint is filed, the plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class—

(I) of the pendency of the action, the claims asserted therein, and the purported class period; and

(II) that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.

(ii) MULTIPLE ACTIONS.—If more than one action on behalf of a class asserting substantially the same claim or claims arising under this title is filed, only the plaintiff or plaintiffs in the first filed action shall be required to cause notice to be published in accordance with clause (i).

(iii) ADDITIONAL NOTICES MAY BE REQUIRED UNDER FEDERAL RULES.—Notice required under clause (i) shall be in addition to any notice required pursuant to the Federal Rules of Civil Procedure.

(B) APPOINTMENT OF LEAD PLAINTIFF.—

(i) IN GENERAL.—Not later than 90 days after the date on which a notice is published under subparagraph (A)(i), the court shall consider any motion made by a purported class member in response to the notice, including any motion by a class member who is not individually named as a plaintiff in the complaint or complaints, and shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members (hereafter in this paragraph referred to as the "most adequate plaintiff") in accordance with this subparagraph.

(ii) CONSOLIDATED ACTIONS.—If more than one action on behalf of a class asserting substantially the same claim or claims arising under this title has been filed, and any party has sought to consolidate those actions for pretrial purposes or for trial, the court shall not make the determination required by clause (i) until after the decision on the motion to consolidate is rendered. As soon as practicable after such decision is rendered, the court shall appoint the most adequate plaintiff as lead plaintiff for the consolidated actions in accordance with this paragraph.

(iii) REBUTTABLE PRESUMPTION.—

(I) IN GENERAL.—Subject to subclause (II), for purposes of clause (i), the court shall adopt a presumption that the most adequate plaintiff in any private action arising under this title is the person or group of persons that—

(aa) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i);

(bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and

(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

(II) REBUTTAL EVIDENCE.—The presumption described in subclause (I) may be rebutted only upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff—

(aa) will not fairly and adequately protect the interests of the class; or

(bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

(iv) DISCOVERY.—For purposes of this subparagraph, discovery relating to whether a member or members of the purported plaintiff class is the most adequate plaintiff may be conducted by a plaintiff only if the plaintiff first demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class.

(v) SELECTION OF LEAD COUNSEL.—The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.

(vi) RESTRICTIONS ON PROFESSIONAL PLAINTIFFS.—Except as the court may otherwise permit, consistent with the purposes of this section, a person may be a lead plaintiff, or an officer, director, or fiduciary of a lead plaintiff, in no more than 5 securities class actions brought as plaintiff class actions pursuant to the Federal Rules of Civil Procedure during any 3-year period.

(4) RECOVERY BY PLAINTIFFS.—The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class. Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class.

(5) RESTRICTIONS ON SETTLEMENTS UNDER SEAL.—The terms and provisions of any settlement agreement of a class action shall not be filed under seal, except that on motion of any party to the settlement, the court may order filing under seal for those portions of a settlement agreement as to which good cause is shown for such filing under seal. For purposes of this paragraph, good cause shall exist only if publication of a term or provision of a settlement agreement would cause direct and substantial harm to any party.

(6) RESTRICTIONS ON PAYMENT OF ATTORNEYS' FEES AND EXPENSES.—Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.

(7) DISCLOSURE OF SETTLEMENT TERMS TO CLASS MEMBERS.—Any proposed or final settlement agreement that is

published or otherwise disseminated to the class shall include each of the following statements, along with a cover page summarizing the information contained in such statements:

(A) STATEMENT OF PLAINTIFF RECOVERY.—The amount of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per share basis.

(B) STATEMENT OF POTENTIAL OUTCOME OF CASE.—

(i) AGREEMENT ON AMOUNT OF DAMAGES.—If the settling parties agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this title, a statement concerning the average amount of such potential damages per share.

(ii) DISAGREEMENT ON AMOUNT OF DAMAGES.—If the parties do not agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this title, a statement from each settling party concerning the issue or issues on which the parties disagree.

(iii) INADMISSIBILITY FOR CERTAIN PURPOSES.—A statement made in accordance with clause (i) or (ii) concerning the amount of damages shall not be admissible in any Federal or State judicial action or administrative proceeding, other than an action or proceeding arising out of such statement.

(C) STATEMENT OF ATTORNEYS' FEES OR COSTS SOUGHT.—If any of the settling parties or their counsel intend to apply to the court for an award of attorneys' fees or costs from any fund established as part of the settlement, a statement indicating which parties or counsel intend to make such an application, the amount of fees and costs that will be sought (including the amount of such fees and costs determined on an average per share basis), and a brief explanation supporting the fees and costs sought. Such information shall be clearly summarized on the cover page of any notice to a party of any proposed or final settlement agreement.

(D) IDENTIFICATION OF LAWYERS' REPRESENTATIVES.—The name, telephone number, and address of one or more representatives of counsel for the plaintiff class who will be reasonably available to answer questions from class members concerning any matter contained in any notice of settlement published or otherwise disseminated to the class.

(E) REASONS FOR SETTLEMENT.—A brief statement explaining the reasons why the parties are proposing the settlement.

(F) OTHER INFORMATION.—Such other information as may be required by the court.

(8) SECURITY FOR PAYMENT OF COSTS IN CLASS ACTIONS.—In any private action arising under this title that is certified as a class action pursuant to the Federal Rules of Civil Procedure, the court may require an undertaking from the attorneys

for the plaintiff class, the plaintiff class, or both, or from the attorneys for the defendant, the defendant, or both, in such proportions and at such times as the court determines are just and equitable, for the payment of fees and expenses that may be awarded under this subsection.

(9) ATTORNEY CONFLICT OF INTEREST.—If a plaintiff class is represented by an attorney who directly owns or otherwise has a beneficial interest in the securities that are the subject of the litigation, the court shall make a determination of whether such ownership or other interest constitutes a conflict of interest sufficient to disqualify the attorney from representing the plaintiff class.

(b) REQUIREMENTS FOR SECURITIES FRAUD ACTIONS.—

(1) MISLEADING STATEMENTS AND OMISSIONS.—In any private action arising under this title in which the plaintiff alleges that the defendant—

(A) made an untrue statement of a material fact; or

(B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

(2) REQUIRED STATE OF MIND.—

(A) IN GENERAL.—Except as provided in subparagraph (B), in any private action arising under this title in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this title, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

(B) EXCEPTION.—In the case of an action for money damages brought against a credit rating agency or a controlling person under this title, it shall be sufficient, for purposes of pleading any required state of mind in relation to such action, that the complaint state with particularity facts giving rise to a strong inference that the credit rating agency knowingly or recklessly failed—

(i) to conduct a reasonable investigation of the rated security with respect to the factual elements relied upon by its own methodology for evaluating credit risk; or

(ii) to obtain reasonable verification of such factual elements (which verification may be based on a sampling technique that does not amount to an audit) from other sources that the credit rating agency considered to be competent and that were independent of the issuer and underwriter.

(3) MOTION TO DISMISS; STAY OF DISCOVERY.—

(A) DISMISSAL FOR FAILURE TO MEET PLEADING REQUIREMENTS.—In any private action arising under this

title, the court shall, on the motion of any defendant, dismiss the complaint if the requirements of paragraphs (1) and (2) are not met.

(B) STAY OF DISCOVERY.—In any private action arising under this title, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

(C) PRESERVATION OF EVIDENCE.—

(i) IN GENERAL.—During the pendency of any stay of discovery pursuant to this paragraph, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

(ii) SANCTION FOR WILLFUL VIOLATION.—A party aggrieved by the willful failure of an opposing party to comply with clause (i) may apply to the court for an order awarding appropriate sanctions.

(D) CIRCUMVENTION OF STAY OF DISCOVERY.—Upon a proper showing, a court may stay discovery proceedings in any private action in a State court, as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this paragraph.

(4) LOSS CAUSATION.—In any private action arising under this title, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this title caused the loss for which the plaintiff seeks to recover damages.

(c) SANCTIONS FOR ABUSIVE LITIGATION.—

(1) MANDATORY REVIEW BY COURT.—In any private action arising under this title, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

(2) MANDATORY SANCTIONS.—If the court makes a finding under paragraph (1) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion, the court shall impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. Prior to making a finding that any party or attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall give such party or attorney notice and an opportunity to respond.

(3) PRESUMPTION IN FAVOR OF ATTORNEYS' FEES AND COSTS.—

(A) IN GENERAL.—Subject to subparagraphs (B) and (C), for purposes of paragraph (2), the court shall adopt a presumption that the appropriate sanction—

(i) for failure of any responsive pleading or dispositive motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation; and

(ii) for substantial failure of any complaint to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred in the action.

(B) REBUTTAL EVIDENCE.—The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that—

(i) the award of attorneys' fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed; or

(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

(C) SANCTIONS.—If the party or attorney against whom sanctions are to be imposed meets its burden under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.

(d) DEFENDANT'S RIGHT TO WRITTEN INTERROGATORIES.—In any private action arising under this title in which the plaintiff may recover money damages, the court shall, when requested by a defendant, submit to the jury a written interrogatory on the issue of each such defendant's state of mind at the time the alleged violation occurred.

(e) LIMITATION ON DAMAGES.—

(1) IN GENERAL.—Except as provided in paragraph (2), in any private action arising under this title in which the plaintiff seeks to establish damages by reference to the market price of a security, the award of damages to the plaintiff shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the subject security and the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market.

(2) EXCEPTION.—In any private action arising under this title in which the plaintiff seeks to establish damages by reference to the market price of a security, if the plaintiff sells or repurchases the subject security prior to the expiration of the

90-day period described in paragraph (1), the plaintiff's damages shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the security and the mean trading price of the security during the period beginning immediately after dissemination of information correcting the misstatement or omission and ending on the date on which the plaintiff sells or repurchases the security.

(3) DEFINITION.—For purposes of this subsection, the "mean trading price" of a security shall be an average of the daily trading price of that security, determined as of the close of the market each day during the 90-day period referred to in paragraph (1).

(f) PROPORTIONATE LIABILITY.—

(1) APPLICABILITY.—Nothing in this subsection shall be construed to create, affect, or in any manner modify, the standard for liability associated with any action arising under the securities laws.

(2) LIABILITY FOR DAMAGES.—

(A) JOINT AND SEVERAL LIABILITY.—Any covered person against whom a final judgment is entered in a private action shall be liable for damages jointly and severally only if the trier of fact specifically determines that such covered person knowingly committed a violation of the securities laws.

(B) PROPORTIONATE LIABILITY.—

(i) IN GENERAL.—Except as provided in subparagraph (A), a covered person against whom a final judgment is entered in a private action shall be liable solely for the portion of the judgment that corresponds to the percentage of responsibility of that covered person, as determined under paragraph (3).

(ii) RECOVERY BY AND COSTS OF COVERED PERSON.—In any case in which a contractual relationship permits, a covered person that prevails in any private action may recover the attorney's fees and costs of that covered person in connection with the action.

(3) DETERMINATION OF RESPONSIBILITY.—

(A) IN GENERAL.—In any private action, the court shall instruct the jury to answer special interrogatories, or if there is no jury, shall make findings, with respect to each covered person and each of the other persons claimed by any of the parties to have caused or contributed to the loss incurred by the plaintiff, including persons who have entered into settlements with the plaintiff or plaintiffs, concerning—

(i) whether such person violated the securities laws;

(ii) the percentage of responsibility of such person, measured as a percentage of the total fault of all persons who caused or contributed to the loss incurred by the plaintiff; and

(iii) whether such person knowingly committed a violation of the securities laws.

(B) CONTENTS OF SPECIAL INTERROGATORIES OR FINDINGS.—The responses to interrogatories, or findings, as appropriate, under subparagraph (A) shall specify the total amount of damages that the plaintiff is entitled to recover and the percentage of responsibility of each covered person found to have caused or contributed to the loss incurred by the plaintiff or plaintiffs.

(C) FACTORS FOR CONSIDERATION.—In determining the percentage of responsibility under this paragraph, the trier of fact shall consider—

(i) the nature of the conduct of each covered person found to have caused or contributed to the loss incurred by the plaintiff or plaintiffs; and

(ii) the nature and extent of the causal relationship between the conduct of each such person and the damages incurred by the plaintiff or plaintiffs.

(4) UNCOLLECTIBLE SHARE.—

(A) IN GENERAL.—Notwithstanding paragraph (2)(B), upon motion made not later than 6 months after a final judgment is entered in any private action, the court determines that all or part of the share of the judgment of the covered person is not collectible against that covered person, and is also not collectible against a covered person described in paragraph (2)(A), each covered person described in paragraph (2)(B) shall be liable for the uncollectible share as follows:

(i) PERCENTAGE OF NET WORTH.—Each covered person shall be jointly and severally liable for the uncollectible share if the plaintiff establishes that—

(I) the plaintiff is an individual whose recoverable damages under the final judgment are equal to more than 10 percent of the net worth of the plaintiff; and

(II) the net worth of the plaintiff is equal to less than $200,000.

(ii) OTHER PLAINTIFFS.—With respect to any plaintiff not described in subclauses (I) and (II) of clause (i), each covered person shall be liable for the uncollectible share in proportion to the percentage of responsibility of that covered person, except that the total liability of a covered person under this clause may not exceed 50 percent of the proportionate share of that covered person, as determined under paragraph (3)(B).

(iii) NET WORTH.—For purposes of this subparagraph, net worth shall be determined as of the date immediately preceding the date of the purchase or sale (as applicable) by the plaintiff of the security that is the subject of the action, and shall be equal to the fair market value of assets, minus liabilities, including the net value of the investments of the plaintiff in real and personal property (including personal residences).

(B) OVERALL LIMIT.—In no case shall the total payments required pursuant to subparagraph (A) exceed the amount of the uncollectible share.

(C) COVERED PERSONS SUBJECT TO CONTRIBUTION.—A covered person against whom judgment is not collectible shall be subject to contribution and to any continuing liability to the plaintiff on the judgment.

(5) RIGHT OF CONTRIBUTION.—To the extent that a covered person is required to make an additional payment pursuant to paragraph (4), that covered person may recover contribution—

(A) from the covered person originally liable to make the payment;

(B) from any covered person liable jointly and severally pursuant to paragraph (2)(A);

(C) from any covered person held proportionately liable pursuant to this paragraph who is liable to make the same payment and has paid less than his or her proportionate share of that payment; or

(D) from any other person responsible for the conduct giving rise to the payment that would have been liable to make the same payment.

(6) NONDISCLOSURE TO JURY.—The standard for allocation of damages under paragraphs (2) and (3) and the procedure for reallocation of uncollectible shares under paragraph (4) shall not be disclosed to members of the jury.

(7) SETTLEMENT DISCHARGE.—

(A) IN GENERAL.—A covered person who settles any private action at any time before final verdict or judgment shall be discharged from all claims for contribution brought by other persons. Upon entry of the settlement by the court, the court shall enter a bar order constituting the final discharge of all obligations to the plaintiff of the settling covered person arising out of the action. The order shall bar all future claims for contribution arising out of the action—

(i) by any person against the settling covered person; and

(ii) by the settling covered person against any person, other than a person whose liability has been extinguished by the settlement of the settling covered person.

(B) REDUCTION.—If a covered person enters into a settlement with the plaintiff prior to final verdict or judgment, the verdict or judgment shall be reduced by the greater of—

(i) an amount that corresponds to the percentage of responsibility of that covered person; or

(ii) the amount paid to the plaintiff by that covered person.

(8) CONTRIBUTION.—A covered person who becomes jointly and severally liable for damages in any private action may recover contribution from any other person who, if joined in the original action, would have been liable for the same damages. A claim for contribution shall be determined based on the per-

centage of responsibility of the claimant and of each person against whom a claim for contribution is made.

(9) STATUTE OF LIMITATIONS FOR CONTRIBUTION.—In any private action determining liability, an action for contribution shall be brought not later than 6 months after the entry of a final, nonappealable judgment in the action, except that an action for contribution brought by a covered person who was required to make an additional payment pursuant to paragraph (4) may be brought not later than 6 months after the date on which such payment was made.

(10) DEFINITIONS.—For purposes of this subsection—

(A) a covered person "knowingly commits a violation of the securities laws"—

(i) with respect to an action that is based on an untrue statement of material fact or omission of a material fact necessary to make the statement not misleading, if—

(I) that covered person makes an untrue statement of a material fact, with actual knowledge that the representation is false, or omits to state a fact necessary in order to make the statement made not misleading, with actual knowledge that, as a result of the omission, one of the material representations of the covered person is false; and

(II) persons are likely to reasonably rely on that misrepresentation or omission; and

(ii) with respect to an action that is based on any conduct that is not described in clause (i), if that covered person engages in that conduct with actual knowledge of the facts and circumstances that make the conduct of that covered person a violation of the securities laws;

(B) reckless conduct by a covered person shall not be construed to constitute a knowing commission of a violation of the securities laws by that covered person;

(C) the term "covered person" means—

(i) a defendant in any private action arising under this title; or

(ii) a defendant in any private action arising under section 11 of the Securities Act of 1933, who is an outside director of the issuer of the securities that are the subject of the action; and

(D) the term "outside director" shall have the meaning given such term by rule or regulation of the Commission.

SEC. 21E. [78u–5] APPLICATION OF SAFE HARBOR FOR FORWARD-LOOKING STATEMENTS.

(a) APPLICABILITY.—This section shall apply only to a forward-looking statement made by—

(1) an issuer that, at the time that the statement is made, is subject to the reporting requirements of section 13(a) or section 15(d);

(2) a person acting on behalf of such issuer;

(3) an outside reviewer retained by such issuer making a statement on behalf of such issuer; or

(4) an underwriter, with respect to information provided by such issuer or information derived from information provided by such issuer.

(b) EXCLUSIONS.—Except to the extent otherwise specifically provided by rule, regulation, or order of the Commission, this section shall not apply to a forward-looking statement—

(1) that is made with respect to the business or operations of the issuer, if the issuer—

(A) during the 3-year period preceding the date on which the statement was first made—

(i) was convicted of any felony or misdemeanor described in clauses (i) through (iv) of section 15(b)(4)(B); or

(ii) has been made the subject of a judicial or administrative decree or order arising out of a governmental action that—

(I) prohibits future violations of the antifraud provisions of the securities laws;

(II) requires that the issuer cease and desist from violating the antifraud provisions of the securities laws; or

(III) determines that the issuer violated the antifraud provisions of the securities laws;

(B) makes the forward-looking statement in connection with an offering of securities by a blank check company;

(C) issues penny stock;

(D) makes the forward-looking statement in connection with a rollup transaction; or

(E) makes the forward-looking statement in connection with a going private transaction; or

(2) that is—

(A) included in a financial statement prepared in accordance with generally accepted accounting principles;

(B) contained in a registration statement of, or otherwise issued by, an investment company;

(C) made in connection with a tender offer;

(D) made in connection with an initial public offering;

(E) made in connection with an offering by, or relating to the operations of, a partnership, limited liability company, or a direct participation investment program; or

(F) made in a disclosure of beneficial ownership in a report required to be filed with the Commission pursuant to section 13(d).

(c) SAFE HARBOR.—

(1) IN GENERAL.—Except as provided in subsection (b), in any private action arising under this title that is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading, a person referred to in subsection (a) shall not be liable with respect to any forward-looking statement, whether written or oral, if and to the extent that—

(A) the forward-looking statement is—

(i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or

(ii) immaterial; or

(B) the plaintiff fails to prove that the forward-looking statement—

(i) if made by a natural person, was made with actual knowledge by that person that the statement was false or misleading; or

(ii) if made by a business entity; was—

(I) made by or with the approval of an executive officer of that entity; and

(II) made or approved by such officer with actual knowledge by that officer that the statement was false or misleading.

(2) ORAL FORWARD-LOOKING STATEMENTS.—In the case of an oral forward-looking statement made by an issuer that is subject to the reporting requirements of section 13(a) or section 15(d), or by a person acting on behalf of such issuer, the requirement set forth in paragraph (1)(A) shall be deemed to be satisfied—

(A) if the oral forward-looking statement is accompanied by a cautionary statement—

(i) that the particular oral statement is a forward-looking statement; and

(ii) that the actual results might differ materially from those projected in the forward-looking statement; and

(B) if—

(i) the oral forward-looking statement is accompanied by an oral statement that additional information concerning factors that could cause actual results to materially differ from those in the forward-looking statement is contained in a readily available written document, or portion thereof;

(ii) the accompanying oral statement referred to in clause (i) identifies the document, or portion thereof, that contains the additional information about those factors relating to the forward-looking statement; and

(iii) the information contained in that written document is a cautionary statement that satisfies the standard established in paragraph (1)(A).

(3) AVAILABILITY.—Any document filed with the Commission or generally disseminated shall be deemed to be readily available for purposes of paragraph (2).

(4) EFFECT ON OTHER SAFE HARBORS.—The exemption provided for in paragraph (1) shall be in addition to any exemption that the Commission may establish by rule or regulation under subsection (g).

(d) DUTY TO UPDATE.—Nothing in this section shall impose upon any person a duty to update a forward-looking statement.

(e) DISPOSITIVE MOTION.—On any motion to dismiss based upon subsection (c)(1), the court shall consider any statement cited in the complaint and any cautionary statement accompanying the forward-looking statement, which are not subject to material dispute, cited by the defendant.

(f) STAY PENDING DECISION ON MOTION.—In any private action arising under this title, the court shall stay discovery (other than discovery that is specifically directed to the applicability of the exemption provided for in this section) during the pendency of any motion by a defendant for summary judgment that is based on the grounds that—

(1) the statement or omission upon which the complaint is based is a forward-looking statement within the meaning of this section; and

(2) the exemption provided for in this section precludes a claim for relief.

(g) EXEMPTION AUTHORITY.—In addition to the exemptions provided for in this section, the Commission may, by rule or regulation, provide exemptions from or under any provision of this title, including with respect to liability that is based on a statement or that is based on projections or other forward-looking information, if and to the extent that any such exemption is consistent with the public interest and the protection of investors, as determined by the Commission.

(h) EFFECT ON OTHER AUTHORITY OF COMMISSION.—Nothing in this section limits, either expressly or by implication, the authority of the Commission to exercise similar authority or to adopt similar rules and regulations with respect to forward-looking statements under any other statute under which the Commission exercises rulemaking authority.

(i) DEFINITIONS.—For purposes of this section, the following definitions shall apply:

(1) FORWARD-LOOKING STATEMENT.—The term "forward-looking statement" means—

(A) a statement containing a projection of revenues, income (including income loss), earnings (including earnings loss) per share, capital expenditures, dividends, capital structure, or other financial items;

(B) a statement of the plans and objectives of management for future operations, including plans or objectives relating to the products or services of the issuer;

(C) a statement of future economic performance, including any such statement contained in a discussion and analysis of financial condition by the management or in the results of operations included pursuant to the rules and regulations of the Commission;

(D) any statement of the assumptions underlying or relating to any statement described in subparagraph (A), (B), or (C);

(E) any report issued by an outside reviewer retained by an issuer, to the extent that the report assesses a forward-looking statement made by the issuer; or

(F) a statement containing a projection or estimate of such other items as may be specified by rule or regulation of the Commission.

(2) INVESTMENT COMPANY.—The term "investment company" has the same meaning as in section 3(a) of the Investment Company Act of 1940.

(3) GOING PRIVATE TRANSACTION.—The term "going private transaction" has the meaning given that term under the rules or regulations of the Commission issued pursuant to section 13(e).

(4) PERSON ACTING ON BEHALF OF AN ISSUER.—The term "person acting on behalf of an issuer" means any officer, director, or employee of such issuer.

(5) OTHER TERMS.—The terms "blank check company", "rollup transaction", "partnership", "limited liability company", "executive officer of an entity" and "direct participation investment program", have the meanings given those terms by rule or regulation of the Commission.

SEC. 21F. [78u–6] SECURITIES WHISTLEBLOWER INCENTIVES AND PROTECTION.

(a) DEFINITIONS.—In this section the following definitions shall apply:

(1) COVERED JUDICIAL OR ADMINISTRATIVE ACTION.—The term "covered judicial or administrative action" means any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000.

(2) FUND.—The term "Fund" means the Securities and Exchange Commission Investor Protection Fund.

(3) ORIGINAL INFORMATION.—The term "original information" means information that—

(A) is derived from the independent knowledge or analysis of a whistleblower;

(B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and

(C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

(4) MONETARY SANCTIONS.—The term "monetary sanctions", when used with respect to any judicial or administrative action, means—

(A) any monies, including penalties, disgorgement, and interest, ordered to be paid; and

(B) any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action.

(5) RELATED ACTION.—The term "related action", when used with respect to any judicial or administrative action brought by the Commission under the securities laws, means any judicial or administrative action brought by an entity de-

scribed in subclauses (I) through (IV) of subsection (h)(2)(D)(i) that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.

(6) WHISTLEBLOWER.—The term "whistleblower" means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.

(b) AWARDS.—

(1) IN GENERAL.—In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—

(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and

(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

(2) PAYMENT OF AWARDS.—Any amount paid under paragraph (1) shall be paid from the Fund.

(c) DETERMINATION OF AMOUNT OF AWARD; DENIAL OF AWARD.—

(1) DETERMINATION OF AMOUNT OF AWARD.—

(A) DISCRETION.—The determination of the amount of an award made under subsection (b) shall be in the discretion of the Commission.

(B) CRITERIA.—In determining the amount of an award made under subsection (b), the Commission—

(i) shall take into consideration—

(I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;

(II) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;

(III) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and

(IV) such additional relevant factors as the Commission may establish by rule or regulation; and

(ii) shall not take into consideration the balance of the Fund.

(2) DENIAL OF AWARD.—No award under subsection (b) shall be made—

(A) to any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of—

(i) an appropriate regulatory agency;

(ii) the Department of Justice;

(iii) a self-regulatory organization;

(iv) the Public Company Accounting Oversight Board; or

(v) a law enforcement organization;

(B) to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section;

(C) to any whistleblower who gains the information through the performance of an audit of financial statements required under the securities laws and for whom such submission would be contrary to the requirements of section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1); or

(D) to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require.

(d) REPRESENTATION.—

(1) PERMITTED REPRESENTATION.—Any whistleblower who makes a claim for an award under subsection (b) may be represented by counsel.

(2) REQUIRED REPRESENTATION.—

(A) IN GENERAL.—Any whistleblower who anonymously makes a claim for an award under subsection (b) shall be represented by counsel if the whistleblower anonymously submits the information upon which the claim is based.

(B) DISCLOSURE OF IDENTITY.—Prior to the payment of an award, a whistleblower shall disclose the identity of the whistleblower and provide such other information as the Commission may require, directly or through counsel for the whistleblower.

(e) NO CONTRACT NECESSARY.—No contract with the Commission is necessary for any whistleblower to receive an award under subsection (b), unless otherwise required by the Commission by rule or regulation.

(f) APPEALS.—Any determination made under this section, including whether, to whom, or in what amount to make awards, shall be in the discretion of the Commission. Any such determination, except the determination of the amount of an award if the award was made in accordance with subsection (b), may be appealed to the appropriate court of appeals of the United States not more than 30 days after the determination is issued by the Commission. The court shall review the determination made by the Commission in accordance with section 706 of title 5, United States Code.

(g) INVESTOR PROTECTION FUND.—

(1) FUND ESTABLISHED.—There is established in the Treasury of the United States a fund to be known as the "Securities and Exchange Commission Investor Protection Fund".

(2) USE OF FUND.—The Fund shall be available to the Commission, without further appropriation or fiscal year limitation, for—

(A) paying awards to whistleblowers as provided in subsection (b); and

(B) funding the activities of the Inspector General of the Commission under section 4(i).

(3) DEPOSITS AND CREDITS.—

(A) IN GENERAL.—There shall be deposited into or credited to the Fund an amount equal to—

(i) any monetary sanction collected by the Commission in any judicial or administrative action brought by the Commission under the securities laws that is not added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) or otherwise distributed to victims of a violation of the securities laws, or the rules and regulations thereunder, underlying such action, unless the balance of the Fund at the time the monetary sanction is collected exceeds $300,000,000;

(ii) any monetary sanction added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) that is not distributed to the victims for whom the Fund was established, unless the balance of the disgorgement fund at the time the determination is made not to distribute the monetary sanction to such victims exceeds $200,000,000; and

(iii) all income from investments made under paragraph (4).

(B) ADDITIONAL AMOUNTS.—If the amounts deposited into or credited to the Fund under subparagraph (A) are not sufficient to satisfy an award made under subsection (b), there shall be deposited into or credited to the Fund an amount equal to the unsatisfied portion of the award from any monetary sanction collected by the Commission in the covered judicial or administrative action on which the award is based.

(4) INVESTMENTS.—

(A) AMOUNTS IN FUND MAY BE INVESTED.—The Commission may request the Secretary of the Treasury to invest the portion of the Fund that is not, in the discretion of the Commission, required to meet the current needs of the Fund.

(B) ELIGIBLE INVESTMENTS.—Investments shall be made by the Secretary of the Treasury in obligations of the United States or obligations that are guaranteed as to principal and interest by the United States, with maturities suitable to the needs of the Fund as determined by the Commission on the record.

(C) INTEREST AND PROCEEDS CREDITED.—The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to the Fund.

(5) REPORTS TO CONGRESS.—Not later than October 30 of each fiscal year beginning after the date of enactment of this subsection, the Commission shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives a report on—

(A) the whistleblower award program, established under this section, including—

(i) a description of the number of awards granted; and

(ii) the types of cases in which awards were granted during the preceding fiscal year;

(B) the balance of the Fund at the beginning of the preceding fiscal year;

(C) the amounts deposited into or credited to the Fund during the preceding fiscal year;

(D) the amount of earnings on investments made under paragraph (4) during the preceding fiscal year;

(E) the amount paid from the Fund during the preceding fiscal year to whistleblowers pursuant to subsection (b);

(F) the balance of the Fund at the end of the preceding fiscal year; and

(G) a complete set of audited financial statements, including—

(i) a balance sheet;

(ii) income statement; and

(iii) cash flow analysis.

(h) PROTECTION OF WHISTLEBLOWERS.—

(1) PROHIBITION AGAINST RETALIATION.—

(A) IN GENERAL.—No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of title 18, United States Code, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

(B) ENFORCEMENT.—

(i) CAUSE OF ACTION.—An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C).

(ii) SUBPOENAS.—A subpoena requiring the attendance of a witness at a trial or hearing conducted under this section may be served at any place in the United States.

(iii) STATUTE OF LIMITATIONS.—

(I) IN GENERAL.—An action under this subsection may not be brought—

(aa) more than 6 years after the date on which the violation of subparagraph (A) occurred; or

(bb) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation of subparagraph (A).

(II) REQUIRED ACTION WITHIN 10 YEARS.—Notwithstanding subclause (I), an action under this subsection may not in any circumstance be brought more than 10 years after the date on which the violation occurs.

(C) RELIEF.—Relief for an individual prevailing in an action brought under subparagraph (B) shall include—

(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;

(ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and

(iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees.

(2) CONFIDENTIALITY.—

(A) IN GENERAL.—Except as provided in subparagraphs (B) and (C), the Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of title 5, United States Code, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or any entity described in subparagraph (C). For purposes of section 552 of title 5, United States Code, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section.

(B) EXEMPTED STATUTE.—For purposes of section 552 of title 5, United States Code, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section 552.

(C) RULE OF CONSTRUCTION.—Nothing in this section is intended to limit, or shall be construed to limit, the abil-

ity of the Attorney General to present such evidence to a grand jury or to share such evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

(D) AVAILABILITY TO GOVERNMENT AGENCIES.—

(i) IN GENERAL.—Without the loss of its status as confidential in the hands of the Commission, all information referred to in subparagraph (A) may, in the discretion of the Commission, when determined by the Commission to be necessary to accomplish the purposes of this Act and to protect investors, be made available to—

(I) the Attorney General of the United States;

(II) an appropriate regulatory authority;

(III) a self-regulatory organization;

(IV) a State attorney general in connection with any criminal investigation;

(V) any appropriate State regulatory authority;

(VI) the Public Company Accounting Oversight Board;

(VII) a foreign securities authority; and

(VIII) a foreign law enforcement authority.

(ii) CONFIDENTIALITY.—

(I) IN GENERAL.—Each of the entities described in subclauses (I) through (VI) of clause (i) shall maintain such information as confidential in accordance with the requirements established under subparagraph (A).

(II) FOREIGN AUTHORITIES.—Each of the entities described in subclauses (VII) and (VIII) of clause (i) shall maintain such information in accordance with such assurances of confidentiality as the Commission determines appropriate.

(3) RIGHTS RETAINED.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any whistleblower under any Federal or State law, or under any collective bargaining agreement.

(i) PROVISION OF FALSE INFORMATION.—A whistleblower shall not be entitled to an award under this section if the whistleblower—

(1) knowingly and willfully makes any false, fictitious, or fraudulent statement or representation; or

(2) uses any false writing or document knowing the writing or document contains any false, fictitious, or fraudulent statement or entry.

(j) RULEMAKING AUTHORITY.—The Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.

HEARINGS BY COMMISSION

SEC. 22. [78v] Hearings may be public and may be held before the Commission, any member or members thereof, or any officer or officers of the Commission designated by it, and appropriate records thereof shall be kept.

RULES, REGULATIONS, AND ORDERS; ANNUAL REPORTS

SEC. 23. [78w] (a)(1) The Commission, the Board of Governors of the Federal Reserve System, and the other agencies enumerated in section 3(a)(34) of this title shall each have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this title for which they are responsible or for the execution of the functions vested in them by this title, and may for such purposes classify persons, securities, transactions, statements, applications, reports, and other matters within their respective jurisdictions, and prescribe greater, lesser, or different requirements for different classes thereof. No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with a rule, regulation, or order of the Commission, the Board of Governors of the Federal Reserve System, other agency enumerated in section 3(a)(34) of this title, or any self-regulatory organization, notwithstanding that such rule, regulation, or order may thereafter be amended or rescinded or determined by judicial or other authority to be invalid for any reason.

(2) The Commission and the Secretary of the Treasury, in making rules and regulations pursuant to any provisions of this title, shall consider among other matters the impact any such rule or regulation would have on competition. The Commission and the Secretary of the Treasury shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this title. The Commission and the Secretary of the Treasury shall include in the statement of basis and purpose incorporated in any rule or regulation adopted under this title, the reasons for the Commission's or the Secretary's determination that any burden on competition imposed by such rule or regulation is necessary or appropriate in furtherance of the purposes of this title.

(3) The Commission and the Secretary, in making rules and regulations pursuant to any provision of this title, considering any application for registration in accordance with section 19(a) of this title, or reviewing any proposed rule change of a self-regulatory organization in accordance with section 19(b) of this title, shall keep in a public file and make available for copying all written statements filed with the Commission and the Secretary and all written communications between the Commission or the Secretary and any person relating to the proposed rule, regulation, application, or proposed rule change: *Provided, however,* That the Commission and the Secretary shall not be required to keep in a public file or make available for copying any such statement or communication which it may withhold from the public in accordance with the provisions of section 552 of title 5, United States Code.

(b)(1) The Commission, the Board of Governors of the Federal Reserve System, and the other agencies enumerated in section

3(a)(34) of this title shall each make an annual report to the Congress on its work for the preceding year, and shall include in each such report whatever information, data, and recommendations for further legislation it considers advisable with regard to matters within its respective jurisdiction under this title.

(2) The appropriate regulatory agency for a self-regulatory organization shall include in its annual report to the Congress for each fiscal year, a summary of its oversight activities under this title with respect to such self-regulatory organization, including a description of any examination conducted as part of such activities of any organization, any material recommendation presented as part of such activities to such organization for changes in its organization or rules, and any such action by such organization in response to any such recommendation.

(3) The appropriate regulatory agency for any class of municipal securities dealers shall include in its annual report to the Congress for each fiscal year a summary of its regulatory activities pursuant to this title with respect to such municipal securities dealers, including the nature of and reason for any sanction imposed pursuant to this title against any such municipal securities dealer.

(4) The Commission shall also include in its annual report to the Congress for each fiscal year—

(A) a summary of the Commission's oversight activities with respect to self-regulatory organizations for which it is not the appropriate regulatory agency, including a description of any examination of any such organization, any material recommendation presented to any such organization for changes in its organization or rules, and any action by any such organization in response to any such recommendations;

(B) a statement and analysis of the expenses and operations of each self-regulatory organization in connection with the performance of its responsibilities under this title, for which purpose data pertaining to such expenses and operations shall be made available by such organization to the Commission at its request;

(C) the steps the Commission has taken and the progress it has made toward ending the physical movement of the securities certificate in connection with the settlement of securities transactions, and its recommendations, if any, for legislation to eliminate the securities certificate;

(D) the number of requests for exemptions from provisions of this title received, the number granted, and the basis upon which any such exemption was granted;

(E) a summary of the Commission's regulatory activities with respect to municipal securities dealers for which it is not the appropriate regulatory agency, including the nature of, and reason for, any sanction imposed in proceedings against such municipal securities dealers;

(F) a statement of the time elapsed between the filing of reports pursuant to section 13(f) of this title and the public availability of the information contained therein, the costs involved in the Commission's processing of such reports and tabulating such information, the manner in which the Commis-

sion uses such information, and the steps the Commission has taken and the progress it has made toward requiring such reports to be filed and such information to be made available to the public in machine language;

(G) information concerning (i) the effects its rules and regulations are having on the viability of small brokers and dealers; (ii) its attempts to reduce any unnecessary reporting burden on such brokers and dealers; and (iii) its efforts to help to assure the continued participation of small brokers and dealers in the United States securities markets;

(H) a statement detailing its administration of the Freedom of Information Act, section 552 of title 5, United States Code, including a copy of the report filed pursuant to subsection (d) of such section; and

(I) the steps that have been taken and the progress that has been made in promoting the timely public dissemination and availability for analytical purposes (on a fair, reasonable, and nondiscriminatory basis) of information concerning government securities transactions and quotations, and its recommendations, if any, for legislation to assure timely dissemination of (i) information on transactions in regularly traded government securities sufficient to permit the determination of the prevailing market price for such securities, and (ii) reports of the highest published bids and lowest published offers for government securities (including the size at which persons are willing to trade with respect to such bids and offers).

(c) The Commission, by rule, shall prescribe the procedure applicable to every case pursuant to this title of adjudication (as defined in section 551 of title 5, United States Code) not required to be determined on the record after notice and opportunity for hearing. Such rules shall, as a minimum, provide that prompt notice shall be given of any adverse action or final disposition and that such notice and the entry of any order shall be accompanied by a statement of written reasons.

(d) CEASE-AND-DESIST PROCEDURES.—Within 1 year after the date of enactment of this subsection, the Commission shall establish regulations providing for the expeditious conduct of hearings and rendering of decisions under section 21C of this title, section 8A of the Securities Act of 1933, section 9(f) of the Investment Company Act of 1940, and section 203(k) of the Investment Advisers Act of 1940.

PUBLIC AVAILABILITY OF INFORMATION

SEC. 24. [78x] (a) For purposes of section 552 of title 5, United States Code, the term "records" includes all applications, statements, reports, contracts, correspondence, notices, and other documents filed with or otherwise obtained by the Commission pursuant to this title or otherwise.

(b) It shall be unlawful for any member, officer, or employee of the Commission to disclose to any person other than a member, officer, or employee of the Commission, or to use for personal benefit, any information contained in any application, statement, report, contract, correspondence, notice, or other document filed with

or otherwise obtained by the Commission (1) in contravention of the rules and regulations of the Commission under section 552 of Title 5, United States Code, or (2) in circumstances where the Commission has determined pursuant to such rules to accord confidential treatment to such information.

(c) CONFIDENTIAL DISCLOSURES.—The Commission may, in its discretion and upon a showing that such information is needed, provide all "records" (as defined in subsection (a)) and other information in its possession to such persons, both domestic and foreign, as the Commission by rule deems appropriate if the person receiving such records or information provides such assurances of confidentiality as the Commission deems appropriate.

(d) RECORDS OBTAINED FROM FOREIGN SECURITIES AUTHORITIES.—Except as provided in subsection (g), the Commission shall not be compelled to disclose records obtained from a foreign securities authority if (1) the foreign securities authority has in good faith determined and represented to the Commission that public disclosure of such records would violate the laws applicable to that foreign securities authority, and (2) the Commission obtains such records pursuant to (A) such procedure as the Commission may authorize for use in connection with the administration or enforcement of the securities laws, or (B) a memorandum of understanding. For purposes of section 552 of title 5, United States Code, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552.

(e) FREEDOM OF INFORMATION ACT.—For purposes of section 552(b)(8) of title 5, United States Code, (commonly referred to as the Freedom of Information Act)—

(1) the Commission is an agency responsible for the regulation or supervision of financial institutions; and

(2) any entity for which the Commission is responsible for regulating, supervising, or examining under this title is a financial institution.

(f) SHARING PRIVILEGED INFORMATION WITH OTHER AUTHORITIES.—

(1) PRIVILEGED INFORMATION PROVIDED BY THE COMMISSION.—The Commission shall not be deemed to have waived any privilege applicable to any information by transferring that information to or permitting that information to be used by—

(A) any agency (as defined in section 6 of title 18, United States Code);

(B) the Public Company Accounting Oversight Board;

(C) any self-regulatory organization;

(D) any foreign securities authority;

(E) any foreign law enforcement authority; or

(F) any State securities or law enforcement authority.

(2) NONDISCLOSURE OF PRIVILEGED INFORMATION PROVIDED TO THE COMMISSION.—The Commission shall not be compelled to disclose privileged information obtained from any foreign securities authority, or foreign law enforcement authority, if the authority has in good faith determined and represented to the Commission that the information is privileged.

(3) NONWAIVER OF PRIVILEGED INFORMATION PROVIDED TO THE COMMISSION.—

(A) IN GENERAL.—Federal agencies, State securities and law enforcement authorities, self-regulatory organizations, and the Public Company Accounting Oversight Board shall not be deemed to have waived any privilege applicable to any information by transferring that information to or permitting that information to be used by the Commission.

(B) EXCEPTION.—The provisions of subparagraph (A) shall not apply to a self-regulatory organization or the Public Company Accounting Oversight Board with respect to information used by the Commission in an action against such organization.

(4) DEFINITIONS.—For purposes of this subsection—

(A) the term "privilege" includes any work-product privilege, attorney-client privilege, governmental privilege, or other privilege recognized under Federal, State, or foreign law;

(B) the term "foreign law enforcement authority" means any foreign authority that is empowered under foreign law to detect, investigate or prosecute potential violations of law; and

(C) the term "State securities or law enforcement authority" means the authority of any State or territory that is empowered under State or territory law to detect, investigate, or prosecute potential violations of law.

(g) SAVINGS PROVISIONS.—Nothing in this section shall—

(1) alter the Commission's responsibilities under the Right to Financial Privacy Act (12 U.S.C. 3401 et seq.), as limited by section 21(h) of this Act, with respect to transfers of records covered by such statutes, or

(2) authorize the Commission to withhold information from the Congress or prevent the Commission from complying with an order of a court of the United States in an action commenced by the United States or the Commission.

COURT REVIEW OF ORDERS AND RULES

SEC. 25. [78y] (a)(1) A person aggrieved by a final order of the Commission entered pursuant to this title may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated by the Commission for that purpose. Thereupon the Commission shall file in the court the record on which the order complained of is entered, as provided in section 2112 of title 28, United States Code, and the Federal Rules of Appellate Procedure.

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.

(4) The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.

(5) If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there was reasonable ground for failure to adduce it before the Commission, the court may remand the case to the Commission for further proceedings, in whatever manner and on whatever conditions the court considers appropriate. If the case is remanded to the Commission, it shall file in the court a supplemental record containing any new evidence, any further or modified findings, and any new order.

(b)(1) A person adversely affected by a rule of the Commission promulgated pursuant to section 6, 9(h)(2), 11, 11A, 15(c) (5) or (6), 15A, 17, 17A, or 19 of this title may obtain review of this rule in the United States Court of Appeals for the circuit in which he resides or has his principal place of business or for the District of Columbia Circuit, by filing in such court, within sixty days after the promulgation of the rule, a written petition requesting that the rule be set aside.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated for that purpose. Thereupon, the Commission shall file in the court the rule under review and any documents referred to therein, the Commission's notice of proposed rulemaking and any documents referred to therein, all written submissions and the transcript of any oral presentations in the rulemaking, factual information not included in the foregoing that was considered by the Commission in the promulgation of the rule or proffered by the Commission as pertinent to the rule, the report of any advisory committee received or considered by the Commission in the rulemaking, and any other materials prescribed by the court.

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the materials set forth in paragraph (2) of this subsection, to affirm and enforce or to set aside the rule.

(4) The findings of the Commission as to the facts identified by the Commission as the basis, in whole or in part, of the rule, if supported by substantial evidence, are conclusive. The court shall affirm and enforce the rule unless the Commission's action in promulgating the rule is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law.

(5) If proceedings have been instituted under this subsection in two or more courts of appeals with respect to the same rule, the Commission shall file the materials set forth in paragraph (2) of this subsection in that court in which a proceeding was first instituted. The other courts shall thereupon transfer all such proceedings to the court in which the materials have been filed. For the convenience of the parties in the interest of justice that court

may thereafter transfer all the proceedings to any other court of appeals.

(c)(1) No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.

(2) The filing of a petition under this section does not operate as a stay of the Commission's order or rule. Until the court's jurisdiction becomes exclusive, the Commission may stay its order or rule pending judicial review if it finds that justice so requires. After the filing of a petition under this section, the court, on whatever conditions may be required and to the extent necessary to prevent irreparable injury, may issue all necessary and appropriate process to stay the order or rule or to preserve status or rights pending its review; but (notwithstanding section 705 of title 5, United States Code) no such process may be issued by the court before the filing of the record or the materials set forth in subsection (b)(2) of this section unless: (A) the Commission has denied a stay or failed to grant requested relief, (B) a reasonable period has expired since the filing of an application for a stay without a decision by the Commission, or (C) there was reasonable ground for failure to apply to the Commission.

(3) When the same order or rule is the subject of one or more petitions for review filed under this section and an action for enforcement filed in a district court of the United States under section 21 (d) or (e) of this title, that court in which the petition or the action is first filed has jurisdiction with respect to the order or rule to the exclusion of any other court, and thereupon all such proceedings shall be transferred to that court; but, for the convenience of the parties in the interest of justice, that court may thereafter transfer all the proceedings to any other court of appeals or district court of the United States, whether or not a petition for review or an action for enforcement was originally filed in the transferee court. The scope of review by a district court under section 21 (d) or (e) of this title is in all cases the same as by a court of appeals under this section.

(d)(1) For purposes of the preceding subsections of this section, the term "Commission" includes the agencies enumerated in section 3(a)(34) of this title insofar as such agencies are acting pursuant to this title and the Secretary of the Treasury insofar as he is acting pursuant to section 15C of this title.

(2) For purposes of subsection (a)(4) of this section and section 706 of title 5, United States Code, an order of the Commission pursuant to section 19(a) of this title denying registration to a clearing agency for which the Commission is not the appropriate regulatory agency or pursuant to section 19(b) of this title disapproving a proposed rule change by such a clearing agency shall be deemed to be an order of the appropriate regulatory agency for such clearing agency insofar as such order was entered by reason of a determination by such appropriate regulatory agency pursuant to section 19(a)(2)(C) or 19(b)(4)(C) of this title that such registration or proposed rule change would be inconsistent with the safeguarding of securities or funds.

UNLAWFUL REPRESENTATIONS

SEC. 26. [78z] No action or failure to act by the Commission or the Board of Governors of the Federal Reserve System, in the administration of this title shall be construed to mean that the particular authority has in any way passed upon the merits of, or given approval to, any security or any transaction or transactions therein, nor shall such action or failure to act with regard to any statement or report filed with or examined by such authority pursuant to this title or rules and regulations thereunder, be deemed a finding by such authority that such statement or report is true and accurate on its face or that it is not false or misleading. It shall be unlawful to make, or cause to be made, to any prospective purchaser or seller of a security any representation that any such action or failure to act by any such authority is to be so construed or has such effect.

JURISDICTION OF OFFENSES AND SUITS

SEC. 27.[87] [78aa]

(a) IN GENERAL.—The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. In any action or proceeding instituted by the Commission under this title in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of title 28, United States Code. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

(b) EXTRATERRITORIAL JURISDICTION.—The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this title involving—

[87] So in law.

(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or

(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

SPECIAL PROVISION RELATING TO STATUTE OF LIMITATIONS ON PRIVATE CAUSES OF ACTION

SEC. 27A. [78aa–1] (a) EFFECT ON PENDING CAUSES OF ACTION.—The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

(b) EFFECT ON DISMISSED CAUSES OF ACTION.—Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991—

(1) which was dismissed as time barred subsequent to June 19, 1991, and

(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

EFFECT ON EXISTING LAW

SEC. 28. [78bb]

(a) LIMITATION ON JUDGMENTS.—

(1) IN GENERAL.—No person permitted to maintain a suit for damages under the provisions of this title shall recover, through satisfaction of judgment in 1 or more actions, a total amount in excess of the actual damages to that person on account of the act complained of. Except as otherwise specifically provided in this title, nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations under this title.

(2) RULE OF CONSTRUCTION.—Except as provided in subsection (f), the rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity.

(3) STATE BUCKET SHOP LAWS.—No State law which prohibits or regulates the making or promoting of wagering or gaming contracts, or the operation of "bucket shops" or other similar or related activities, shall invalidate—

(A) any put, call, straddle, option, privilege, or other security subject to this title (except any security that has a pari-mutuel payout or otherwise is determined by the Commission, acting by rule, regulation, or order, to be appropriately subject to such laws), or apply to any activity

which is incidental or related to the offer, purchase, sale, exercise, settlement, or closeout of any such security;

(B) any security-based swap between eligible contract participants; or

(C) any security-based swap effected on a national securities exchange registered pursuant to section 6(b).

(4) OTHER STATE PROVISIONS.—No provision of State law regarding the offer, sale, or distribution of securities shall apply to any transaction in a security-based swap or a security futures product, except that this paragraph may not be construed as limiting any State antifraud law of general applicability. A security-based swap may not be regulated as an insurance contract under any provision of State law.

(b) Nothing in this title shall be construed to modify existing law with regard to the binding effect (1) on any member of or participant in any self-regulatory organization of any action taken by the authorities of such organization to settle disputes between its members or participants, (2) on any municipal securities dealer or municipal securities broker of any action taken pursuant to a procedure established by the Municipal Securities Rulemaking Board to settle disputes between municipal securities dealers and municipal securities brokers, or (3) of any action described in paragraph (1) or (2) on any person who has agreed to be bound thereby.

(c) The stay, setting aside, or modification pursuant to section 19(e) of this title of any disciplinary sanction imposed by a self-regulatory organization on a member thereof, person associated with a member, or participant therein, shall not affect the validity or force of any action taken as a result of such sanction by the self-regulatory organization prior to such stay, setting aside, or modification: *Provided,* That such action is not inconsistent with the provisions of this title or the rules or regulations thereunder. The rights of any person acting in good faith which arise out of any such action shall not be affected in any way by such stay, setting aside, or modification.

(d) No State or political subdivision thereof shall impose any tax on any change in beneficial or record ownership of securities effected through the facilities of a registered clearing agency or registered transfer agent or any nominee thereof or custodian therefor or upon the delivery or transfer of securities to or through or receipt from such agency or agent or any nominee thereof or custodian therefor, unless such change in beneficial or record ownership or such transfer or delivery or receipt would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or political subdivision. No State or political subdivision thereof shall impose any tax on securities which are deposited in or retained by a registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor, unless such securities would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or political subdivision.

(e)(1) No person using the mails, or any means or instrumentality of interstate commerce, in the exercise of investment discretion with respect to an account shall be deemed to have acted unlawfully or to have breached a fiduciary duty under State or Federal law unless expressly provided to the contrary by a law enacted by the Congress or any State subsequent to the date of enactment of the Securities Acts Amendments of 1975 solely by reason of his having caused the account to pay a member of an exchange, broker, or dealer an amount of commission for effecting a securities transaction in excess of the amount of commission another member of an exchange, broker, or dealer would have charged for effecting that transaction, if such person determined in good faith that such amount of commission was reasonable in relation to the value of the brokerage and research services provided by such member, broker, or dealer, viewed in terms of either that particular transaction or his overall responsibilities with respect to the accounts as to which he exercises investment discretion. This subsection is exclusive and plenary insofar as conduct is covered by the foregoing, unless otherwise expressly provided by contract: *Provided, however,* That nothing in this subsection shall be construed to impair or limit the power of the Commission under any other provision of this title or otherwise.

(2) A person exercising investment discretion with respect to an account shall make such disclosure of his policies and practices with respect to commissions that will be paid for effecting securities transactions, at such times and in such manner, as the appropriate regulatory agency, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) For purposes of this subsection a person provides brokerage and research services insofar as he—

(A) furnishes advice, either directly or through publications or writings, as to the value of securities, the advisability of investing in, purchasing, or selling securities, and the availability of securities or purchasers or sellers of securities;

(B) furnishes analyses and reports concerning issuers, industries, securities, economic factors and trends, portfolio strategy, and the performance of accounts; or

(C) effects securities transactions and performs functions incidental thereto (such as clearance, settlement, and custody) or required in connection therewith by rules of the Commission or a self-regulatory organization of which such person is a member or person associated with a member or in which such person is a participant.

(4) The provisions of this subsection shall not apply with regard to securities that are security futures products.

(f) LIMITATIONS ON REMEDIES.—[88]

(1) CLASS ACTION LIMITATIONS.—No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—

[88] See footnote to section 16 of the Securities Act of 1933.

(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(2) REMOVAL OF COVERED CLASS ACTIONS.—Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

(3) PRESERVATION OF CERTAIN ACTIONS.—

(A) ACTIONS UNDER STATE LAW OF STATE OF INCORPORATION.—

(i) ACTIONS PRESERVED.—Notwithstanding paragraph (1) or (2), a covered class action described in clause (ii) of this subparagraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(ii) PERMISSIBLE ACTIONS.—A covered class action is described in this clause if it involves—

(I) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(II) any recommendation, position, or other communication with respect to the sale of securities of an issuer that—

(aa) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(bb) concerns decisions of such equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(B) STATE ACTIONS.—

(i) IN GENERAL.—Notwithstanding any other provision of this subsection, nothing in this subsection may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(ii) STATE PENSION PLAN DEFINED.—For purposes of this subparagraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of a State or political subdivision thereof, or by any agency or instrumentality thereof.

(C) ACTIONS UNDER CONTRACTUAL AGREEMENTS BETWEEN ISSUERS AND INDENTURE TRUSTEES.—Notwithstanding paragraph (1) or (2), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(D) REMAND OF REMOVED ACTIONS.—In an action that has been removed from a State court pursuant to paragraph (2), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(4) PRESERVATION OF STATE JURISDICTION.—The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(5) DEFINITIONS.—For purposes of this subsection, the following definitions shall apply:

(A) AFFILIATE OF THE ISSUER.—The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(B) COVERED CLASS ACTION.—The term "covered class action" means—

(i) any single lawsuit in which—

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(C) EXCEPTION FOR DERIVATIVE ACTIONS.—Notwithstanding subparagraph (B), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(D) COUNTING OF CERTAIN CLASS MEMBERS.—For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(E) COVERED SECURITY.—The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) of the Securities Act of 1933, at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under the Securities Act of 1933 pursuant to rules issued by the Commission under section 4(2) of that Act.

(F) RULE OF CONSTRUCTION.—Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

VALIDITY OF CONTRACTS

SEC. 29. [78cc] (a) Any 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.

(b) Every contract made in violation of any provision of this title or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation: *Provided,* (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (3) of subsection (c) of section 15 of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) or (2) of subsection (c) of section 15 of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation. The Commission may, in a rule or regulation prescribed pursuant to such paragraph (2)

of such section 15(c), designate such rule or regulation, or portion thereof, as a rule or regulation, or portion thereof, a contract in violation of which shall not be void by reason of this subsection.

(c) Nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this title, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this title or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this title or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien.

FOREIGN SECURITIES EXCHANGES

SEC. 30. [78dd] (a) It shall be unlawful for any broker or dealer, directly or indirectly, to make use of the mails or of any means or instrumentality of interstate commerce for the purpose of effecting on an exchange not within or subject to the jurisdiction of the United States, any transaction in any security the issuer of which is a resident of, or is organized under the laws of, or has its principal place of business in, a place within or subject to the jurisdiction of the United States, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors or to prevent the evasion of this title.

(b) The provisions of this title or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this title.

(c) RULE OF CONSTRUCTION.—No provision of this title that was added by the Wall Street Transparency and Accountability Act of 2010, or any rule or regulation thereunder, shall apply to any person insofar as such person transacts a business in security-based swaps without the jurisdiction of the United States, unless such person transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of any provision of this title that was added by the Wall Street Transparency and Accountability Act of 2010. This subsection shall not be construed to limit the jurisdiction of the Commission under any provision of this title, as in effect prior to the date of enactment of the Wall Street Transparency and Accountability Act of 2010.

PROHIBITED FOREIGN TRADE PRACTICES BY ISSUERS [89]

SEC. 30A. [78dd–1] (a) PROHIBITION.—It shall be unlawful for any issuer which has a class of securities registered pursuant to section 12 of this title or which is required to file reports under section 15(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or in-

[89] Note follows at end of SEC. 30A.

fluence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

(b) EXCEPTION FOR ROUTINE GOVERNMENTAL ACTION.—Subsections (a) and (g) shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) AFFIRMATIVE DEFENSES.—It shall be an affirmative defense to actions under subsections (a) or (g) that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) GUIDELINES BY THE ATTORNEY GENERAL.—Not later than one year after the date of the enactment of the Foreign Corrupt Practices Act Amendments of 1988, the Attorney General, after consultation with the Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue—

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which issuers may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code, and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(e) OPINIONS OF THE ATTORNEY GENERAL.—(1) The Attorney General, after consultation with appropriate departments and

agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by issuers concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by an issuer and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code, and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by an issuer under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of title 5, United States Code, and shall not, except with the consent of the issuer, be made publicly available, regardless of whether the Attorney General responds to such a request or the issuer withdraws such request before receiving a response.

(3) Any issuer who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(f) DEFINITIONS.—For purposes of this section:

(1)(A) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term "public international organization" means—

(i) an organization that is designated by Executive order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(2)(A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if—

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(3)(A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in—

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decisionmaking process to encourage a decision to award new business to or continue business with a particular party.

(g) ALTERNATIVE JURISDICTION.—

(1) It shall also be unlawful for any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to section 12 of this title or which is required to file reports under section 15(d) of this title, or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term "United States person" means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

SEC. 31. [78ee] TRANSACTION FEES.

(a) RECOVERY OF COSTS OF ANNUAL APPROPRIATION.—The Commission shall, in accordance with this section, collect transaction fees and assessments that are designed to recover the costs to the Government of the annual appropriation to the Commission by Congress.

(b) EXCHANGE-TRADED SECURITIES.—Subject to subsection (j), each national securities exchange shall pay to the Commission a fee at a rate equal to $15 per $1,000,000 of the aggregate dollar amount of sales of securities (other than bonds, debentures, other evidences of indebtedness, security futures products, and options on securities indexes (excluding a narrow-based security index)) transacted on such national securities exchange.

(c) OFF-EXCHANGE TRADES OF EXCHANGE REGISTERED AND LAST-SALE-REPORTED SECURITIES.—Subject to subsection (j), each national securities association shall pay to the Commission a fee at a rate equal to $15 per $1,000,000 of the aggregate dollar amount of sales transacted by or through any member of such association otherwise than on a national securities exchange of securities (other than bonds, debentures, other evidences of indebtedness, security futures products, and options on securities indexes (excluding a narrow-based security index)) registered on a national securities exchange or subject to prompt last sale reporting pursuant to the rules of the Commission or a registered national securities association.

(d) ASSESSMENTS ON SECURITY FUTURES TRANSACTIONS.—Each national securities exchange and national securities association

shall pay to the Commission an assessment equal to $0.009 for each round turn transaction (treated as including one purchase and one sale of a contract of sale for future delivery) on a security future traded on such national securities exchange or by or through any member of such association otherwise than on a national securities exchange, except that for fiscal year 2007 and each succeeding fiscal year such assessment shall be equal to $0.0042 for each such transaction.

(e) DATES FOR PAYMENTS.—The fees and assessments required by subsections (b), (c), and (d) of this section shall be paid—

(1) on or before March 15, with respect to transactions and sales occurring during the period beginning on the preceding September 1 and ending at the close of the preceding December 31; and

(2) on or before September 25, with respect to transactions and sales occurring during the period beginning on the preceding January 1 and ending at the close of the preceding August 31.

(f) EXEMPTIONS.—The Commission, by rule, may exempt any sale of securities or any class of sales of securities from any fee or assessment imposed by this section, if the Commission finds that such exemption is consistent with the public interest, the equal regulation of markets and brokers and dealers, and the development of a national market system.

(g) PUBLICATION.—The Commission shall publish in the Federal Register notices of the fee or assessment rates applicable under this section for each fiscal year[90] not later than 30 days after the date on which an Act making a regular appropriation to the Commission for such fiscal year is enacted, together with any estimates or projections on which such fees are based.

(h) PRO RATA APPLICATION.—The rates per $1,000,000 required by this section shall be applied pro rata to amounts and balances of less than $1,000,000.

(i) DEPOSIT OF FEES.—

(1) OFFSETTING COLLECTIONS.—Fees collected pursuant to subsections (b), (c), and (d) for any fiscal year—

(A) shall be deposited and credited as offsetting collections to the account providing appropriations to the Commission; and

(B) except as provided in subsection (k), shall not be collected for any fiscal year except to the extent provided in advance in appropriation Acts.

(2) GENERAL REVENUES PROHIBITED.—No fees collected pursuant to subsections (b), (c), and (d) for fiscal year 2002 or any succeeding fiscal year shall be deposited and credited as general revenue of the Treasury.

(j) ADJUSTMENTS TO FEE RATES.—

(1) ANNUAL ADJUSTMENT.—Subject to subsections (i)(1)(B) and (k), for each fiscal year, the Commission shall by order adjust each of the rates applicable under subsections (b) and (c) for such fiscal year to a uniform adjusted rate that, when ap-

[90] The required fees for fiscal year 1997 are set forth in the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Division A, Title I, Sec. 101(a), Title V, Securities and Exchange Commission, Salaries and Expenses. Pub. L. No. 104–208.

plied to the baseline estimate of the aggregate dollar amount of sales for such fiscal year, is reasonably likely to produce aggregate fee collections under this section (including assessments collected under subsection (d) of this section) that are equal to the regular appropriation to the Commission by Congress for such fiscal year.

(2) MID-YEAR ADJUSTMENT.—Subject to subsections (i)(1)(B) and (k), for each fiscal year, the Commission shall determine, by March 1 of such fiscal year, whether, based on the actual aggregate dollar volume of sales during the first 5 months of such fiscal year, the baseline estimate of the aggregate dollar volume of sales used under paragraph (1) for such fiscal year is reasonably likely to be 10 percent (or more) greater or less than the actual aggregate dollar volume of sales for such fiscal year. If the Commission so determines, the Commission shall by order, no later than March 1, adjust each of the rates applicable under subsections (b) and (c) for such fiscal year to a uniform adjusted rate that, when applied to the revised estimate of the aggregate dollar amount of sales for the remainder of such fiscal year, is reasonably likely to produce aggregate fee collections under this section (including fees collected during such five-month period and assessments collected under subsection (d) of this section) that are equal to the regular appropriation to the Commission by Congress for such fiscal year. In making such revised estimate, the Commission shall, after consultation with the Congressional Budget Office and the Office of Management and Budget, use the same methodology required by subsection (l).

(3) REVIEW.—In exercising its authority under this subsection, the Commission shall not be required to comply with the provisions of section 553 of title 5, United States Code. An adjusted rate prescribed under paragraph (1) or (2) and published under subsection (g) shall not be subject to judicial review.

(4) EFFECTIVE DATE.—

(A) ANNUAL ADJUSTMENT.—Subject to subsections (i)(1)(B) and (k), an adjusted rate prescribed under paragraph (1) shall take effect on the later of—

(i) the first day of the fiscal year to which such rate applies; or

(ii) 60 days after the date on which an Act making a regular appropriation to the Commission for such fiscal year is enacted.

(B) MID-YEAR ADJUSTMENT.—An adjusted rate prescribed under paragraph (2) shall take effect on April 1 of the fiscal year to which such rate applies.

(k) LAPSE OF APPROPRIATION.—If on the first day of a fiscal year a regular appropriation to the Commission has not been enacted, the Commission shall continue to collect (as offsetting collections) the fees and assessments under subsections (b), (c), and (d) at the rate in effect during the preceding fiscal year, until 60 days after the date such a regular appropriation is enacted.

(l) BASELINE ESTIMATE OF THE AGGREGATE DOLLAR AMOUNT OF SALES.—The baseline estimate of the aggregate dollar amount of

sales for any fiscal year is the baseline estimate of the aggregate dollar amount of sales of securities (other than bonds, debentures, other evidences of indebtedness, security futures products, and options on securities indexes (excluding a narrow-based security index)) to be transacted on each national securities exchange and by or through any member of each national securities association (otherwise than on a national securities exchange) during such fiscal year as determined by the Commission, after consultation with the Congressional Budget Office and the Office of Management and Budget, using the methodology required for making projections pursuant to section 257 of the Balanced Budget and Emergency Deficit Control Act of 1985.

(m) TRANSMITTAL OF COMMISSION BUDGET REQUESTS.—

(1) BUDGET REQUIRED.—For fiscal year 2012, and each fiscal year thereafter, the Commission shall prepare and submit a budget to the President. Whenever the Commission submits a budget estimate or request to the President or the Office of Management and Budget, the Commission shall concurrently transmit copies of the estimate or request to the Committee on Appropriations of the Senate, the Committee on Appropriations of the House of Representatives, the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives.

(2) SUBMISSION TO CONGRESS.—The President shall submit each budget submitted under paragraph (1) to Congress, in unaltered form, together with the annual budget for the Administration submitted by the President.

(3) CONTENTS.—The Commission shall include in each budget submitted under paragraph (1)—

(A) an itemization of the amount of funds necessary to carry out the functions of the Commission.

(B) an amount to be designated as contingency funding to be used by the Commission to address unanticipated needs; and

(C) a designation of any activities of the Commission for which multi-year budget authority would be suitable.

PENALTIES

SEC. 32. [78ff] (a) Any person who willfully violates any provision of this title (other than section 30A), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this title, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this title or any rule or regulation thereunder or undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not ex-

ceeding $25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 15 of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c)(1)(A) Any issuer that violates subsection (a) or (g) of section 30A shall be fined not more than $2,000,000.

(B) Any issuer that violates subsection (a) or (g) of section 30A shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(2)(A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 30A of this title shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

(B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 30A of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer.

SEPARABILITY OF PROVISIONS

SEC. 33. [78gg] If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

EFFECTIVE DATE

SEC. 34. [78hh] This Act shall become effective on July 1, 1934, except that sections 6 and 12 (b), (c), (d), and (e) shall become effective on September 1, 1934; and sections 5, 7, 8, 9(a)(6), 10, 11, 12(a), 13, 14, 15, 16, 17, 18, 19, and 30 shall become effective on October 1, 1934.

SEC. 35. [78kk] AUTHORIZATION OF APPROPRIATIONS.

In addition to any other funds authorized to be appropriated to the Commission, there are authorized to be appropriated to carry out the functions, powers, and duties of the Commission—

(1) for fiscal year 2011, $1,300,000,000;
(2) for fiscal year 2012, $1,500,000,000;
(3) for fiscal year 2013, $1,750,000,000;
(4) for fiscal year 2014, $2,000,000,000; and
(5) for fiscal year 2015, $2,250,000,000.

REQUIREMENTS FOR THE EDGAR SYSTEM

SEC. 35A. [78ll] The Commission, by rule or regulation—

(1) shall provide that any information in the EDGAR system that is required to be disseminated by the contractor—

(A) may be sold or disseminated by the contractor only pursuant to a uniform schedule of fees prescribed by the Commission;

(B) may be obtained by a purchaser by direct interconnection with the EDGAR system;

(C) shall be equally available on equal terms to all persons; and

(D) may be used, resold, or redisseminated by any person who has lawfully obtained such information without restriction and without payment of additional fees or royalties; and

(2) shall require that persons, or classes of persons, required to make filings with the Commission submit such filings in a form and manner suitable for entry into the EDGAR system and shall specify the date that such requirement is effective with respect to that person or class; except that the Commission may exempt persons or classes of persons, or filings or classes of filings, from such rules or regulations in order to prevent hardships or to avoid imposing unreasonable burdens or as otherwise may be necessary or appropriate.

SEC. 36. [78mm] GENERAL EXEMPTIVE AUTHORITY.

(a) AUTHORITY.—

(1) IN GENERAL.—Except as provided in subsection (b), but notwithstanding any other provision of this title, the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

(2) PROCEDURES.—The Commission shall, by rule or regulation, determine the procedures under which an exemptive order under this section shall be granted and may, in its sole discretion, decline to entertain any application for an order of exemption under this section.

(b) LIMITATION.—The Commission may not, under this section, exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions from section 15C or the rules or regulations issued thereunder or (for purposes of section 15C and the rules and regulations issued thereunder) from any definition in paragraph (42), (43), (44), or (45) of section 3(a).

(c) DERIVATIVES.—Unless the Commission is expressly authorized by any provision described in this subsection to grant exemptions, the Commission shall not grant exemptions, with respect to amendments made by subtitle B of the Wall Street Transparency and Accountability Act of 2010, with respect to paragraphs (65), (66), (68), (69), (70), (71), (72), (73), (74), (75), (76), and (79) of section 3(a), and sections 10B(a), 10B(b), 10B(c), 13A, 15F, 17A(g),

17A(h), 17A(i), 17A(j), 17A(k), and 17A(l); provided that the Commission shall have exemptive authority under this title with respect to security-based swaps as to the same matters that the Commodity Futures Trading Commission has under the Wall Street Transparency and Accountability Act of 2010 with respect to swaps, including under section 4(c) of the Commodity Exchange Act.

SEC. 37. [78nn] TENNESSEE VALLEY AUTHORITY.

(a) IN GENERAL.—Commencing with the issuance by the Tennessee Valley Authority of an annual report on Commission Form 10–K (or any successor thereto) for fiscal year 2006 and thereafter, the Tennessee Valley Authority shall file with the Commission, in accordance with such rules and regulations as the Commission has prescribed or may prescribe, such periodic, current, and supplementary information, documents, and reports as would be required pursuant to section 13 if the Tennessee Valley Authority were an issuer of a security registered pursuant to section 12. Notwithstanding the preceding sentence, the Tennessee Valley Authority shall not be required to register any securities under this title, and shall not be deemed to have registered any securities under this title.

(b) LIMITED TREATMENT AS ISSUER.—Commencing with the issuance by the Tennessee Valley Authority of an annual report on Commission Form 10–K (or any successor thereto) for fiscal year 2006 and thereafter, the Tennessee Valley Authority shall be deemed to be an issuer for purposes of section 10A, other than for subsection (m)(1) or (m)(3) of section 10A. The Tennessee Valley Authority shall not be required by this subsection to comply with the rules issued by any national securities exchange or national securities association in response to rules issued by the Commission pursuant to section 10A(m)(1).

(c) NO EFFECT ON TVA AUTHORITY.—Nothing in this section shall be construed to diminish, impair, or otherwise affect the authority of the Board of Directors of the Tennessee Valley Authority to carry out its statutory functions under the Tennessee Valley Authority Act of 1933.

SEC. 38. [78oo] FEDERAL NATIONAL MORTGAGE ASSOCIATION, FEDERAL HOME LOAN MORTGAGE CORPORATION, FEDERAL HOME LOAN BANKS.

(a) FEDERAL NATIONAL MORTGAGE ASSOCIATION AND FEDERAL HOME LOAN MORTGAGE CORPORATION.—No class of equity securities of the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation shall be treated as an exempted security for purposes of section 12, 13, 14, or 16.

(b) FEDERAL HOME LOAN BANKS.—

(1) REGISTRATION.—Each Federal Home Loan Bank shall register a class of its common stock under section 12(g), not later than 120 days after the date of enactment of the Federal Housing Finance Regulatory Reform Act of 2008, and shall thereafter maintain such registration and be treated for purposes of this title as an "issuer", the securities of which are required to be registered under section 12, regardless of the number of members holding such stock at any given time.

(2) STANDARDS RELATING TO AUDIT COMMITTEES.—Each Federal Home Loan Bank shall comply with the rules issued by the Commission under section 10A(m).

(c) DEFINITIONS.—For purposes of this section, the following definitions shall apply:

(1) FEDERAL HOME LOAN BANK; MEMBER.—The terms "Federal Home Loan Bank" and "member", have the same meanings as in section 2 of the Federal Home Loan Bank Act.

(2) FEDERAL NATIONAL MORTGAGE ASSOCIATION.—The term "Federal National Mortgage Association" means the corporation created by the Federal National Mortgage Association Charter Act.

(3) FEDERAL HOME LOAN MORTGAGE CORPORATION.—The term "Federal Home Loan Mortgage Corporation" means the corporation created by the Federal Home Loan Mortgage Corporation Act.

SEC. 39. [78pp] INVESTOR ADVISORY COMMITTEE.

(a) ESTABLISHMENT AND PURPOSE.—

(1) ESTABLISHMENT.—There is established within the Commission the Investor Advisory Committee (referred to in this section as the "Committee").

(2) PURPOSE.—The Committee shall—

(A) advise and consult with the Commission on—

(i) regulatory priorities of the Commission;

(ii) issues relating to the regulation of securities products, trading strategies, and fee structures, and the effectiveness of disclosure;

(iii) initiatives to protect investor interest; and

(iv) initiatives to promote investor confidence and the integrity of the securities marketplace; and

(B) submit to the Commission such findings and recommendations as the Committee determines are appropriate, including recommendations for proposed legislative changes.

(b) MEMBERSHIP.—

(1) IN GENERAL.—The members of the Committee shall be—

(A) the Investor Advocate;

(B) a representative of State securities commissions;

(C) a representative of the interests of senior citizens; and

(D) not fewer than 10, and not more than 20, members appointed by the Commission, from among individuals who—

(i) represent the interests of individual equity and debt investors, including investors in mutual funds;

(ii) represent the interests of institutional investors, including the interests of pension funds and registered investment companies;

(iii) are knowledgeable about investment issues and decisions; and

(iv) have reputations of integrity.

(2) TERM.—Each member of the Committee appointed under paragraph (1)(B) shall serve for a term of 4 years.

(3) MEMBERS NOT COMMISSION EMPLOYEES.—Members appointed under paragraph (1)(B) shall not be deemed to be employees or agents of the Commission solely because of membership on the Committee.

(c) CHAIRMAN; VICE CHAIRMAN; SECRETARY; ASSISTANT SECRETARY.—

(1) IN GENERAL.—The members of the Committee shall elect, from among the members of the Committee—

(A) a chairman, who may not be employed by an issuer;

(B) a vice chairman, who may not be employed by an issuer;

(C) a secretary; and

(D) an assistant secretary.

(2) TERM.—Each member elected under paragraph (1) shall serve for a term of 3 years in the capacity for which the member was elected under paragraph (1).

(d) MEETINGS.—

(1) FREQUENCY OF MEETINGS.—The Committee shall meet—

(A) not less frequently than twice annually, at the call of the chairman of the Committee; and

(B) from time to time, at the call of the Commission.

(2) NOTICE.—The chairman of the Committee shall give the members of the Committee written notice of each meeting, not later than 2 weeks before the date of the meeting.

(e) COMPENSATION AND TRAVEL EXPENSES.—Each member of the Committee who is not a full-time employee of the United States shall—

(1) be entitled to receive compensation at a rate not to exceed the daily equivalent of the annual rate of basic pay in effect for a position at level V of the Executive Schedule under section 5316 of title 5, United States Code, for each day during which the member is engaged in the actual performance of the duties of the Committee; and

(2) while away from the home or regular place of business of the member in the performance of services for the Committee, be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703(b) of title 5, United States Code.

(f) STAFF.—The Commission shall make available to the Committee such staff as the chairman of the Committee determines are necessary to carry out this section.

(g) REVIEW BY COMMISSION.—The Commission shall—

(1) review the findings and recommendations of the Committee; and

(2) each time the Committee submits a finding or recommendation to the Commission, promptly issue a public statement—

(A) assessing the finding or recommendation of the Committee; and

(B) disclosing the action, if any, the Commission intends to take with respect to the finding or recommendation.

(h) COMMITTEE FINDINGS.—Nothing in this section shall require the Commission to agree to or act upon any finding or recommendation of the Committee.

(i) CHAPTER 10 OF TITLE 5, UNITED STATES CODE.—Chapter 10 of title 5, United States Code, shall not apply with respect to the Committee and its activities.

(j) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to the Commission such sums as are necessary to carry out this section.

SEC. 40. [78qq] SMALL BUSINESS CAPITAL FORMATION ADVISORY COMMITTEE.

(a) ESTABLISHMENT AND PURPOSE.—

(1) ESTABLISHMENT.—There is established within the Commission the Small Business Capital Formation Advisory Committee (hereafter in this section referred to as the "Committee").

(2) FUNCTIONS.—

(A) IN GENERAL.—The Committee shall provide the Commission with advice on the Commission's rules, regulations, and policies with regard to the Commission's mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as such rules, regulations, and policies relate to—

(i) capital raising by emerging, privately held small businesses ("emerging companies") and publicly traded companies with less than $250,000,000 in public market capitalization ("smaller public companies") through securities offerings, including private and limited offerings and initial and other public offerings;

(ii) trading in the securities of emerging companies and smaller public companies; and

(iii) public reporting and corporate governance requirements of emerging companies and smaller public companies.

(B) LIMITATION.—The Committee shall not provide any advice with respect to any policies, practices, actions, or decisions concerning the Commission's enforcement program.

(b) MEMBERSHIP.—

(1) IN GENERAL.—The members of the Committee shall be—

(A) the Advocate for Small Business Capital Formation;

(B) not fewer than 10, and not more than 20, members appointed by the Commission, from among individuals—

(i) who represent—

(I) emerging companies engaging in private and limited securities offerings or considering initial public offerings ("IPO") (including the companies' officers and directors);

(II) the professional advisors of such companies (including attorneys, accountants, investment bankers, and financial advisors); and

(III) the investors in such companies (including angel investors, venture capital funds, and family offices);

(ii) who are officers or directors of minority-owned small businesses or women-owned small businesses;

(iii) who represent—

(I) smaller public companies (including the companies' officers and directors);

(II) the professional advisors of such companies (including attorneys, auditors, underwriters, and financial advisors); and

(III) the pre-IPO and post-IPO investors in such companies (both institutional, such as venture capital funds, and individual, such as angel investors); and

(iv) who represent participants in the marketplace for the securities of emerging companies and smaller public companies, such as securities exchanges, alternative trading systems, analysts, information processors, and transfer agents; and

(C) three non-voting members—

(i) one of whom shall be appointed by the Investor Advocate;

(ii) one of whom shall be appointed by the North American Securities Administrators Association; and

(iii) one of whom shall be appointed by the Administrator of the Small Business Administration.

(2) TERM.—Each member of the Committee appointed under subparagraph (B), (C)(ii), or (C)(iii) of paragraph (1) shall serve for a term of 4 years.

(3) MEMBERS NOT COMMISSION EMPLOYEES.—Members appointed under subparagraph (B), (C)(ii), or (C)(iii) of paragraph (1) shall not be treated as employees or agents of the Commission solely because of membership on the Committee.

(c) CHAIRMAN; VICE CHAIRMAN; SECRETARY; ASSISTANT SECRETARY.—

(1) IN GENERAL.—The members of the Committee shall elect, from among the members of the Committee—

(A) a chairman;

(B) a vice chairman;

(C) a secretary; and

(D) an assistant secretary.

(2) TERM.—Each member elected under paragraph (1) shall serve for a term of 3 years in the capacity for which the member was elected under paragraph (1).

(d) MEETINGS.—

(1) FREQUENCY OF MEETINGS.—The Committee shall meet—

(A) not less frequently than four times annually, at the call of the chairman of the Committee; and

(B) from time to time, at the call of the Commission.

(2) NOTICE.—The chairman of the Committee shall give the members of the Committee written notice of each meeting, not later than 2 weeks before the date of the meeting.

(e) COMPENSATION AND TRAVEL EXPENSES.—Each member of the Committee who is not a full-time employee of the United States shall—

(1) be entitled to receive compensation at a rate not to exceed the daily equivalent of the annual rate of basic pay in effect for a position at level V of the Executive Schedule under section 5316 of title 5, United States Code, for each day during which the member is engaged in the actual performance of the duties of the Committee; and

(2) while away from the home or regular place of business of the member in the performance of services for the Committee, be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5, United States Code.

(f) STAFF.—The Commission shall make available to the Committee such staff as the chairman of the Committee determines are necessary to carry out this section.

(g) REVIEW BY COMMISSION.—The Commission shall—

(1) review the findings and recommendations of the Committee; and

(2) each time the Committee submits a finding or recommendation to the Commission, promptly issue a public statement—

(A) assessing the finding or recommendation of the Committee; and

(B) disclosing the action, if any, the Commission intends to take with respect to the finding or recommendation.

(h) FEDERAL ADVISORY COMMITTEE ACT.—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply with respect to the Committee and its activities.

SEC. 41. [78rr] DATA STANDARDS FOR SECURITY-BASED SWAP REPORTING.

(a) REQUIREMENT.—The Commission shall, by rule, adopt data standards for all reports related to security-based swaps that are required under this Act.

(b) CONSISTENCY.—The data standards required under subsection (a) shall incorporate, and ensure compatibility with (to the extent feasible), all applicable data standards established in the rules promulgated under section 124 of the Financial Stability Act of 2010, including, to the extent practicable, by having the characteristics described in clauses (i) through (vi) of subsection (c)(1)(B) of such section 124.

TITLE II—AMENDMENTS TO SECURITIES ACT OF 1933

[Sections 201–209 of title II amended the Securities Act of 1933. Section 210 of title II provided for the transfer of the functions and duties of the Federal Trade Commission under the Securities Act of 1933 to the Securities and Exchange Commission. Sec-

tion 211 of title II required the Securities and Exchange Commission to make a study of certain protective and reorganization committees.]

EXHIBIT 305

Conformed to Federal Register version

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 276

[Release No. IA-5248; File No. S7-07-18]

RIN: 3235-AM36

Commission Interpretation Regarding Standard of Conduct for Investment Advisers

AGENCY: Securities and Exchange Commission.

ACTION: Interpretation.

SUMMARY: The Securities and Exchange Commission (the "SEC" or the "Commission") is publishing an interpretation of the standard of conduct for investment advisers under the Investment Advisers Act of 1940 (the "Advisers Act" or the "Act").

DATES: Effective July 12, 2019.

FOR FURTHER INFORMATION CONTACT: Olawalé Oriola, Senior Counsel; Matthew Cook, Senior Counsel; or Jennifer Songer, Branch Chief, at (202) 551-6787 or *IArules@sec.gov*, Investment Adviser Regulation Office, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-8549.

SUPPLEMENTARY INFORMATION: The Commission is publishing an interpretation of the standard of conduct for investment advisers under the Advisers Act [15 U.S.C. 80b].[1]

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[1] 15 U.S.C. 80b. Unless otherwise noted, when we refer to the Advisers Act, or any paragraph of the Advisers Act, we are referring to 15 U.S.C. 80b of the United States Code, at which the Advisers Act is codified, and when we refer to rules under the Advisers Act, or any paragraph of these rules, we are referring to title 17, part 275 of the Code of Federal Regulations [17 CFR 275], in which these rules are published.

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I. INTRODUCTION

Under federal law, an investment adviser is a fiduciary.[2] The fiduciary duty an investment adviser owes to its client under the Advisers Act, which comprises a duty of care and a duty of loyalty, is important to the Commission's investor protection efforts. Also important to the Commission's investor protection efforts is the standard of conduct that a broker-dealer owes to a retail customer when it makes a recommendation of any securities transaction or investment strategy involving securities.[3] Both investment advisers and broker-dealers play an important

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[2] *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) ("SEC v. Capital Gains"); *see also infra* footnotes 34–44 and accompanying text; Investment Adviser Codes of Ethics, Investment Advisers Act Release No. 2256 (July 2, 2004); Compliance Programs of Investment Companies and Investment Advisers, Investment Advisers Act Release No. 2204 (Dec. 17, 2003); Electronic Filing by Investment Advisers; Proposed Amendments to Form ADV, Investment Advisers Act Release No. 1862 (Apr. 5, 2000). Investment advisers also have antifraud liability with respect to prospective clients under section 206 of the Advisers Act.

[3] *See* Regulation Best Interest, Exchange Act Release No. 34-86031 (June 5, 2019) ("Reg. BI Adoption"). This final interpretation regarding the standard of conduct for investment advisers under the Advisers Act ("Final Interpretation") interprets section 206 of the Advisers Act, which is applicable to both SEC- and

role in our capital markets and our economy more broadly. Investment advisers and broker-dealers have different types of relationships with investors, offer different services, and have different compensation models. This variety is important because it presents investors with choices regarding the types of relationships they can have, the services they can receive, and how they can pay for those services.

On April 18, 2018, the Commission proposed rules and forms intended to enhance the required standard of conduct for broker-dealers[4] and provide retail investors with clear and succinct information regarding the key aspects of their brokerage and advisory relationships.[5] In connection with the publication of these proposals, the Commission published for comment a separate proposed interpretation regarding the standard of conduct for investment advisers under the Advisers Act ("Proposed Interpretation").[6] We stated in the Proposed Interpretation, and we continue to believe, that it is appropriate and beneficial to address in one release and reaffirm—and in some cases clarify—certain aspects of the fiduciary duty that an investment adviser owes

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state-registered investment advisers, as well as other investment advisers that are exempt from registration or subject to a prohibition on registration under the Advisers Act. This Final Interpretation is intended to highlight the principles relevant to an adviser's fiduciary duty. It is not, however, intended to be the exclusive resource for understanding these principles. Separately, in various circumstances, case law, statutes (such as the Employee Retirement Income Security Act of 1974 ("ERISA")), and state law impose obligations on investment advisers. In some cases, these standards may differ from the standard enforced by the Commission.

4 Regulation Best Interest, Exchange Act Release No. 83062 (Apr. 18, 2018) ("Reg. BI Proposal").

5 Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles, Investment Advisers Act Release No. 4888 (Apr. 18, 2018) ("Relationship Summary Proposal").

6 Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation, Investment Advisers Act Release No. 4889 (Apr. 18, 2018).

to its clients under section 206 of the Advisers Act.[7] After considering the comments received, we are publishing this Final Interpretation with some clarifications to address comments.[8]

A. Overview of Comments

We received over 150 comment letters on our Proposed Interpretation from individuals, investment advisers, trade or professional organizations, law firms, consumer advocacy groups, and bar associations.[9] Although many commenters generally agreed that the Proposed Interpretation was useful,[10] some noted the challenges inherent in a Commission interpretation covering the broad scope of the fiduciary duty that an investment adviser owes to its clients under the Advisers Act.[11] Some of these commenters suggested modifications to or withdrawal

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7 Further, the Commission recognizes that many advisers provide impersonal investment advice. *See, e.g.*, Advisers Act rule 203A-3 (defining "impersonal investment advice" in the context of defining "investment adviser representative" as "investment advisory services provided by means of written material or oral statements that do not purport to meet the objectives or needs of specific individuals or accounts"). This Final Interpretation does not address the extent to which the Advisers Act applies to different types of impersonal investment advice.

8 In the Proposed Interpretation, the Commission also requested comment on: licensing and continuing education requirements for personnel of SEC-registered investment advisers; delivery of account statements to clients with investment advisory accounts; and financial responsibility requirements for SEC-registered investment advisers, including fidelity bonds. We are continuing to evaluate the comments received in response.

9 Comment letters submitted in File No. S7-09-18 are available on the Commission's website at https://www.sec.gov/comments/s7-09-18/s70918.htm. We also considered those comments submitted in File No. S7-08-18 (Comments on Relationship Summary Proposal) and File No. S7-07-18 (Comments on Reg. BI Proposal). Those comments are available on the Commission's website at https://www.sec.gov/comments/s7-08-18/s70818.htm and https://www.sec.gov/comments/s7-07-18/s70718.htm.

10 *See, e.g.*, Comment Letter of North American Securities Administrators Association (Aug. 23, 2018) ("NASAA Letter") (stating that the Proposed Interpretation is a "useful resource"); Comment Letter of Invesco (Aug. 7, 2018) ("Invesco Letter") (agreeing that "there are benefits to having a clear statement regarding the fiduciary duty that applies to an investment adviser").

11 *See, e.g.*, Comment Letter of Pickard Djinis and Pisarri LLP (Aug. 7, 2018) ("Pickard Letter") (noting the Commission's "efforts to synthesize case law, legislative history, academic literature, prior Commission releases and other sources to produce a comprehensive explanation of the fiduciary standard of conduct"); Comment Letter of Dechert LLP (Aug. 7, 2018) ("Dechert Letter") ("It is crucial that any universal interpretation of an adviser's fiduciary duty be based on sound and time-tested principles. Given the difficulty of defining and encompassing all of an adviser's responsibilities to its clients, while also accommodating the diversity of advisory arrangements, interpretive issues will arise in the future."); Comment Letter of the Hedge Funds Subcommittee of the Federal Regulation of Securities Committee of the Business Law Section of the American Bar Association (Aug. 24, 2018) ("ABA Letter") ("We note at

of the Proposed Interpretation.[12] Although most commenters agreed that an investment adviser's fiduciary duty comprises a duty of care and a duty of loyalty, as described in the Proposed Interpretation, they had differing views on aspects of the fiduciary duty and in some cases sought clarification on its application.[13]

Some commenters requested that we adopt rule text instead.[14] The relationship between an investment adviser and its client has long been based on fiduciary principles not generally set forth in specific statute or rule text. We believe that this principles-based approach should continue as it expresses broadly the standard to which investment advisers are held while allowing them flexibility to meet that standard in the context of their specific services. In our view, adopting rule text is not necessary to achieve our goal in this Final Interpretation of reaffirming and in some cases clarifying certain aspects of the fiduciary duty.

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the outset that it is difficult to capture the nature of an investment adviser's fiduciary duty in a broad statement that has universal applicability.").

12 *See, e.g.*, Comment Letter of L.A. Schnase (Jul. 30, 2018) (urging the Commission not to issue the Proposed Interpretation in final form, or at least not without substantial rewriting or reshaping); Comment Letter of Money Management Institute (Aug. 7, 2018) ("MMI Letter") (urging the Commission to "revise the interpretation so that it reflects the common law principles in which an investment adviser's fiduciary duty is grounded"); Dechert Letter (recommending that we withdraw the Proposed Interpretation and instead rely on existing authority and sources of law, as well as existing Commission practices for providing interpretive guidance, in order to define the source and scope of an investment adviser's fiduciary duty).

13 *See, e.g.*, Comment Letter of Cambridge Investment Research Inc. (Aug. 7, 2018) ("Cambridge Letter") (stating that "greater clarity on all aspects of an investment adviser's fiduciary duty will improve the ability to craft such policies and procedures, as well as support the elimination of confusion for retail clients and investment professionals"); Comment Letter of Institutional Limited Partners Association (Aug. 6, 2018) ("ILPA Letter 1") ("Interpretation will provide more certainty regarding the fiduciary duties owed by private fund advisers to their clients."); Comment Letter of New York City Bar Association (Jun. 26, 2018) ("NY City Bar Letter") (stating that the uniform interpretation of an investment adviser's fiduciary duty is necessary).

14 Some commenters suggested that we codify the Proposed Interpretation. *See, e.g.,* Comment Letter of Roy Tanga (Apr. 25, 2018); Comment Letter of Financial Engines (Aug. 6, 2018) ("Financial Engines Letter"); ILPA Letter 1; Comment Letter of AARP (Aug. 7, 2018) ("AARP Letter"); Comment Letter of Gordon Donohue (Aug. 6, 2018); Comment Letter of Financial Planning Coalition (Aug. 7, 2018) ("FPC Letter").

II. INVESTMENT ADVISERS' FIDUCIARY DUTY

The Advisers Act establishes a federal fiduciary duty for investment advisers.[15] This fiduciary duty is based on equitable common law principles and is fundamental to advisers' relationships with their clients under the Advisers Act.[16] The investment adviser's fiduciary duty is broad and applies to the entire adviser-client relationship.[17] The fiduciary duty to which advisers are subject is not specifically defined in the Advisers Act or in Commission rules, but reflects a Congressional recognition "of the delicate fiduciary nature of an investment advisory relationship" as well as a Congressional intent to "eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested."[18] An adviser's fiduciary duty is imposed under the

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15 *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979) ("Transamerica Mortgage v. Lewis") ("§ 206 establishes federal fiduciary standards to govern the conduct of investment advisers.") (quotation marks omitted); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 471, n.11 (1977) (in discussing SEC v. Capital Gains, stating that the Supreme Court's reference to fraud in the "equitable" sense of the term was "premised on its recognition that Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers"); SEC v. Capital Gains, *supra* footnote 2; Amendments to Form ADV, Investment Advisers Act Release No. 3060 (July 28, 2010) ("Investment Advisers Act Release 3060") ("Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients' interests to its own," citing Proxy Voting by Investment Advisers, Investment Advisers Act Release No. 2106 (Jan. 31, 2003) ("Investment Advisers Act Release 2106")).

16 *See* SEC v. Capital Gains, *supra* footnote 2 (discussing the history of the Advisers Act, and how equitable principles influenced the common law of fraud and changed the suits brought against a fiduciary, "which Congress recognized the investment adviser to be").

17 The Commission has previously recognized the broad scope of section 206 of the Advisers Act in a variety of contexts. *See, e.g.,* Investment Advisers Act Release 2106, *supra* footnote 15; Timbervest, LLC, et al., Advisers Act Release No. 4197 (Sept. 17, 2015) (Commission Opinion) (" [O]nce an investment advisory relationship is formed, the Advisers Act does not permit an adviser to exploit that fiduciary relationship by defrauding his client in any investment transaction connected to the advisory relationship."); *see also SEC v. Lauer*, 2008 WL 4372896, at 24 (S.D. Fla. Sept. 24, 2008) ("Unlike the antifraud provisions of the Securities Act and the Exchange Act, Section 206 of the Advisers Act does not require that the activity be 'in the offer or sale of any' security or 'in connection with the purchase or sale of any security.'"); Thomas P. Lemke & Gerald T. Lins, Regulation of Investment Advisers (2013 ed.), at § 2:30 ("[T]he SEC has … applied [sections 206(1) and 206(2)] where fraud arose from an investment advisory relationship, even though the wrongdoing did not specifically involve securities.").

18 *See* SEC v. Capital Gains, *supra* footnote 2; *see also* In the Matter of Arleen W. Hughes, Exchange Act Release No. 4048 (Feb. 18, 1948) ("Arleen Hughes") (Commission Opinion) (discussing the relationship of

Advisers Act in recognition of the nature of the relationship between an investment adviser and a client and the desire "so far as is presently practicable to eliminate the abuses" that led to the enactment of the Advisers Act.[19] It is made enforceable by the antifraud provisions of the Advisers Act.[20]

An investment adviser's fiduciary duty under the Advisers Act comprises a duty of care and a duty of loyalty.[21] This fiduciary duty requires an adviser "to adopt the principal's goals,

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trust and confidence between the client and a dual registrant and stating that the registrant was a fiduciary and subject to liability under the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934).

19 *See* SEC v. Capital Gains, *supra* footnote 2 (noting that the "declaration of policy" in the original bill, which became the Advisers Act, declared that "the national public interest and the interest of investors are adversely affected … when the business of investment advisers is so conducted as to defraud or mislead investors, or to enable such advisers to relieve themselves of their fiduciary obligations to their clients. It is hereby declared that the policy and purposes of this title, in accordance with which the provisions of this title shall be interpreted, *are to mitigate and, so far as is presently practicable to eliminate* the abuses enumerated in this section") (citing S. 3580, 76th Cong., 3d Sess., § 202 and Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission, Pursuant to Section 30 of the Public Utility Holding Company Act of 1935, on Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services, H.R. Doc. No. 477, 76th Cong. 2d Sess., 1, at 28) (emphasis added).

20 *Id.*; Transamerica Mortgage v. Lewis, *supra* footnote 15 ("[T]he Act's legislative history leaves no doubt that Congress intended to impose enforceable fiduciary obligations."). Some commenters questioned the standard to which the Advisers Act holds investment advisers. *See, e.g.,* Comment Letter of Stark & Stark, PC (undated) ("The duty of care at common law and under the Advisers Act only requires that advisers not be negligent in performing their duties.") (internal citation omitted); Comment Letter of Institutional Limited Partners Association (Nov. 21, 2018) ("ILPA Letter 2") ("The Advisers Act standard is a lower simple 'negligence' standard."). Claims arising under Advisers Act section 206(2) are not scienter-based and can be adequately pled with only a showing of negligence. *Robare Group, Ltd., et al. v. SEC*, 922 F.3d 468, 472(D.C. Cir. 2019) ("Robare v. SEC"); *SEC v. Steadman*, 967 F.2d 636, 643, n.5 (D.C. Cir. 1992) (citing SEC v. Capital Gains, *supra* footnote 2) ("[A] violation of § 206(2) of the Investment Advisers Act may rest on a finding of simple negligence."); *SEC v. DiBella*, 587 F.3d 553, 567 (2d Cir. 2009) ("the government need not show intent to make out a section 206(2) violation"); *SEC v. Gruss*, 859 F. Supp. 2d 653, 669 (S.D.N.Y. 2012) ("Claims arising under Section 206(2) are not scienter-based and can be adequately pled with only a showing of negligence."). However, claims arising under Advisers Act section 206(1) require scienter. *See, e.g.*, Robare v. SEC; *SEC v. Moran*, 922 F. Supp. 867, 896 (S.D.N.Y. 1996*); Carroll v. Bear, Stearns & Co.*, 416 F. Supp. 998, 1001 (S.D.N.Y. 1976).

21 *See, e.g.*, Investment Advisers Act Release 2106, *supra* footnote 15. These duties were generally recognized by commenters. *See, e.g.*, Comment Letter of Consumer Federation of America (Aug. 7, 2018) ("CFA Letter"); Comment Letter of the Investment Adviser Association (Aug. 6, 2018) ("IAA Letter"); Comment Letter of Investments & Wealth Institute (Aug. 6, 2018); Comment Letter of Raymond James (Aug. 7, 2018); FPC Comment Letter. *But see* Dechert Letter (questioning the sufficiency of support for a duty of care).

objectives, or ends."[22] This means the adviser must, at all times, serve the best interest of its client and not subordinate its client's interest to its own. In other words, the investment adviser cannot place its own interests ahead of the interests of its client. This combination of care and loyalty obligations has been characterized as requiring the investment adviser to act in the "best interest" of its client at all times.[23] In our view, an investment adviser's obligation to act in the best interest of its client is an overarching principle that encompasses both the duty of care and the duty of loyalty. As discussed in more detail below, in our view, the duty of care requires an investment adviser to provide investment advice in the best interest of its client, based on the client's objectives. Under its duty of loyalty, an investment adviser must eliminate or make full and fair disclosure of all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which is not disinterested such that a client can provide informed consent to the conflict.[24] We believe this is another part of an investment adviser's obligation to act in the best interest of its client.

A. Application of Duty Determined by Scope of Relationship

An adviser's fiduciary duty is imposed under the Advisers Act in recognition of the

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22 Arthur B. Laby, *The Fiduciary Obligations as the Adoption of Ends*, 56 Buffalo Law Review 99 (2008); *see also* Restatement (Third) of Agency, §2.02 Scope of Actual Authority (2006) (describing a fiduciary's authority in terms of the fiduciary's reasonable understanding of the principal's manifestations and objectives).

23 Investment Advisers Act Release 3060, *supra* footnote 15 (adopting amendments to Form ADV and stating that "under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients' interests to its own," citing Investment Advisers Act Release 2106, *supra* footnote 15). *See SEC v. Tambone*, 550 F.3d 106, 146 (1st Cir. 2008) ("SEC v. Tambone") ("Section 206 imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund…"); *SEC v. Moran*, 944 F. Supp. 286, 297 (S.D.N.Y 1996) ("SEC v. Moran") ("Investment advisers are entrusted with the responsibility and duty to act in the best interest of their clients."). Although most commenters agreed that an adviser has an obligation to act in its client's best interest, some questioned whether the Proposed Interpretation appropriately considered the best interest obligation as part of the duty of care, or whether it instead should be considered part of the duty of loyalty. *See, e.g.*, MMI Letter; Comment Letter of Investment Company Institute (Aug. 7, 2018) ("ICI Letter").

24 *See infra* footnotes 67-70 and accompanying text for a more detailed discussion of informed consent and how it is generally considered on an objective basis and may be inferred.

nature of the relationship between an adviser and its client—a relationship of trust and confidence.[25] The adviser's fiduciary duty is principles-based and applies to the entire relationship between the adviser and its client. The fiduciary duty follows the contours of the relationship between the adviser and its client, and the adviser and its client may shape that relationship by agreement, provided that there is full and fair disclosure and informed consent.[26] With regard to the scope of the adviser-client relationship, we recognize that investment advisers provide a wide range of services, from a single financial plan for which a client may pay a one-time fee, to ongoing portfolio management for which a client may pay a periodic fee based on the value of assets in the portfolio. Investment advisers also serve a large variety of clients, from retail clients with limited assets and investment knowledge and experience to institutional clients with very large portfolios and substantial knowledge, experience, and analytical resources.[27] In our experience, the principles-based fiduciary duty imposed by the Advisers Act has provided sufficient flexibility to serve as an effective standard of conduct for investment advisers, regardless of the services they provide or the types of clients they serve.

Although all investment advisers owe each of their clients a fiduciary duty under the Advisers Act, that fiduciary duty must be viewed in the context of the agreed-upon scope of the

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[25] *See, e.g.*, Hearings on S. 3580 before Subcommittee of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess. (leading investment advisers emphasized their relationship of "trust and confidence" with their clients); SEC v. Capital Gains, *supra* footnote 2 (citing same).

[26] Several commenters asked that we clarify that an adviser and its client can tailor the scope of the relationship to which the fiduciary duty applies through contract. *See, e.g.*, MMI Letter; Financial Engines Letter; ABA Letter.

[27] This Final Interpretation also applies to automated advisers, which are often colloquially referred to as "robo-advisers." Automated advisers, like all SEC-registered investment advisers, are subject to all of the requirements of the Advisers Act, including the requirement that they provide advice consistent with the fiduciary duty they owe to their clients. *See* Division of Investment Management, Robo Advisers, IM Guidance Update No. 2017-02 (Feb. 2017), *available at* https://www.sec.gov/investment/im-guidance-2017-02.pdf (describing Commission staff's guidance as to three distinct areas under the Advisers Act that automated advisers should consider, due to the nature of their business model, in seeking to comply with their obligations under the Advisers Act).

relationship between the adviser and the client. In particular, the specific obligations that flow from the adviser's fiduciary duty depend upon what functions the adviser, as agent, has agreed to assume for the client, its principal. For example, the obligations of an adviser providing comprehensive, discretionary advice in an ongoing relationship with a retail client (*e.g.*, monitoring and periodically adjusting a portfolio of equity and fixed income investments with limited restrictions on allocation) will be significantly different from the obligations of an adviser to a registered investment company or private fund where the contract defines the scope of the adviser's services and limitations on its authority with substantial specificity (*e.g.*, a mandate to manage a fixed income portfolio subject to specified parameters, including concentration limits and credit quality and maturity ranges).[28]

While the application of the investment adviser's fiduciary duty will vary with the scope of the relationship, the relationship in all cases remains that of a fiduciary to the client. In other words, an adviser's federal fiduciary duty may not be waived, though it will apply in a manner that reflects the agreed-upon scope of the relationship.[29] A contract provision purporting to waive the adviser's federal fiduciary duty generally, such as (i) a statement that the adviser will not act as a fiduciary, (ii) a blanket waiver of all conflicts of interest, or (iii) a waiver of any

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[28] *See, e.g., infra* text following footnote 35.

[29] Because an adviser's federal fiduciary obligations are enforceable through section 206 of the Advisers Act, we would view a waiver of enforcement of section 206 as implicating section 215(a) of the Advisers Act, which provides that "any condition, stipulation or provision binding any person to waive compliance with any provision of this title. . . shall be void." *See also* Restatement (Third) of Agency, § 8.06 Principal's Consent (2006) ("[T]he law applicable to relationships of agency as defined in § 1.01 imposes mandatory limits on the circumstances under which an agent may be empowered to take disloyal action. These limits serve protective and cautionary purposes. Thus, an agreement that contains general or broad language purporting to release an agent in advance from the agent's general fiduciary obligation to the principal is not likely to be enforceable. This is because a broadly sweeping release of an agent's fiduciary duty may not reflect an adequately informed judgment on the part of the principal; if effective, the release would expose the principal to the risk that the agent will exploit the agent's position in ways not foreseeable by the principal at the time the principal agreed to the release. In contrast, when a principal consents to specific transactions or to specified types of conduct by the agent, the principal has a focused opportunity to assess risks that are more readily identifiable.").

specific obligation under the Advisers Act, would be inconsistent with the Advisers Act,[30] regardless of the sophistication of the client.[31]

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[30] *See* sections 206 and 215(a). Commenters generally agreed that a client cannot waive an investment adviser's fiduciary duty through agreement. *See* Dechert Letter; Comment Letter of Ropes & Gray LLP (Aug. 7, 2018) ("Ropes & Gray Letter"), at n.20; *see also supra* footnote 29. In the Proposed Interpretation, we stated that "the investment adviser cannot disclose or negotiate away, and the investor cannot waive, the federal fiduciary duty." One commenter disputed this broad statement, believing that it called into question "the ability of an investment adviser and client to define the scope of the adviser's services and duties." ABA Letter; *see also* Financial Engines Letter. We have modified this statement to clarify that a general waiver of the fiduciary duty would violate that duty and to provide examples of such a general waiver.

[31] Some commenters mentioned a 2007 No-Action Letter in which staff indicated that whether a clause in an advisory agreement that purports to limit an adviser's liability under that agreement (a so-called "hedge clause") would violate sections 206(1) and 206(2) of the Advisers Act depends on all of the surrounding facts and circumstances. Heitman Capital Management, LLC, SEC Staff No-Action Letter (Feb. 12, 2007) ("Heitman Letter"). A few commenters indicated that the Heitman Letter expanded the ability of investment advisers to private funds, and potentially other sophisticated clients, to disclaim their fiduciary duties under state law in an advisory agreement. *See, e.g.*, ILPA Letter 1; ILPA Letter 2. The commenters' descriptions of the Heitman Letter suggest that it may have been applied incorrectly. The Heitman Letter does not address the scope or substance of an adviser's federal fiduciary duty; rather, it addresses the extent to which hedge clauses may be misleading in violation of the Advisers Act's antifraud provisions. Another commenter agreed with this reading of the Heitman Letter. *See* Comment Letter of American Investment Council (Feb. 25, 2019). In response to these comments, we express below the Commission's views about an adviser's obligations under sections 206(1) and 206(2) of the Advisers Act with respect to the use of hedge clauses. Accordingly, because we are expressing our views in this Final Interpretation, the Heitman Letter is withdrawn.

This Final Interpretation makes clear that an adviser's federal fiduciary duty may not be waived, though its application may be shaped by agreement. This Final Interpretation does not take a position on the scope or substance of any fiduciary duty that applies to an adviser under applicable state law. *See supra* footnote 3. The question of whether a hedge clause violates the Advisers Act's antifraud provisions depends on all of the surrounding facts and circumstances, including the particular circumstances of the client (*e.g.,* sophistication). In our view, however, there are few (if any) circumstances in which a hedge clause in an agreement with a retail client would be consistent with those antifraud provisions, where the hedge clause purports to relieve the adviser from liability for conduct as to which the client has a non-waivable cause of action against the adviser provided by state or federal law. Such a hedge clause generally is likely to mislead those retail clients into not exercising their legal rights, in violation of the antifraud provisions, even where the agreement otherwise specifies that the client may continue to retain its non-waivable rights. Whether a hedge clause in an agreement with an institutional client would violate the Advisers Act's antifraud provisions will be determined based on the particular facts and circumstances. To the extent that a hedge clause creates a conflict of interest between an adviser and its client, the adviser must address the conflict as required by its duty of loyalty.

B. Duty of Care

As fiduciaries, investment advisers owe their clients a duty of care.[32] The Commission has discussed the duty of care and its components in a number of contexts.[33] The duty of care includes, among other things: (i) the duty to provide advice that is in the best interest of the client, (ii) the duty to seek best execution of a client's transactions where the adviser has the responsibility to select broker-dealers to execute client trades, and (iii) the duty to provide advice and monitoring over the course of the relationship.

1. Duty to Provide Advice that is in the Best Interest of the Client

The duty of care includes a duty to provide investment advice that is in the best interest of the client, including a duty to provide advice that is suitable for the client.[34] In order to

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[32] *See* Investment Advisers Act Release 2106, *supra* footnote 15 (stating that under the Advisers Act, "an adviser is a fiduciary that owes each of its clients duties of care and loyalty with respect to all services undertaken on the client's behalf, including proxy voting," which is the subject of the release, and citing SEC v. Capital Gains *supra* footnote 2, to support this point). This Final Interpretation does not address the specifics of how an investment adviser might satisfy its fiduciary duty when voting proxies. *See also* Restatement (Third) of Agency, § 8.08 (discussing the duty of care that an agent owes its principal as a matter of common law); Tamar Frankel & Arthur B. Laby, The Regulation of Money Managers (updated 2017) ("Advice can be divided into three stages. The first determines the needs of the particular client. The second determines the portfolio strategy that would lead to meeting the client's needs. The third relates to the choice of securities that the portfolio would contain. The duty of care relates to each of the stages and depends on the depth or extent of the advisers' obligation towards their clients.").

[33] *See, e.g.*, Suitability of Investment Advice Provided by Investment Advisers; Custodial Account Statements for Certain Advisory Clients, Investment Advisers Act Release No. 1406 (Mar. 16, 1994) ("Investment Advisers Act Release 1406") (stating that advisers have a duty of care and discussing advisers' suitability obligations); Interpretive Release Concerning the Scope of Section 28(e) of the Securities Exchange Act of 1934 and Related Matters, Exchange Act Release No. 23170 (Apr. 28, 1986) ("Exchange Act Release 23170") ("an adviser, as a fiduciary, owes its clients a duty of obtaining the best execution on securities transactions"). We highlight certain contexts, but not all, in which the Commission has addressed the duty of care. *See, e.g.,* Investment Advisers Act Release 2106, *supra* footnote 15.

[34] In 1994, the Commission proposed a rule that would have made express the fiduciary obligation of investment advisers to make only suitable recommendations to a client. Investment Advisers Act Release 1406, *supra* footnote 33. Although never adopted, the rule was designed, among other things, to reflect the Commission's interpretation of an adviser's *existing* suitability obligation under the Advisers Act. In addition, we do not cite Investment Advisers Act Release 1406 as the source of authority for the view we express here, which at least one comment letter suggested, but cite it merely to show that the Commission has long held this view. *See* Comment Letter of the Managed Funds Association and the Alternative Investment Management Association (Aug. 7, 2018) (indicating that the Commission's failure to adopt the proposed suitability rule means "investment advisers are not subject to an express 'suitability' standard

provide such advice, an adviser must have a reasonable understanding of the client's objectives. The basis for such a reasonable understanding generally would include, for retail clients, an understanding of the investment profile, or for institutional clients, an understanding of the investment mandate.[35] The duty to provide advice that is in the best interest of the client based on a reasonable understanding of the client's objectives is a critical component of the duty of care.

Reasonable Inquiry into Client's Objectives

How an adviser develops a reasonable understanding will vary based on the specific facts and circumstances, including the nature of the client, the scope of the adviser-client relationship, and the nature and complexity of the anticipated investment advice.

In order to develop a reasonable understanding of a retail client's objectives, an adviser should, at a minimum, make a reasonable inquiry into the client's financial situation, level of financial sophistication, investment experience, and financial goals (which we refer to collectively as the retail client's "investment profile"). For example, an adviser undertaking to formulate a comprehensive financial plan for a retail client would generally need to obtain a

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under existing regulation"). We believe that this obligation to make only suitable recommendations to a client is part of an adviser's fiduciary duty to act in the best interest of its client. Accordingly, an adviser must provide investment advice that is suitable for its client in providing advice that is in the best interest of its client. *See* SEC v. Tambone, *supra* footnote 23 ("Section 206 imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund…."); SEC v. Moran, *supra* footnote 23 ("Investment advisers are entrusted with the responsibility and duty to act in the best interest of their clients.").

35 Several commenters stated that the duty to make a reasonable inquiry into a client's investment profile may not apply in the institutional client context. *See, e.g.,* Comment Letter of BlackRock, Inc. (Aug. 7, 2018); Comment Letter of Teachers Insurance and Annuity Association of America (Aug. 7, 2018); Comment Letter of Allianz Global Investors U.S. LLC (Aug. 7, 2018) ("Allianz Letter"); Comment Letter of John Hancock Life Insurance Company (U.S.A.) (Aug. 3, 2018). Accordingly, we are describing the duty as a duty to have a reasonable understanding of the client's objectives. While not every client will have an investment profile, every client will have objectives. For example, an institutional client's objectives may be ascertained through its investment mandate.

range of personal and financial information about the client such as current income, investments, assets and debts, marital status, tax status, insurance policies, and financial goals.[36]

In addition, it will generally be necessary for an adviser to a retail client to update the client's investment profile in order to maintain a reasonable understanding of the client's objectives and adjust the advice to reflect any changed circumstances.[37] The frequency with which the adviser must update the client's investment profile in order to consider changes to any advice the adviser provides would itself turn on the facts and circumstances, including whether the adviser is aware of events that have occurred that could render inaccurate or incomplete the investment profile on which the adviser currently bases its advice. For instance, in the case of a financial plan where the investment adviser also provides advice on an ongoing basis, a change in the relevant tax law or knowledge that the client has retired or experienced a change in marital status could trigger an obligation to make a new inquiry.

By contrast, in providing investment advice to institutional clients, the nature and extent of the reasonable inquiry into the client's objectives generally is shaped by the specific investment mandates from those clients. For example, an investment adviser engaged to advise on an institutional client's investment grade bond portfolio would need to gain a reasonable understanding of the client's objectives within that bond portfolio, but not the client's objectives

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[36] Investment Advisers Act Release 1406, *supra* footnote 33. After making a reasonable inquiry into the client's investment profile, it generally would be reasonable for an adviser to rely on information provided by the client (or the client's agent) regarding the client's financial circumstances, and an adviser should not be held to have given advice not in its client's best interest if it is later shown that the client had misled the adviser concerning the information on which the advice was based.

[37] Such updating would not be needed with one-time investment advice. In the Proposed Interpretation, we stated that an adviser "must" update a client's investment profile in order to adjust the advice to reflect any changed circumstances. We believe that any obligation to update a client's investment profile, like the nature and extent of the reasonable inquiry into a retail client's objectives, turns on what is reasonable under the circumstances. Accordingly, we have revised the wording of this statement in this Final Interpretation.

within its entire investment portfolio. Similarly, an investment adviser whose client is a registered investment company or a private fund would need to have a reasonable understanding of the fund's investment guidelines and objectives. For advisers acting on specific investment mandates for institutional clients, particularly funds, we believe that the obligation to update the client's objectives would not be applicable except as may be set forth in the advisory agreement.

Reasonable belief that advice is in the best interest of the client

An investment adviser must have a reasonable belief that the advice it provides is in the best interest of the client based on the client's objectives. The formation of a reasonable belief would involve considering, for example, whether investments are recommended only to those clients who can and are willing to tolerate the risks of those investments and for whom the potential benefits may justify the risks.[38] Whether the advice is in a client's best interest must be evaluated in the context of the portfolio that the adviser manages for the client and the client's objectives.

For example, when an adviser is advising a retail client with a conservative investment objective, investing in certain derivatives may be in the client's best interest when they are used to hedge interest rate risk or other risks in the client's portfolio, whereas investing in certain directionally speculative derivatives on their own may not. For that same client, investing in a particular security on margin may not be in the client's best interest, even if investing in that same security without the use of margin may be in the client's best interest. However, for

[38] Item 8 of Part 2A of Form ADV requires an investment adviser to describe its methods of analysis and investment strategies and disclose that investing in securities involves risk of loss which clients should be prepared to bear. This item also requires that an adviser explain the material risks involved for each significant investment strategy or method of analysis it uses and particular type of security it recommends, with more detail if those risks are significant or unusual. Accordingly, investment advisers are required to identify and explain certain risks involved in their investment strategies and the types of securities they recommend. An investment adviser needs to consider those same risks in determining the clients to which the adviser recommends those investments.

example, when advising a financially sophisticated client, such as a fund or other sophisticated client that has an appropriate risk tolerance, it may be in the best interest of the client to invest in such derivatives or in securities on margin, or to invest in other complex instruments or other products that may have limited liquidity.

Similarly, when an adviser is assessing whether high risk products—such as penny stocks or other thinly-traded securities—are in a retail client's best interest, the adviser should generally apply heightened scrutiny to whether such investments fall within the retail client's risk tolerance and objectives. As another example, complex products such as inverse or leveraged exchange-traded products that are designed primarily as short-term trading tools for sophisticated investors may not be in the best interest of a retail client absent an identified, short-term, client-specific trading objective and, to the extent that such products are in the best interest of a retail client initially, they would require daily monitoring by the adviser.[39]

A reasonable belief that investment advice is in the best interest of a client also requires that an adviser conduct a reasonable investigation into the investment sufficient not to base its advice on materially inaccurate or incomplete information.[40] We have taken enforcement action where an investment adviser did not independently or reasonably investigate securities before recommending them to clients.[41]

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[39] *See* Exchange-Traded Funds, Securities Act Release No. 10515 (June 28, 2018); SEC staff and FINRA, Investor Alert, Leveraged and Inverse ETFs: Specialized Products with Extra Risks for Buy-and-Hold Investors (Aug. 1, 2009); SEC Office of Investor Education and Advocacy, Investor Bulletin: Exchange-Traded Funds (ETFs) (Aug. 2012); *see also* FINRA Regulatory Notice 09-31, Non-Traditional ETFs – FINRA Reminds Firms of Sales Practice Obligations Relating to Leveraged and Inverse Exchange-Traded Funds (June 2009).

[40] *See, e.g.*, Concept Release on the U.S. Proxy System, Investment Advisers Act Release No. 3052 (July 14, 2010) (indicating that a fiduciary "has a duty of care requiring it to make a reasonable investigation to determine that it is not basing its recommendations on materially inaccurate or incomplete information").

[41] *See, e.g.*, In the Matter of Larry C. Grossman, Investment Advisers Act Release No. 4543 (Sept. 30, 2016) (Commission Opinion) ("*In re* Grossman") (in connection with imposing liability on a principal of a

The cost (including fees and compensation) associated with investment advice would generally be one of many important factors—such as an investment product's or strategy's investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility, likely performance in a variety of market and economic conditions, time horizon, and cost of exit—to consider when determining whether a security or investment strategy involving a security or securities is in the best interest of the client. When considering similar investment products or strategies, the fiduciary duty does not necessarily require an adviser to recommend the lowest cost investment product or strategy.

Moreover, an adviser would not satisfy its fiduciary duty to provide advice that is in the client's best interest by simply advising its client to invest in the lowest cost (to the client) or least remunerative (to the investment adviser) investment product or strategy without any further analysis of other factors in the context of the portfolio that the adviser manages for the client and the client's objective. Rather, the adviser could recommend a higher-cost investment or strategy if the adviser reasonably concludes that there are other factors about the investment or strategy that outweigh cost and make the investment or strategy in the best interest of the client, in light of that client's objectives. For example, it might be consistent with an adviser's fiduciary duty to advise a client with a high risk tolerance and significant investment experience to invest in a private equity fund with relatively higher fees and significantly less liquidity as compared with a fund that invests in publicly-traded companies if the private equity fund was in the client's best

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registered investment adviser for recommending offshore private investment funds to clients), *stayed in part,* Investment Advisers Act No. 4563 (Nov. 1, 2016), *response to remand*, Investment Advisers Act Release No. 4871 (Mar. 29, 2018) (reinstating the Sept. 30, 2016 opinion and order, except with respect to the disgorgement and prejudgment interest in light of the Supreme Court's decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017)).

interest because it provided exposure to an asset class that was appropriate in the context of the client's overall portfolio.

An adviser's fiduciary duty applies to all investment advice the investment adviser provides to clients, including advice about investment strategy, engaging a sub-adviser, and account type.[42] Advice about account type includes advice about whether to open or invest through a certain type of account (*e.g.*, a commission-based brokerage account or a fee-based advisory account) and advice about whether to roll over assets from one account (*e.g.*, a retirement account) into a new or existing account that the adviser or an affiliate of the adviser manages.[43] In providing advice about account type, an adviser should consider all types of accounts offered by the adviser and acknowledge to a client when the account types the adviser offers are not in the client's best interest.[44]

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[42] In addition, with respect to prospective clients, investment advisers have antifraud liability under section 206 of the Advisers Act, which, among other things, applies to transactions, practices, or courses of business which operate as a fraud or deceit upon prospective clients, including those regarding investment strategy, engaging a sub-adviser, and account type. We believe that, in order to avoid liability under this antifraud provision, an investment adviser should have sufficient information about the prospective client and its objectives to form a reasonable basis for advice before providing any advice about these matters. At the point in time at which the prospective client becomes a client of the investment adviser (*e.g.*, at account opening), the fiduciary duty applies. Accordingly, while advice to prospective clients about these matters must comply with the antifraud provisions under section 206 of the Advisers Act, the adviser must also satisfy its fiduciary duty with respect to any such advice (*e.g.*, regarding account type) when a prospective client becomes a client.

[43] We consider advice about "rollovers" to include advice about account type, in addition to any advice regarding the investments or investment strategy with respect to the assets to be rolled over, as the advice necessarily includes the advice about the account type into which assets are to be rolled over. As noted below, as a general matter, an adviser's duty to monitor extends to all personalized advice it provides to the client, including, for example, in an ongoing relationship, an evaluation of whether a client's account or program type (for example, a wrap account) continues to be in the client's best interest. *See infra* text accompanying footnote 52.

[44] Accordingly, in providing advice to a client or customer about account type, a financial professional who is dually licensed (*i.e.,* an associated person of a broker-dealer and a supervised person of an investment adviser (regardless of whether the professional works for a dual registrant, affiliated firms, or unaffiliated firms)) should consider all types of accounts offered (*i.e.,* both brokerage accounts and advisory accounts) when determining whether the advice is in the client's best interest. A financial professional who is only a supervised person of an investment adviser (regardless of whether that advisory firm is a dual registrant or affiliated with a broker-dealer) may only recommend an advisory account the adviser offers when the account is in the client's best interest. If a financial professional who is only a supervised person of an

2. Duty to Seek Best Execution

An investment adviser's duty of care includes a duty to seek best execution of a client's transactions where the adviser has the responsibility to select broker-dealers to execute client trades (typically in the case of discretionary accounts).[45] In meeting this obligation, an adviser must seek to obtain the execution of transactions for each of its clients such that the client's total cost or proceeds in each transaction are the most favorable under the circumstances. An adviser fulfills this duty by seeking to obtain the execution of securities transactions on behalf of a client with the goal of maximizing value for the client under the particular circumstances occurring at the time of the transaction. Maximizing value encompasses more than just minimizing cost. When seeking best execution, an adviser should consider "the full range and quality of a broker's services in placing brokerage including, among other things, the value of research provided as well as execution capability, commission rate, financial responsibility, and responsiveness" to the adviser.[46] In other words, the "determinative factor" is not the lowest possible commission cost, "but whether the transaction represents the best qualitative execution."[47] Further, an

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investment adviser chooses to advise a client to consider a non-advisory account (or to speak with other personnel at a dual registrant or affiliate about a non-advisory account), that advice should be in the best interest of the client. This same framework applies in the case of a prospective client, but any advice or recommendation given to a prospective client would be subject to the antifraud provisions of the federal securities laws. *See supra* footnote 42 and Reg. BI Adoption, *supra* footnote 3.

45 *See* Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934, Exchange Act Release No. 54165 (July 18, 2006) (stating that investment advisers have "best execution obligations"); Investment Advisers Act Release 3060, *supra* footnote 15 (discussing an adviser's best execution obligations in the context of directed brokerage arrangements and disclosure of soft dollar practices); *see also* Advisers Act rule 206(3)-2(c) (referring to adviser's duty of best execution of client transactions).

46 Exchange Act Release 23170, *supra* footnote 33.

47 *Id.*

investment adviser should "periodically and systematically" evaluate the execution it is receiving for clients.[48]

3. Duty to Provide Advice and Monitoring over the Course of the Relationship

An investment adviser's duty of care also encompasses the duty to provide advice and monitoring at a frequency that is in the best interest of the client, taking into account the scope of the agreed relationship.[49] For example, when the adviser has an ongoing relationship with a client and is compensated with a periodic asset-based fee, the adviser's duty to provide advice and monitoring will be relatively extensive as is consistent with the nature of the relationship.[50] Conversely, absent an express agreement regarding the adviser's monitoring obligation, when the adviser and the client have a relationship of limited duration, such as for the provision of a

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[48] *Id.* The Advisers Act does not prohibit advisers from using an affiliated broker to execute client trades. However, the adviser's use of such an affiliate involves a conflict of interest that must be fully and fairly disclosed and the client must provide informed consent to the conflict. *See also* Interpretation of Section 206(3) of the Investment Advisers Act of 1940, Investment Advisers Act Release No. 1732 (Jul. 17, 1998) (discussing application of section 206(3) of the Advisers Act to certain principal and agency transactions). Two commenters requested that we prescribe specific obligations related to best execution. Comment Letter of the Healthy Markets Association (Aug. 7, 2018); Comment Letter of ICE Data Services (Aug. 7, 2018). However, prescribing specific requirements of how an adviser might satisfy its best execution obligations is outside of the scope of this Final Interpretation.

[49] *Cf.* SEC v. Capital Gains, *supra* footnote 2 (describing advisers' "basic function" as "furnishing to clients on a personal basis competent, unbiased, and continuous advice regarding the sound management of their investments" (quoting Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission, Pursuant to Section 30 of the Public Utility Holding Company Act of 1935, on Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services, H.R. Doc. No. 477, 76th Cong. 2d Sess., 1, at 28)). *Cf.* Barbara Black, *Brokers and Advisers-What's in a Name?*, 32 Fordham Journal of Corporate and Financial Law XI (2005) ("[W]here the investment adviser's duties include management of the account, [the adviser] is under an obligation to monitor the performance of the account and to make appropriate changes in the portfolio."); Arthur B. Laby, *Fiduciary Obligations of Broker-Dealers and Investment Advisers*, 55 Villanova Law Review 701 (2010) ("Laby Villanova Article") (stating that the scope of an adviser's activity can be altered by contract and that an adviser's fiduciary duty would be commensurate with the scope of the relationship) (internal citations omitted).

[50] However, an adviser and client may scope the frequency of the adviser's monitoring (*e.g.*, agreement to monitor quarterly or monthly and as appropriate in between based on market events), provided that there is full and fair disclosure and informed consent. We consider the frequency of monitoring, as well as any other material facts relating to the agreed frequency, such as whether there will also be interim monitoring when there are market events relevant to the client's portfolio, to be a material fact relating to the advisory relationship about which an adviser must make full and fair disclosure and obtain informed consent as required by its fiduciary duty.

one-time financial plan for a one-time fee, the adviser is unlikely to have a duty to monitor. In other words, in the absence of any agreed limitation or expansion, the scope of the duty to monitor will be indicated by the duration and nature of the agreed advisory arrangement.[51] As a general matter, an adviser's duty to monitor extends to all personalized advice it provides to the client, including, for example, in an ongoing relationship, an evaluation of whether a client's account or program type (for example, a wrap account) continues to be in the client's best interest.[52]

C. Duty of Loyalty

The duty of loyalty requires that an adviser not subordinate its clients' interests to its own.[53] In other words, an investment adviser must not place its own interest ahead of its client's interests.[54] To meet its duty of loyalty, an adviser must make full and fair disclosure to its clients

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51 *See also* Laby Villanova Article, *supra* footnote 49, at 728 (2010) ("If an adviser has agreed to provide continuous supervisory services, the scope of the adviser's fiduciary duty entails a continuous, ongoing duty to supervise the client's account, regardless of whether any trading occurs. This feature of the adviser's duty, even in a non-discretionary account, contrasts sharply with the duty of a broker administering a non-discretionary account, where no duty to monitor is required.") (internal citations omitted).

52 Investment advisers also may consider whether written policies and procedures relating to monitoring would be appropriate under Advisers Act rule 206(4)-7, which requires any investment adviser registered or required to be registered under the Advisers Act to adopt and implement written policies and procedures reasonably designed to prevent violation of the Advisers Act and the rules thereunder by the adviser and its supervised persons.

53 Investment Advisers Act Release 3060, *supra* footnote 15 (adopting amendments to Form ADV and stating that "[u]nder the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients' interests to its own," citing Investment Advisers Act Release 2106, *supra* footnote 15). The duty of loyalty applies not just to advice regarding potential investments, but to all advice the investment adviser provides to an existing client, including advice about investment strategy, engaging a sub-adviser, and account type. *See supra* text accompanying footnotes 42-43.

54 For example, an adviser cannot favor its own interests over those of a client, whether by favoring its own accounts or by favoring certain client accounts that pay higher fee rates to the adviser over other client accounts. The Commission has brought numerous enforcement actions against advisers that allocated trades to their own accounts and allocated less favorable or unprofitable trades to their clients' accounts. *See, e.g.*, *SEC v. Strategic Capital Management, LLC and Michael J. Breton*, Litigation Release No. 23867 (June 23, 2017) (partial settlement) (adviser placed trades through a master brokerage account and then allocated profitable trades to adviser's account while placing unprofitable trades into the client accounts in

of all material facts relating to the advisory relationship.[55] Material facts relating to the advisory relationship include the capacity in which the firm is acting with respect to the advice provided. This will be particularly relevant for firms or individuals that are dually registered as broker-dealers and investment advisers and who serve the same client in both an advisory and a brokerage capacity. Thus, such firms and individuals generally should provide full and fair disclosure about the circumstances in which they intend to act in their brokerage capacity and the circumstances in which they intend to act in their advisory capacity. This disclosure may be accomplished through a variety of means, including, among others, written disclosure at the beginning of a relationship that clearly sets forth when the dual registrant would act in an advisory capacity and how it would provide notification of any changes in capacity.[56] Similarly, a dual registrant acting in its advisory capacity should disclose any circumstances under which its advice will be limited to a menu of certain products offered through its affiliated broker-dealer or affiliated investment adviser.

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violation of fiduciary duty and contrary to disclosures). In the Proposed Interpretation, we stated that the duty of loyalty requires an adviser to "put its client's interest first." One commenter suggested that the requirement of an adviser to put its client's interest "first" is very different from a requirement not to "subordinate" or "subrogate" clients' interests, and is inconsistent with how the duty of loyalty had been applied in the past. *See* Comment Letter of the Asset Management Group of the Securities Industry and Financial Markets Association (Aug. 7, 2018) ("SIFMA AMG Letter"). Accordingly, we have revised the description of the duty of loyalty in this Final Interpretation to be more consistent with how we have previously described the duty. *See* Investment Advisers Act Release 3060, *supra* footnote 15 ("Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients' interests to its own.") (citing Investment Advisers Act Release 2106, *supra* footnote 15). In practice, referring to putting a client's interest first is a plain English formulation commonly used by investment advisers to explain their duty of loyalty in a way that may be more understandable to retail clients.

55 *See* SEC v. Capital Gains, *supra* footnote 2 ("Failure to disclose material facts must be deemed fraud or deceit within its intended meaning."); Investment Advisers Act Release 3060, *supra* footnote 15 ("as a fiduciary, an adviser has an ongoing obligation to inform its clients of any material information that could affect the advisory relationship"); *see also* General Instruction 3 to Part 2 of Form ADV ("Under federal and state law, you are a fiduciary and must make full disclosure to your clients of all material facts relating to the advisory relationship.").

56 *See also* Reg. BI Adoption, *supra* footnote 3, at 99.

In addition, an adviser must eliminate or at least expose through full and fair disclosure all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested.[57] We believe that while full and fair disclosure of all material facts relating to the advisory relationship or of conflicts of interest and a client's informed consent prevent the presence of those material facts or conflicts themselves from violating the adviser's fiduciary duty, such disclosure and consent do not themselves satisfy the adviser's duty to act in the client's best interest.[58] To illustrate what

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[57] In the Proposed Interpretation, we stated that an adviser must seek to avoid conflicts of interest with its clients. Proposed Interpretation, *supra* footnote 6. Some commenters requested clarity on what it means to "seek to avoid" conflicts of interest. *See, e.g.,* Comment Letter of Schulte Roth & Zabel LLP (Aug. 8, 2018); ABA Letter (stating that this wording could be read to require an adviser to first seek to avoid a conflict, before addressing a conflict through disclosure, rather than being able to provide full and fair disclosure of a conflict, and only seek avoidance if the conflict cannot be addressed through disclosure). The Commission first used this phrasing when adopting amendments to the Form ADV Part 2 instructions. *See* Investment Advisers Act Release 3060, *supra* footnote 15 and General Instruction 3 to Part 2 of Form ADV ("As a fiduciary, you also must seek to avoid conflicts of interest with your clients, and, at a minimum, make full disclosure of all material conflicts of interest between you and your clients that could affect the advisory relationship."). The release adopting this instruction clarifies the Commission's intent that it capture the fiduciary duty described in SEC v. Capital Gains and Arleen Hughes. *See* Investment Advisers Act Release 3060, *supra* footnote 15, at n.4 and accompanying text (citing SEC v. Capital Gains, *supra* footnote 2, and Arleen Hughes, *supra* footnote 18, as the basis of this language). Both of these cases emphasized that the adviser, as a fiduciary, should seek to avoid conflicts, but at a minimum must make full and fair disclosure of the conflict and obtain the client's informed consent. *See* SEC v. Capital Gains, *supra* footnote 2 ("The Advisers Act thus reflects . . . a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested."); Arleen Hughes, *supra* footnote 18 ("Since loyalty to his trust is the first duty which a fiduciary owes to his principal, it is the general rule that a fiduciary must not put himself into a position where his own interests may come in conflict with those of his principal" but if a fiduciary "chooses to assume a role in which she is motivated by conflicting interests, . . . she may do so if, but only if, she obtains her client's consent after disclosure . . ."). We believe the Commission's reference to "seek to avoid" conflicts in the Form ADV Part 2 instructions is consistent with the Final Interpretation's statement that an adviser "must eliminate or at least expose all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested" as well as the substantively identical statements in SEC v. Capital Gains, *supra* footnote 2, and Arleen Hughes, *supra* footnote 18. While an adviser may satisfy its duty of loyalty by making full and fair disclosure of conflicts of interest and obtaining the client's informed consent, an adviser is prohibited from overreaching or taking unfair advantage of a client's trust.

[58] As noted above, an investment adviser's obligation to act in the best interest of its client is an overarching principle that encompasses both the duty of care and the duty of loyalty. *See* SEC v. Tambone, *supra* footnote 23 (stating that Advisers Act section 206 "imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund . . . and *includes* an obligation to provide 'full and fair disclosure of all material facts'") (emphasis added) (citing SEC v. Capital Gains, *supra* footnote 2). We describe

constitutes full and fair disclosure, we are providing the following guidance on (i) the appropriate level of specificity, including the appropriateness of stating that an adviser "may" have a conflict, and (ii) considerations for disclosure regarding conflicts related to the allocation of investment opportunities among eligible clients.

In order for disclosure to be full and fair, it should be sufficiently specific so that a client is able to understand the material fact or conflict of interest and make an informed decision whether to provide consent.[59] For example, it would be inadequate to disclose that the adviser has "other clients" without describing how the adviser will manage conflicts between clients if and when they arise, or to disclose that the adviser has "conflicts" without further description.

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above in this Final Interpretation how the application of an investment adviser's fiduciary duty to its client will vary with the scope of the advisory relationship. *See supra* section II.A.

[59] Arleen Hughes, *supra* footnote 18, at 4 and 8 (stating, "[s]ince loyalty to his trust is the first duty which a fiduciary owes to his principal, it is the general rule that a fiduciary must not put himself into a position where his own interests may come in conflict with those of his principal. To prevent any conflict and the possible subordination of this duty to act solely for the benefit of his principal, a fiduciary at common law is forbidden to deal as an adverse party with his principal. An exception is made, however, where the principal gives his informed consent to such dealings," and adding that, "[r]egistrant has an affirmative obligation to disclose all material facts to her clients in a manner which is clear enough so that a client is fully apprised of the facts and is in a position to give his informed consent."); *see also Hughes v. Securities and Exchange Commission*, 174 F.2d 969 (1949) (affirming the SEC decision in Arleen Hughes); General Instruction 3 to Part 2 of Form ADV (stating that an adviser's disclosure obligation "requires that [the adviser] provide the client with sufficiently specific facts so that the client is able to understand the conflicts of interest [the adviser has] and the business practices in which [the adviser] engage[s], and can give informed consent to such conflicts or practices or reject them"); Investment Advisers Act Release 3060, *supra* footnote 15; Restatement (Third) of Agency §8.06 ("Conduct by an agent that would otherwise constitute a breach of duty as stated in §§ 8.01, 8.02, 8.03, 8.04, and 8.05 [referencing the fiduciary duty] does not constitute a breach of duty if the principal consents to the conduct, provided that (a) in obtaining the principal's consent, the agent (i) acts in good faith, (ii) discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and (iii) otherwise deals fairly with the principal; and (b) the principal's consent concerns either a specific act or transaction, or acts or transactions of a specified type that could reasonably be expected to occur in the ordinary course of the agency relationship."). *See infra* footnotes 67-70 and accompanying text for a more detailed discussion of informed consent and how it is generally considered on an objective basis and may be inferred.

Similarly, disclosure that an adviser "may" have a particular conflict, without more, is not adequate when the conflict actually exists.[60] For example, we would consider the use of "may" inappropriate when the conflict exists with respect to some (but not all) types or classes of clients, advice, or transactions without additional disclosure specifying the types or classes of clients, advice, or transactions with respect to which the conflict exists. In addition, the use of "may" would be inappropriate if it simply precedes a list of all possible or potential conflicts regardless of likelihood and obfuscates actual conflicts to the point that a client cannot provide informed consent. On the other hand, the word "may" could be appropriately used to disclose to a client a potential conflict that does not currently exist but might reasonably present itself in the future.[61]

Whether the disclosure is full and fair will depend upon, among other things, the nature of the client, the scope of the services, and the material fact or conflict. Full and fair disclosure for an institutional client (including the specificity, level of detail, and explanation of terminology) can differ, in some cases significantly, from full and fair disclosure for a retail client because institutional clients generally have a greater capacity and more resources than

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[60] We have brought enforcement actions in such cases. *See, e.g.,* In the Matter of The Robare Group, Ltd., et al., Investment Advisers Act Release No. 4566 (Nov. 7, 2016) (Commission Opinion) (finding, among other things, that adviser's disclosure that it *may* receive a certain type of compensation was inadequate because it did not reveal that the adviser actually had an arrangement pursuant to which it received fees that presented a potential conflict of interest); *aff'd in part and rev'd in part on other grounds Robare* v. SEC, *supra* footnote 20; *In re Grossman*, *supra* footnote 41 (indicating that "the use of the prospective 'may' in [the relevant Form ADV disclosures] is misleading because it suggested the mere possibility that [the broker] would make a referral and/or be paid 'referral fees' at a later point, when in fact a commission-sharing arrangement was already in place and generating income"). *Cf. Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 640 (D.C. Cir. 2008) ("The Commission noted the critical distinction between disclosing the risk that a future event *might* occur and disclosing actual knowledge the event *will* occur.") (emphasis in original). For Form ADV Part 2 purposes, advisers are instructed that when they have a conflict or engage in a practice with respect to some (but not all) types or classes of clients, advice, or transactions, to indicate as such rather than disclosing that they "may" have the conflict or engage in the practice. General Instruction 2 to Part 2 of Form ADV.

[61] We have added this example of a circumstance where "may" could be appropriately used in response to the request of some commenters. *See, e.g.,* Pickard Letter; ICI Letter; Ropes & Gray Letter; IAA Letter.

retail clients to analyze and understand complex conflicts and their ramifications.[62] Nevertheless, regardless of the nature of the client, the disclosure must be clear and detailed enough for the client to make an informed decision to consent to the conflict of interest or reject it.

When allocating investment opportunities among eligible clients, an adviser may face conflicts of interest either between its own interests and those of a client or among different clients.[63] If so, the adviser must eliminate or at least expose through full and fair disclosure the conflicts associated with its allocation policies, including how the adviser will allocate investment opportunities, such that a client can provide informed consent.[64] When allocating investment opportunities, an adviser is permitted to consider the nature and objectives of the client and the scope of the relationship.[65] An adviser need not have *pro rata* allocation policies, or any particular method of allocation, but, as with other conflicts and material facts, the

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62 *Arleen Hughes, supra* footnote 18 (the "method and extent of disclosure depends upon the particular client involved," and an unsophisticated client may require "a more extensive explanation than the informed investor").

63 *See* Restatement (Third) of Agency, § 8.01 General Fiduciary Principle (2006) ("Unless the principal consents, the general fiduciary principle, as elaborated by the more specific duties of loyalty stated in §§ 8.02 to 8.05, also requires that an agent refrain from using the agent's position or the principal's property to benefit the agent or a third party.").

64 The Commission has brought numerous enforcement actions alleging that advisers unfairly allocated client trades to preferred clients without making full and fair disclosure. *See* Staff of the U.S. Securities and Exchange Commission, *Study on Investment Advisers and Broker-Dealers As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Jan. 2011), *available at* https://www.sec.gov/news/studies/2011/913studyfinal.pdf, at 23–24 (citing enforcement actions). This Final Interpretation sets forth the Commission's views regarding what constitutes full and fair disclosure. *See, e.g., supra* text accompanying footnote 59; *see also* Barry Barbash and Jai Massari, *The Investment Advisers Act of 1940; Regulation by Accretion*, 39 Rutgers Law Journal 627 (2008) (stating that under section 206 of the Advisers Act and traditional notions of fiduciary and agency law, an adviser must not give preferential treatment to some clients or systematically exclude eligible clients from participating in specific opportunities without providing the clients with appropriate disclosure regarding the treatment).

65 An adviser and a client may even agree that certain investment opportunities or categories of investment opportunities will not be allocated or offered to a client.

adviser's allocation practices must not prevent it from providing advice that is in the best interest of its clients.[66]

While most commenters agreed that informed consent is a component of the fiduciary duty, a few commenters objected to what they saw as subjectivity in the use of the term "informed" to describe a client's consent to a disclosed conflict.[67] The fact that disclosure must be full and fair such that a client can provide informed consent does not require advisers to make an affirmative determination that a particular client understood the disclosure and that the client's consent to the conflict of interest was informed. Rather, disclosure should be designed to put a client in a position to be able to understand and provide informed consent to the conflict of interest. A client's informed consent can be either explicit or, depending on the facts and circumstances, implicit.[68] We believe, however, that it would not be consistent with an adviser's fiduciary duty to infer or accept client consent where the adviser was aware, or reasonably should have been aware, that the client did not understand the nature and import of the conflict.[69]

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66 In the Proposed Interpretation, we stated that "in allocating investment opportunities among eligible clients, an adviser must treat all clients fairly." Some commenters interpreted this statement to mean that it would be impermissible for an adviser to allocate a particular investment to one eligible client instead of a second eligible client, even when the second client had received full and fair disclosure and provided informed consent to such an investment being allocated to the first client. *See, e.g.,* Ropes & Gray Letter; SIFMA AMG Letter. We have removed that sentence from this Final Interpretation and replaced it with this discussion that clarifies our views regarding allocation of investment opportunities.

67 *See, e.g.,* Comment Letter of LPL Financial LLC (Aug. 7, 2018); Ropes & Gray Letter.

68 We do not interpret an adviser's fiduciary duty to require that full and fair disclosure or informed consent be achieved in a written advisory contract or otherwise in writing. For example, an adviser could provide a client full and fair disclosure of all material facts relating to the advisory relationship as well as full and fair disclosure of all conflicts of interest which might incline the adviser, consciously or unconsciously, to render advice that was not disinterested, through a combination of Form ADV and other disclosure and the client could implicitly consent by entering into or continuing the investment advisory relationship with the adviser.

69 *See* Arleen Hughes, *supra* footnote 18 ("Registrant cannot satisfy this duty by executing an agreement with her clients which the record shows some clients do not understand and which, in any event, does not contain the essential facts which she must communicate."). In the Proposed Interpretation, we stated that inferring or accepting client consent to a conflict would not be consistent with the fiduciary duty where "the material facts concerning the conflict could not be fully and fairly disclosed." Some commenters expressed

In some cases, conflicts may be of a nature and extent that it would be difficult to provide disclosure to clients that adequately conveys the material facts or the nature, magnitude, and potential effect of the conflict sufficient for a client to consent to or reject it.[70] In other cases, disclosure may not be specific enough for a client to understand whether and how the conflict could affect the advice it receives. For retail clients in particular, it may be difficult to provide disclosure regarding complex or extensive conflicts that is sufficiently specific, but also understandable. In all of these cases where an investment adviser cannot fully and fairly disclose a conflict of interest to a client such that the client can provide informed consent, the adviser should either *eliminate* the conflict or adequately *mitigate* (*i.e.,* modify practices to reduce) the conflict such that full and fair disclosure and informed consent are possible.

Full and fair disclosure of all material facts relating to the advisory relationship, and all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested, can help clients and prospective clients in evaluating and selecting investment advisers. Accordingly, we require advisers to deliver to their clients a "brochure," under Part 2A of Form ADV, which sets out minimum disclosure requirements, including disclosure of certain conflicts.[71] Investment advisers are required to

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agreement with this statement. *See, e.g.,* CFA Letter (agreeing that "advisers should be precluded from inferring or accepting client consent to a conflict" where the material facts concerning the conflict could not be fully and fairly disclosed). Other commenters expressed doubt that such disclosure could be impossible. *See, e.g.,* Allianz Letter ("[W]e have not encountered a situation in which we could not fully and fairly disclose the material facts, including the nature, extent, magnitude and potential effects of the conflict."). In response to commenters, we have replaced the general statement about an inability to fully and fairly disclose material facts about the conflict with more specific examples of how advisers can make such full and fair disclosure. *See supra* text accompanying footnotes 59-66.

70 As discussed above, institutional clients generally have a greater capacity and more resources than retail clients to analyze and understand complex conflicts and their ramifications. *See supra* text accompanying footnote 62.

71 Investment Advisers Act Release 3060, *supra* footnote 15; General Instruction 3 to Part 2 of Form ADV ("Under federal and state law, you are a fiduciary and must make full disclosure to your clients of all material facts relating to the advisory relationship. As a fiduciary, you also must seek to avoid conflicts of

deliver the brochure to a prospective client at or before entering into a contract so that the prospective client can use the information contained in the brochure to decide whether or not to enter into the advisory relationship.[72] In a concurrent release, we are requiring all investment advisers to deliver to retail investors, at or before the time the adviser enters into an investment advisory agreement, a relationship summary, which would include, among other things, a plain English summary of certain of the firm's conflicts of interest, and would encourage retail investors to inquire about those conflicts.[73]

III. ECONOMIC CONSIDERATIONS

As noted above, this Final Interpretation is intended to reaffirm, and in some cases clarify, certain aspects of an investment adviser's fiduciary duty under the Advisers Act. The Final Interpretation does not itself create any new legal obligations for advisers. Nonetheless, the Commission recognizes that to the extent an adviser's practices are not consistent with the Final Interpretation provided above, the Final Interpretation could have potential economic effects. We discuss these potential effects below.

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interest with your clients, and, at a minimum, make full disclosure of all material conflicts of interest between you and your clients that could affect the advisory relationship. This obligation requires that you provide the client with sufficiently specific facts so that the client is able to understand the conflicts of interest you have and the business practices in which you engage, and can give informed consent to such conflicts or practices or reject them."). *See also* Robare v. SEC, *supra* footnote 20 ("[R]egardless of what Form ADV requires, [investment advisers have] a fiduciary duty to fully and fairly reveal conflicts of interest to their clients.").

72 Investment Advisers Act rule 204-3. *See* Investment Advisers Act Release 3060, *supra* footnote 15 (adopting amendments to Form ADV and stating that, "A client may use this disclosure to select his or her own adviser and evaluate the adviser's business practices and conflicts on an ongoing basis. As a result, the disclosure clients and prospective clients receive is critical to their ability to make an informed decision about whether to engage an adviser and, having engaged the adviser, to manage that relationship."). To the extent that the information required for inclusion in the brochure does not satisfy an adviser's disclosure obligation, the adviser "may have to disclose to clients information not specifically required by Part 2 of Form ADV or in more detail than the brochure items might otherwise require" and this disclosure may be made "in [the] brochure or by some other means." General Instruction 3 to Part 2 of Form ADV.

73 Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles, Investment Advisers Act Release No. 5247 (June 5, 2019) ("Relationship Summary Adoption").

A. Background

The Commission's interpretation of the standard of conduct for investment advisers under the Advisers Act set forth in this Final Interpretation would affect investment advisers and their associated persons as well as the clients of those investment advisers, and the market for financial advice more broadly.[74] As of December 31, 2018, there were 13,299 investment advisers registered with the Commission with over $84 trillion in assets under management as well as 17,268 investment advisers registered with states with approximately $334 billion in assets under management and 3,911 investment advisers who submit Form ADV as exempt reporting advisers.[75] As of December 31, 2018, there are approximately 41 million client accounts advised by SEC-registered investment advisers.[76]

These investment advisers currently incur ongoing costs related to their compliance with their legal and regulatory obligations, including costs related to understanding the standard of conduct. We believe, based on the Commission's experience, that the interpretations set forth in this Final Interpretation are generally consistent with investment advisers' current understanding of their fiduciary duty under the Advisers Act.[77] However, we recognize that as the scope of the

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74 *See* Relationship Summary Proposal, *supra* footnote 5, at section IV.A (discussing the market for financial advice generally).

75 Data on investment advisers is based on staff analysis of Form ADV, particularly Item 5.F.(2)(c) of Part 1A for Regulatory Assets under Management. Because this Final Interpretation interprets an adviser's fiduciary duty under section 206 of the Advisers Act, this interpretation would be applicable to both SEC- and state-registered investment advisers, as well as other investment advisers that are exempt from registration or subject to a prohibition on registration under the Advisers Act.

76 Item 5.F.(2)(f) of Part 1A of Form ADV.

77 *See supra* section II.B.i. For example, some commenters asked that we clarify from the Proposed Interpretation that an adviser and its client can tailor the scope of the relationship to which the fiduciary duty applies, through contract. *See, e.g.,* MMI Letter; Financial Engines Letter; ABA Letter. *See supra* footnotes 67–69 and accompanying text, including clarifications addressing these commenters' concerns. More generally, some commenters requested clarifications from the Proposed Interpretation, and we are issuing this Final Interpretation to address those issues raised by commenters, as discussed in more detail above.

adviser-client relationship varies and in many cases can be broad, there may be certain current circumstances where investment advisers interpret their fiduciary duty to require something less, and other current circumstances where they interpret their fiduciary duty to require something more, than this Final Interpretation. We lack data to identify which investment advisers currently understand their fiduciary duty to require something different from the standard of conduct articulated in this Final Interpretation. Based on our experience over decades of interacting with the investment management industry as its primary regulator, however, we generally believe that it is not a significant portion of the market.

One commenter suggested that the Proposed Interpretation's discussion of how an adviser fulfills its fiduciary duty appeared to be based in the context of having as a client an individual investor, and not a fund.[78] This commenter indicated its concerns about the ability of a fund manager to infer consent from a client that is a fund, and that issues regarding inferring consent from funds could significantly increase compliance costs for venture capital funds.[79] Our discussion above in this Final Interpretation includes clarifications to address comments, and expressly acknowledges that while all investment advisers owe each of their clients a fiduciary duty, the specific application of the investment adviser's fiduciary duty must be viewed in the context of the agreed-upon scope of the adviser-client relationship.[80] This Final Interpretation, as compared to the Proposed Interpretation, includes significantly more examples of the application of the fiduciary duty to institutional clients, and clarifies the Commission's interpretation of what constitutes full and fair disclosure and informed consent, acknowledging a number of comments

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78 *See* Comment Letter of National Venture Capital Association (Aug. 7, 2018) ("NVCA Letter").

79 *Id.*

80 *See supra* section II.A.

on this topic.[81] We believe that these clarifications will help address some of this commenter's concerns with respect to increased compliance costs for venture capital funds, in part by clarifying how the fiduciary duty can apply to institutional clients. We continue to believe, based on our experience with investment advisers to different types of clients, that advisers understand their fiduciary duty to be generally consistent with the standards of this Final Interpretation.

B. Potential Economic Effects

Based on our experience as the long-standing regulator of the investment adviser industry, the Commission's interpretation of the fiduciary duty under section 206 of the Advisers Act described in this Final Interpretation generally reaffirms the current practices of investment advisers. Therefore, we expect there to be no significant economic effects from this Final Interpretation. However, as with other circumstances in which the Commission speaks to the legal obligations of regulated entities, we acknowledge that affected firms, including those whose practices are consistent with the Commission's interpretation, incur costs to evaluate the Commission's interpretation and assess its applicability to them. Further, to the extent certain investment advisers currently understand the practices necessary to comply with their fiduciary duty to be different from those discussed in this Final Interpretation, there could be some economic effects, which we discuss below.

Clients of investment advisers

The typical relationship between an investment adviser and a client is a principal-agent relationship, where the principal (the client) hires an agent (the investment adviser) to perform

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[81] In particular, this Final Interpretation expressly notes our belief that a client generally may provide its informed consent implicitly "by entering into or continuing the investment advisory relationship with the adviser" after disclosure of a conflict of interest. *See supra* footnote 68.

some service (investment advisory services) on the principal's behalf.[82] Because investors and investment advisers are likely to have different preferences and goals, the investment adviser relationship is subject to agency problems, including those resulting from conflicts: that is, investment advisers may take actions that increase their well-being at the expense of investors, thereby imposing agency costs on investors.[83] A fiduciary duty, such as the duty investment advisers owe their clients, can mitigate these agency problems and reduce agency costs by deterring investment advisers from taking actions that expose them to legal liability.[84]

To the extent this Final Interpretation causes a change in behavior of those investment advisers, if any, who currently interpret their fiduciary duty to require something different from this Final Interpretation, we expect a potential reduction in agency problems and, consequently, a reduction of agency costs to the client.[85] For example, an adviser that, as part of its duty of loyalty, fully and fairly discloses[86] a conflict of interest and receives informed consent from its client with respect to the conflict may reduce agency costs by increasing the client's awareness of the conflict and improving the client's ability to monitor the adviser with respect to this conflict. Alternatively, the client may choose to not consent given the information the adviser

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82 *See*, *e.g.*, James A. Brickley, Clifford W. Smith, Jr. & Jerold L. Zimmerman, *Managerial Economics and Organizational Architecture* (2004), at 265 ("An agency relationship consists of an agreement under which one party, the principal, engages another party, the agent, to perform some service on the principal's behalf."); *see also* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 Journal of Financial Economics 305-360 (1976) ("Jensen and Meckling").

83 *See, e.g.*, Jensen and Meckling, *supra* footnote 82.

84 *See*, *e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 Journal of Law & Economics 425-46 (1993).

85 To the extent that this Final Interpretation clarifies the fiduciary duty for investment advisers, one commenter suggested it may then clarify what clients expect of their investment advisers. *See* Cambridge Letter (stating that "greater clarity on all aspects of an investment adviser's fiduciary duty will improve the ability to craft such policies and procedures, as well as support the elimination of confusion for retail clients and investment professionals").

86 As discussed above, whether such a disclosure is full and fair will depend upon, among other things, the nature of the client, the scope of the services, and the conflict. *See supra* section II.C.

discloses about a conflict of interest if the perceived risk associated with the conflict is too significant, and instead try to renegotiate the contract with the adviser or look for an alternative adviser or other financial professional. In addition, the obligation to fully and fairly disclose a current conflict may cause the adviser to take other actions, for example eliminating or adequately mitigating (*i.e.*, modifying practices to reduce) that conflict rather than taking the risk that the client will not provide informed consent or will look for an alternative adviser or other financial professional. The extent to which agency costs would be reduced by such a disclosure is difficult to assess given that we are unable to ascertain the total number of investment advisers that currently interpret their fiduciary duty to require something different from the Commission's interpretation,[87] and consequently we are not able to estimate the agency costs such advisers currently impose on investors. In addition, we believe that there may be potential benefits for clients of those investment advisers, if any, to the extent this Final Interpretation is effective at strengthening investment advisers' understanding of their obligations to their clients. Further, to the extent that this Final Interpretation enhances the understanding of any investment advisers of their duty of care, it may potentially raise the quality of investment advice and also lead to increased compliance with the duty to monitor, for example whether advice about an account or program type remains in the client's best interest, thereby increasing the likelihood that the advice fits with a client's objectives.

In addition, to the extent that this Final Interpretation causes some investment advisers to properly identify circumstances in which conflicts may be of a nature and extent that it would be

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[87] One commenter did not agree that the discussion of fiduciary obligations in the Proposed Interpretation applied to advisers to funds as well as advisers to retail investors. *See* NVCA Letter. As discussed above, this Final Interpretation has clarified the discussion to address this commenter's concerns and acknowledges that the application of the fiduciary duty of an adviser to a retail client would be different from the specific application of the fiduciary duty of an adviser to a registered investment company or private fund.

difficult to provide disclosure to clients that adequately conveys the material facts or nature, magnitude, and potential effect of the conflict sufficient for clients to consent to it or reject it, or in which the disclosure may not be specific enough for clients to understand whether and how the conflict could affect the advice they receive, this Final Interpretation may lead those investment advisers to take additional steps to improve their disclosures or to determine whether adequately mitigating (*i.e.,* modifying practices to reduce) the conflict may be appropriate such that full and fair disclosure and informed consent are possible. This Final Interpretation may also cause some investment advisers to conclude in some circumstances that they cannot fully and fairly disclose a conflict of interest to a client such that the client can provide informed consent. We would expect that these advisers would either eliminate the conflict or adequately mitigate (*i.e.,* modify practices to reduce) the conflict such that full and fair disclosure and informed consent would be possible. Thus, to the extent this Final Interpretation would cause investment advisers to better understand their obligations and therefore to modify their business practices in ways that (i) reduce the likelihood that conflicts and other agency costs will cause an adviser to place its interests ahead of the interests of the client or (ii) help those advisers to provide full and fair disclosure, it would be expected to ameliorate the agency conflict between investment advisers and their clients. In turn, this may improve the quality of advice that the clients receive and therefore produce higher overall returns for clients and increase the efficiency of portfolio allocation. However, as discussed above, we would generally expect these effects to be minimal because we believe that the interpretations we are setting forth in this Final Interpretation are generally consistent with investment advisers' current understanding of their fiduciary duty under the Advisers Act. Finally, this Final Interpretation would also benefit

clients of investment advisers to the extent it assists the Commission in its oversight of investment advisers' compliance with their regulatory obligations.

Investment advisers and the market for investment advice

In general, we expect this Final Interpretation to affirm investment advisers' understanding of the fiduciary duty they owe their clients under the Advisers Act, reduce uncertainty for advisers, and facilitate their compliance. Further, by addressing in one release certain aspects of the fiduciary duty that an investment adviser owes to its clients under the Advisers Act, this Final Interpretation could reduce investment advisers' costs associated with comprehensively assessing their compliance obligations. We acknowledge that, as with other circumstances in which the Commission speaks to the legal obligations of regulated entities, affected firms, including those whose practices are consistent with the Commission's interpretation, incur costs to evaluate the Commission's interpretation and assess its applicability to them. Moreover, as discussed above, there may be certain investment advisers who currently understand their fiduciary duty to require something different from the fiduciary duty described in this Final Interpretation. Those investment advisers would experience an increase in their compliance costs as they change their systems, processes, disclosures, and behavior, and train their supervised persons, to align with this Final Interpretation. However, this increase in costs would be mitigated by potential benefits in efficiency for investment advisers that are able to understand aspects of their fiduciary duty by reference to a single Commission release that reaffirms—and in some cases clarifies—certain aspects of the fiduciary duty.[88] In addition, and as discussed above, in the case of an investment adviser that believed it owed its clients a lower

[88] As noted above, *supra* footnote 3, this Final Interpretation is intended to highlight the principles relevant to an adviser's fiduciary duty. It is not, however, intended to be the exclusive resource for understanding these principles.

standard of conduct, there will be client benefits from the ensuing adaptation of a higher standard of conduct and related change in policies and procedures.

Moreover, to the extent any investment advisers that understood their fiduciary duty to require something different from the fiduciary duty described in this Final Interpretation change their behavior to align with this Final Interpretation, there could also be some economic effects on the market for investment advice. For example, any improved compliance may not only reduce agency costs in current investment advisory relationships and increase the value of those relationships to current clients, it may also increase trust in the market for investment advice among all investors, which may result in more investors seeking advice from investment advisers. This may, in turn, benefit investors by improving the efficiency of their portfolio allocation. To the extent it is costly or difficult, at least in the short term, to expand the supply of investment advisory services to meet an increase in demand, any such new demand for investment advisory services could put some upward price pressure on fees. At the same time, however, if any such new demand increases the overall profitability of investment advisory services, then we expect it would encourage entry by new investment advisers—or hiring of new representatives by current investment advisers—such that competition would increase over time. Indeed, the recent growth in the investment adviser segment of the market, both in terms of number of firms and number of representatives,[89] may suggest that the costs of expanding the supply of investment advisory services are currently relatively low.

Additionally, we acknowledge that to the extent certain investment advisers recognize, as a result of this Final Interpretation, that their fiduciary duty is stricter than the fiduciary duty as they currently interpret it, it could potentially affect competition. Specifically, this Final

[89] *See* Relationship Summary Proposal, *supra* footnote 5, at section IV.A.1.d.

Interpretation of certain aspects of the standard of conduct for investment advisers may result in additional compliance costs for investment advisers seeking to meet their fiduciary duty. This increase in compliance costs, in turn, may discourage competition for client segments that generate lower revenues, such as clients with relatively low levels of financial assets, which could reduce the supply of investment advisory services and raise fees for these client segments. However, the investment advisers who already are complying with the understanding of their fiduciary duty reflected in this Final Interpretation, and who may therefore currently have a comparative cost disadvantage, could find it more profitable to compete for the clients of those investment advisers who would face higher compliance costs as a result of this Final Interpretation, which would mitigate negative effects on the supply of investment advisory services. Further, as noted above, there has been a recent growth trend in the supply of investment advisory services, which is likely to mitigate any potential negative supply effects from this Final Interpretation.[90]

One commenter discussed that, in its view, any statement in the Proposed Interpretation that certain circumstances may require the elimination of material conflicts, rather than full and fair disclosure or the mitigation of such conflicts, could lead to an effect on the market and costs to advisers, if such a requirement would cause advisers who had not shared that interpretation to change their business models or product offerings or the ways in which they interact with

[90] Beyond having an effect on competition in the market for investment adviser services, it is possible that this Final Interpretation could affect competition between investment advisers and other providers of financial advice, such as broker-dealers, banks, and insurance companies. This may be the case if certain investors base their choice between an investment adviser and another provider of financial advice, at least in part, on their perception of the standards of conduct each owes to their customers. To the extent that this Final Interpretation increases investors' trust in investment advisers' overall compliance with their standard of conduct, certain of these investors may become more willing to hire an investment adviser rather than one of their non-investment adviser competitors. As a result, investment advisers as a group may become more competitive compared to that of other types of providers of financial advice. On the other hand, if this Final Interpretation raises costs for investment advisers, they could become less competitive with other financial advice providers.

clients.[91] We disagree that this Final Interpretation includes a requirement to eliminate conflicts of interest. As discussed in more detail above, elimination of a conflict is one method of addressing that conflict; when appropriate advisers may also address the conflict by providing full and fair disclosure such that a client can provide informed consent to the conflict.[92] Further, we believe that any potential costs or market effects resulting from investment advisers addressing conflicts of interest may be decreased by the flexibility advisers have to meet their federal fiduciary duty in the context of the specific scope of services that they provide to their clients, as discussed in this Final Interpretation.

The commenter also drew particular attention to the question of whether the Commission's discussion of the fiduciary duty in the Proposed Interpretation applied to advisers to institutional clients as well as those to retail clients. The same commenter indicated that failing to accommodate the application of the concepts in the Proposed Interpretation to sophisticated clients could risk changing the marketplace or limiting investment opportunities for sophisticated clients, increasing compliance burdens for advisers to sophisticated clients, or chilling innovation. As explained above, this Final Interpretation, as compared to the Proposed Interpretation, discusses in more detail the ability of investment advisers and different types of clients to shape the scope of the relationship to which the fiduciary duty applies.[93] In particular, this Final Interpretation acknowledges that while advisers owe each of their clients a fiduciary duty, the specific obligations of, for example, an adviser providing comprehensive, discretionary advice in an ongoing relationship with a retail client will be significantly different from the

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91 *See* Dechert Letter.

92 *See supra* section II.C.

93 *See supra* footnotes 78-81 and accompanying text.

obligations of an adviser to an institutional client, such as a registered investment company or private fund, where the contract defines the scope of the adviser's services and limitations on its authority with substantial specificity.[94]

Finally, to the extent this Final Interpretation causes some investment advisers to reassess their compliance with their duty of loyalty, it could lead to a reduction in the expected profitability of advice relating to particular investments for which compliance costs would increase following the reassessment.[95] As a result, the number of investment advisers willing to advise a client to make these investments may be reduced. A decline in the supply of investment adviser advice regarding these types of investments could affect efficiency for investors; it could reduce the efficiency of portfolio allocation for those investors who might otherwise benefit from investment adviser advice regarding these types of investments and are no longer able to receive such advice. At the same time, if providing full and fair disclosure and appropriate monitoring for highly complex products (*e.g.*, those with a complex payout structure, such as those that include variable or contingent payments or payments to multiple parties) results in these products becoming less profitable for investment advisers, investment advisers may be discouraged from supplying advice regarding such products. However, investors may benefit from (1) no longer receiving inadequate disclosure or monitoring for such products, (2) potentially receiving advice regarding other, less complex or expensive products that may be more efficient for the investor, and (3) only receiving recommendations for highly complex or high cost products for which an

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94 *See supra* section II.A.

95 For example, such products could include highly complex, high cost products with risk and return characteristics that are hard for retail investors to fully understand, or where the investment adviser and its representatives receive complicated payments from affiliates that create conflicts of interest that are difficult for retail investors to fully understand.

investment adviser can provide full and fair disclosure regarding its conflicts and appropriate monitoring.

List of Subjects in 17 CFR Part 276

Securities.

Amendments to the Code of Federal Regulations

For the reasons set out above, the Commission is amending Title 17, chapter II of the Code of Federal Regulations as set forth below:

PART 276–INTERPRETATIVE RELEASES RELATING TO THE INVESTMENT ADVISERS ACT OF 1940 AND GENERAL RULES AND REGULATIONS THEREUNDER

1. Part 276 is amended by adding Release No. IA–5428 and the release date of June 5, 2019, to the end of the list of interpretive releases to read as follows"

Subject	**Release No.**	**Date**	**Fed. Reg. Vol. and Page**
* * * * * * *			
Commission Interpretation Regarding Standard of Conduct for Investment Advisers	IA-5248	June 5, 2019	[Insert FR Volume Number] FR [Insert FR Page Number]

By the Commission.

Dated: June 5, 2019.

Vanessa A. Countryman,

Acting Secretary.

CERTIFICATE OF FILING/SERVICE

I do hereby certify that on date indicated below, I filed via electronic means (ESTTA) the foregoing document with the:

U. S. Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

with a copy via email to counsel of record, including:

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This the 13th day of June, 2023.

/ Katarina K. Wong /
Katarina K. Wong

Attorney for Applicant