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VIA ELECTRONIC MAIL

November 12, 2020

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Notice of filing of a National Market System Plan Regarding Consolidated Equity Market Data, Release No. 34-90096 (File No. 4-757)

Dear Ms. Countryman:

The Proposed National Market System ("NMS") Plan[1] is fundamentally flawed. The voting structure that the Commission ordered to be included in the Plan[2] exceeds the Commission's authority under the Securities Exchange Act of 1934 (the "Act") as well as the Commission's own regulations, and is arbitrary and capricious in violation of the Administrative Procedure Act ("APA").[3]

As Nasdaq stated in its response to the Commission's initial proposal to direct certain Self-Regulatory Organizations ("SROs")[4] to submit a new NMS Plan, the Order is inconsistent with the statutory authorization for the national market system under Section 11A of the Act[5] and Rule 608 under Regulation NMS,[6] and is in conflict with the authority granted to SROs by

[1] Securities Exchange Act Release No. 90096 (October 6, 2020), 85 Fed. Reg. 64565 (October 13, 2020) (File No. 4-757).

[2] *See* Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Release No. 34-88827 (May 6, 2020), 85 Fed. Reg. 28702 (May 13, 2020) (File No. 4-757) (the "Order"). Capitalized terms used but not defined herein shall have the meanings assigned to them by the Order.

[3] 5 U.S.C. § 706.

[4] The following SROs submitted the Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., Investors Exchange LLC, Long Term Stock Exchange, Inc., MEMX LLC, Nasdaq BX, Inc., Nasdaq ISE, LLC, Nasdaq PHLX LLC, Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., NYSE National, Inc., and Financial Industry Regulatory Authority, Inc. ("FINRA").

[5] 15 U.S.C. § 78k-1.

[6] 17 C.F.R. § 242.608(3).

Sections 6 and 19 of the Act.[7] As such, Nasdaq and others filed a petition for review in the Court of Appeals for the D.C. Circuit, seeking to vacate the Order.[8] All of the statements set forth in Nasdaq's comment letters on the Order[9] and in the opening brief filed on behalf of Nasdaq and the other petitioners in the Court of Appeals, attached as Appendix B, are incorporated herein by reference.[10] For all of the reasons stated therein, the Commission should disapprove the proposed Plan. At a minimum, the Commission should take no action with respect to the proposed Plan until the Court of Appeals has ruled on the legality of the Order.

In addition to reiterating its prior critiques of the Order and the resulting Plan, Nasdaq also wishes to comment on the Conflict of Interest and Confidentiality provisions of the proposed Plan. The proposed Plan obeys the Commission's directive to "include provisions designed to address the conflicts of interest of SRO members and Non-SRO Members as outlined in the Conflicts of Interest Approval Orders… [and] provisions designed to protect confidential and proprietary information from misuse as outlined in the Confidentiality Policy Approval Orders."[11] The Conflicts of Interest Approval Orders[12] and Confidentiality Policy Approval Orders,[13] in turn, substantively modified proposed amendments that had been filed by the current Equity Data Plans. As a result, the proposed Plan would perpetuate the arbitrary and

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[7] 15 U.S.C. §§ 78f, 78s.

[8] *See The Nasdaq Stock Market LLC, et al., v. Securities and Exchange Commission*, Case No. 20-1181 (D.C. Cir.).

[9] *See* Letter from Joan Conley to Vanessa Countryman re Notice of Proposed Order Directing the Exchanges to Submit a New National Market System Plan, Securities Exchange Act Release No. 87906 (January 8, 2020), 85 FED. REG. 2164 (January 14, 2020) (File No. 4-757) (comments on proposed order) available at https://www.sec.gov/comments/4-757/4757-6892318-210936.pdf; Letter from Joan Conley to Vanessa Countryman re Notice of Proposed Order Directing the Exchanges to Submit a New National Market System Plan, Securities Exchange Act Release No. 87906 (January 8, 2020), 85 FR 2164 (January 14, 2020) (File No. 4-757) (New consolidated data plan) (February 28, 2020) (discussion of relationship of proposed Order and Market Data Infrastructure Proposal), available at https://www.sec.gov/comments/4-757/4757-6892874-211004.pdf.

[10] *See* Appendix B, *The Nasdaq Stock Market LLC, et al. v. Securities and Exchange Commission*, Opening Brief for Petitioners, Case No. 20-1181 (D.C. Cir.).

[11] *See* Order, 85 Fed. Reg. at 28730 (May 13, 2020).

[12] *See* Consolidated Tape Association; Order Approving the Thirtieth Substantive Amendment to the Second Restatement of the CTA Plan and Twenty-Second Substantive Amendment to the Restated CQ Plan, as Modified by the Commission, Concerning Conflicts of Interest, Securities Exchange Act Release No. 88823 (May 6, 2020), 85 Fed. Reg. 28046 (May 12, 2020) (File No. SR-CTA/CQ-2019-01); Joint Industry Plan; Order Approving the Forty-Seventh Amendment to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges, as Modified by the Commission, Concerning a Confidentiality Policy, Securities Exchange Act Release No. 88826 (May 6, 2020), 85 Fed. Reg. 28069 (May 12, 2020) (File No. S7-24-89).

[13] *See* Consolidated Tape Association; Order Approving the Thirty-Third Substantive Amendment to the Second Restatement of the CTA Plan and Twenty-Fourth Substantive Amendment to the Restated CQ Plan, as Modified by the Commission, Concerning a Confidentiality Policy, Securities Exchange Act Release No. 88825 (May 6, 2020), 85 Fed. Reg. 28090 (May 12, 2020) (File No. SR-CTA/CQ-2019-04); Joint Industry Plan; Order Approving the Forty-Seventh Amendment to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges, as Modified by the Commission, Concerning a Confidentiality Policy, Securities Exchange Act Release No. 88826 (May 6, 2020), 85 Fed. Reg. 28069 (File No. S7-24-89).

capricious rulemaking undertaken by the Commission when it failed to provide notice or seek comment on its own modifications to the policy language proposed by the Equity Data Plans.[14] Accordingly, if the Commission approves the proposed Plan, it should exclude the unlawful Conflict of Interest and Confidentiality provisions from the proposed Plan.

At a minimum, while the Commission should, for the reasons discussed above, disapprove the Plan or defer action on it, if it determines to approve it with amendments, it should publish the exact text of its intended amendments and seek comment on them before issuing any approval. The necessity of seeking comment on amendments proposed by the Commission itself is amply demonstrated by the numerous errors and potential unintended consequences visited on the current Equity Data Plans by the Commission's hasty issuance of the Conflicts of Interest Approval Orders and Confidentiality Policy Approval Orders. Specifically, the resulting policies, as now included in the Equity Data Plans and as proposed to be included in the Plan, give rise to several concerns. If the Commission is inclined to approve the proposed Plan and to include the Conflict of Interest and Confidentiality provisions as part of the Plan, it should first publish for public comment amendments addressing those concerns.

As a general matter, the Confidentiality Policy (Exhibit C to the proposed Plan) imposes unreasonable burdens and risks upon SROs, their representatives, and their senior management by failing to recognize that the entire SRO, not its voting representative, is the Plan's Member,[15] and by failing to acknowledge that senior management is ultimately responsible for all aspects of the SRO's operation, including the participation in national market system plans and compliance with SEC Rule 608. As a result, the Policy language seems to posit that SRO representatives can and should assume sole responsibility for all things related to the Plan, without the ability to seek guidance from SRO senior management, technical advice from other SRO employees, or possibly even legal advice from corporate counsel. Even if such consultations are permitted in some circumstances, the relevant language forces SRO employees to continually evaluate whether particular information is needed by specific individuals for specific purposes. However, it is not the individual, but rather the SRO, that is responsible for compliance with the terms of the Plan and Rule 608. Moreover, it is the SRO and its officers and directors who are subject to enforcement action under Section 19(h) of the Act[16] for the failure to comply with the Plan, the Act and rules thereunder. Thus, the approach taken in the Confidentiality Policy creates the risk that SROs and their officers and directors could be held accountable for the actions of an SRO representative, despite being deprived of the ability to adequately supervise him or her.

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[14] Notably, the language of SEC Rule 608(b)(2), 17 CFR 242.608(b)(2), purporting to allow the Commission to approve an NMS "plan or amendment with such changes…as the Commission may deem necessary or appropriate" cannot override the plain language of the Administrative Procedure Act requiring general notice of a proposed rulemaking to be published in the *Federal Register* and to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments…." 5 U.S.C. § 553.

[15] As used in the proposed Plan, the term "Member" denotes both a member of the Plan and a Member of the limited liability company ("LLC") that would be established to manage the Plan. Accordingly, the term is essentially interchangeable with the term "SRO" in this context. Non-SRO Voting Representatives would be granted voting powers under the proposed Plan but would not be "members" of the Plan or the LLC.

[16] 15 U.S.C. § 78s(h).

Analysis of more specific concerns requires an understanding of the interlocking definitions used in the Confidentiality Policy. Specifically, "Restricted Information" is defined as "highly sensitive customer-specific financial information, customer-specific audit information, other customer financial information and personal identifiable information." "Highly Confidential Information" is defined as "highly sensitive Member-specific, customer-specific, individual-specific, or otherwise sensitive information relating to the Operating Committee, Members, Vendors, Subscribers, or customers that is not otherwise Restricted Information. Highly Confidential Information includes: the Company's contract negotiations with the Processors or Administrator; personnel matters; information concerning the intellectual property of Members or customers; and any document subject to the Attorney-Client Privilege or Work-Product Doctrine." The Confidentiality Policy further defines "Covered Persons" as "representatives of the Members, the Non-SRO Voting Representatives, SRO Applicants, the Administrator, and the Processors; affiliates, employees, and Agents of the Operating Committee, a Member, the Administrator, and the Processors; any third parties invited to attend meetings of the Operating Committee or subcommittees; and the employers of the Non-SRO Voting Representatives." "Agents" are defined as "agents of the Operating Committee, a Member, the Administrator, and the Processors, including, but not limited to, attorneys, auditors, advisors, accountants, contractors or subcontractors."

With respect to Restricted Information, the Policy then provides that "Covered Persons in possession of Restricted Information are prohibited from disclosing it to others, *including Agents.* This prohibition does not apply to disclosures to the staff of the SEC or as otherwise required by Applicable Law, or to other Covered Persons as expressly provided for by this Policy." (emphasis added). Covered Persons are barred from providing Highly Confidential Information "to others, including Agents, except to other Covered Persons who need the Highly Confidential Information to fulfill their responsibility to the Company" (i.e., to the LLC to be established to govern the New Consolidated Data Plan). However, "the prohibition does not apply to disclosures to the staff of the SEC or as otherwise required by law (such as those required to receive the information to ensure the Member complies with its regulatory obligations), or to other Covered Persons authorized to receive it."

In the version of the Policy originally submitted to the SEC by the Equity Data Plans, Restricted Information and Highly Confidential Information were both defined as forms of "Confidential Information," and the Operating Committee was specifically authorized to approve the provision of *any form* of Confidential Information to a Covered Person. However, the Commission's amendments re-defined "Confidential Information" to *exclude* Restricted Information and Highly Confidential Information, thereby eliminating any provision that would "expressly provide[]" for the transfer of Restricted Information from one Covered Person to another or that would designate a "Covered Person [as] authorized to receive" Highly Confidential Information. Whether intended or not, this change had the effect of putting information in a lockbox and throwing away the key.

The drafters of the proposed Plan made some effort to correct this apparent error by making slight modifications to the provisions regarding Highly Confidential Information from the versions in the current Equity Data Plans. Specifically, the language would acknowledge that

Highly Confidential Information can be shared to allow Covered Persons to fulfill responsibilities to the Company, and that sharing of such information may be required by law to ensure that the Member complies with its regulatory obligations. However, this language, which is arguably not consistent with the Confidentiality Policy Approval Orders, nevertheless fails to address numerous remaining gaps and ambiguities. Specifically:

- The exceptions for Highly Confidential Information are not also applicable to Restricted Information. Thus, a literal reading of the Confidentiality Policy prevents any Covered Person in position of Restricted Information from providing it to any other Covered Person. This would prevent, for example, the Plan Administrator from providing Customer-specific information to attorneys retained to pursue collection actions against such Customers or accountants retained to prepare financial audits, unless such information sharing is construed to be required by law.

- With respect to Highly Confidential Information, the new parenthetical explaining that disclosures required by law include "those required to receive the information to ensure the Member complies with its regulatory obligations" does not clearly establish whether Highly Confidential Information can therefore be provided to specific employees of the Member. As a result, parties subject to the Policy would be subject to the risk that their judgments about what is necessary to "ensure" compliance might be second-guessed. For example:

    - Can a Member's representative seek guidance from corporate counsel and senior management regarding issues arising in contract negotiations with a Processor or Administrator?

    - If a particular Subscriber, Vendor, or Member is experiencing a technological problem in receiving or disseminating data as contemplated under the Plan, can an SRO provide the related Highly Confidential Information to its technical experts to develop the SRO's position on the issue?

    - The Nasdaq exchanges that would be Plan Members are wholly owned subsidiaries of Nasdaq, Inc., a public company that is required to publish audited financial statements for itself and its consolidated subsidiaries. Nasdaq Inc.'s auditors have advised it that the preparation of such audits requires access to customer-level information about the customers of the Equity Data Plans in order to assess the accuracy of financial reporting regarding customer receivables. Moreover, Section 404 of the Sarbanes-Oxley Act of 2002[17] requires the management of public companies and their auditors to attest to the adequacy of internal controls associated with financial controls, including controls regarding the accuracy of revenue reporting; such an attestation requires the ability to examine and test the relevant controls. In a possible future Plan in which Nasdaq would no longer be an Administrator, moreover, the auditor and management

[17] 15 U.S.C. § 7262.

would still need to examine the controls of the new Administrator, as it would be acting as an agent to collect and distribute Nasdaq revenues. While Nasdaq believes that all access to information necessary to conduct financial audits and reporting is in fact "required by law," we also believe that the Commission should provide a clear endorsement of that conclusion in any future action with respect to the Plan or the Equity Data Plans to remove any ambiguity.

- Nasdaq's auditors have also expressed concerns about whether the Confidentiality Policy is consistent with professional obligations that require them to subject their work to peer review and that may therefore require making Restricted Information or Highly Confidential Information available to persons who are not Covered Persons. Notably, while the Confidentiality Policy Approval Orders state that disclosures "required by law or professional ethics obligations" are permitted,[18] the actual policy language does not make reference to professional ethics obligations. Nasdaq's auditors have also expressed concerns that requiring all natural persons who received information during an audit to acknowledge that they will abide by the Confidentiality Policy places an unreasonable burden on the firm to obtain signatures from persons who are already bound by the ethical obligations imposed on their profession.

- If a Covered Person needs Restricted Information or Highly Confidential Information to advance or defend a civil lawsuit, can that person obtain and use it for that purpose, even if this means providing the information to a person who is not a Covered Person?

The Conflicts Policy from the Equity Data Plans, which is contained in Exhibit B and Section 4.10 of the proposed Plan, requires persons involved with the Plan to make specified public disclosures and to refrain from serving as Voting Representatives in certain circumstances. While this policy is less problematic than the Confidentiality Policy, it nevertheless gives rise to at least one interpretive challenge. The Conflicts Policy bars a Disclosing Party (*i.e.* a Member or Non-SRO Voting Representative) from appointing as its Voting Representative a person responsible for or involved with the development, modeling, pricing, licensing or sale of proprietary data products offered to customers of consolidated data feeds if the person has a financial interest (including compensation) that is tied directly to the Disclosing Party's market data business or the procurement of market data and if the compensation would cause a reasonable objective observer to expect the compensation to affect the impartiality of the representative. Since this provision is directed specifically to Voting Representatives, and since the New Consolidated Data Plans and the current Equity Data Plans allow Member Observers to attend meetings of the Operating Committee and Executive Committee, there does not appear to be any limitation on meeting attendance by SRO employees other than the Voting Representative, such as attorneys and financial and technical experts. If that is the case, why, as discussed in detail above, is the Confidentiality Policy susceptible to a reading that would bar access to information by any SRO employee other than Voting

[18] *See, e.g.,* 85 Fed. Reg. at 28071 n.32 (May 12, 2020).

Representatives? If that is not the case, then are certain SRO employees barred from attendance at meetings?[19]

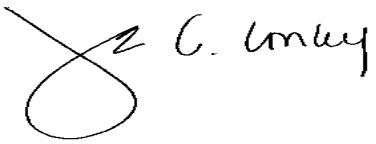
We note that since the adoption of the Conflicts and Confidentiality Policies, counsel for the Operating Committees of the current Equity Data Plans have engaged in a dialogue with SEC Staff regarding many of the interpretive issues discussed above. While some of the feedback from Staff has been supportive of, for example, allowing the Operating Committee to approve access to Restricted Information by counsel and auditors, Staff lacks authority to modify the language of the Policies; thus, uncertainty will persist unless the Commission allows modifications to address these issues. Moreover, Staff has not yet endorsed the precept that the SROs tasked with responsibility for operating the Plan and enforcing compliance with its provisions should also have access to Plan information, as long as such access is not inconsistent with the purposes of the Plan.

Thus, while the Commission should disapprove the Plan, if it is inclined to proceed with approval, it should exclude the unlawful Conflict of Interest and Confidentiality provisions from the proposed Plan. Alternatively, the Commission should first publish for notice and comment amendments to the Plan that address all of the concerns expressed in this letter, as well as any other amendments that it determines are appropriate. If SROs and other interested members of the public cannot read the actual Plan language before it takes effect, they will be deprived of the opportunity to comment that is afforded them by the Administrative Procedure Act.

In addition, the Commission set forth a number of narrow questions regarding particular provisions of the Proposed NMS Plan. Nasdaq's responses to those questions on which it believes comments are warranted are set forth in Appendix A.

Thank you for the opportunity to comment on this Proposal and please do not hesitate to contact me with any questions.

Sincerely,



Joan C. Conley
Senior Vice President and Corporate Secretary

cc: Chairman Jay Clayton
Commissioner Hester M. Peirce

[19] The Plan proposes to apply the above recusal position to Non-SRO Voting Representatives as well as SRO Voting Representatives. Given the conflicts of interest that will arise if consumers or distributors of market data are given voting rights, including these reciprocal recusal obligations would be entirely appropriate in the event that the Plan is approved.

Commissioner Elad L. Roisman
Commissioner Allison H. Lee
Commissioner Caroline A. Crenshaw
Brett Redfearn, Director of the Division of Trading and Markets

Attachment

APPENDIX A
RESPONSES TO SELECT QUESTIONS

QUESTION 2

Paragraph (c) of the Recitals of the proposed CT Plan provides that, following the Effective Date, the CT Plan will not become operative as an NMS Plan that governs the dissemination of real-time consolidated equity market data until the first day of the month that is at least 90 days after the last of five specified actions has occurred (the "Operative Date"). Do commenters agree that the completion of all five specified actions is necessary prior to the Operative Date? Should the CT Plan set deadlines for some or all of the specified actions? Should the CT Plan require that the Operating Committee provide periodic updates as to the status of implementation of the specified actions? If so, should these updates be made public? Should the CT Plan include deadlines requiring that the Operating Committee be constituted within a set time if the Commission approves the CT Plan? Should the CT Plan explicitly specify that constituting the Operating Committee must be the first action undertaken by the CT Plan after the Effective Date? Should the Operating Committee be required within set times to establish fees, enter into contracts with an Administrator and Processor(s), and approve or file with the Commission, as applicable, all "policies and procedures that are necessary or appropriate for the operation of the Company"? What policies and procedures do commenters believe are necessary or appropriate for the operation of the CT Plan? Should the CT Plan specify which policies and procedures are necessary or appropriate? Is the proposed 90-day period appropriate and reasonable, or should it be longer or shorter?

The Plan would become effective after: (i) it is approved by the Commission pursuant to Rule 608 of Regulation NMS, and (ii) the Company has been formed by filing a certificate of formation with the Delaware Secretary of State. The Plan would become operative on the first day of the month that is at least 90 days after the last of the following have occurred:

(a) The SRO Voting Representatives and Non-SRO Voting Representatives of the Operating Committee have been determined;

(b) Fees for market data disseminated pursuant to the Plan have been established by the Operating Committee, are effective as an amendment to the Plan pursuant to Rule 608 of Regulation NMS, and are ready to be implemented on the Operative Date;

(c) The Company has entered into an agreement with the necessary Processor(s);

(d) The Company has entered into an agreement with an Administrator selected pursuant to Section 6.3 of the Plan and such Administrator has completed the transition from prior Administrators under the CQ Plan, CTA Plan, and UTP Plan such that it is able to provide services under the Administrative Services Agreement, including that (1) new contracts between the Company and Vendors and the Company and Subscribers have been finalized such that all Vendors and Subscribers under the CQ Plan, CTA Plan, and UTP Plan are ready to transition to

such new contracts by the Operative Date, (2) the Administrator has in place a system to administer distributions, and (3) the Administrator has in place a system to administer fees; and

(e) The Operating Committee and, if applicable, the Commission has approved all policies and procedures that are necessary or appropriate for the operation of the Company.

The Commission asked whether all five of these steps is necessary prior to the Operative Date. In the event the Commission proceeds to approve the Plan, the answer is yes. As the Commission itself has stated, "the New Consolidated Data Plan's terms should provide for the orderly and predictable transition of functions and responsibilities from the three existing Equity Data Plans to the New Consolidated Data Plan,"[20] noting that "before commencing operations, the operating committee of the New Consolidated Data Plan would need to, among other things, select plan processors and an independent plan administrator . . . ."[21]

This is exactly what the proposed CT Plan provides.

First, all voting participants must be selected prior to commencement of operations so that voting can take place as set forth in the Plan.

Second, market data fees must be set before the Operative Date to avoid the cost and administrative inefficiencies that would arise if a new Administrator needed to establish billing processes for current fees and then modify the processes for a new set of fees.

Third, the new Operating Agreement must enter into Processor agreements to enable it to effectively manage the Processors as soon as operations begin.

Fourth, a new Administrator agreement, new Vendor agreements, a system to administer distributions, and a system to administer fees must all be in place before the new Operating Committee can administer the new Plan. New customer contracts must be executed to allow the new Operating Committee to enforce customer agreements.

Fifth, it is axiomatic that the new Operating Committee must approve all policies and procedures necessary or appropriate for the operation of the Company before commencing operations.

Failure to implement any one of these conditions will create unnecessary cost to the new plan.

Moreover, as noted in Nasdaq's prior comment letter on the Order, the current administrators and processors of the UTP and CTA/CQ Plans operate pursuant to service contracts. Termination of these agreements pursuant to the Order without regard to the

[20] 85 Fed. Reg. 2164, 2185 (January 14, 2020).

[21] *Id.* at 2185-2186 (emphasis added).

administrators' or processors' rights under these contracts would violate the Fifth Amendment prohibition against takings without just compensation. As explained by the Supreme Court, "if a regulation goes too far it will be recognized as a taking."[22] To avoid an unconstitutional taking, the administrators' and processors' rights under current contractual provisions must be followed. It may be necessary to delay launch of a new Plan until these contracts have expired or appropriate compensation has been provided.

The Commission also asked whether the CT Plan should include deadlines requiring that the Operating Committee be constituted within a set time if the Commission approves the CT Plan. Any deadline that the Commission would set at this point would be inherently arbitrary without a sound analysis of the scope of the project. Setting unreasonable deadlines will do nothing to move the project forward, and rushing to complete an inherently complex project may result in costly errors. Regular reporting requirements may be acceptable, if steps are taken to prevent the disclosure of confidential information such as, for example, information about ongoing contractual negotiations.

Question 3

The Commission requests comment generally on the distinctions drawn in the proposed CT Plan between actions that are governed by the Operating Committee, which includes Non-SRO Voting Representatives as required by the Order, and other specified actions that are governed solely by the SROs as the "Members" of the LLC. Does the proposed CT Plan appropriately draw these distinctions in a way that supports the purpose of the CT Plan, consistent with the Order? Do commenters believe that these distinctions will result in a significant and inappropriate dilution of Non-SRO Voting Representatives' influence on CT Plan matters that are relevant to the operation of the CT Plan as an NMS plan for the collection, processing, and dissemination of equity market data? What revisions to the plan provisions, if any, do commenters believe would be appropriate to ensure that the distinctions drawn in the CT Plan between matters to be decided by the Operating Committee and matters to be decided solely by the SROs do not inappropriately dilute the Non-SRO Voting Representatives' participation and influence on the Operating Committee?

The actions that are governed solely by the SROs as "Members" of the LLC are unrelated to the collection, processing, and dissemination of equity market data, but rather focus on organizational aspects of the LLC's existence. Section 4.1(a) of the LLC Agreement clarifies that, except as otherwise expressly provided in the LLC Agreement, the Operating Committee has full and complete control over the business and affairs of the CT Plan, including implementing "policies and procedures as necessary to ensure prompt, accurate, reliable and fair collection, processing, distribution, and publication of information with respect to Transaction Reports and Quotation Information in Eligible Securities and the fairness and usefulness of the form and content of that information." Actions entrusted to Members to authorize without the consent of the Operating Committee are limited to the following: (i) to appoint and remove persons as officers of the CT Plan, delegate duties to such persons and approve salary or other

[22] *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922))

compensation for such persons, pursuant to Section 4.8 of the LLC Agreement; (ii) to approve the compromise or settlement by the Partnership Representative of any tax audit or litigation affecting the Members, pursuant to Section 10.1(c); (iii) to approve the dissolution of the CT Plan, pursuant to Section 11.1(a), and to appoint a liquidating trustee to wind up the affairs of the CT Plan, pursuant to Section 11.2; (iv) to determine appropriate reserves that will be charged to the Capital Accounts of the Members for contingent liabilities or amounts that are needed to pay the CT Plan's operating expenses, pursuant to Section 13.1; and (v) to approve amendments to Articles IX [Allocations], X [Records and Accounting, Reports], XI [Dissolution and Termination] and XII [Exculpation and Indemnification] of the LLC Agreement. The limited rights of the Members do not affect the operation of the CT Plan for the following reasons:

- Appointment of Officers – Section 6.1 of the LLC Agreement provides that the Administrator performs all administrative functions on behalf of the CT Plan. Therefore, it is unlikely that there will be a need for the LLC to appoint any officers, but if such officers were to be appointed, their powers would not extend to matters entrusted to the Operating Committee, the Administrator or the Processors.

- Approve Tax Settlements – The approval of compromises or settlements of tax audits or litigation affecting the Members has economic effects solely on the Members but does not affect the dissemination of information.

- Dissolution – The existence and operation of the CT Plan is required by the Commission and therefore the dissolution of the CT Plan is only possible if the Commission approves an alternative plan for the dissemination of information. Requiring the approval of the Operating Committee in a situation where the Commission has approved an alternative plan is unnecessary.

- Appropriate Reserves – The determination of appropriate reserves has purely economic effects on the Members and does not affect the dissemination of information. In addition, the level of reserves should not affect the continued operation of the CT Plan given that: (i) Section 8.2 of the LLC Agreement provides that each Member agrees to make capital contributions for "reasonable administrative and other reasonable expenses" of the CT Plan, and (ii) Section 3.7(b) of the LLC Agreement provides that, to the extent that amounts have not been paid to the Processors or Administrator under the terms of the Processor Services Agreements and Administrative Services Agreement, respectively, or pursuant to the LLC Agreement, each Member is obligated to return its pro rata share of distributions from the CT Plan in the one year period prior to such default in payment.

- Amendments – The limited amendment rights of the Members are to provisions of the LLC Agreement that purely affect the economic interests of the Members (Articles IX and X), the protections of the Members as among themselves (Article XII) and the ongoing existence of the CT Plan (Article XI). Specifically: (i) as noted above, Operating Committee input on provisions relating to the economic

interests of the Members does not affect the dissemination of public information because it solely has economic effects on the Members, (ii) Operating Committee input on exculpation and indemnification relates to protections that Members and their representatives have from liability as among themselves and does not affect the dissemination of public information, and (iii) as noted above, the existence and operation of the CT Plan is required by the Commission and the dissolution of the CT Plan is only possible with the approval of the Commission.

Question 5

Article I, Section 1.1(n) of the proposed CT Plan defines the term "Covered Persons" as representatives of the Members, the Non-SRO Voting Representatives, SRO Applicants, the Administrator, and the Processors; affiliates, employees, and Agents of the Operating Committee, a Member, the Administrator, and the Processors; any third parties invited to attend meetings of the Operating Committee or subcommittees; and the employers of Non-SRO Voting Representatives. Covered Persons do not include staff of the Commission. The Commission requests comment on the proposed definition. Should other types of representatives be specified in the proposed definition? For example, should the proposed definition specifically include Member Observers, as defined in Article I, Section 1.1(oo) of the proposed CT Plan?

As stated in the body of this letter, the Conflict and Confidentiality Policies are unlawful; at a minimum, they must be revised. Among other things, the policies are not clear, and require exceptions for actions required by law or rules of professional conduct, and the Operating Committee must be permitted to authorize exceptions. In the event that the Commission wishes to approve the proposed Plan, and intends to include the Conflict of Interest and Confidentiality provisions as part of the Plan, it should first publish for comment amendments to effect these necessary corrections. In the event that the Commission disapproves the Plan, it should work with the Operating Committee of the current Equity Data Plans to effect these necessary corrections.

If these corrections are made, Member Observers could appropriately be included in the definition of Covered Persons to bring them within the scope of the Conflict of Interest and Confidentiality policies.

Question 7

Article I, Section 1.1(oo) of the proposed CT Plan defines the term "Member Observer" to mean any individual, other than a Voting Representative, that a Member, in its sole discretion, determines is necessary in connection with such Member's compliance with its obligations under Rule 608(c) of Regulation NMS to attend Operating Committee and subcommittee meetings. What are commenters' views on whether an SRO would reasonably find it necessary to select a Member Observer to comply with its obligations under Rule 608(c) of Regulation NMS? Under what circumstances, if any, would the representation of an SRO on the Operating Committee by its selected SRO Voting Representative be an insufficient means for the SRO to fulfill its obligations under Rule 608 of Regulation NMS? Should persons who hold certain positions within an SRO be prohibited from serving as Member Observers? For example, should a person

who has direct responsibility for the management, marketing, sale, or development of proprietary equity data products offered separately be permitted to serve as a Member Observer? If Member Observers are necessary, should only persons who perform certain roles within an SRO (e.g., legal or compliance personnel) be able to serve as Member Observers? Should the CT Plan limit the number of Member Observers that each SRO would be permitted to name or the frequency with which the person serving as a Member Observer can be changed? If so, how?

Rule 608(c) requires each SRO "to comply with the terms of any effective national market system plan of which it is a participant."[23] The Voting Representative of a participant (*i.e.*, a Member of the Plan) is necessarily a generalist, who is routinely asked to opine on legal, technical, regulatory, systems and business matters that will require the expertise of specialists in those fields. Any limitation on the ability of the Voting Representative to call upon such expertise when needed will interfere with the ability of the Operating Committee, comprising such Voting Representatives, to address complex legal, regulatory and technical issues as they arise, while also interfering with the ability of the SROs to comply with the decisions of the Operating Committee. In addition, the Operating Committee may itself need to call experts on particular topics, such as, for example, technical aspects of data distribution, which may require calling experts employed by the SROs.

There should be no limit on the number of Member Observers, or the frequency of attendance at Plan meetings. Any such limitation would be inherently arbitrary, as there is no objective way of predicting when expert or other assistance may be necessary in the future. Members must be allowed to make judgments about what is necessary to fulfill their obligations under the Plan and Rule 608.

Question 10

Do commenters believe that the organizational, governance, and managerial structure set forth in the proposed CT Plan—including the limitation of membership in the LLC to SROs and the prescribed role and responsibilities of the Operating Committee—is consistent with the purposes of the CT Plan with respect to the dissemination of equity market data and the statutory mandate of ensuring 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"? If not, what changes to the organizational, governance, and managerial terms of the proposed CT Plan do commenters believe should be made to be consistent with the purposes of the CT Plan?

The role of the Operating Committee is generally to oversee the business and affairs of the CT Plan, and the role of the Non-SRO Voting Representatives on the Operating Committee is to review and vote on certain actions affecting the business and affairs of the CT Plan as required by the LLC Agreement. The Non-SRO Voting Representatives are able to fulfill their role for the Operating Committee without being a member of the CT Plan. While not required by Delaware law, membership status generally is paired with an economic interest in the applicable limited liability company. In this case, providing the Non-SRO Voting Representatives with an

[23] 17 C.F.R. § 242.608(c).

economic interest in the CT Plan would seem to serve no appropriate purpose, as it would provide individuals with a claim on revenues that they did nothing to generate and expose them to funding obligations that they would not be prepared to support.

Question 11

Article III, Section 3.7 of the proposed CT Plan describes the obligations and liabilities of the SROs as Members of the LLC, including among other things, a provision that SROs shall have no liability for the debt, liabilities, commitments, or any other obligations of the CT Plan or for any losses of the CT Plan. Given the role and public purpose of the CT Plan as part of the national market system, do commenters believe that the provisions set forth in Section 3.7 are consistent with the SROs' obligations to, and purposes of, the CT Plan?

The CT Plan is proposed to be organized as a Delaware limited liability company. The principle stated in Section 3.7 that no member of the LLC is liable for the debts, liabilities, commitments or other obligations of the CT Plan or for any losses of the CT Plan is consistent with Delaware law. Section 18-303 of the Delaware Limited Liability Company Act provides as follows:

> (a) Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company, and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.
>
> (b) Notwithstanding the provisions of subsection (a) of this section, under a limited liability company agreement or under another agreement, a member or manager may agree to be obligated personally for any or all of the debts, obligations and liabilities of the limited liability company.[24]

Similarly, if the CT Plan had been formed as a corporation and the members were stockholders of that corporation, the stockholders would not have been liable for the obligations of the CT Plan.[25]

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[24] *See also Cannon v. Poliquin*, 2020 WL 2511120, at *2 (Del. Super. Ct. May 15, 2020) (citing 6 *Del. C.* § 18–303(a)) ("Unlike a general partnership, where partners are jointly and severally liable for the obligations of the partnership, the members of a LLC are not jointly and severally liable for the acts of agents of the LLC.").

[25] *See* 8 *Del. C.* § 102(b)(6); *Longoria v. Somers as Tr. of Charles Somers Living Tr. Dated Nov. 2002*, 2019 WL 2270017, at *3 (Del. Ch. May 28, 2019) ("It is true that stockholders are not ordinarily liable for the debts of the firm in their capacity as stockholders, at least absent a charter provision authorized by Section 102(b)(6) of the Delaware General Corporation Law . . . ."); *Cigna Health & Life Ins. Co. v. Audax Health Sols., Inc.*, 107 A.3d 1082, 1096 (Del. Ch. 2014) (citing 8 *Del. C.* § 102(b)(6)) ("Absent . . . a provision [in the certificate of incorporation making stockholders liable for the corporation's debts], stockholders are not liable for the debts of the corporation except by reason of their own actions.").

Retaining the principle that no member of the CT Plan is liable for the obligations of the CT Plan is not an attempt to avoid appropriate funding for the CT Plan. Section 8.2 of the LLC Agreement provides that each Member agrees to make capital contributions for "reasonable administrative and other reasonable expenses" of the CT Plan. In addition, Section 3.7(b) of the LLC Agreement provides that, to the extent that amounts have not been paid to the Processors or Administrator under the terms of the Processor Services Agreements and Administrative Services Agreement, respectively, or pursuant to the LLC Agreement, each Member is obligated to return its pro rata share of distributions from the CT Plan in the one year period prior to such default in payment.[26]

Question 12

Article III, Section 3.7(e) of the proposed CT Plan states, "[t]o the fullest extent permitted by law, no Member shall, in its capacity as a Member, owe any duty (fiduciary or otherwise) to the Company or to any other Member other than the duties expressly set forth in this Agreement." The Commission requests comment on the limitations proposed in this provision and the potential impact to the CT Plan's responsibilities for the collection, processing, and dissemination of equity market data.

Each of the Members has obligations under federal securities laws regarding the dissemination of real-time consolidated equity market data and compliance with the Plan and Rule 608. It is those obligations, rather than the obligations of Members to the CT Plan and each other, that will ensure that the Members comply with their responsibilities regarding the dissemination of real-time consolidated equity market data. Any elimination of fiduciary duties of the Members of the CT Plan to the CT Plan or the other Members has no effect on the Members' obligations to comply with federal securities laws.

Under Delaware law, individuals or entities that manage a limited liability company may have fiduciary duties to the limited liability company and the members of the limited liability company, commonly referred to as the duties of care and loyalty.[27] Generally, a member of a Delaware limited liability company, acting in such capacity, does not have fiduciary duties under Delaware law so long as it does not exercise control over the company.[28] With respect to the CT

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[26] It should also be noted that the Options Price Reporting Authority Plan is structured as an LLC, with similar limitation of liability provisions. https://assets.website-files.com/5ba40927ac854d8c97bc92d7/5d0bd57d87d3ccca102102d7_OPRA%20Plan%20with%20Updated%20Exhibit%20A%20-%2006-19-2019.pdf.

[27] *See Feeley v. NHAOCG, LLC*, 62 A.3d 649, 661-63 (Del. Ch. 2012) (explaining that managers owe default fiduciary duties of loyalty and care to the limited liability company and the members of the limited liability company unless they are modified in the limited liability company agreement); *Kelly v. Blum*, 2010 WL 629850, at *10 (Del. Ch. Feb. 24, 2010) (citing 6 *Del. C.* § 18-1101(c)) ("In the case of fiduciary duties, the LLC Act permits LLC contracting parties to expand, restrict, or eliminate duties, including fiduciary duties, owed by members and managers to each other and to the LLC.").

[28] *See Beach to Bay Real Estate Ctr. LLC v. Beach to Bay Realtors Inc.*, 2017 WL 2928033, at *5 (Del. Ch. July 10, 2017) ("[I]t is well settled that only managing members or controllers owe fiduciary duties by default in LLCs."), *as revised* (July 11, 2017); *Feeley*, 62 A.3d at 662 ("Managers and managing members owe default fiduciary duties; passive members do not."); *Kuroda v. SPJS Holdings, L.L.C.*, 2010 WL 925853, at *7 (Del. Ch. Mar. 16, 2010)

Plan, the Operating Committee has managerial responsibility for the operations of the CT Plan and the Members of the CT Plan only have limited rights to take actions. In addition, no individual Member of the CT Plan has the ability to control the actions of the CT Plan. Therefore, it is unlikely that under Delaware law the Members of the CT Plan, when acting in such capacity, would owe fiduciary duties to the CT Plan or the Members even in the absence of Section 3.7(e). Section 3.7(e) therefore confirms the outcome that is likely under Delaware law in the first place, which is that the Members, acting in such capacity, do not owe fiduciary duties to the CT Plan or the other Members. Moreover, since the Plan is a product of federal law, it would be inappropriate to subject its Members to state fiduciary duties, as this would give rise to a potential conflict between state and federal law. Presumably, the Commission would not wish to have the obligations of Members adjudicated by a Delaware state court.

The fiduciary status of Non-SRO Voting Representatives under Delaware law and the LLC Agreement is less clear, since they are members of the Operating Committee that are appointed to represent a specific constituency but do not benefit from an explicit disclaimer of fiduciary duty in the Plan. In the interest of consistent treatment under state law, there would be some logic in expanding the disclaimer of fiduciary duties to cover them. That said, there is no change that would address the discrepancy between the federal law obligations of the Members and the Non-SRO Voting Representatives. SEC Rule 608 would require the Members to comply with the Plan and to enforce compliance by their broker members; neither that rule, nor any other provision of law, imposes corresponding duties on the Non-SRO Voting Representatives. The Commission's decision to give Plan voting rights to individuals who are not also accountable to the Commission is one of the foundational weaknesses of the Order, and by extension, the proposed Plan.

Question 14

Article IV, Section 4.1(a) of the proposed CT Plan states that the responsibilities of the Operating Committee include "interpreting the Agreement and its provisions." Do commenters believe it is appropriate for the Operating Committee to develop its own interpretation of the meaning of the CT Plan and its provisions? Should all interpretations of the CT Plan be required to be in writing? Should all interpretations of the CT Plan be required to be made publicly available for comment before being adopted or taking effect? Should all interpretations of the CT Plan be submitted in writing to the Commission or to Commission staff before being adopted or taking effect? Should the CT Plan include policies and procedures to distinguish operational interpretations of the CT Plan from amendments required to be submitted to the Commission under Rule 608 of Regulation NMS?

As noted above, the Operating Committee has full and complete control over the business and affairs of the CT Plan,[29] including interpretations of the CT Plan. Any formal interpretations of the CT Plan would be subject to discussion at a meeting of the Operating Committee, and "the

(holding that since the member had "no control, power or authority" over the limited liability company and "was neither a manager of . . . [the limited liability company] nor a controlling member," the member did not owe fiduciary duties but the member did owe contractual duties).

[29] *See* Proposed LLC Agreement, § 4.1(a).

duly approved minutes of the Operating Committee with detail sufficient to inform the public on matters under discussion and the views expressed thereon (without attribution)" will be available to the public.[30] The CT Plan therefore already provides sufficient notice to the public and all interested parties of interpretations of the CT Plan, rendering superfluous any requirement that interpretations be in writing.

Question 15

Article IV, Section 4.1(b) of the proposed CT Plan proposes to allow the Operating Committee to delegate "administrative functions" to a subcommittee or to one or more of the Members (i.e., SROs) or to one or more Non-SRO Voting Representatives or to another person, such as the Administrator. Thus, the Operating Committee would be empowered to delegate an administrative function only to SROs, or only to Non-SRO Voting Representatives. Should the CT Plan specify the "administrative functions" that would be covered by this provision? Do commenters believe the CT Plan should permit the Operating Committee to delegate "administrative functions" to a subcommittee consisting only of SROs? Do commenters have concerns that, under this proposed provision, an SRO-only subcommittee could discuss the details of an administrative matter without input from Non-SRO Voting Representatives? Do commenters believe the CT Plan should permit the Operating Committee to delegate "administrative functions" to a subcommittee consisting only of Non-SRO Voting Representatives? Section 4.1(b) also provides that a subcommittee cannot take any actions that require approval of the Operating Committee. Does the limitation that a subcommittee cannot take actions that require Operating Committee approval mitigate concerns about the delegation of "administrative functions"? What, if any, actions could a subcommittee take without approval of the Operating Committee pursuant to Section 4.3?

This question implies a misinterpretation of Section 4.1(b). The provision providing for delegation must be read in the context of the notation that, "[f]or the avoidance of doubt, no delegation to a subcommittee shall contravene Section 4.3 and no subcommittee shall take actions requiring approval of the Operating Committee pursuant to Section 4.3 unless such approval shall have been obtained." As such, there would be no delegation of the Operating Committee's voting authority under Section 4.3, but solely the authority to implement a decision by the Operating Committee, develop a proposal for Operating Committee consideration, or perform other ministerial functions on the Operating Committee's behalf. Requiring an Operating Committee vote should mitigate any concern about undue delegation of authority to an SRO or non-SRO voting representative.

Subcommittees provide an efficient mechanism to develop proposals for Operating Committee consideration. They are voluntarily staffed by Operating Committee Members and Member Observers. Unnecessarily limiting subcommittee deliberations would constrain the ability of the Operating Committee to do its work effectively and efficiently.

Question 16

[30] *Id.* § 1.1(kkk) (definition of "Public Information").

Article IV, Section 4.2(b) of the proposed CT Plan discusses Non-SRO Voting Representatives, including term limits, the selection process for the initial Non-SRO Voting Representatives, and the nomination and election process for Non-SRO Voting Representative replacements. Do commenters believe that the proposed process—including public notice requesting nominations, listing nominated individuals, and soliciting and discussing any public comments received—is fair and transparent? Do commenters believe that the CT Plan should be required to use any means beyond publication on its website to seek interested, qualified candidates to be nominated and for public comment to be solicited? If so, which means? Do commenters believe that a Non-SRO Voting Representative should be permitted, in addition to nominating himself or herself, to nominate other persons to serve as a Non-SRO Voting Representative? If so, should that be explicitly stated in the CT Plan?

The proposed CT Plan authorizes the initial Non-SRO voting representative for each category to be "selected by a majority vote of the Advisory Committee Members."[31] The notion that the non-SRO representatives can select themselves without SRO approval is inconsistent with the statutory authorization for the national market system under Section 11A of the Act[32] and Rule 608 under Regulation NMS,[33] and is in conflict with the authority granted to SROs by Sections 6 and 19 of the Act.[34]

Question 18

Article IV, Section 4.2(b) provides that Non-SRO Voting Representatives shall serve for two-year terms for a maximum of two terms total, whether consecutive or nonconsecutive. Is the proposed maximum of two terms an appropriate limit on the number of terms a Non-SRO Voting Representative may serve on the Operating Committee? Should the limit on the number of terms be increased or decreased? Should it be eliminated? Do commenters believe that similar term limits should apply to SRO Voting Representatives? What are commenters' views on whether a lifetime limitation on service that applies only to Non-SRO Voting Representatives would support the meaningful and informed participation of Non-SRO Voting Representatives on the Operating Committee? Do commenters believe there is a sufficiently large pool of qualified and informed persons able to serve as Non-SRO Voting Representatives to sustain a diversity of views on the Operating Committee over time if the proposed term limits were adopted?

An SRO Voting Representative is not acting as an individual, but as a representative of a self-regulatory organization required to "act jointly" with other self-regulatory organizations "with respect to matters as to which they share authority under this title in planning, developing, operating, or regulating a national market system . . . ."[35] The concept of term limits—invented to limit the number of terms an individual may serve in an elected or appointed office—is

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[31] *Id.* § 4.2(b)(i).

[32] 15 U.S.C. § 78k-1.

[33] 17 C.F.R. § 242.608(3) (emphasis added).

[34] 15 U.S.C. §§ 78f, 78s.

[35] 17 U.S.C. § 78k-1(a)(3)(B).

meaningless in the context of an office held by a legal entity, which may change its Voting Representative at any time. Applying a term limit to an SRO voting representative will not change voting—the vote will always be on behalf of the entity and not the individual—but will interfere with the ability of the self-regulatory organization to discharge its responsibilities under the Exchange Act through the individual it determines is best able to execute those functions. Nasdaq therefore strongly opposes term limits for SRO Voting Representatives.

Question 19

Article IV, Section 4.3(c) of the proposed CT Plan delineates several circumstances, in addition to those described in the Order—which are the selection of Non-SRO Voting Representatives and the decision to enter Executive Session—in which an augmented majority vote of the Operating Committee would not be required. The Commission requests comment on each of the proposed CT Plan provisions that would permit action by a majority vote of the SROs. Specifically, do commenters believe that the CT Plan should include additional details on the proposed provisions with respect to: (i) the operation of the CT Plan as an LLC, (ii) modifications to LLC-related provisions of the proposed CT Plan, and (iii) the selection (including appointment and removal) of Officers of the CT Plan, other than the Chair? Would permitting action by the SROs alone with respect to these elements of CT Plan operation be consistent with providing a meaningful role to non-SROs in the governance of the collection, processing, and dissemination of equity market data? Should an augmented majority vote of the Operating Committee be required for any or all aspects of the operation of the CT Plan as an LLC? If so, which ones?

The additional actions that do not require an augmented majority vote of the Operating Committee, and the reasons they are appropriate, are as follows:

- Decisions concerning the operation of the CT Plan as an LLC as specified in Section 10.3 and Section 11.2 –
    - The ability to operate as an LLC as specified in Section 10.3 is limited. The role of the Operating Committee in Section 10.3 is to appoint an entity as the "Partnership Representative" to represent the CT Plan in connection with tax audits and litigation. Because the role of the Partnership Representative is limited to matters that affect the economics of ownership of the LLC and do not affect the dissemination of equity market data, there is no role for the Non-SRO Voting Representatives in the decision.
    - The ability to operate as an LLC as specified in Section 11.2 is likewise limited. Section 11.2, which applies to the winding up of the CT Plan after its dissolution, by its terms, does not provide the Operating Committee with any role in the winding up of the CT Plan
- Modifications to LLC-related provisions of the LLC Agreement pursuant to Section 13.5(b) –

- See response to question #3 above.

- Selection of Officers of the CT Plan (other than the Chair), pursuant to Section 4.8 –

  - See response to Question 3 above.

Question 20

Article IV, Section 4.4(g) of the proposed CT Plan would permit Member Observers to attend Executive Sessions of the Operating Committee. Do commenters believe that permitting Member Observers to attend Executive Sessions is necessary? If so, under what circumstances do commenters believe Member Observers should attend? Should the CT Plan limit the ability of some or all Member Observers to attend Executive Session, Operating Committee, or subcommittee meetings? If so, under what circumstances should such attendance be limited and to what subset, if any, of Member Observers should such limitations apply?

As explained in response to Question 7, the Voting Representative regularly requires expert advice on legal, technical, regulatory, systems and business matters before the Operating Committee. Any limitation on the participation of Member Observers would be inherently arbitrary, as there is no objective standard with which to predict when expert or other assistance may be necessary. In order to fulfill their statutory and regulatory responsibilities, SROs must be able to use their judgment concerning the need for legal, technical or other expert advice in matters before the Executive Committee.

Question 21

Article IV, Section 4.4(g) of the proposed CT Plan provides that items for discussion within an Executive Session should be limited to those "for which it is appropriate to exclude Non-SRO Voting Representatives," identified as: (i) any topic that requires discussion of Highly Confidential Information; (ii) vendor or subscriber audit findings; and (iii) litigation matters. The proposed CT Plan further provides that the above items are "not dispositive of all matters that may by their nature require discussion in an Executive Session." The Commission requests comment on the specified items proposed in the CT Plan as appropriate topics for Executive Session. Do commenters agree, for example, that any topic that requires discussion of Highly Confidential Information should not be considered by the full Operating Committee? Do commenters believe that there are sufficient mechanisms in place under the CT Plan to ensure that the use of Executive Session is appropriate? If not, what mechanisms should be added? Should the list of permissible topics for Executive Session be delineated more specifically in the CT Plan? What, if any, additional permissible topics should be included? What, if any, topics should be specifically excluded? Would the proposed provision that the topics identified in the CT Plan are "not dispositive of all matters that may by their nature require discussion in an Executive Session" allow the SROs excessive discretion to limit or prevent the participation of Non-SRO Voting Representatives in certain CT Plan matters? Should the CT Plan specify a limited set of categories of items that could be discussed in Executive Session? If so, what categories should be included, and what level of detail regarding these categories would be

appropriate?

From time to time, the Operating Committee will be required to discuss "highly sensitive Member-specific, customer-specific, individual-specific, or otherwise sensitive information relating to the Operating Committee, Members, Vendors, Subscribers, or customers that is not otherwise Restricted Information."[36] Examples of this, as listed in the proposed CT Plan, include "[t]he Company's contract negotiations with the Processors or Administrator; personnel matters; information concerning the intellectual property of Members or customers; and any document subject to the Attorney-Client Privilege or Work Product Doctrine."[37] To prevent overuse of Executive Session, the basis for discussing a matter in Executive Session must be made explicit and publicly disclosed: "[a] request to create an Executive Session must be included on the written agenda for an Operating Committee meeting, along with the clearly stated rationale as to why such item to be discussed would be appropriate for Executive Session."[38]

Executive Sessions have rarely been used in recent years. Publicly disclosing the basis for Executive Sessions will ensure that they will continue to be called only when needed.

Question 22

Article IV, Section 4.5 of the proposed CT Plan provides that the CT Plan is not prohibited from employing or dealing with persons in which an SRO or any of its affiliates has a connection or a direct or indirect interest. What relevant CT Plan employment relationships or business dealings do commenters believe might be covered by this provision? Are there specific types of employment relationships or business dealings that should be prohibited? Are there specific types of employment relationships or business dealings that should be permitted? If the CT Plan permits such employment relationships or business dealings, should it also require the relevant SROs to maintain information barriers between themselves and the affiliates or persons that have employment relationships or business dealings with the CT Plan? If so, what type of information barrier would be appropriate? In commenters' views, could Section 4.5 permit conflicts of interest that should be disclosed under the conflicts of interest policy? If so, what modifications to that policy, if any, should be made? Do commenters think that any additional disclosure, recusal, or voting procedures should be required before the CT Plan employs or deals with persons in which an SRO or any of its affiliates has a direct or indirect interest or a connection?

Although the CT Plan provides that the "Administrator selected by the Operating Committee may not be owned or controlled by a corporate entity that, either directly or via

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[36] Proposed LLC Agreement, § 1.1(ii).

[37] *Id.* § 1.1(ii).

[38] *Id.* § 4.4(g); *see also id.* § 4.4(g)(iii) ("Requests to discuss a topic in Executive Session must be included on the written agenda for the Operating Committee meeting, along with the clearly stated rationale for each topic as to why such discussion is appropriate for Executive Session. Such rationale may be that the topic to be discussed falls within the list provided in subparagraph (g)(i).").

another subsidiary, offers for sale its own PDP,"[39] there is no such limitation on the Processor. Two proposed CT Plan Members currently provide processing services to the UTP and CTA/CQ Plans, and Section 4.5, which, among other things, allows the Company to employ a Member or its Affiliates to render or perform a service for the CT Plan, would allow this arrangement to continue.

Employing a Member as Processor has allowed the Operating Committee to apply the cutting-edge technology that Members have developed in exchange operations to the dissemination of consolidated data. The Commission has implicitly acknowledged this beneficial relationship by allowing Member organizations to continue to be employed as Plan Processors. Any limitation on the ability of the CT Plan to contract with a Member may jeopardize this relationship. To the degree that there are concerns about confidentiality or conflicts of interest, these should be addressed in the context of those policies, or through contractual agreements with the processors, not by any limitation on the ability of the CT Plan to contract with the entity best able to provide the required service.

Question 23

Article IV, Section 4.6 of the proposed CT Plan permits the SROs to engage in business activities outside of the business activities of the CT Plan, including through investments or business relationships with other persons engaged in market data services or through strategic relationships with businesses that are or may be competitive with the CT Plan. What specific types of business activities would be covered by this provision? Would any of these business activities create a conflict of interest with an SRO's obligations with respect to the CT Plan under the federal securities laws, rules, and regulations? Are any potential conflicts of interest sufficiently mitigated by the conflicts of interest policy? If not, how should the CT Plan address such conflicts of interest?

The purpose of the CT Plan is limited to the "collection, consolidation, and dissemination of Transaction Reports, Quotation Information, and other such information concerning Eligible Securities as the Members shall agree as provided herein,"[40] and the other purposes set forth in Section 2.4 of the proposed CT Plan.

Imposing limits on the business activities of the SROs is not within the scope of the CT Plan, is unwarranted, and would require specific rulemaking by the Commission. The CT Plan is not an appropriate vehicle for a substantive regulation of SRO operations.

Question 24

Section 4.6(b) provides that none of the SROs shall be obligated to recommend or take any action that prefers the interest of the CT Plan or any other Member over its own interests, and it also provides that none of the SROs will be obligated to inform or present to the CT Plan any opportunity, relationship, or investment. This provision defines investments or other business

[39] *Id.* § 6.3.

[40] *Id.* § 2.4(a)(i).

relationships with persons engaged in the business of the CT Plan other than through the CT Plan as "Other Business." What specific types of opportunities, relationships, or investments would be covered by this provision? Would any of these opportunities, relationships, or investments create a conflict of interest with an SRO's obligations with respect to the CT Plan under the federal securities laws, rules, and regulations? Exhibit B of the proposed CT Plan provides a list of questions and instructions tailored to elicit responses that disclose potential conflicts of interest. In response to these questions, would the SROs be required to disclose certain opportunities, relationships, or investments? Would these disclosures sufficiently mitigate any conflicts of interest? If not, how should the CT Plan address such conflicts of interest? Should the CT Plan require that an SRO's representatives (SRO Voting Representative or Member Observer, as applicable) be recused from discussion of, or voting on, matters relating to opportunities, relationships, or investments when the SRO's interests may be in conflict with the goals of the CT Plan?

As noted in response to Question 12, each of the Members has obligations under federal securities laws, and it is those obligations, rather than the obligations of Members to the CT Plan and each other, that will ensure that the Members comply with their responsibilities regarding the dissemination of real-time consolidated equity market data.

Also, as discussed in response to Question 31 below, the disclosures set forth in Exhibit B of the CT Plan are more than adequate to identify, and mitigate, any potential conflict of interest.

Question 25

Do commenters believe that Section 4.6(b) could be interpreted in a manner that could result in the SROs acting inconsistently with their obligations under the federal securities laws, rules, and regulations? Could this language result in an SRO voting against needed improvements to the provision of consolidated equity market data? Do commenters have other concerns with the proposed provision? If so, how could such concerns be mitigated?

Section 4.6(b) is a waiver of the corporate opportunities doctrine, which generally provides that a person with fiduciary duties may not divert to themselves or their affiliates any business opportunity that belongs to the company.[41] As noted in response to Question 12 above, the Members of the CT Plan likely do not have fiduciary duties to the CT Plan under default Delaware law, and Section 3.7(e) further clarifies that the Members do not have such duties. For these reasons, the Members likely are not subject to the corporate opportunities doctrine even in the absence of Section 4.6(b). Nevertheless, the Members of the CT Plan are large companies with complex business dealings and the CT Plan is formed for the limited purpose of creating a

[41] *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 155 (Del. 1996) (citing *Guth v. Loft, Inc.*, 5 A.2d 503, 509 (1939)) (explaining the corporate opportunity doctrine prohibits a fiduciary from taking a business opportunity for itself in certain situations); *Grove v. Brown*, 2013 WL 4041495, at *8 (Del. Ch. Aug. 8, 2013) ("The corporate opportunity doctrine is a consequence of a fiduciary's duty of loyalty, and it exists to prevent officers or directors of a corporation—or, as in this case, a managing member of an LLC—from personally benefiting from opportunities belonging to the corporation.").

new system to govern the public dissemination of real-time consolidated equity market data. Because the CT Plan has a limited purpose, the fact that the Members have confirmed to each other that other business opportunities do not need to be pursued through the CT Plan will not affect the public dissemination of information.

Moreover, an express waiver of the corporate opportunities doctrine does not affect any of the obligations that SROs have under the federal securities laws. It simply means that a Member cannot be sued for a breach of the corporate opportunities doctrine by the CT Plan or the Members of the CT Plan.[42]

Question 26

Article IV, Section 4.7(a) of the proposed CT Plan provides that subcommittee chairs will be selected by the Chair from SRO Voting Representatives or Member Observers with input from the Operating Committee. What are commenters' views on whether Non-SRO Voting Representatives should be unable to serve as a subcommittee chair? What are commenters' views on whether Member Observers should be permitted to serve as a subcommittee chair? Do commenters believe that the CT Plan should permit Non-SRO Voting Representatives to serve as chair, co-chair, or vice-chair of any subcommittees of the Operating Committee? Should subcommittees of the Operating Committee be required to have the same relative balance of membership between SRO Voting Representatives and Non-SRO Voting Representatives as the Operating Committee itself? Should Member Observers be permitted to participate in subcommittee deliberations?

While Nasdaq does not object to Non-SRO Voting Representatives becoming subcommittee chairs in principle, Non-SRO Voting Representatives must be prohibited from participation in the Legal Subcommittee, as that would potentially waive the attorney-client privilege. Likewise, limitations on Member Observers' participation in subcommittees would be antithetical to the purpose of many subcommittees. For example, Member Observers who are attorneys participate in the Legal Subcommittee, while Member Observers who are technologists participate in the Systems Subcommittee.

In addition, requiring any specific subcommittee to "have the same relative balance of membership between SRO Voting Representatives and Non-SRO Voting Representatives as the Operating Committee itself" is unnecessary and excessively bureaucratic, in that: (i) subcommittees are filled by volunteers with no numerical limit; and (ii) subcommittees generally exist to develop proposals for Operating Committee consideration and it is the Operating Committee, not subcommittees, that acts on behalf of the Plan. As stated in the Proposed LLC Agreement: "[f]or the avoidance of doubt, no delegation to a subcommittee shall contravene Section 4.3 and no subcommittee shall take actions requiring approval of the Operating Committee pursuant to Section 4.3 unless such approval shall have been obtained."[43]

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[42] *See 77 Charters, Inc. v. Gould*, 2020 WL 2520272, at *12-13 (Del. Ch. May 18, 2020) (explaining that since the agreement at issue waived the corporate opportunity doctrine, the defendant had no obligation to share opportunities with the company).

[43] Proposed LLC Agreement, § 4.3(b).

Question 27

Section 4.7(c) provides that SRO Voting Representatives, Member Observers, and other persons as deemed appropriate by the SRO Voting Representatives may meet in a subcommittee to discuss an item subject to attorney-client privilege of the CT Plan or that is attorney work product of the CT Plan. What are commenters' views on the scope of the "other persons" who may be deemed appropriate by the SRO Voting Representatives to discuss an item subject to attorney-client privilege of the CT Plan or that is attorney work product of the CT Plan? Should there be any limitations? If so, what limitations would be appropriate?

The CT Plan provides that "SRO Voting Representatives, Member Observers, and other persons as deemed appropriate by the SRO Voting Representatives may meet in a subcommittee to discuss an item subject to the attorney-client privilege of the Company or that is attorney work product of the Company."[44] Naturally, such "other persons" would primarily be counsel hired by the CT Plan, but might also include, for example, persons with information relevant to a privileged matter, or experts assisting counsel. Placing any sort of limitation on the ability of the Members to consult with counsel or the persons whom counsel may consult in order to provide legal advice to the Members would place an arbitrary and capricious limitation on the attorney-client relationship, and is beyond the power of the Commission.

Question 30

Article IV, Section 4.10 of the proposed CT Plan sets forth provisions for recusals and for the disclosure of conflicts of interest and provides that the Members, the Processors, the Administrator, the Non-SRO Voting Representatives, and each service provider or subcontractor engaged in CT Plan business that has access to Restricted or Highly Confidential Information shall be subject to Section 4.10 and Exhibit B to the CT Plan. Exhibit B to the CT Plan provides a list of questions and instructions tailored to elicit responses that disclose potential conflicts of interest. Do commenters believe that Member Observers should be expressly subject to Section 4.10 and Exhibit B? If so, do commenters believe that the same disclosure requirements and recusal provisions that apply to Members and other identified persons would sufficiently mitigate any conflicts of interest faced by Member Observers? If not, what additional disclosures or recusal provisions do commenters believe would be appropriate? Do commenters believe that Officers of the CT Plan should be expressly subject to Section 4.10 and Exhibit B? If so, do commenters believe that the same disclosure requirements and recusal provisions that apply to Members and other identified persons would sufficiently mitigate any conflicts of interest faced by Officers? If not, what additional disclosures or recusal provisions do commenters believe would be appropriate?

A "Member Observer," defined as "any individual, other than a Voting Representative, that a Member, in its sole discretion, determines is necessary in connection with such Member's compliance with its obligations under Rule 608(c) of Regulation NMS to attend Operating

[44] *Id.* § 4.7(c).

Committee and subcommittee meetings,"[45] is an agent of the Member. Most Member Observers are employees of the Member charged with that Member's compliance obligations under Rule 608(c), and therefore included within the disclosures of that Member. Other Member Observers may be outside counsel, experts reporting to counsel, or other individuals advising the Member on compliance or other obligations. It would be improper for the Commission to limit the ability of counsel to obtain information necessary to advise a client, or the ability of corporate management to obtain information necessary to operate their business.

The identity and affiliation of the Member Observer would be disclosed in meeting minutes, and any reasonable questions concerning the Member Observer's affiliation could be addressed at the Operating Committee meeting.

Question 31

Article IV, Section 4.6 of the proposed CT Plan addresses the ability of SROs to engage in certain business activities outside of the business activities of the CT Plan. Do commenters believe that the disclosure requirements under Section 4.10 and Exhibit B elicit sufficient relevant information to mitigate conflicts of interest that may result from such business activities? If not, how should the SROs update the conflicts of interest policy of the CT Plan to address this?

The questions enumerated under Exhibit B require a Member to provide information about whether it is profit or not-for-profit,[46] whether it is publicly or privately owned,[47] if privately owned, a list of any owner with an interest of 5% or more of the Member,[48] detailed information concerning any Proprietary Data Product ("PDP")[49] offered by the Member, the names of Voting Representatives and a narrative description of that individual's role within the organization and in the development, dissemination, sales or marketing of PDP, as well as that person's compensation structure,[50] and any other "relationships or material economic interests that could be perceived by a reasonable objective observer to present a potential conflict of interest with their responsibilities to the Company."[51] Disclosures such as these are more than adequate to identify any potential conflict of interest.

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[45] *Id.* § 1.1(oo)

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* Exh. B (a)(ii). Proprietary Market Data products include "Transaction Reports and Quotation Information data in Eligible Securities from a Member's Market or a Trading Center, and if from a Member, is filed with the Commission." *Id.* § 1.1(fff).

[50] *Id.* Exh. B (a)(iii).

[51] *Id.* Exh. B (a)(iv).

Question 32

Article IV, Section 4.10(d) of the proposed CT Plan provides that, if the Commission's approval of the conflicts of interest policies filed by the CQ Plan, the CTA Plan, or UTP Plan is stayed or overturned (for example, by a court), the requirements of Section 4.10 and Exhibit B of the CT Plan shall not apply. What are commenters' views on whether such a provision is necessary or appropriate for the CT Plan? Do commenters believe that the CT Plan should, at a minimum, contain provisions for addressing conflicts of interest that are not subject to elimination, or provisions specifying that the CT Plan must be amended to include a new policy with respect to conflicts of interest before the existing policy can be removed?

The proposed CT Plan provides that "[i]f the Commission's approval order of the conflicts of interest policies filed by the CQ Plan, CTA Plan, or UTP Plan is stayed or overturned by a Governmental Authority, the requirements of this Section 4.10 and Exhibit B shall not apply."[52]

The policies referenced are the subject of pending litigation. It would be inappropriate to mandate the continued effectiveness of the provision following a judicial determination that it is contrary to law. Nothing in the proposed Plan prevents the Operating Committee from instituting a revised policy that is consistent with the court's ruling if and when the need arises.

Question 33

Article IV, Section 4.11(a) of the proposed CT Plan states that the SROs and the Non-SRO Voting Representatives are subject to the Confidentiality Policy set forth in Exhibit C to the CT Plan. Do commenters believe that Section 4.10(a) should be modified to expressly apply to Member Observers? Do commenters believe that the definition of Member Observer should be more narrowly tailored to limit the individuals within an SRO that have access to Highly Confidential or Confidential Information? Should Member Observers be prohibited from receiving Restricted or Highly Confidential Information, or be excluded from being present when such information is discussed? Should Member Observers be required to demonstrate a legitimate or particularized need for specific Restricted or Highly Confidential Information before being granted access? Are there other confidentiality provisions that should expressly apply to Member Observers?

As explained in response to Question 30, Member Observers are agents of the Member, most of whom are employees of the Member and subject to its confidentiality policies, or outside counsel, or other individuals advising the Member on compliance or other obligations. It would be improper for the Commission to arbitrarily and capriciously limit the ability of counsel to obtain information necessary to advise a client, or the ability of corporate management to obtain information necessary to operate their business.

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[52] *Id.* § 4.10(d)

Question 34

Article IV, Section 4.11(b) of the proposed CT Plan provides that, if the Commission's approval of the confidentiality policies filed by the CQ Plan, the CTA Plan, or UTP Plan is stayed or overturned (for example, by a court), the requirements of Section 4.11 and Exhibit C of the CT Plan shall not apply. What are commenters' views on whether such a provision is necessary or appropriate for the CT Plan? Do commenters believe that the CT Plan should, at a minimum, contain provisions for identifying and protecting confidential information that are not subject to elimination, or provisions specifying that the CT Plan must be amended to include a new policy with respect to confidential information before the existing policy can be removed?

As stated in response to Question 32, the policies referenced are the subject of pending litigation, and it would be inappropriate to maintain a provision following a judicial determination that it is contrary to law.

Question 39

Should the CT Plan specify in detail the minimum performance standards applicable to the Processor? For example, should the CT Plan set minimum standards for the timely dissemination of information, bandwidth, or other metrics? If so, what minimum standards would be appropriate?

Financial services technology changes rapidly. Technological standards that might have been appropriate when Regulation NMS was adopted in 2005, for example, are no longer relevant today. It is the responsibility of the Operating Committee to establish standards and adjust them in light of changing technology. Codifying technical standards in the CT Plan would interfere with the Operating Committee's ability to respond to changing conditions.

Question 47

Articles VIII and IX of the proposed CT Plan govern the use of capital accounts under the CT Plan, including contributions to and distributions from such accounts, and allocations to the SROs. What are commenters' views regarding these provisions? Would these provisions serve to prohibit unreasonable discrimination with regard to the allocation of capital contributions, distributions, and profits and losses among the SROs? If not, how should these provisions be modified?

Article VIII addresses Capital Contributions and Capital Accounts, and Article IX addresses Allocations among Members, providing that "all items of income, gain, loss, and deduction shall be allocated among the Members in accordance with Exhibit D."[53] Exhibit D outlines the methodology for revenue sharing among Members.

Nasdaq has proposed two changes to the revenue allocation formula not reflected in the

[53] *Id.* § 9.2(a).

proposed CT Plan.[54] First, Nasdaq favors revising the revenue allocation formula to reward exchanges that display quotes that result in an execution. Second, Nasdaq proposes removing Over-the-Counter Bulletin Board ("OTCBB") data from the Nasdaq SIP to lower costs.

Prior to 2005, revenue attributable to consolidated data sales was distributed among the exchanges according to the trades and shares each exchange executed as a percentage of the whole, not taking quotations into account. With Regulation NMS, the Commission changed the formula to allocate revenue to equally reward trade executions and displayed quotations. Over time, however, certain exchanges skewed that allocation by attracting displayed quotations without executing a commensurate number of trades. If the goal of consolidated data is to improve market quality, the revenue allocation formula should aim to improve the quality of quotes on public exchanges, where available liquidity is always on display and an execution can be accomplished. To accomplish this goal, the revenue allocation formula should be adjusted to reward exchanges that display quotes that result in an execution.

OTCBB data was included in the Nasdaq SIP at its inception in 1990, when FINRA operated the SIP and Nasdaq as a single, integrated system. Although the SIP was separated from Nasdaq systems in 2002, and Nasdaq registered as an independent exchange in 2006, the allocation formula set forth in Exhibit D still provides that "6.25% of the revenue received by the Company during such calendar year attributable to the segment of the Data Feeds reflecting the dissemination of information with Network C Securities and FINRA OTC Data . . . shall be paid to FINRA as compensation for the FINRA OTC Data . . . ."[55] In 2008, the Operating Committee submitted Amendment 21 to remove OTCBB data, but it was not acted upon. The revenue allocated to FINRA for OTCBB data should be reallocated to investors.

Question 52

Article XIII, Section 13.5 of the proposed CT Plan governs amendments to the CT Plan. Section 13.5(b) provides that Articles IX (Allocations), X (Records and Accounting; Reports), XI (Dissolution and Termination), and XII (Exculpation and Indemnification) may be modified upon approval by a majority of Members; provided, however, that Operating Committee approval will be required for modifications to the allocation of all items of income, gain, loss, and deduction. Do commenters believe that amendments to Articles IX through XII of the CT Plan should be subject to the approval only of SROs? Do commenters believe that Non-SRO Voting Representatives should also have voting rights with respect to the approval of amendments to Articles IX through XII of the CT Plan?

See response to Question 3 above.

Question 54

Paragraph (j) of Exhibit D to the proposed CT Plan provides the definition of the term Net

[54] *See* A. Friedman, TotalMarkets: A Blueprint for a Better Tomorrow, (April 10, 2019), available at https://www.nasdaq.com/docs/Nasdaq_TotalMarkets_2019_2.pdf.

[55] Proposed LLC Agreement, Exh. D (j)(ii).

Distributable Operating Income. Do commenters believe that this definition provides sufficient and appropriate detail for the CT Plan to calculate the Net Distributable Operating Income? Do commenters believe that further details would be appropriate or necessary for the CT Plan to determine the Net Distributable Operating Income?

As noted in response to Question 47 above, Paragraph (j) provides that "6.25% of the revenue received by the Company during such calendar year attributable to the segment of the Data Feeds reflecting the dissemination of information with Network C Securities and FINRA OTC Data . . . shall be paid to FINRA as compensation for the FINRA OTC Data . . . ."[56] For the reasons set forth in response to Question 47, this antiquated revenue allocation provision serves no ongoing purpose, and should be removed from Exhibit D.

Question 58

Article I, Section 1.1(oo) of the proposed CT Plan would allow SROs to select Member Observers, and Article IV, Section 4.4(g) of the proposed CT Plan would permit Member Observers to attend general and Executive Session meetings of the CT Plan. What effect, if any, do commenters believe the ability of the SROs to select Member Observers, who would have access to Confidential Information and Highly Confidential Information, would have on competition?

As noted in response to Question 30, a Member Observer is an agent of the Member, and includes employees, outside counsel, or other individuals advising the Member on compliance obligations. Limiting the ability of Members to obtain legal and technical advice and of senior management to run their companies would hamper the ability of the exchanges to run their companies efficiently, placing an undue burden on their ability to compete in the marketplace.

[56] *Id.*

APPENDIX B

The Nasdaq Stock Market LLC, et al. v. Securities and Exchange Commission
Opening Brief for Petitioners

[INITIAL BRIEF]

ORAL ARGUMENT NOT YET SCHEDULED
No. 20-1181, Consolidated with Nos. 20-1192, 20-1231

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE NASDAQ STOCK MARKET LLC, et al.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petitions For Review Of An Order
Of The United States Securities And Exchange Commission

OPENING BRIEF FOR PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28, petitioners submit this Certificate as to Parties, Rulings, and Related Cases:

A. Parties

The parties in this case are petitioners The Nasdaq Stock Market LLC, Nasdaq BX, Inc., Nasdaq PHLX LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., NYSE National, Inc., Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., and Cboe Exchange, Inc., and respondent United States Securities and Exchange Commission (the "Commission"). There are currently no intervenors or *amici*.

B. Rulings Under Review

Petitioners seek review, under 15 U.S.C. § 78y, of the Commission's final order entitled Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Release No. 34-88827, 85 Fed. Reg. 28,702 (May 13, 2020). *See* JA_.

C. Related Cases

This matter has not previously been before this Court. The Court consolidated the petition in Case No. 20-1181 with the petitions in Case Nos. 20-1192 and 20-1231.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and this Court's Rule 26.1, petitioners state as follows:

The Nasdaq Stock Market LLC, Nasdaq BX, Inc., and Nasdaq PHLX LLC are registered national securities exchanges. Each is a Delaware corporation and is wholly owned by Nasdaq, Inc., a public company. Borse Dubai Limited and Investor AB own more than 10% of Nasdaq, Inc.'s shares.

New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. are indirect, wholly owned subsidiaries of Intercontinental Exchange, Inc., a public company. Intercontinental Exchange, Inc. has no parent corporation and, as of the date hereof, no publicly held company owns 10% or more of its stock.

Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., and Cboe Exchange, Inc. are each a direct or indirect wholly-owned subsidiary of Cboe Global Markets, Inc., a public company. Cboe Global Markets, Inc. has no parent corporation; T. Rowe Price Associates, Inc. and The Vanguard Group, Inc. owned 10% or more of Cboe Global Markets, Inc.'s common stock as of June 30, 2020.

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GLOSSARY

APA	Administrative Procedure Act
Commission	United States Securities and Exchange Commission
Equity Data Plans	The National Market System plans that currently govern the dissemination of core market data for equity securities
Exchange Act	Securities Exchange Act of 1934
Nasdaq	The Nasdaq Stock Market LLC
New Consolidated Data Plan	The National Market System plan that, under the NMS Governance Order, will replace the Equity Data Plans
NMS	National Market System
NMS Governance Order	Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Release No. 34-88827, 85 Fed. Reg. 28,702 (May 13, 2020)
NYSE	New York Stock Exchange LLC
Proposed Data Infrastructure Rule	Market Data Infrastructure, Release No. 34-88216, 85 Fed. Reg. 16,726 (Mar. 24, 2020)
Proposed NMS Governance Order	Notice of Proposed Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Release No. 34-87906, 85 Fed. Reg. 2,164 (Jan. 14, 2020)

SIP	Securities information processor
SRO	Self-regulatory organization

INTRODUCTION

Section 11A of the Securities Exchange Act of 1934 (the "Exchange Act") gives the Securities and Exchange Commission (the "Commission") the power "to authorize or require *self-regulatory organizations* to act jointly with respect to matters as to which they share authority under this chapter in planning, developing, operating, or regulating a national market system" for the trading of securities. 15 U.S.C. § 78k-1(a)(3)(B) (emphasis added). Consistent with that statutory direction, for 35 years, self-regulatory organizations ("SROs"), including the national securities exchanges that are petitioners in this proceeding, have acted jointly—subject to Commission oversight—to operate national market system plans ("NMS plans"), administrative bodies responsible for the development and operation of various aspects of the national market system.

In the NMS Governance Order at issue here, however, the Commission disregarded the circumscribed statutory authorization in Section 11A and its own settled practice by ordering the SROs to share with individuals representing *non*-SROs the authority to operate a new NMS plan that would replace the three existing "Equity Data Plans"—which are responsible for the dissemination of certain types of market data regarding equity securities—with a single "New Consolidated Data Plan." *See* JA_ [85.Fed.Reg.28702]. The NMS Governance Order impairs SROs' ability to "act jointly" with each other in operating the New Consolidated

Data Plan, 15 U.S.C. § 78k-1(a)(3)(B), by mandating a voting structure that vests individuals representing non-SROs with voting power and that enables the approval of proposals even if they are *opposed* by a majority of SROs.

This Court should vacate the NMS Governance Order because it exceeds the Commission's authority under the Exchange Act and the Commission's own regulations, and because it is arbitrary and capricious in violation of the Administrative Procedure Act (the "APA"). 5 U.S.C. § 706. The Exchange Act and the Commission's implementing regulations both provide that SROs—and only SROs—are responsible for "act[ing] jointly" to develop and implement the national market system. 15 U.S.C. § 78k-1(a)(3)(B); 17 C.F.R. § 242.608(a)(3). Vesting that power exclusively with SROs makes sound policy sense because, unlike ordinary private persons, SROs are obligated under the Exchange Act to discharge quasi-governmental functions and, in so doing, are required to act in the public interest and in furtherance of the Exchange Act's statutory objectives.

The Commission admitted that the Exchange Act does not expressly empower it to vest individuals representing non-SROs with authority to participate with SROs in "planning, developing, operating, or regulating a national market system." 15 U.S.C. § 78k-1(a)(3)(B); *see also* JA_ [85.Fed.Reg.28715]. The Commission nevertheless *inferred* the existence of such power based on the statute's "silence" on the issue. JA_ [85.Fed.Reg.28715]. As this Court has made clear, however, an

agency cannot rely on statutory "silence" to infer the existence of sweeping regulatory powers withheld by Congress. To hold otherwise would set a dangerous precedent, permitting agencies unilaterally to expand the scope of their regulatory authority merely by asserting that Congress has not affirmatively foreclosed the exercise of that authority. *See Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995). Such an aggrandizement of administrative power is particularly inappropriate here, where the Commission completely ignored that its own regulations authorize SROs, and no one else, to operate, implement, and administer NMS plans. *See* 17 C.F.R. § 242.608(a)(3).

The Commission exacerbated the deficiencies in the NMS Governance Order by adopting a flawed voting structure that further interferes with SROs' ability to "act jointly" in the operation of the national market system. The Commission did not simply allocate one vote to each individual SRO—as has been the practice for decades under the Equity Data Plans—but instead arbitrarily diluted the voting power of individual SROs that share a corporate affiliation based on their membership in a so-called "exchange group," a concept found nowhere in the Exchange Act or its implementing regulations. JA_ [85.Fed.Reg.28712]. Under the NMS Governance Order, SROs that "operat[e] under one corporate umbrella" will collectively receive only one or two votes for the entire "exchange group"

(depending on their combined market share), regardless of how many individual SROs are in the exchange group. JA_ [85.Fed.Reg.28702, 28712].

When combined with the addition of non-SRO votes, the NMS Governance Order's exchange-group-based voting structure means that a majority of individual SROs will be unable to fulfill their statutory mandate to exercise joint authority over the operations of the New Consolidated Data Plan. JA_ [85.Fed.Reg.28713]. In particular, a majority of individual SROs will be unable to stop the non-SRO voting representatives from joining with a minority of individual SROs to force through changes to the national market system that the majority of individual SROs believe are not in the public interest. By enabling such an outcome, the NMS Governance Order impermissibly restricts the ability of the majority of individual SROs to discharge their statutory obligation to ensure that the operations of the New Consolidated Data Plan meet the standards imposed by the Exchange Act.

The Commission *agrees* that the Exchange Act requires "self-regulatory organizations" to retain a voting majority on the New Consolidated Data Plan, JA_ [85.Fed.Reg.28716, 28721], but nevertheless insists that its reallocation of voting rights to "exchange groups"—together with its convoluted "augmented majority" voting structure—meets that standard. It does not. The Exchange Act's definition of "self-regulatory organization" is focused on *individual* SROs and does not encompass or contemplate the notion of "exchange groups." Indeed, in every other

context, the Commission treats each individual SRO as a separate regulated entity with its own burdens and obligations, regardless of corporate affiliation.

Compounding these errors, the Commission also imposed a requirement that the New Consolidated Data Plan have an "independent" plan administrator—*i.e.*, an administrator that does not offer its own proprietary market-data products for sale directly to market participants—displacing the exchanges that have acted as Equity Data Plan administrators for years. In so doing, the Commission would deprive the New Consolidated Data Plan of the substantial expertise and institutional knowledge of the existing administrators and would require the participants in the New Consolidated Data Plan to bear the costs of identifying and training an "independent" plan administrator. The Commission purported to base this requirement on the theoretical possibility of a conflict of interest, without providing any factual basis from which to conclude that an actual conflict exists or that any potential conflict could not be addressed through less burdensome measures. Further, the Commission imposed this requirement even though the NMS Governance Order would still permit a non-SRO data vendor—which could theoretically benefit from access to subscriber lists in the same way as exchanges that sell their own proprietary data products—to serve as the plan administrator. The Commission did not explain why that scenario supposedly does *not* involve a conflict of interest, whereas the current situation supposedly does.

Because the Commission has adopted changes to the national market system that exceed its statutory and regulatory authority, that impair SROs' ability to discharge their statutory obligations, and that increase the costs and burdens of disseminating market data with no offsetting benefit, the NMS Governance Order is both contrary to law and arbitrary and capricious. It should be vacated.

STATEMENT OF JURISDICTION

This Court has jurisdiction under Section 25 of the Exchange Act. 15 U.S.C. § 78y. The NMS Governance Order was issued by the Commission on May 6, 2020, and published in the Federal Register on May 13, 2020. *See* JA_ [85.Fed.Reg.28702]. Petitioners filed timely petitions for review on June 1, 2020, June 8, 2020, and June 30, 2020.

STATEMENT OF ISSUES

Whether the Commission's promulgation of the NMS Governance Order was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, because, among other reasons, the voting structure mandated by the NMS Governance Order exceeds the Commission's authority under, and conflicts with the requirements of, the Exchange Act and the Commission's regulations, and because the NMS Governance Order's adoption of an "independent" plan administrator requirement is unreasoned.

STATUTES AND REGULATIONS

All pertinent statutes and regulations are reproduced in the separately bound Addendum, along with a chart that provides corresponding United States Code citations for relevant sections of the Exchange Act.

STATEMENT OF THE CASE

A. The National Market System

Prior to the enactment of the Exchange Act in 1934, securities exchanges were solely responsible for the regulation of the securities markets. *See* S. Rep. No. 73-792, at 4 (1934). The Exchange Act brought the securities markets under federal oversight. In so doing, the Exchange Act codified exchanges' existing self-regulatory responsibilities and vested them with the statutory "responsibility to oversee trading on their respective markets and to regulate conduct of their members." Memorandum from the SEC Division of Trading and Markets, *Current Regulatory Model for Trading Venues and for Market Data Dissemination*, https://perma.cc/58F2-3NE3 (Oct. 20, 2015).

The Exchange Act also brought exchanges under federal regulatory control by deeming them to be SROs. *See* 15 U.S.C. § 78c(a)(26) (defining "self-regulatory organization" as "any national securities exchange, registered securities association, or registered clearing agency"). SROs must register with the Commission, *see* 15 U.S.C. § 78s(a), submit proposed rule changes affecting their members and

operations to the Commission for approval, *see id.* § 78s(b), and demonstrate to the Commission that their rules are designed, among other things, to "protect investors and the public interest," *id.* §§ 78f(b)(5), 78o-3(b)(5)-(6), 78q-1(b)(3)(D), (F). In addition, SROs must "enforce compliance" with their own rules. *Id.* § 78s(g)(1).

In 1975, Congress recognized that, although the securities markets had "flourished" under the Exchange Act as originally enacted, "the statutory and regulatory structure ha[d] not kept up with the economic and technological changes or with shifts in public investment patterns." H.R. Conf. Rep. No. 94-229, at 91 (1975). The result was "operational breakdowns and economic distortions" that "impaired public confidence in the securities markets." *Id.*

To remedy those shortcomings, Congress passed the Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97, amending the Exchange Act to add, among other provisions, Section 11A, 15 U.S.C. § 78k-1. In Section 11A, Congress directed the Commission, "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 chapter to facilitate the establishment of a national market system for securities"—in other words, a uniform nationwide securities market. 15 U.S.C. § 78k-1(a)(2). To that end, Section 11A provides that the Commission may "authorize or require self-regulatory organizations to act jointly with respect to matters as to which they share authority under this chapter in planning, developing,

operating, or regulating a national market system (or a subsystem thereof) or one or more facilities thereof." *Id.* § 78k-1(a)(3)(B).

Pursuant to its authority under Section 11A, the Commission promulgated Regulation NMS in 2005. *See* Regulation NMS, Release No. 34-51808, 70 Fed. Reg. 37,496 (June 29, 2005). Regulation NMS sets forth the procedures for developing and implementing an NMS plan pursuant to SROs' authority to "act jointly" under Section 11A of the Exchange Act. 15 U.S.C. § 78k-1(a)(3)(B). An NMS plan is defined as a "joint self-regulatory organization plan" in connection with either "[t]he planning, development, operation or regulation of a national market system (or a subsystem thereof) or one or more facilities thereof"; or "[t]he development and implementation of procedures and/or facilities designed to achieve compliance by self-regulatory organizations and their members with any section of [ ] Regulation NMS." 17 C.F.R. § 242.600(44). More simply, an NMS plan is an administrative body jointly operated by SROs to carry out the mandates of Regulation NMS and to promote the objectives of the Exchange Act, including with respect to the dissemination of quotation and transaction information for publicly traded securities.

Rule 608 of Regulation NMS provides that "[a]ny two or more self-regulatory organizations, acting jointly, may file a national market system plan or may propose an amendment to an effective national market system plan" by submitting the plan

or amendment to the Commission for its approval. 17 C.F.R. § 242.608(a)(1). Rule 608 goes on to state that "[s]elf-regulatory organizations are authorized to act jointly in . . . [p]reparing and filing a national market system plan" and in "[i]mplementing or administering an effective national market system plan." *Id.* § 242.608(a)(3)(ii)-(iii). Rule 608(c) directs that "[e]ach self-regulatory organization shall comply with the terms of any effective national market system plan of which it is a sponsor or a participant," and "[e]ach self-regulatory organization also shall, absent reasonable justification or excuse, enforce compliance with any such plan by its members and persons associated with its members." *Id.* § 242.608(c).[1]

For more than 30 years, three NMS plans—referred to by the Commission as the "Equity Data Plans"—have governed the dissemination of quotation and transaction information for equity securities. Pursuant to these Equity Data Plans, national securities exchanges are required to provide certain quotation and transaction data (among other information) for securities traded on their platforms to a central, exclusive securities information processor ("SIP"). Each SIP

[1] Prior to Regulation NMS, the framework for NMS plans was governed by Rule 11Aa3-2, adopted shortly after Section 11A was enacted. *See* National Market System Plans; Procedures and Requirements, Release No. 34-17580, 46 Fed. Reg. 15,866 (Mar. 10, 1981). Rule 11Aa3-2 included materially identical language regarding the joint authority of SROs. *See* 17 C.F.R. § 240.11Aa3-2(b)(3) (repealed 2005) ("Self-regulatory organizations are authorized to act jointly in . . . preparing and filing a national market system plan or . . . implementing or administering an effective national market system plan.").

consolidates the information and disseminates it to market participants for a fee set by the Equity Data Plans. JA_ [85.Fed.Reg.28703]. The information disseminated by the SIPs for each publicly traded security—which comprises last-sale reports, the current highest bid and lowest offer on each exchange, and the national best bid and offer—is known as "core data." *See NetCoalition v. SEC*, 615 F.3d 525, 529 (D.C. Cir. 2010).

The SIPs collect quotation and transaction data from the exchanges, consolidate that data, and then disseminate the consolidated data over three separate networks: "Tape A" provides information for securities listed on the New York Stock Exchange LLC ("NYSE"), "Tape B" provides information for securities listed on exchanges other than NYSE and The Nasdaq Stock Market LLC ("Nasdaq"), and "Tape C" provides information for securities listed on Nasdaq. JA_ [85.Fed.Reg.28703]. The three Equity Data Plans govern the dissemination of market data from each of these networks:

- The Consolidated Tape Association ("CTA") Plan governs the collection, consolidation, processing, and dissemination of last sale information for securities reported on Tape A and Tape B;

- The Consolidated Quotation System ("CQ") Plan governs the collection, consolidation, processing, and dissemination of quotation information for securities reported on Tape A and Tape B;

- The Unlisted Trading Privileges ("UTP") Plan governs the collection, consolidation, processing, and dissemination of last sale and quotation information for securities reported on Tape C.

Id.

Each Equity Data Plan is governed by an operating committee consisting solely of representatives of each SRO that is a participant in the NMS Plan. JA_ [85.Fed.Reg.28704]. Each individual SRO that participates in a particular Equity Data Plan has one vote on the operating committee of that NMS plan. JA_ [85.Fed.Reg.28712]. Individuals representing non-SROs—such as representatives of broker-dealers—can sit on an advisory committee, can attend meetings of the operating committee, and can submit their views to the operating committee, but do not have voting power. JA_ [85.Fed.Reg.28702].

In addition, each Equity Data Plan has an administrator responsible for carrying out the operations of the plan. NYSE serves as the administrator for the CTA and CQ Plans, and Nasdaq serves as the administrator for the UTP Plan. JA_ [85.Fed.Reg.2174.n118].

During the past decade, SROs have made significant investments in and improvements to the systems for delivery of core data to market participants through the SIPs. Over that period, latency (the time taken to process information from input to output) has dropped substantially while system capacity (the amount of information that can be processed at one time) has increased. JA_ [Nasdaq.Letter.I.at.10]. For example, the SIP for the UTP Plan reduced "[p]rocessing time . . . by over 99 percent, from approximately 5,700 microseconds

in June 2009, to approximately 16 microseconds in December 2018." *Id.* And, in 2020, the SIP for the CTA Plan and CQ Plan invested in and implemented two significant technological upgrades. JA_ [NYSE.Letter.I.at.6-7].

Several exchanges or their affiliates also offer proprietary data products for sale directly to market participants; those products include some elements of the core data—specifically, the exchanges' last-sale reports and the exchanges' current highest bid and lowest offer—that those exchanges provide to the SIPs to consolidate and then disseminate. JA_ [85.Fed.Reg.28704]; *see also NetCoalition*, 615 F.3d at 529-30. Unlike the core data provided to the SIPs, proprietary data products do not need to be consolidated by a SIP before being disseminated directly to data recipients by an exchange. Some exchanges or their affiliates also sell "depth-of-book" proprietary data products that provide additional information regarding the number and pricing of bids and offers for a particular stock—information that is not contained in core data distributed by the SIPs. JA_ [85.Fed.Reg.28704].[2]

[2] In addition to the Equity Data Plans, other NMS plans—none of which is implicated in the NMS Governance Order—include the Consolidated Audit Trail, which records and documents orders sent to national securities exchanges, *see* https://www.catnmsplan.com/, the Options Price Reporting Authority, which disseminates quotation and transaction information for options exchanges, *see* https://www.opraplan.com, and the Limit Up/Limit Down Plan, which is designed to address extraordinary market volatility, *see* http://www.luldplan.com. Voting power on each of the other NMS plans is limited to SROs and allocated to individual SROs, rather than exchange groups.

B. The Proposed NMS Governance Order

On January 14, 2020, the Commission issued a Notice of Proposed Order that proposed fundamental changes to the structure and governance of the national market system with respect to the dissemination of core data. JA_ [85.Fed.Reg.2164].

The Commission first expressed its view that the current governance structure of the Equity Data Plans is outdated. It restated "concerns" by some market participants that "the current speed of core data [delivered by the SIPs] is no longer sufficient for them to trade competitively," JA_ [85.Fed.Reg.2169], and that "[i]nvestment in the SIPs [has] lagged" while the exchanges have been improving the speed and sophistication of their own proprietary data feeds, JA_ [85.Fed.Reg.2170]. The Commission attributed this purported disparity to an alleged "conflict of interest" in the governance of the Equity Data Plans. *Id.* According to the Commission, SROs have less incentive to "invest in certain improvements to enhance the distribution of core data or the content of the core data itself" because doing so would make the exchanges' proprietary data feeds less valuable. *Id.*

To address this alleged conflict of interest, the Commission proposed to direct the SROs to develop a new NMS plan to govern the dissemination of core data. Under the Commission's proposal, the three existing Equity Data Plans would be

replaced by a single "New Consolidated Data Plan." JA_ [85.Fed.Reg.2182]. The New Consolidated Data Plan would have four key differences in its governance and operational structure from the existing Equity Data Plans.

First, the Commission proposed to provide non-SROs with voting representation on the operating committee of the New Consolidated Data Plan. JA_ [85.Fed.Reg.2177]. The non-SRO voting members would be individuals representing each of the following six categories: institutional investors, broker-dealers with a predominantly retail investor customer base, broker-dealers with a predominantly institutional investor customer base, securities market-data vendors, issuers of publicly traded stock, and retail investors. JA_ [85.Fed.Reg.2179]. The Commission acknowledged that non-SROs—including broker-dealers, non-exchange alternative trading platforms, and data vendors—already have non-voting representation on advisory committees for each of the Equity Data Plans. *Id.* Nevertheless, the Commission proposed providing individuals representing non-SROs with one-third of the aggregate voting power on the operating committee of the New Consolidated Data Plan. JA_ [85.Fed.Reg.2180].

Second, the Commission proposed to dilute the voting power of exchanges that share a corporate affiliation by allocating operating-committee votes to "exchange groups," rather than to each of the individual affiliated exchanges. JA_ [85.Fed.Reg.2175]. Under the Commission's proposal, each "unaffiliated SRO"

would receive one vote on the operating committee of the New Consolidated Data Plan, and each "exchange group"—defined as "multiple exchanges operating under one corporate umbrella," JA_ [85.Fed.Reg.2168]—would receive one vote, with a second vote being added if the unaffiliated SRO or exchange group trades more than 15% of consolidated equity market share, JA_ [85.Fed.Reg.2175]. This would not only have the effect of diluting the voting power of each SRO that is a member of an exchange group, but it would also have the effect of increasing the concentration of voting power in each unaffiliated SRO.

By way of example, under the current Equity Data Plans, petitioners NYSE, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. each receive one vote on the operating committees of the three plans. Under the New Consolidated Data Plan, these five exchanges would be treated as an "exchange group" and would receive only two votes in total (based on their greater than 15% consolidated equity market share), instead of one vote each for a total of five votes.[3]

Third, the Commission proposed to eliminate the requirement of unanimous voting for certain operating committee actions and instead require only an

[3] Two votes would also be allocated to the four equities exchanges affiliated with Cboe Global Markets, Inc.—Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe EDGX Exchange, Inc.—as well as to the three equities exchanges affiliated with Nasdaq, Inc.—Nasdaq, Nasdaq BX, Inc., and Nasdaq PHLX LLC.

"augmented majority" vote—defined as a "two-thirds majority of all votes on the operating committee, provided that this vote also includes a majority of the SRO votes," as redefined by the Commission based on the novel "exchange group" concept. JA_ [85.Fed.Reg.2181]. As explained further below, under this voting structure, a minority of individual SROs could unite with the non-SRO voting representatives to approve actions opposed by a majority of individual SROs.

Fourth, the Commission proposed to address a purported conflict of interest theoretically affecting the current plan administrators by requiring that the administrator of the New Consolidated Data Plan be "independent," meaning that "the administrator should not be owned or controlled by a corporate entity that separately offers for sale a market data product, either directly or via another subsidiary." JA_ [85.Fed.Reg.2183]. Under this "independence" requirement, the current administrators—NYSE and Nasdaq—would need to be replaced by a new administrator, which would lack comparable experience and institutional knowledge. The Commission's proposed requirement would permit non-SRO-affiliated data vendors—which are unfamiliar with the SIPs and their administration—to serve as plan administrators, even though those vendors are subject to the same theoretical conflicts of interest as SRO administrators that sell their own proprietary market-data products.

C. Response To The Proposed NMS Governance Order

Several national securities exchanges submitted comments on the Proposed Governance Order that highlighted a number of legal deficiencies in the proposal.

The exchanges emphasized that the Exchange Act and Regulation NMS permit the Commission to authorize only *SROs* to "act jointly" in the development, implementation, and operation of NMS plans. JA_ [NYSE.Letter.I.at.14-15]; JA_ [Nasdaq.Letter.I.at.5-6]. The statute and regulation contain no parallel provision permitting the Commission to authorize individuals representing *non*-SROs to participate in the governance of NMS plans. *Id.*

The exchanges further objected that unlike SROs—which are subject to a comprehensive set of statutory obligations and prohibitions under the Exchange Act—the individuals who would be non-SRO voting representatives on the operating committee of the New Consolidated Data Plan would have no corresponding duty to further the objectives of the national market system or to protect investors. JA_ [Nasdaq.Letter.I.at.9]. Indeed, the individuals representing each of the six designated categories of non-SRO market participants may not even be subject to the Commission's authority (other than its antifraud authority). *Id.*; *see also* JA_ [Cboe.Letter.at.7-8]. The exchanges explained that this absence of statutory duties and regulatory oversight calls into question whether providing individuals representing non-SROs with voting power would actually alleviate any

perceived conflicts of interest, because there would be nothing to prevent those individuals from acting out of pure self-interest when casting votes on the operating committee. JA_ [NYSE.Letter.I.at.15-17].

The exchanges also addressed the lack of statutory authority for the Commission's proposed allocation of votes to "exchange groups" rather than to individual exchanges. JA_ [NYSE.Letter.I.at.17-18]; JA_ [Cboe.Letter.at.9-10]; JA_ [Nasdaq.Letter.I.at.7]. The exchanges emphasized that the Commission treats affiliated exchanges as discrete entities for all other purposes and has affirmatively prohibited affiliated exchanges from implementing measures that seek to leverage their affiliation with other exchanges. JA_ [NYSE.Letter.I.at.17-18]; JA_ [Cboe.Letter.at.9-10]; JA_ [Nasdaq.Letter.I.at.7]. In fact, voting power on all existing NMS plans is allocated to individual SROs and not to "exchange groups." *See supra* note 2.

Finally, the exchanges highlighted the lack of any reasoned basis for requiring the administrator of the New Consolidated Data Plan to be "independent," emphasizing that identifying and training a new, inexperienced administrator would generate costs and inefficiencies and sacrifice the benefits of retaining the current administrators, which have years of experience in overseeing the dissemination of market data. JA_ [NYSE.Letter.I.at.20]; JA_ [Nasdaq.Letter.I.at.12-13].

D. The Market Data Infrastructure Proposed Rule

The Proposed NMS Governance Order was not the Commission's only effort to revamp the national market system in early 2020. While the Proposed NMS Governance Order was open for comment, the Commission published a proposed rule entitled "Market Data Infrastructure" that would further alter the way in which market data is disseminated. *See* Market Data Infrastructure, Release No. 34-88216, 85 Fed. Reg. 16,726 (Mar. 24, 2020) (the "Proposed Data Infrastructure Rule"). The Proposed Data Infrastructure Rule would end the dissemination of core data through the exclusive SIPs and instead require exchanges to transmit core data—at a price set by the operating committee of the New Consolidated Data Plan—to so-called "competing consolidators," which would then process and distribute that data to market participants at whatever price they deem appropriate. *Id.* at 16,730. The proposed rule would also drastically expand the types of information classified as "core data" and, in so doing, substantially reduce the utility of exchanges' proprietary data feeds. *See id.* at 16,729-30. The Commission justified these changes on many of the same grounds that it offered in support of the proposed NMS Governance Order, including exchanges' supposed conflicts of interest. *See id.* at 16,818.

Although the Commission barely mentioned the Proposed NMS Governance Order in the Proposed Data Infrastructure Rule, commenters explained that the two

proposals are inextricably intertwined. JA_ [Nasdaq.Letter.II]; JA_ [NYSE.Letter.II]. In particular, the Proposed NMS Governance Order would vest individuals representing non-SROs with voting authority on the New Consolidated Data Plan, and under the Proposed Data Infrastructure Rule, those non-SRO voting representatives would have price-setting authority over an expanded class of core data that exchanges would be obligated to provide to competing consolidators. Moreover, some of the non-SRO voting representatives could themselves be affiliated with competing consolidators, thus enabling competing consolidators to play a significant role in setting the price for obtaining exchanges' core market data that they could then turn around and sell to market participants (in competition with the exchanges). Multiple commenters therefore suggested that the Commission consider the two proposals together so that market participants could fully understand and respond to the combined effect of the Commission's potentially transformative plans for the nation's equity markets. JA_ [Nasdaq.Letter.II.at.3], JA_ [NYSE.Letter.II.at.2].

The Commission, however, refused to heed those requests.

E. The NMS Governance Order

On May 6, 2020, the Commission issued the NMS Governance Order, which adopted the Proposed NMS Governance Order. JA_ [85.Fed.Reg.28702].

With respect to the allocation of voting power to individuals representing non-SROs, the Commission acknowledged that Section 11A of the Exchange Act only "affirmatively authorizes the Commission to allow or require the SROs to act jointly." JA_ [85.Fed.Reg.28715]. Nevertheless, the Commission opined that the Exchange Act "does not prohibit non-SRO participation in developing and administering NMS plans," but rather "is silent on this issue." *Id.* The Commission reasoned that "in the context of a statute delegating rulemaking to an agency, statutory silence leaves discretion with the agency" and that "it is appropriate to exercise that discretion to give non-SROs a vote on the New Consolidated Data Plan's operating committee." *Id.* The Commission did not address whether Regulation NMS independently constrained its ability to vest individuals representing non-SROs with voting power, nor did it meaningfully consider the fact that the non-SRO voting representatives would not be bound by the same statutory duties as SROs, even though commenters raised both of those issues. JA_ [NYSE.Letter.I.at.14-15]; JA_ [Nasdaq.Letter.I.at.5.8-9].

Regarding the allocation of votes based on "exchange groups," the Commission agreed that it must "ensure that at all times the SROs have sufficient voting power to act jointly on behalf of the plan pursuant to the requirements of Section 11A of the Act and Rule 608 of Regulation NMS," but contended that "[t]he requirement for an augmented majority vote" accomplishes that purpose. JA_

[85.Fed.Reg.28721]. As for the Commission's longstanding practice of treating each exchange as a distinct entity subject to its own regulatory obligations, the Commission merely declared, without any substantive legal analysis, that it "believes . . . that a meaningful legal distinction exists between, on one hand, each SRO's individual responsibility [under the Exchange Act] . . . and, on the other hand, the responsibility of the SROs to jointly operate the NMS plans pursuant to Section 11A of the Act." JA_ [85.Fed.Reg.28713].

Finally, with regard to the requirement that the administrator of the New Consolidated Data Plan be "independent," the Commission acknowledged that there will be costs associated with moving toward an "independent" administrator, but nonetheless stated its belief that "the proposed independent plan administrator requirement would address concerns regarding the potential use of SIP subscriber audit data to pursue commercial interests outside of the New Consolidated Data Plan." JA_ [85.Fed.Reg.28723]. The Commission failed to provide evidence of any actual real-world impact of this purely theoretical conflict of interest and was also silent as to why those same purported concerns are not implicated by the potential appointment of a non-SRO data vendor to serve as the plan administrator. Nor did the Commission consider whether its concerns might be addressed by other means.

F. Procedural History

Following the promulgation of the NMS Governance Order, petitioners filed timely petitions for review. Petitioners Nasdaq, Nasdaq BX, Inc., and Nasdaq PHLX LLC also filed a motion for a stay of the NMS Governance Order with the Commission pending resolution of these proceedings. JA_ [Motion.for.Stay]. The Commission denied the motion. JA_ [Denial.Order].[4]

STANDARD OF REVIEW

The APA requires courts to "set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency must examine the relevant data and articulate a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

[4] As mandated by the NMS Governance Order, the SROs submitted a proposed version of the New Consolidated Data Plan to the Commission on August 11, 2020. *See* Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data, Release No. 34-90096, 85 Fed. Reg. 64,565 (Oct. 13, 2020). Petitioners participated in the drafting and proposal of the New Consolidated Data Plan solely to satisfy the requirements of the challenged NMS Governance Order and the requirements of Rule 608. Petitioners' compliance with the NMS Governance Order does not indicate support for the New Consolidated Data Plan or a belief that its terms are appropriate. The existing Equity Data Plans will remain in effect until the Commission approves a new plan and until the conditions for the new plan to become operative, as specified in that plan, are satisfied.

SUMMARY OF ARGUMENT

For multiple reasons, the Court should grant the petitions for review and vacate the NMS Governance Order.

I. The Commission lacks authority to vest individuals representing non-SROs with voting power on the operating committee of the New Consolidated Data Plan. Section 11A of the Exchange Act states that the Commission may "authorize or require *self-regulatory organizations* to act jointly with respect to matters as to which they share authority under this chapter in planning, developing, operating, or regulating a national market system." 15 U.S.C. § 78k-1(a)(3)(B) (emphasis added). The statute contains no comparable authorization relating to individuals representing non-SROs. The Commission admits this, but nevertheless insists that the statutory "silence" gives it discretion to exercise whatever powers it deems appropriate to design and implement a national market system. JA_ [85.Fed.Reg.28715].

The Commission's capacious understanding of its regulatory powers is foreclosed by this Court's precedent, which squarely rejects the expansion of administrative authority based on nothing more than statutory silence. *See Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995). Although the Commission has discretion "when Congress has left a gap for the agency to fill," *id.*, there are no statutory "gaps" in Section 11A's unambiguous authorization for the Commission

to direct *SROs* to "act jointly" to develop and administer the national market system. Section 11A identifies with specificity the respective roles of the Commission and SROs, and, except for an expressly conferred advisory role (*see* 15 U.S.C. § 78k-1(a)(3)(A), *id.* § 78k-1(d)(1)), non-SROs have no place in that framework. The Commission's own regulations—which the Commission failed to address despite comments squarely raising them—confirm this. *See* 17 C.F.R. § 242.608(a)(3). The NMS Governance Order therefore exceeds the Commission's authority under Section 11A of the Exchange Act and Rule 608 of Regulation NMS.

II. Even if the Commission were authorized to grant individuals representing non-SROs voting power on the operating committee of an NMS plan, the Commission's exchange-group-based voting structure would still violate the Exchange Act and constitute arbitrary and capricious agency action under the APA. The NMS Governance Order impermissibly impairs the ability of SROs to "act jointly" in administering the New Consolidated Data Plan by enabling non-SRO voting representatives and a *minority* of individual SROs to adopt proposals over the objection of a majority of individual SROs. This shortcoming is a direct result of the Commission's decision to allocate votes based on so-called "exchange groups," which limits affiliated SROs to a maximum of two total votes on the operating committee, even if three or more individual SROs are part of the "exchange group."

The Commission's exchange-group-based voting structure is incompatible with the Exchange Act's definition of "self-regulatory organization," which focuses on *individual* entities. 15 U.S.C. § 78c(a)(26). The Commission's adoption of exchange-group-based voting also arbitrarily and capriciously departs from the Commission's longstanding practice of treating each SRO individually for regulatory purposes, regardless of its corporate affiliation with other SROs. The Commission offered no cogent explanation for this abrupt policy shift.

III. The NMS Governance Order's mandate that there be an "independent" plan administrator is also arbitrary and capricious. The Commission failed to substantiate the existence of the purely theoretical conflict of interest—the current administrators' potential use of confidential subscriber information to benefit their own proprietary-data businesses—that it seeks to address. And, in any event, the NMS Governance Order fails to remedy that purported conflict, because it leaves open the possibility that a non-SRO data vendor—which could likewise benefit from access to subscriber lists—could serve as the plan administrator. In addition, the Commission did not find that prohibiting experienced administrators from serving in that role, while requiring the New Consolidated Data Plan to incur the costs of identifying and training a new administrator, will do more good than harm. Nor did the Commission acknowledge that the current administrators' supposed conflict of

interest would be eliminated if the Commission adopts the Proposed Data Infrastructure Rule.

STANDING

Petitioners have standing because, as national securities exchanges, they are the direct targets of the NMS Governance Order, which requires petitioners to develop and propose a New Consolidated Data Plan and dilutes their voting rights on the operating committee of the new NMS plan. As "regulated parties," petitioners satisfy the "irreducible constitutional minimum of Article III standing." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1286-87 (D.C. Cir. 2005) (internal quotation marks omitted).

ARGUMENT

I. THE COMMISSION LACKS AUTHORITY TO GRANT INDIVIDUALS REPRESENTING NON-SROS VOTING POWER ON THE OPERATING COMMITTEE OF THE NEW CONSOLIDATED DATA PLAN.

The NMS Governance Order is contrary to law because the Commission lacks authority to grant individuals representing non-SROs voting power on the operating committee of the New Consolidated Data Plan. Section 11A of the Exchange Act and Rule 608 of Regulation NMS both explicitly authorize the Commission to require only "self-regulatory organizations" to "act jointly" in developing, operating, administering, and implementing the NMS plans. 15 U.S.C. § 78k-1(a)(3)(B); 17 C.F.R. § 242.608(a)(3). Nothing in either of those provisions extends the

Commission's authority to representatives of non-SROs. The Court should reject the Commission's unlawful attempt to expand its own authority in the face of this unambiguous statutory and regulatory language.

A. The Exchange Act Forecloses The Commission's Expansive Interpretation Of Its Authority.

The Exchange Act does not authorize the Commission to grant individuals representing non-SROs the power to operate an NMS plan. Instead, Section 11A of the Exchange Act authorizes the Commission to direct "*self-regulatory organizations* to act jointly with respect to matters as to which they share authority . . . in planning, developing, operating, or regulating a national market system (or a subsystem thereof) or one or more facilities thereof." 15 U.S.C. § 78k-1(a)(3)(B) (emphasis added).

The import of this plain language is clear: The Commission is authorized to direct "self-regulatory organizations," and *only* self-regulatory organizations, to take joint action in planning, developing, operating, or regulating a national market system, including through the operation of an NMS plan. Nowhere does Section 11A state that the Commission has parallel authority with respect to *non*-SROs (or individuals representing them), and the Commission may not simply "read an absent word into the statute." *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004).

The fact that the Exchange Act speaks expressly to the Commission's power over SROs, but is silent as to non-SROs, unambiguously conveys the limited scope

of the Commission's authority because it is well-settled that Congress's "mention of one thing implies exclusion of another thing." *Ethyl Corp.*, 51 F.3d at 1061 (internal quotation marks omitted); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) ("The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)." (internal quotation marks omitted)). Section 11A is explicit as to the Commission's authority to grant SROs a role in the development and implementation of the national market system, and its silence as to non-SROs demonstrates that Congress did not intend to authorize the Commission to afford non-SROs, or individuals representing non-SROs, an equivalent role.

To that end, Section 11A(a)(3)(B) is clear that the Commission's ability to direct joint action by the SROs exists solely "with respect to matters as to which [the SROs] share authority under this chapter." 15 U.S.C. § 78k-1(a)(3)(B). That is, the Commission is empowered only to direct joint action as to matters confined by the Exchange Act to the shared, and otherwise exclusive, authority of the SROs. This further underscores that the Commission's authority to direct joint action under Section 11A does not and cannot extend to individuals representing non-SROs: The Commission cannot use its power to direct joint action under Section 11A in such a way as to give non-SROs authority over matters that are confined by statute to the authority of the SROs.

Two other features of Section 11A reinforce the conclusion that Congress did not intend to authorize the Commission to afford individuals representing non-SROs a role equivalent to that of the SROs. First, Section 11A(a)(3)(A) authorizes the creation of advisory committees, which may include individuals representing non-SROs among their members, to provide input on national market system issues. *See* 15 U.S.C. § 78k-1(a)(3)(A). Second, Section 11A(d) requires the creation of a National Market Advisory Board consisting of "persons associated with brokers and dealers . . . and persons not so associated who are representative of the public." *Id.* § 78k-1(d)(1). These provisions demonstrate that Congress envisioned a limited, advisory role for non-SROs in developing and implementing the national market system. *See, e.g.*, *id.* § 78k-1(d)(3)(C) ("In carrying out its responsibilities under this paragraph, the Advisory Board shall consult with self-regulatory organizations"). Statutes should be interpreted "as a symmetrical and coherent regulatory scheme," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks omitted), and it would make little sense for Congress to expressly require the creation of a non-voting advisory board comprising representatives of non-SROs if it intended to authorize the Commission to include individuals representing non-SROs as voting members with the power to participate in exercising direct control over NMS plans.

The Commission did not dispute that it lacks express statutory authority to vest individuals representing non-SROs with voting power on the operating committee of an NMS plan. JA_ [85.Fed.Reg.28715]. Instead, it reasoned that "in the context of a statute delegating rulemaking to an agency, statutory silence leaves discretion with the agency." *Id.* (citing *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 368 (D.C. Cir. 2014), *overruled on other grounds by Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014); *Catawba County v. EPA*, 571 F.3d 20, 36 (D.C. Cir. 2009)). This broad proposition of law does not justify the Commission's unilateral expansion of its statutory authority under the Exchange Act.

As an initial matter, the Commission's characterization of the Exchange Act as "silent" is wrong. Section 11A provides *express* authorization for the Commission to empower one specific group, SROs, to take joint action in connection with the development and implementation of the national market system, but includes no comparable authorization with respect to individuals representing non-SROs, who are limited to a non-voting role on advisory committees. The principle that "statutory silence leaves discretion with the agency" applies only if "traditional tools of statutory construction" are insufficient to resolve the interpretive question. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984); *see also Hearth, Patio & Barbecue Ass'n v. U.S. Dep't of Energy*, 706 F.3d 499, 503 (D.C. Cir. 2013) ("[W]e always first examine the statute *de novo*,

employing traditional tools of statutory construction." (internal quotation marks omitted)). And, as discussed above, the canon that the "mention of one thing implies exclusion of another thing" is undoubtedly a traditional tool of statutory construction. *Ethyl Corp.*, 51 F.3d at 1061 (internal quotation marks omitted) (invoking the canon in an APA challenge evaluated under *Chevron*).

The Commission did not dispute that, *if* this canon of construction applies, it conclusively refutes the Commission's reading of Section 11A. Instead, the Commission declared that it "disagrees . . . that because the language of a statute or regulation expressly refers to a particular group, the negative implication is that other groups are not covered by the provision." JA_ [85.Fed.Reg.28715]. But the Commission's "disagree[ment]" cannot override the fact that both the Supreme Court and this Court have repeatedly deployed the longstanding interpretive tool that Congress acts deliberately when it mentions one thing and excludes another. *See, e.g.*, *United States v. Johnson*, 529 U.S. 53, 58 (2000); *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 644 (D.C. Cir. 2000); *Schumann v. Comm'r*, 857 F.2d 808, 811 (D.C. Cir. 1988). The Commission may not simply cast aside those interpretive principles it finds unhelpful to its desired outcome.

To the extent the Commission intended to suggest that this particular rule of statutory construction does not apply in the context of agency interpretations of

statutes, this Court's precedent forecloses that position. In *Ethyl Corp. v. EPA*, this Court rejected the EPA's argument that, because Congress had not expressly forbidden the agency from considering public-health concerns in assessing an application for an exception to a statutory requirement, it had "discretion to regulate on the basis of that issue." 51 F.3d at 1060. The Court explained that "deference is warranted only when Congress has left a *gap* for the agency to fill pursuant to an express or implied delegation of authority to the agency." *Id.* (emphasis added; alterations omitted).

The suggestion that deference is warranted "any time a statute does not expressly *negate* the existence of a claimed administrative power," the Court emphasized, "is both flatly unfaithful to the principles of administrative law and refuted by precedent." *Ethyl Corp.*, 51 F.3d at 1060 (alterations and internal quotation marks omitted). Indeed, "[w]ere courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Id.* The Court therefore "refuse[d] . . . to presume a delegation of power merely because Congress has not expressly withheld such power." *Id.*

Here, there is likewise no "gap" for the Commission to fill. The Exchange Act tells the Commission *how* it can exercise its authority ("by rule or order"), *over*

whom it can exercise its authority ("self-regulatory organizations"), and *what* it can direct those regulated SROs to do ("act jointly with respect to . . . planning, developing, operating, or regulating a national market system"). 15 U.S.C. § 78k-1(a)(3)(B). Congress has thus "directly spoken to the precise question at issue in this case." *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) (citation and internal quotation marks omitted). And Congress has provided no authority for the Commission to authorize individuals representing non-SROs to exercise voting power on the operating committees of NMS plans.[5]

The Commission's interpretation of Section 11A also violates a second, equally settled principle of statutory construction: the rule against superfluity. This "traditional tool[ ] of statutory construction," *Chevron*, 467 U.S. at 843 n.9, provides that "every word and every provision is to be given effect and that none should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence," *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019) (alteration and internal quotation marks omitted). The principle works in tandem with the

[5] The cases cited by the Commission are not to the contrary. *See* JA_ [85.Fed.Reg.28715]. In *National Association of Manufacturers*, the statute left "gaps" regarding the "threshold for conducting due diligence" and "the obligations of uncertain issuers." 748 F.3d at 366. And in *Catawba County*, the statute was "replete with the kinds of words that suggest a congressional intent to leave unanswered questions to an agency's discretion and expertise." 571 F.3d at 35. Neither circumstance is present here.

maxim that "[a] specific provision controls over one of more general application." *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991).

Application of those principles here forecloses the Commission's expansive reading of its authority under Section 11A. There would have been no need for Congress to expressly vest the Commission with authority to direct "self-regulatory organizations to act jointly" in "operating" NMS plans if Congress intended to authorize the Commission to empower *anyone* to participate in the operation of NMS plans. 15 U.S.C. § 78k-1(a)(3)(B). Congress's deliberate and precise language makes clear that the Commission is only authorized to task SROs with operating NMS plans.

The Commission was equally off-base in invoking Congress's direction in Section 11A(a)(2) that the Commission "use its authority under this chapter to facilitate the establishment of a national market system for securities." 15 U.S.C. § 78k-1(a)(2); *see also* JA_ [85.Fed.Reg.28715]. As this Court has made clear, a general delegation of authority does not imply "limitless hegemony" to take all actions the agency deems appropriate. *Ethyl Corp.*, 51 F.3d at 1060. Such a boundless interpretation of agency authority is inconsistent with the principle that

"an agency's power is no greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986).[6]

The Court recently reiterated these principles in rejecting another of the Commission's expansive interpretations of the Exchange Act. In *New York Stock Exchange LLC v. SEC*, 962 F.3d 541 (D.C. Cir. 2020), this Court vacated a Commission rule that sought to implement a "transaction fee pilot" to test the effect of lower transaction fees and rebate caps on the securities market. *Id.* at 544-46. Rejecting the Commission's assertion that it had authority to implement the pilot pursuant to its general authority to promulgate such "regulations as may be necessary or appropriate," 15 U.S.C. § 78w(a)(1), this Court held that "an agency cannot purport to act with the force of law without delegated authority from Congress," *N.Y. Stock Exchange LLC*, 962 F.3d at 554. The Court explained that "[m]erely because an agency has rulemaking power does not mean that it has delegated authority to adopt a particular regulation." *Id.*; *see also Ry. Labor Executives' Ass'n*, 29 F.3d at 659 (rejecting the argument that the Court should "*presume* a delegation of power from Congress absent an express *withholding* of such power" because the agency's argument came "close to saying that the [agency] has the power to do whatever it pleases merely by virtue of its existence").

[6] It is not even clear that Section 11A(a)(2) is a general delegation of new authority, because it simply directs the Commission to use its *existing* authority under the Exchange Act to further the goals of Section 11A. *See* 15 U.S.C. § 78k-1(a)(2).

The Commission's sweeping conception of its authority under Section 11A also conflicts with the design and purpose of the Exchange Act. SROs are subject to comprehensive statutory obligations and regulatory duties under the Exchange Act: They are statutorily required to "protect investors and the public interest," 15 U.S.C. §§ 78f(b)(5), 78o-3(b)(6), 78q-1(b)(3)(F); their rules are subject to Commission review and approval, *see id.* § 78s(b); and they must comply with their own rules and enforce compliance with those rules, as well as with the securities laws, by their members and persons associated with their members, *see id.* §§ 78f(b)(1), 78o-3(b)(2), 78q-1(b)(3)(A), 78s(g). It makes sense, then, that Congress would have entrusted responsibility for the development and implementation of the NMS plans to SROs, which must exercise that responsibility in a manner consistent with their statutory obligations and regulatory duties.

In contrast, individuals representing non-SROs are unlikely to be subject to any Exchange Act duties. While these individuals are supposed to "represent" each of six enumerated categories of non-SRO market participants, the individuals who would be non-SRO representatives on the operating committee would have no general obligation to protect investors or further the public interest, or to comply with the terms of the New Consolidated Data Plan. Even if the entities within the represented categories of non-SROs—such as broker-dealers, market-data vendors, or issuers—are subject to some regulatory obligations, the individual representing

those non-SROs on the operating committee of the New Consolidated Data Plan would not be under any such obligations when casting operating-committee votes. Indeed, that individual would not even have an obligation to further the non-SROs' interests—let alone the public interest—when voting, leaving the non-SRO representative free to act in his or her own *self*-interest.

Similarly, the Commission has no authority (other than antifraud authority, *see* 15 U.S.C. § 78j) over individuals who are not themselves members of an SRO. As a result, the Commission would likely have no meaningful authority over the individuals representing non-SROs on the operating committee of the New Consolidated Data Plan. In short, there would be nothing to prohibit those individuals from acting entirely out of self-interest, and in disregard of the public interest, when casting votes.

In light of the disparity between the extensive regulatory obligations of SROs and the absence of obligations for the individuals representing non-SROs on the operating committee, the Commission's decision to expand operating-committee voting power to include individuals representing non-SROs could have serious consequences for the functioning of the national market system, the well-being of investors, and the broader public interest. Although the exchanges raised concerns about the absence of regulatory constraints on non-SRO voting representatives, JA_ [NYSE.Letter.I.at.14-15], JA_ [Nasdaq.Letter.I.at.8-9], the Commission largely

failed to address this issue. Only in a discussion regarding mechanisms to prevent conflicts of interest did the Commission tangentially touch upon the fact that non-SRO representatives face few, if any, of the same statutory duties and regulatory restrictions as SROs. JA_ [85.Fed.Reg.28725-26].

Even there, however, the Commission failed to acknowledge a fundamental shortcoming in its interpretation of Section 11A: Because non-SROs have no obligation to further the public-interest objectives of the Exchange Act, it would make no sense to infer that Congress intended for individuals representing those entities to wield power over the governance of the national market system—and, in turn, over the SROs themselves, which are required to comply with the terms of an NMS plan. The Commission's failure to address this defect in its reasoning underscores the plain error in its interpretation and also renders the NMS Governance Order arbitrary and capricious. *See Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) ("[A]n agency must respond to comments that can be thought to challenge a fundamental premise underlying the proposed agency decision." (internal quotation marks omitted)).

B. The NMS Governance Order Contravenes The Commission's Own Regulations.

Even if the Exchange Act were susceptible to the Commission's expansive reading, the NMS Governance Order would still contravene the Commission's own regulations.

Rule 608(a)(3) of Regulation NMS is even more specific and explicit than the Exchange Act regarding the role that SROs are to play in the development of the national market system:

> (3) Self-regulatory organizations are authorized to act jointly in:
>
> > (i) Planning, developing, and operating any national market subsystem or facility contemplated by a national market system plan;
> >
> > (ii) Preparing and filing a national market system plan or any amendment thereto; or
> >
> > (iii) Implementing or administering an effective national market system plan.

17 C.F.R. § 242.608(a)(3).

The Commission's regulation is clear that "[s]elf-regulatory organizations" are responsible for "[i]mplementing" and "administering" the NMS plans and grants no comparable authority to non-SROs or individuals representing them. 17 C.F.R. § 242.608(a)(3). Thus, even if the Commission had the statutory authority to afford non-SROs a role in the implementation and governance of the NMS plans—which, as discussed above, it does not—the Commission's existing regulations do not permit such a role for non-SROs.

"It is axiomatic that an administrative agency is bound by its own regulations." *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1507 (D.C. Cir. 1984); *see also Service v. Dulles*, 354 U.S. 363, 372 (1957) ("regulations validly prescribed by a government administrator are binding upon him"). Accordingly, the Commission

cannot promulgate a binding regulation specifying the scope of its authority and then repudiate that regulation without amending or repealing it. But that is precisely what the Commission did when issuing the NMS Governance Order and granting individuals representing non-SROs a role in the governance of the New Consolidated Data Plan that Regulation NMS does not authorize. This conflict with the Commission's own regulations requires vacatur of the NMS Governance Order.

Vacatur is also independently required because Nasdaq submitted a comment letter highlighting the regulatory restrictions on the Commission's ability to allocate voting power to non-SROs, JA_ [Nasdaq.Letter.I.at.5], but the Commission nevertheless failed to address Rule 608 *at all* in assessing its authority to grant voting power to individuals representing non-SROs, JA_ [85.Fed.Reg.28712-14]. An agency's failure "to consider an important aspect of the problem"—including by "fail[ing] to respond to significant points and consider all relevant factors raised by the public comments," *Carlson*, 938 F.3d at 344 (internal quotation marks omitted)—is arbitrary and capricious under the APA, *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43. The Commission's complete failure to address how the NMS Governance Order comports with its own regulations is an additional ground for vacatur.

II. THE NMS GOVERNANCE ORDER'S EXCHANGE-GROUP-BASED VOTING STRUCTURE CONFLICTS WITH THE EXCHANGE ACT AND REGULATION NMS AND IS ARBITRARY AND CAPRICIOUS.

Even if individuals representing non-SROs were permitted to exercise voting power on NMS plan operating committees, the voting structure of the New Consolidated Data Plan would still be unlawful for another reason: The NMS Governance Order allocates votes to so-called "exchange groups," rather than to individual exchanges, and therefore establishes a voting structure that prevents SROs from "act[ing] jointly" to operate the New Consolidated Data Plan. 15 U.S.C. § 78k-1(a)(3)(B); 17 C.F.R. § 242.608(a)(3). In addition to violating the Exchange Act and Regulation NMS, that allocation of voting rights is arbitrary and capricious because it deviates from the Commission's settled practice of treating each individual SRO separately for regulatory purposes.

A. Exchange-Group-Based Voting Prevents SROs From Acting Jointly To Implement The New Consolidated Data Plan.

As described above, the Exchange Act empowers the Commission to authorize SROs to "act jointly" when "operating" NMS plans. 15 U.S.C. § 78k-1(a)(3)(B). Likewise, Rule 608 authorizes SROs to "act jointly" when "[i]mplementing or administering" NMS plans. 17 C.F.R. § 242.608(a)(3)(iii). But SROs cannot "act jointly" in operating, implementing, or administering an NMS plan if the operating committee of the plan can approve a policy *opposed* by a

majority of SROs. Such an outcome is a very real possibility under the voting framework the Commission has adopted for the New Consolidated Data Plan.

This outcome is possible because the NMS Governance Order does not allocate one vote to each SRO on the New Consolidated Data Plan's operating committee, but instead grants each "unaffiliated SRO" and each "exchange group"—defined by the Commission as "multiple exchanges operating under one corporate umbrella"—one vote, or two votes if they have "consolidated equity market share of more than 15 percent." JA_ [85.Fed.Reg.28702.28730]. Thus, instead of granting one vote to each of the seventeen SROs that have a role in the equity markets, each of the five unaffiliated SROs would get one vote, the exchange group affiliated with Intercontinental Exchange, Inc. would get two votes (for its five exchanges), the exchange group affiliated with Cboe Global Markets, Inc. would get two votes (for its four exchanges), and the exchange group affiliated with Nasdaq, Inc. would get two votes (for its three exchanges).[7]

[7] There were sixteen voting SROs at the time the Commission released the Proposed Governance Order, with two additional, unaffiliated SROs already approved by the Commission and planning to become operational as exchanges in the fall of 2020. After issuance of the NMS Governance Order, the Commission approved the application of an additional exchange to begin processing equities trades, making it the fifth unaffiliated SRO with voting authority on the Equity Data Plans. Two of the affiliated voting SROs at the time of the Proposed Governance Order are no longer operational as equities exchanges and thus would not have voting authority on the operating committee of the New Consolidated Data Plan.

The NMS Governance Order further provides non-SRO voting representatives with a third of the voting power on the operating committee and adopts an "augmented majority" voting structure that requires a two-thirds majority vote of the operating committee, and a majority of "SRO votes" (as redefined by the Commission based on its "exchange group" concept), to approve a proposal. JA_ [85.Fed.Reg.28720-22]. To effectuate this "augmented majority" voting structure with the eleven SRO votes created under the Commission's exchange-group-based approach, the non-SRO voting representatives on the operating committee would receive a total of five and a half votes. For a proposal to pass, it would need to garner eleven overall votes (two-thirds of all votes) and six SRO votes. *Cf.* JA_ [Nasdaq.Letter.I.at.6].

As a result, the non-SRO voting representatives and a minority of individual SROs would have sufficient voting power to force through plan actions and amendments without the assent of a majority of individual SROs. JA_ [Nasdaq.Letter.I.at.7]; *see also* JA_ [85.Fed.Reg.28712.n.174]. For example, a proposal that is supported by all of the non-SRO voting representatives (a total of

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JA_ [85.Fed.Reg.28714]. None of these developments alters the deficiencies in the voting structure adopted by the Commission.

five and a half votes), the five unaffiliated SROs, and the Nasdaq-affiliated exchange group (with two votes for its three exchanges) would have sufficient support to be adopted under the Commission's voting framework. But assuming that the five SROs affiliated with Intercontinental Exchange, Inc. and the four SROs affiliated with Cboe Global Markets, Inc. each opposed the proposal, the proposal would be supported by only eight out of the seventeen individual SROs. By opening the door to the adoption of plan policies opposed by a majority of individual SROs, the Commission's voting structure erects a barrier to "joint[ ]" SRO operation of the New Consolidated Data Plan that is incompatible with the Exchange Act and Regulation NMS. 15 U.S.C. § 78k-1(a)(3)(B); 17 C.F.R. § 242.608(a)(3).

The Commission does not dispute this outcome. Nor does it dispute that whatever voting framework it adopts must "ensure that at all times the *SROs have sufficient voting power to act jointly* on behalf of the plan pursuant to the requirements of Section 11A of the Act and Rule 608 of Regulation NMS." JA_ [85.Fed.Reg.28721] (emphasis added; footnote omitted); *see also* JA_ [85.Fed.Reg.28716] ("[T]he Commission believes that the SROs should, by themselves, maintain sufficient voting power at all times to act jointly on behalf of the New Consolidated Data Plan . . . ."). In the Commission's view, though, "[t]he requirement for an augmented majority vote" accomplishes that purpose because, supposedly, a majority of "SROs" must approve every measure. JA_

[85.Fed.Reg.28721]. But as demonstrated above, that simply is not the case: Because the Commission has allocated votes based on "exchange groups" rather than to each individual SRO, plan action could be approved over the opposition of a majority of SROs.

The Commission's fallacy that its voting structure will preserve majority control by SROs rests on the Commission's belief that it is permissible to allocate votes to so-called "exchange groups," rather than allocating a single vote to each individual exchange (whether or not that exchange shares a corporate affiliation with another exchange). The term "exchange group," however, appears nowhere in the Exchange Act or the Commission's regulations. And the concept is at odds with the statutory definition of "self-regulatory organization," which encompasses "*any* national securities exchange," 15 U.S.C. § 78c(a)(26) (emphasis added), including those that share a corporate affiliation with one or more other exchanges. Thus, to preserve the ability of "self-regulatory organizations to act jointly with respect to . . . developing [and] operating . . . a national market system," *id.* § 78k-1(a)(3)(B), the Commission must ensure that an NMS plan's actions reflect the will of a majority of *individual* SROs. The NMS Governance Order fails to meet this requirement because it enables a minority of individual SROs—together with the non-SRO voting representatives—to band together to override the views of the majority of individual SROs.

The Commission has no authority to alter the Exchange Act's definition of "self-regulatory organization" in a manner that suits the Commission "from a policy perspective." JA_ [85.Fed.Reg.28713]. A "general authority to define terms . . . does not confer power to *redefine* those terms that the statute itself defines." *FAIC Sec., Inc. v. United States*, 768 F.2d 352, 362 (D.C. Cir. 1985); *see also Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition . . . .").

Accordingly, the Commission's admission that it must ensure "SROs have sufficient voting power to act jointly on behalf of the plan" is fatal to the NMS Governance Order. JA_ [85.Fed.Reg.28721]. Because the Commission's attempt to comply with that statutory requirement rests on an impermissible redefinition of the term "self-regulatory organization," its exchange-group-based voting structure violates both the Exchange Act and Regulation NMS.

B. The Commission Deviated From Existing Practice With No Adequate Explanation.

The Commission's adoption of an exchange-group-based voting structure is also arbitrary and capricious because it is incompatible with the Commission's treatment of affiliated exchanges in other regulatory settings.

The Commission requires SROs—including "multiple exchanges operating under one corporate umbrella," JA_ [85.Fed.Reg.2168]—to maintain their separate identities in numerous concrete ways. For example, exchanges must maintain

separate pools of liquidity, *see* Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data, Release No. 34-59039, 73 Fed. Reg. 74,770, 74,790 (Dec. 9, 2008), and separate rebate schedules, *see* Order Disapproving Proposed Rule Change to Offer a Rebate Based on Members' Aggregate Customer Volume, Release No. 34-72633, 79 Fed. Reg. 42,578, 42,586 (July 22, 2014). Indeed, as the Commission has emphasized, it "historically has reviewed whether a proposed exchange rule is consistent with the provisions of Section 6 of the [Exchange] Act," 15 U.S.C. § 78f—which establishes substantive standards governing exchange rule filings—"on an exchange-by-exchange basis." *Id.* at 42,585. "[T]hat is, an exchange's proposed rule change is analyzed at the individual level of the registered securities exchange and *not at the group level of exchanges*." *Id.* (emphasis added). Yet, in the NMS Governance Order—unlike in these other settings, including relating to the planning, administering, and regulating of the existing NMS plans, *see supra* note 2—the Commission has proposed to do just that: take regulatory action that operates "at the group level of exchanges" based on the exchanges' corporate affiliation.

In response to comments highlighting this regulatory disparity, JA_ [Nasdaq.Letter.I.at.7], the Commission did not dispute that it treats affiliated SROs as separate entities for all other purposes under the Exchange Act. Instead, the Commission offered the terse explanation that it "believes . . . that a meaningful

legal distinction exists between, on one hand, each SRO's individual responsibility [under the Exchange Act] . . . and, on the other hand, the responsibility of the SROs to jointly operate the NMS plans pursuant to Section 11A of the Act." JA_ [85.Fed.Reg.28713]. But the Commission did not explain what that purported "legal distinction" *is*, or the basis for drawing it. Tellingly, the Commission did not draw this distinction when, in the NMS Governance Order, it ordered the SROs individually, and not as exchange groups, to jointly develop the New Consolidated Data Plan.

The Commission's *ipse dixit* is not sufficient under the APA. If the Commission intends to deviate from its existing policy of treating affiliated SROs independently, it "must show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also Sw. Airlines Co. v. FERC*, 926 F.3d 851, 856 (D.C. Cir. 2019) ("A full and rational explanation becomes especially important when . . . an agency elects to shift its policy or depart from its typical manner of administering a program." (alterations and internal quotation marks omitted)). While an agency need not demonstrate that its new policy is *better* than the old one, it must at least "acknowledge [those] precedents" and then either "distinguish them" or explain its "rejection of their approach." *Tenn. Gas Pipeline Co. v. FERC*, 867 F.2d 688, 692 (D.C. Cir. 1989). But "however the agency justifies its new position, what it may not do is gloss over or swerve from

prior precedents without discussion." *Sw. Airlines Co.*, 926 F.3d at 856 (alterations and internal quotation marks omitted).

Here, the Commission impermissibly "gloss[ed] over" its longstanding policy of treating each SRO separately, regardless of its affiliation with other SROs. The Commission rested its action on its unsupported and unexplained "belie[f]" that there is a "meaningful legal distinction" between voting power on the operating committee of an NMS plan and other regulatory contexts. JA_ [85.Fed.Reg.28713]. That conclusory assertion falls well short of the "full and rational explanation" required by this Court's precedents. *Sw. Airlines*, 926 F.3d at 856.

The Commission's failure to explain its change in position is exacerbated by the fact that its new regulatory approach subjects certain exchanges to disparate treatment based solely on their affiliation with an "exchange group." Under the New Consolidated Data Plan, exchanges that are part of an exchange group will have less voting power on the operating committee than exchanges that are not. NYSE, for example, will effectively receive only two-fifths of a vote because it must share two votes with the four other exchanges affiliated with Intercontinental Exchange, Inc. In contrast, Investors Exchange LLC will continue to have a full vote because it is not affiliated with any other exchanges.

It is well settled that government "is at its most arbitrary when it treats similarly situated people differently." *Etelson v. Office of Personnel Mgmt.*, 684

F.2d 918, 926 (D.C. Cir. 1982). An agency seeking to draw distinctions between similarly situated entities therefore must "offer[] a[] reason for its differing treatment." *Id.* at 927. But the Commission failed to "articulate[] an adequate explanation" for its disparate treatment of affiliated exchanges. *Int'l Fabricare Inst. v. EPA*, 972 F.2d 384, 389 (D.C. Cir. 1992). Instead, it claimed that the current voting structure "concentrates voting power in a small number of exchange group stakeholders, which also have inherent conflicts of interest with respect to the operations of the Plans." JA_ [85.Fed.Reg.28713]. But that still does not explain why exchanges that sell their own proprietary data products should receive less voting power when they are affiliated with other exchanges than when they are unaffiliated exchanges. If an exchange is conflicted because it sells proprietary data products, the same holds true regardless of whether the exchange is unaffiliated or part of an exchange group. The Commission's reasoning thus does nothing to explain the disparate treatment of affiliated exchanges or to save the NMS Governance Order from invalidity under the APA.

III. THE REQUIREMENT OF AN "INDEPENDENT" ADMINISTRATOR IS ARBITRARY AND CAPRICIOUS.

The NMS Governance Order is arbitrary and capricious for the additional reason that the Commission failed to articulate a rational explanation for the requirement of an "independent plan administrator" not owned or controlled by an entity that "offers for sale its own proprietary market data product," JA_

[85.Fed.Reg.28722], a requirement that would bar either of the current plan administrators from serving as administrator of the New Consolidated Data Plan.

The sole basis the Commission offered for requiring an "independent" plan administrator is that "an entity that acts as the administrator while also offering for sale its own proprietary data products faces a substantial, inherent conflict of interest, because it would have access to sensitive SIP customer information of significant commercial value." JA_ [85.Fed.Reg.28722]. There are several fundamental flaws in this reasoning.

First, the Commission did not adequately define the problem it purports to solve with an "independent" plan administrator requirement because it failed to provide any factual basis from which to conclude that an actual conflict of interest exists. *See New York Stock Exchange*, 962 F.3d at 554 (invalidating a Commission rule where "the Commission acted without explaining what problems with the existing regulatory requirements it meant for the Rule to correct"). The Commission identified no evidence that an SRO administrator has ever taken advantage of its access to SIP subscriber information to benefit its own proprietary-data business. Nor did the Commission explain why the *existing* confidentiality requirements were inadequate to address any theoretical conflict of interest.

Second, the Commission failed to explain why it prohibited SROs that sell proprietary data products from serving as the plan administrator, but did not prohibit

non-SRO data vendors, even though they also separately sell market data and could also theoretically benefit from access to subscriber lists. The NMS Governance Order treats non-SRO data vendors as sufficiently "independent" because they are not owned or controlled by entities that sell proprietary market-data products. The Commission "recognize[d]," however, "that non-SRO members also face conflicts of interest as both voting members of the operating committee and employees of businesses that utilize core data or proprietary data feeds," and thus agreed that the plan's general conflict-of-interest provisions should apply to non-SROs. JA_ [85.Fed.Reg.28725-26]. Having recognized non-SROs' susceptibility to conflicts of interest, the Commission never explained why a supposed conflict of interest would disqualify the current SRO administrators from serving as the administrator of the New Consolidated Data Plan but would not disqualify non-SRO data vendors.

Third, the Commission failed to consider whether "more good than harm will come of its action." *Md. People's Counsel v. FERC*, 761 F.2d 768, 779 (D.C. Cir. 1985). The Commission acknowledged that it would be costly to transition from the current plan administrators—which have "significant experience and familiarity" with operation of the Equity Data Plans—to a new "independent" plan administrator. JA_ [85.Fed.Reg.28723]. The new administrator will necessarily lack the existing administrators' experience and institutional knowledge, and, as the Commission conceded, will inevitably incur costs associating with "system infrastructure" and

hiring and training "human capital." *Id.* The Commission failed to explain why those deficits in experience and acknowledged inefficiencies were warranted other than to assert that it "believes that eliminating the conflict of interest justifies the requirement" of "independence." *Id.* That conclusory assertion is not sufficient under the APA to justify the imposition of a burdensome new regulatory requirement that will provide no discernable benefit to investors, the securities market, or the public interest.

Fourth, the Commission failed to give full consideration to the effect of the Proposed Data Infrastructure Rule—which the Commission was simultaneously considering—on the NMS Governance Order, including its requirement for an independent administrator. A comment letter submitted by NYSE and its affiliated exchanges highlighted that the Proposed Data Infrastructure Rule was drafted to "purportedly address the alleged conflicts of interest" that the NMS Governance Order "hopes to eliminate," potentially rendering the NMS Governance Order unnecessary. JA_ [NYSE.Letter.II.at.3-4]. The Commission's only response was a general statement that the NMS Governance Order "addresses governance issues that are not addressed in the Infrastructure Proposal." JA_ [85.Fed.Reg.28708]. But that does not explain why those governance changes, such as the requirement of an independent administrator, would remain necessary if, as the Proposed Data Infrastructure Rule provides, the administrator of the New Consolidated Data Plan

will no longer be distributing market data directly to customers. The Commission's failure to adequately explain the relationship between the two proposals renders the NMS Governance Order arbitrary and capricious. *See Carlson*, 938 F.3d at 344.

Finally, the Commission failed to address the impact of its action approving—simultaneously with adoption of the NMS Governance Order—amendments to the Equity Data Plans that provide for the strict confidential treatment of certain categories of information, including subscriber lists, and that prohibit participants, including exchanges, from disclosing that information even to their own agents. *See, e.g.*, Order Approving the Forty-Seventh Amendment to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges, as Modified by the Commission, Concerning a Confidentiality Policy, Release No. 34-88826, 85 Fed. Reg. 28,069, 28,080-81 (May 12, 2020). The amendments were proposed for the express purpose of "protect[ing] against any potential misuse of confidential information," including "information obtained or generated by the Administrator . . . in connection with the operation of" a SIP. *Id.* at 28,069. And these amendments themselves expanded on similar policies already in place to restrict the administrator's use and dissemination of certain confidential information. JA_ [NYSE.Letter.I.at.13.20].

The Commission acknowledged in the NMS Governance Order that the confidentiality amendments—which must be incorporated into the New Consolidated Data Plan—"are a necessary first step towards implementing a policy to address the commercial use of confidential or proprietary information." JA_ [85.Fed.Reg.28726]. The Commission did not explain, however, why the requirement of an independent administrator would still be necessary in light of these new, stringent confidentiality procedures.

In sum, the independent administrator requirement is nothing more than an arbitrary and capricious solution in search of a non-existent problem.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions for review and vacate the NMS Governance Order.

Dated: November 3, 2020

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7) because this brief contains 12,682 words, as determined by the word-count function of Microsoft Word 2019, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Times New Roman font.

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I hereby certify that on November 3, 2020, I caused a true and correct copy of this brief to be electronically filed through the Court's CM/ECF system, which will send a notice of filing to all registered users.

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ORAL ARGUMENT NOT YET SCHEDULED
No. 20-1181, Consolidated with Nos. 20-1192, 20-1231

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE NASDAQ STOCK MARKET LLC, et al.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petitions For Review Of An Order
Of The United States Securities And Exchange Commission

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(c) The Working Group shall report to the President initially within 60 days (and periodically thereafter) on its progress and, if appropriate, its views on any recommended legislative changes.

SEC. 3. *Administration.* (a) The heads of Executive departments, agencies, and independent instrumentalities shall, to the extent permitted by law, provide the Working Group such information as it may require for the purpose of carrying out this Order.

(b) Members of the Working Group shall serve without additional compensation for their work on the Working Group.

(c) To the extent permitted by law and subject to the availability of funds therefor, the Department of the Treasury shall provide the Working Group with such administrative and support services as may be necessary for the performance of its functions.

RONALD REAGAN.

§ 78c. Definitions and application

(a) Definitions

When used in this chapter, 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) 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 chapter, the rules and regulations thereunder, and its own rules. For purposes of sections 78f(b)(1), 78f(b)(4), 78f(b)(6), 78f(b)(7), 78f(d), 78q(d), 78s(d), 78s(e), 78s(g), 78s(h), and 78u 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 78f(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 chapter, 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 chapter 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 brokerage 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 24 of title 12, in conformity with section 78*o*–5 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 1841 of title 12), 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 program 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 November 12, 1999; 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 [15 U.S.C. 80a–1 et seq.] 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 1841 of title 12) other than—

(I) a registered broker or dealer; or

(II) an affiliate that is engaged in merchant banking, as described in section 1843(k)(4)(H) of title 12.

(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 [15 U.S.C. 77c(b), 77d(2), 77d(5)] or the rules and regulations issued thereunder;

(II) at any time after the date that is 1 year after November 12, 1999, is not af-

filiated with a broker or dealer that has been registered for more than 1 year in accordance with this chapter, and engages in dealing, market making, or underwriting activities, 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 78*o*(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 78*o*(e).[1]—The term ''broker'' does not include a bank that—

(i) was, on the day before November 12, 1999, subject to section 78*o*(e)[1] of this title; 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).

(5) DEALER.—

(A) IN GENERAL.—The term ''dealer'' means any person engaged in the business of buying and selling securities for such person's own account through a broker or otherwise.

[1] See References in Text note below.

(B) EXCEPTION FOR PERSON NOT ENGAGED IN THE BUSINESS OF DEALING.—The term ''dealer'' does not include a person that buys or sells securities 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 24 of title 12, in conformity with section 78*o*–5 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 1462(5) of title 12, (B) a member bank of the Federal Reserve System, (C) any other banking institution or savings association, as defined in section 1462(4) of title 12, 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 section 92a of title 12, 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 chapter, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph.

(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, 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, straddle, 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 secu-

rity; 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 [15 U.S.C. 80a–3(c)(3)];

(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 [15 U.S.C. 80a–3(c)(10)(B)];

(vi) solely for purposes of sections 78*l*, 78m, 78n, and 78p 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 [15 U.S.C. 80a–3(c)(14)]; 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 chapter which by their terms do not apply to an ''exempted security'' or to ''exempted securities''.

(B)(i) Notwithstanding subparagraph (A)(i) of this paragraph, government securities shall not be deemed to be ''exempted securities'' for the purposes of section 78q–1 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 78*o* and 78q–1 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 title 26, (ii) an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of title 26, (iii) a governmental plan as defined in section 414(d) of title 26 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 [15 U.S.C. 80a–3(c)(14)], 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 title 26, or (II) is a plan funded by an annuity contract described in section 403(b) of title 26.

(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.

(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.

(15) The term ''Commission'' means the Securities and Exchange Commission established by section 78d 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.

(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 78*o*(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 [15 U.S.C. 80a–1 et seq.].

(20) The terms ''investment adviser'' and ''underwriter'' have the same meanings as in the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 et seq.].

(21) The term ''person 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 regular circulation, any self-regulatory organizations, 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 153 of title 47, subject to the jurisdiction of the Federal Communications Commission or a State commission, as defined in section 153 of title 47, 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 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 chapter; (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 78s(b), 78s(c), and 78w(b)[1] of this title) the Municipal Securities Rulemaking Board established by section 78*o*–4 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)[1] of title 26) the interest on which is excludable from gross income under section 103(a)(1)[1] of title 26 if, by reason of the application of paragraph (4) or (6) of section 103(c)[1] of title 26 (determined as if paragraphs (4)(A), (5), and (7) were not included in such section 103(c)),[1] paragraph (1) of such section 103(c)[1] 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 78*o*–4(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 securities 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, or a subsidiary or a department or division of any such bank;

(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, or a subsidiary or a department or division of such subsidiary;

(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 subsidiary or department or division thereof;

(iv) the Director of the Office of Thrift Supervision, in the case of a savings association (as defined in section 3(b) of the

Federal Deposit Insurance Act (12 U.S.C. 1813(b))), the deposits of which are insured by the Federal Deposit Insurance Corporation, a subsidiary or a department or division of any such savings association, or a savings and loan holding company; and

(v) 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, or a subsidiary of any such bank;

(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, or 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;

(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 subsidiary thereof;

(iv) the Director of the Office of Thrift Supervision, in the case of a savings association (as defined in section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b))), the deposits of which are insured by the Federal Deposit Insurance Corporation, or a subsidiary of any such savings association, or a savings and loan holding company; and

(v) 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 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, or 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 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) when the appropriate regulatory agency for such clearing agency is not the Commission;

(iv) the Director of the Office of Thrift Supervision, in the case of a savings association (as defined in section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b))), the deposits of which are insured by the Federal Deposit Insurance Corporation, a savings and loan holding company, or a subsidiary of a savings and loan holding company when the appropriate regulatory agency for such clearing agency is not the Commission; and

(v) 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 [12 U.S.C. 1811 et seq.]:

(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 any other member bank of the Federal Reserve System;

(iii) the Director of the Office of Thrift Supervision, in the case of a savings association (as defined in section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b))) the deposits of which are insured by the Federal Deposit Insurance Corporation; and

(iv) the Federal Deposit Insurance Corporation, in the case of any other insured bank.

(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;

(ii) the Director of the Office of Thrift Supervision, in the case of a savings association (as defined in section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b))), the deposits of which are insured by the Federal Deposit Insurance Corporation; and

(iii) the Board of Governors of the Federal Reserve System in the case of any other member bank of the Federal Reserve System;

(iv) 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 [12 U.S.C. 1811 et seq.]; and

(v) 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 or a Federal branch or Federal agency of a foreign bank (as such terms are used in the Inter-

national Banking Act of 1978 [12 U.S.C. 3101 et seq.]);

(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 [12 U.S.C. 601 et seq., 611 et seq.];

(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) or an insured State branch of a foreign bank (as such terms are used in the International Banking Act of 1978);

(iv) the Director of the Office of Thrift Supervision, in the case of a savings association (as defined in section 3(b) of the Federal Deposit Insurance Act [12 U.S.C. 1813(b)]) the deposits of which are insured by the Federal Deposit Insurance Corporation;[2]

(v) 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 1841(c)(2), or held under section 1843(f) of title 12—

(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 [12 U.S.C. 611 et seq.];

(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 [12 U.S.C. 1811 et seq.]; 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 1841 of title 12, and the term ''District of Columbia savings and loan association'' means any association subject to examination and supervision by the Office of Thrift Supervision under section 1466a of title 12. As used in this paragraph, the term ''savings and loan holding company'' has the same meaning as in section 1467a(a) of title 12.

(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 chapter and the 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 chapter which the Commission determines is unfair and not necessary or appropriate in furtherance of the purposes of this chapter.

(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) 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, or government securities dealer 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 asso-

[2] So in original. Probably should be followed by ''and''.

ciated with a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, 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, or government securities dealer, 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, 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 78*o*(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 is rated in one of the two highest rating categories by at least one nationally recognized statistical rating organization, 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 5402(6) of title 42, 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 mortgagee approved by the Secretary of Housing and Urban Development pursuant to sections 1709 and 1715b of title 12, 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 1703 of title 12; or

(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 [3] 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 78*o*–5 and 78q–1 of this title, 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 78*o*, 78*o*–5, and 78q–1 of this title as applied to a bank, a qualified Canadian government obligation as defined in section 24 of title 12.

(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 [12 U.S.C. 1813(b)]) 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 [15 U.S.C. 7201 et seq.], the Trust Indenture Act of 1939 (15 U.S.C. 77aaa et seq.), the 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.) [15 U.S.C. 80b–1 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 78*o* or

[3] So in original. Probably should be ''evidenced''.

78*o*–4 of this title, except that in paragraph (3) of this subsection and sections 78f and 78*o*–3 of this title 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 78*o*–5(a)(1)(A) of this title.

(49) The term ''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 [15 U.S.C. 80a–1 et seq.];

(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 determine 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 is rated in 1 of the 4 highest rating categories by at least 1 nationally recognized statistical rating organization, 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 632(a) of this title;

(iii) the term ''insured depository institution'' has the same meaning as in section 3 of the Federal Deposit Insurance Act [12 U.S.C. 1813]; and

(iv) the term ''insured credit union'' has the same meaning as in section 1752 of title 12.

(54) QUALIFIED INVESTOR.—

(A) DEFINITION.—Except as provided in subparagraph (B), for purposes of this chapter, the term ''qualified investor'' means—

(i) any investment company registered with the Commission under section 8 of the Investment Company Act of 1940 [15 U.S.C. 80a–8];

(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 [15 U.S.C. 80a–3(c)(7)];

(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 [12 U.S.C. 1813(b)]), broker, dealer, insurance company (as defined in section 2(a)(13) of the Securities

Act of 1933 [15 U.S.C. 77b(a)(13)]), or business development company (as defined in section 2(a)(48) of the Investment Company Act of 1940 [15 U.S.C. 80a–2(a)(48)]);

(iv) any small business investment company licensed by the United States Small Business Administration under section 301(c) [15 U.S.C. 681(c)] or (d)[1] 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 [29 U.S.C. 1001 et seq.], 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 [29 U.S.C. 1002(21)], 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 [15 U.S.C. 80a–3(c)(2)];

(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 [12 U.S.C. 3101(7)]);

(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 subsection (a)(5)(C)(iii) of this section 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 financial 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 paragraph (12) of this subsection as in effect on January 11, 1983 (other than any municipal security as defined in paragraph (29) of this subsection as in effect on January 11, 1983). The term ''security future'' does not include any agreement, contract, or transaction excluded from the Commodity Exchange Act [7 U.S.C. 1 et seq.] under section 2(c), 2(d), 2(f), or 2(g) of the Commodity Exchange Act [7 U.S.C. 2(c), (d), (f), (g)] (as in effect on December 21, 2000) or sections 27 to 27f of title 7.

(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 78*l* of this title;

(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 index, before December 21, 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 December 21, 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 December 21, 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 December 21, 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 78f(g) of this title that is higher than the minimum amount established and in effect pursuant to section 78g(c)(2)(B) of this title.

(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 [15 U.S.C. 7201].

(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 78*o*–7(a)(1)(B)(ix) of this title, 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 September 29, 2006);

(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 78*o*–7 of this title.

(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.

(77)[4] 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.

(b) Power to define technical, trade, accounting, and other terms

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 chapter, consistently with the provisions and purposes of this chapter.

(c) Application to governmental departments or agencies

No provision of this chapter 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.

(d) Issuers of municipal securities

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.

[4] So in original. See Amendment of Subsection (a) note below.

(e) Charitable organizations

(1) Exemption

Notwithstanding any other provision of this chapter, 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 [15 U.S.C. 80a–3(c)(10)(D)], 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 chapter 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 [15 U.S.C. 80a–3(c)(10)(B)]; or

(C) a trust or other donative instrument described in section 3(c)(10)(B) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(10)(B)], 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 December 8, 1995, 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 [15 U.S.C. 80a–3(c)(10)(B)], 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 chapter 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 title 26, no person or entity eligible to establish and maintain such a plan under title 26, 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 [15 U.S.C. 80a–3(c)(14)], and no trustee, director, 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 chapter—

(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 [15 U.S.C. 80a–3(c)(14)]; 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.

(June 6, 1934, ch. 404, title I, § 3, 48 Stat. 882; Aug. 23, 1935, ch. 614, § 203(a), 49 Stat. 704; Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7517, 60 Stat. 1352; Pub. L. 86–70, § 12(b), June 25, 1959, 73 Stat. 143; Pub. L. 86–624, § 7(b), July 12, 1960, 74 Stat. 412; Pub. L. 88–467, § 2, Aug. 20, 1964, 78 Stat. 565; Pub. L. 91–373, title IV, § 401(b), Aug. 10, 1970, 84 Stat. 718; Pub. L. 91–547, § 28(a), (b), Dec. 14, 1970, 84 Stat. 1435; Pub. L. 91–567, § 6(b), Dec. 22, 1970, 84 Stat. 1499; Pub. L. 94–29, § 3, June 4, 1975, 89 Stat. 97; Pub. L. 95–283, § 16, May 21, 1978, 92 Stat. 274; Pub. L. 96–477, title VII, § 702, Oct. 21, 1980, 94 Stat. 2295; Pub. L. 97–303, § 2, Oct. 13, 1982, 96 Stat. 1409; Pub. L. 98–376, § 6(a), Aug. 10, 1984, 98 Stat. 1265; Pub. L. 98–440, title I, § 101, Oct. 3, 1984, 98 Stat. 1689; Pub. L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 99–571, title I, § 102(a)–(d), Oct. 28, 1986, 100 Stat. 3214–3216; Pub. L. 100–181, title III, §§ 301–306, Dec. 4, 1987, 101 Stat. 1253, 1254; Pub. L. 100–704, § 6(a), Nov. 19, 1988, 102 Stat. 4681; Pub. L. 101–73, title VII, § 744(u)(1), Aug. 9, 1989, 103 Stat. 441; Pub. L. 101–429, title V, § 503, Oct. 15, 1990, 104 Stat. 952; Pub. L. 101–550, title II, §§ 203(b), 204, Nov. 15, 1990, 104 Stat. 2717, 2718; Pub. L. 103–202, title I, §§ 106(b)(2)(A), 109(a), Dec. 17, 1993, 107 Stat. 2350, 2352; Pub. L. 103–325, title II, § 202, title III, § 347(a), Sept. 23, 1994, 108 Stat. 2198, 2241; Pub. L. 104–62, § 4(a), (b), Dec. 8, 1995, 109 Stat. 684; Pub. L. 104–290, title I, § 106(b), title V, § 508(c), Oct. 11, 1996, 110 Stat. 3424, 3447; Pub. L. 105–353, title III, § 301(b)(1)–(4), Nov. 3, 1998, 112 Stat. 3235, 3236; Pub. L. 106–102, title II, §§ 201, 202, 207, 208, 221(b), 231(b)(1), Nov. 12, 1999, 113 Stat. 1385, 1390, 1394, 1395, 1401, 1406; Pub. L. 106–554, § 1(a)(5) [title II, § 201], Dec. 21, 2000, 114 Stat. 2763, 2763A–413; Pub. L. 107–204, § 2(b), title II, § 205(a), title VI, § 604(c)(1)(A), July 30, 2002, 116 Stat. 749, 773, 796; Pub. L. 108–359, § 1(c)(1), Oct. 25, 2004, 118 Stat. 1666; Pub. L. 108–386, § 8(f)(1)–(3), Oct. 30, 2004, 118 Stat. 2232; Pub. L. 108–447, div. H, title V, § 520(1), Dec. 8, 2004, 118 Stat. 3267; Pub. L. 109–291, § 3(a), Sept. 29, 2006, 120 Stat. 1328; Pub. L. 109–351, title I, § 101(a)(1), title IV, § 401(a)(1), (2), Oct. 13, 2006, 120 Stat. 1968, 1971, 1972; Pub. L. 111–203, title III, § 376(1), title VII, § 761(a), title IX, §§ 932(b), 939(e), 941(a), 944(b), 985(b)(2), 986(a)(1), July 21, 2010, 124 Stat. 1566, 1754, 1883, 1886, 1890, 1898, 1933, 1935.)

AMENDMENT OF SUBSECTION (a)

Pub. L. 111–203, title VII, §§ 761(a), 774, July 21, 2010, 124 Stat. 1754, 1802, provided that, effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B (§§ 761–774) of title VII of Pub. L. 111–203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, subsection (a) of this section is amended as follows:

(1) in paragraph (5)(A), (B), by inserting ''(not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants)'' after ''securities'' each place that term appears;

(2) in paragraph (10), by inserting ''security-based swap,'' after ''security future,'';

(3) in paragraph (13), by adding at the end the following: ''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.'';

(4) in paragraph (14), by adding at the end the following: ''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.'';

(5) in paragraph (39)—

(A) in subparagraph (B)(i)—

(i) in subclause (I), by striking ''or government securities dealer'' and inserting ''government securities dealer, security-based swap dealer, or major security-based swap participant''; and

(ii) in subclause (II), by inserting ''security-based swap dealer, major security-based swap participant,'' after ''government securities dealer,'';

(B) in subparagraph (C), by striking ''or government securities dealer'' and inserting ''government securities dealer, security-based swap dealer, or major security-based swap participant''; and

(C) in subparagraph (D), by inserting ''security-based swap dealer, major security-based swap participant,'' after ''government securities dealer,''; and

(6) by adding at the end the following:

(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).

(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 January 11, 1983 (other than any municipal security as defined in paragraph (29) as in effect on January 11, 1983), 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 78o–10(l)(2) of this title, 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 78i, 78j, 78p, 78t, and 78u–1 of this title, 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.

AMENDMENT OF SUBSECTION (a)(34)

Pub. L. 111–203, title III, §§ 351, 376(1), July 21, 2010, 124 Stat. 1546, 1566, provided that, effective on the transfer date, subsection (a)(34) of this section is amended as follows:

(1) in subparagraph (A)—

(A) in clause (i), by striking ''or a subsidiary or a department or division of any such bank'' and inserting ''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'';

(B) in clause (ii), by striking ''or a subsidiary or a department or division of such subsidiary'' and inserting ''a subsidiary or a department or division of such subsidiary, or a savings and loan holding company'';

(C) in clause (iii), by striking ''or a subsidiary or department or division thereof;'' and inserting ''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''; and

(D) by striking clause (iv) and redesignating clause (v) as clause (iv);

(2) in subparagraph (B)—

(A) in clause (i), by striking ''or a subsidiary of any such bank'' and inserting ''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'';

(B) in clause (ii), by striking ''or 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'' and inserting ''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'';

(C) in clause (iii), by striking ''or a subsidiary thereof;'' and inserting ''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''; and

(D) by striking clause (iv) and redesignating clause (v) as clause (iv);

(3) in subparagraph (C)—

(A) in clause (i), by striking ''bank'' and inserting ''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'';

(B) in clause (ii), by striking ''or 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'' and inserting ''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'';

(C) in clause (iii), by striking ''System)'' and inserting, ''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''; and

(D) by striking clause (iv) and redesignating clause (v) as clause (iv);

(4) in subparagraph (D)—

(A) in clause (i), by inserting after ''bank'' the following: ''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'';

(B) in clause (ii), by adding ''and'' at the end;

(C) by striking clause (iii) and redesignating clause (iv) as clause (iii); and

(D) in clause (iii), as so redesignated, by inserting after ''bank'' the following: ''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'';

(5) in subparagraph (F)—

(A) in clause (i), by inserting after ''bank'' the following: ''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'';

(B) by striking clause (ii) and redesignating clauses (iii), (iv), and (v) as clauses (ii), (iii), and (iv), respectively; and

(C) in clause (iii), as so redesignated, by inserting before the semicolon the following: ''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'';

(6) in subparagraph (G)—

(A) in clause (i), by inserting after ''national bank'' the following: '', 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,'';

(B) in clause (iii), by inserting after ''bank)'' the following: '', 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,'' and by adding ''and'' at the end; and

(C) by striking clause (iv) and redesignating clause (v) as clause (iv); and

(7) in the undesignated matter following subparagraph (H), by striking '', and the term 'District of Columbia savings and loan association' means any association subject to examination and supervision by the Office of Thrift Supervision under section 1466a of title 12''.

See Effective Date of 2010 Amendment note below.

AMENDMENT OF SUBSECTION (a)(41)

Pub. L. 111–203, title IX, § 939(e)(1), (g), July 21, 2010, 124 Stat. 1886, 1887, provided that, effective 2 years after July 21, 2010, subsection (a)(41) of this section is amended by striking ''is rated in one of the two highest rating categories by at least one nationally recognized statistical rating organization'' and inserting ''meets standards of credit-worthiness as established by the Commission''.

AMENDMENT OF SUBSECTION (a)(53)(A)

Pub. L. 111–203, title IX, § 939(e)(2), (g), July 21, 2010, 124 Stat. 1886, 1887, provided that, effective 2 years after July 21, 2010, subsection (a)(53)(A) of this section is amended by striking ''is rated in 1 of the 4 highest rating categories by at least 1 nationally recognized statistical rating organization'' and inserting ''meets standards of credit-worthiness as established by the Commission''.

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a), (b), (c), (e)(1), (f), and (g), was in the original ''this title''. See References in Text note set out under section 78a of this title.

The Investment Company Act of 1940, referred to in subsec. (a)(4)(B)(v), (19), (47), (51)(A)(iii), is title I of act Aug. 20, 1940, ch. 686, 54 Stat. 789, which is classified generally to subchapter I (§ 80a–1 et seq.) of chapter 2D of this title. For complete classification of this Act to the Code, see section 80a–51 of this title and Tables.

This chapter, referred to in subsec. (a)(4)(B)(vii)(II), was in the original ''this Act''. See References in Text note set out under section 78a of this title.

Section 206 of the Gramm-Leach-Bliley Act, referred to in subsec. (a)(4)(B)(ix), (5)(C)(iv), (54)(B), is section 206 of Pub. L. 106–102, which is set out as a note below.

Subsec. (e) of section 78*o* of this title, referred to in subsec. (a)(4)(E), was redesignated (f) by Pub. L. 111–203, title IX, § 929X(c)(1), July 21, 2010, 124 Stat. 1870.

The Investment Advisers Act of 1940, referred to in subsec. (a)(20), (47), is title II of act Aug. 20, 1940, ch. 686, 54 Stat. 847, which is classified generally to sub-

chapter II (§ 80b–1 et seq.) of chapter 2D of this title. For complete classification of this Act to the Code, see section 80b–20 of this title and Tables.

Section 78w(b) of this title, referred to in subsec. (a)(26), was omitted from the Code.

Section 103 of title 26, referred to in subsec. (a)(29), which related to interest on certain governmental obligations, was amended generally by Pub. L. 99–514, title XIII, § 1301(a), Oct. 22, 1986, 100 Stat. 2602, and, as so amended, relates to interest on State and local bonds. Section 103(b)(2) (formerly section 103(c)(2)), which prior to the general amendment defined industrial development bond, relates to the applicability of the interest exclusion to arbitrage bonds.

The Federal Deposit Insurance Act, referred to in subsec. (a)(34)(D), (F)(iv), (H)(iii), is act Sept. 21, 1950, ch. 967, § 2, 64 Stat. 873, which is classified generally to chapter 16 (§ 1811 et seq.) of Title 12, Banks and Banking. For complete classification of this Act to the Code, see Short Title note set out under section 1811 of Title 12 and Tables.

The International Banking Act of 1978, referred to in subsec. (a)(34)(G)(i) to (iii), (46)(B), is Pub. L. 95–369, Sept. 17, 1978, 92 Stat. 607, which enacted chapter 32 (§ 3101 et seq.) and sections 347d and 611a of Title 12, Banks and Banking, amended sections 72, 378, 614, 615, 618, 619, 1813, 1815, 1817, 1818, 1820, 1821, 1822, 1823, 1828, 1829b, 1831b, and 1841 of Title 12, and enacted provisions set out as notes under sections 247, 611a, and 3101 of Title 12 and formerly set out as notes under sections 36, 247, and 601 of Title 12. For complete classification of this Act to the Code, see Short Title note set out under section 3101 of Title 12 and Tables.

Section 25 of the Federal Reserve Act, referred to in subsec. (a)(34)(G)(ii), is classified to subchapter I (§ 601 et seq.) of chapter 6 of Title 12, Banks and Banking. Section 25A of the Federal Reserve Act, referred to in subsec. (a)(34)(G)(ii), (H)(ii), is classified to subchapter II (§ 611 et seq.) of chapter 6 of Title 12.

The Commodity Exchange Act, referred to in subsec. (a)(39)(B)(ii), (C), (55)(A), is act Sept. 21, 1922, ch. 369, 42 Stat. 998, which is classified generally to chapter 1 (§ 1 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 1 of Title 7 and Tables.

The Securities Act of 1933, referred to in subsec. (a)(47), is act May 27, 1933, ch. 38, title I, 48 Stat. 74, which is classified generally to subchapter I (§ 77a et seq.) of chapter 2A of this title. For complete classification of this Act to the Code, see section 77a of this title and Tables.

The Securities Exchange Act of 1934, referred to in subsec. (a)(47), is act June 6, 1934, ch. 404, 48 Stat. 881, which is classified generally to this chapter (§ 78a et seq.). For complete classification of this Act to the Code, see section 78a of this title and Tables.

The Sarbanes-Oxley Act of 2002, referred to in subsec. (a)(47), is Pub. L. 107–204, July 30, 2002, 116 Stat. 745. Section 2 of the Act enacted section 7201 of this title and amended this section. For complete classification of this Act to the Code, see Short Title note set out under section 7201 of this title and Tables.

The Trust Indenture Act of 1939, referred to in subsec. (a)(47), is title III of act May 27, 1933, ch. 38, as added Aug. 3, 1939, ch. 411, 53 Stat. 1149, which is classified generally to subchapter III (§ 77aaa et seq.) of chapter 2A of this title. For complete classification of this Act to the Code, see section 77aaa of this title and Tables.

The Securities Investor Protection Act of 1970, referred to in subsec. (a)(47), is Pub. L. 91–598, Dec. 30, 1970, 84 Stat. 1636, which is classified generally to chapter 2B–1 (§ 78aaa et seq.) of this title. For complete classification of this Act to the Code, see section 78aaa of this title and Tables.

Section 301(d) of the Small Business Investment Act of 1958, referred to in subsec. (a)(54)(A)(iv), was classified to section 681(d) of this title and was repealed by Pub. L. 104–208, div. D, title II, § 208(b)(3)(A), Sept. 30, 1996, 110 Stat. 3009–742.

The Employee Retirement Income Security Act of 1974, referred to in subsec. (a)(54)(A)(v), is Pub. L. 93–406, Sept. 2, 1974, 88 Stat. 832, which is classified principally to chapter 18 (§ 1001 et seq.) of Title 29, Labor. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of Title 29 and Tables.

CODIFICATION

Words ''Philippine Islands'' deleted from definition of term ''State'' in subsec. (a)(16) under authority of Proc. No. 2695, which granted independence to the Philippine Islands. Proc. No. 2695 was issued pursuant to section 1394 of Title 22, Foreign Relations and Intercourse, and is set out as a note under that section.

AMENDMENTS

2010—Subsec. (a)(4)(B)(vii)(I). Pub. L. 111–203, § 944(b), substituted ''4(5)'' for ''4(6)''.

Subsec. (a)(47). Pub. L. 111–203, § 986(a)(1), struck out ''the Public Utility Holding Company Act of 1935,'' before ''the Trust Indenture Act of 1939''.

Subsec. (a)(55)(A). Pub. L. 111–203, § 985(b)(2)(A), made technical amendment to reference in original act which appears in text as reference to paragraph (12) of this subsection.

Subsec. (a)(62). Pub. L. 111–203, § 932(b), redesignated subpars. (B) and (C) as (A) and (B), respectively, and struck out former subpar. (A) which read as follows: ''has been in business as a credit rating agency for at least the 3 consecutive years immediately preceding the date of its application for registration under section 78*o*–7 of this title;''.

Subsec. (a)(77). Pub. L. 111–203, § 941(a), added par. (77).

Subsec. (g). Pub. L. 111–203, § 985(b)(2)(B), substituted ''account, person'' for ''account person'' in introductory provisions.

2006—Subsec. (a)(4)(F). Pub. L. 109–351, § 101(a)(1), added subpar. (F).

Subsec. (a)(6)(A). Pub. L. 109–351, § 401(a)(1)(A), inserted ''or a Federal savings association, as defined in section 1462(5) of title 12'' after ''a banking institution organized under the laws of the United States''.

Subsec. (a)(6)(C). Pub. L. 109–351, § 401(a)(1)(B), inserted ''or savings association, as defined in section 1462(4) of title 12'' after ''other banking institution'' and ''or savings associations'' after ''having supervision over banks''.

Subsec. (a)(34). Pub. L. 109–351, § 401(a)(2)(G), inserted at end of concluding provisions ''As used in this paragraph, the term 'savings and loan holding company' has the same meaning as in section 1467a(a) of title 12.''

Subsec. (a)(34)(A)(ii). Pub. L. 109–351, § 401(a)(2)(A)(i), substituted ''clause (i), (iii), or (iv)'' for ''clause (i) or (iii)''.

Subsec. (a)(34)(A)(iv), (v). Pub. L. 109–351, § 401(a)(2)(A)(ii)–(iv), added cl. (iv) and redesignated former cl. (iv) as (v).

Subsec. (a)(34)(B)(ii). Pub. L. 109–351, § 401(a)(2)(B)(i), substituted ''clause (i), (iii), or (iv)'' for ''clause (i) or (iii)''.

Subsec. (a)(34)(B)(iv), (v). Pub. L. 109–351, § 401(a)(2)(B)(ii)–(iv), added cl. (iv) and redesignated former cl. (iv) as (v).

Subsec. (a)(34)(C)(ii). Pub. L. 109–351, § 401(a)(2)(C)(i), substituted ''clause (i), (iii), or (iv)'' for ''clause (i) or (iii)''.

Subsec. (a)(34)(C)(iv), (v). Pub. L. 109–351, § 401(a)(2)(C)(ii)–(iv), added cl. (iv) and redesignated former cl. (iv) as (v).

Subsec. (a)(34)(D)(iii), (iv). Pub. L. 109–351, § 401(a)(2)(D), added cl. (iii) and redesignated former cl. (iii) as (iv).

Subsec. (a)(34)(F)(ii) to (v). Pub. L. 109–351, § 401(a)(2)(E), added cl. (ii) and redesignated former cls. (ii) to (iv) as (iii) to (v), respectively.

Subsec. (a)(34)(H). Pub. L. 109–351, § 401(a)(2)(F), moved subpar. (H) and inserted it immediately after subpar. (G).

Subsec. (a)(60) to (64). Pub. L. 109–291 added pars. (60) to (64).

2004—Subsec. (a)(12)(C)(iv). Pub. L. 108–359 added cl. (iv).

Subsec. (a)(34)(A)(i), (B)(i), (C)(i), (D)(i), (F)(i). Pub. L. 108–386, §8(f)(1), struck out ''or a bank operating under the Code of Law for the District of Columbia'' after ''national bank''.

Subsec. (a)(34)(G)(i). Pub. L. 108–386, §8(f)(2), struck out '', a bank in the District of Columbia examined by the Comptroller of the Currency,'' after ''national bank''.

Subsec. (a)(34)(H)(i). Pub. L. 108–386, §8(f)(3), struck out ''or a bank in the District of Columbia examined by the Comptroller of the Currency'' after ''national bank''.

Subsec. (a)(42)(B). Pub. L. 108–447 inserted ''by the Tennessee Valley Authority or'' after ''issued or guaranteed''.

2002—Subsec. (a)(39)(F). Pub. L. 107–204, §604(c)(1)(A), inserted '', or is subject to an order or finding,'' before ''enumerated'' and substituted ''(H), or (G)'' for ''or (G)''.

Subsec. (a)(47). Pub. L. 107–204, §2(b), inserted ''the Sarbanes-Oxley Act of 2002,'' before ''the Public Utility Holding Company Act of 1935''.

Subsec. (a)(58), (59). Pub. L. 107–204, §205(a), added pars. (58) and (59).

2000—Subsec. (a)(10). Pub. L. 106–554, §1(a)(5) [title II, §201(1)], inserted ''security future,'' after ''treasury stock,''.

Subsec. (a)(11). Pub. L. 106–554, §1(a)(5) [title II, §201(2)], added par. (11) and struck out former par. (11) which read as follows: ''The term 'equity security' means any stock or similar 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.''

Subsec. (a)(13), (14). Pub. L. 106–554, §1(a)(5) [title II, §201(3), (4)], inserted at end ''For security futures products, such term includes any contract, agreement, or transaction for future delivery.''

Subsec. (a)(55) to (57). Pub. L. 106–554, §1(a)(5) [title II, §201(5)], added pars. (55) to (57).

1999—Subsec. (a)(4). Pub. L. 106–102, §201, inserted heading and amended text of par. (4) generally. Prior to amendment, text read as follows: ''The term 'broker' means any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank.''

Subsec. (a)(5). Pub. L. 106–102, §202, inserted heading and amended text of par. (5) generally. Prior to amendment, text read as follows: ''The term 'dealer' means any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, or any person insofar as he buys or sells securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business.''

Subsec. (a)(12)(A)(iii). Pub. L. 106–102, §221(b), amended cl. (iii) generally. Prior to amendment, cl. (iii) read as follows: ''any interest or participation in any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of assets contributed thereto by such bank in its capacity as trustee, executor, administrator, or guardian;''.

Subsec. (a)(34)(H). Pub. L. 106–102, §231(b)(1), added subpar. (H) at end of par. (34).

Subsec. (a)(42)(E). Pub. L. 106–102, §208, added subpar. (E).

Subsec. (a)(54). Pub. L. 106–102, §207, added par. (54).

1998—Subsec. (a)(10). Pub. L. 105–353, §301(b)(1), substituted ''deposit for'' for ''deposit, for''.

Subsec. (a)(12)(A)(vi). Pub. L. 105–353, §301(b)(2), realigned margins.

Subsec. (a)(22)(A). Pub. L. 105–353, §301(b)(3), substituted ''section 153'' for ''section 153(h)'' and for ''section 153(t)''.

Subsec. (a)(39)(B)(i). Pub. L. 105–353, §301(b)(4), substituted ''of the Commission'' for ''to the Commission'' in introductory provisions.

1996—Subsec. (a)(12)(A)(vi), (vii). Pub. L. 104–290, §508(c)(1), added cl. (vi) and redesignated former cl. (vi) as (vii).

Subsecs. (f), (g). Pub. L. 104–290, §§106(b), 508(c)(2), added subsecs. (f) and (g), respectively.

1995—Subsec. (a)(12)(A)(iv) to (vi). Pub. L. 104–62, §4(a), struck out ''and'' at end of cl. (iv), added cl. (v), and redesignated former cl. (v) as (vi).

Subsec. (e). Pub. L. 104–62, §4(b), added subsec. (e).

1994—Subsec. (a)(41)(A)(i). Pub. L. 103–325, §347(a), substituted ''on a residential'' for ''or on a residential'' and inserted before semicolon '', or on one or more parcels of real estate upon which is located one or more commercial structures''.

Subsec. (a)(53). Pub. L. 103–325, §202, added par. (53).

1993—Subsec. (a)(12)(B)(ii). Pub. L. 103–202, §106(b)(2)(A), substituted ''sections 78*o* and 78q–1'' for ''sections 78*o*, 78*o*–3 (other than subsection (g)(3)), and 78q–1''.

Subsec. (a)(34)(G)(ii) to (iv). Pub. L. 103–202, §109(a)(1), amended cls. (ii) to (iv) generally. Prior to amendment, cls. (ii) to (iv) read as follows:

''(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, a State branch or a State agency of a foreign bank, or a commercial lending company owned or controlled by a foreign bank (as such terms are used in the International Banking Act of 1978);

''(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);

''(iv) the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation;''.

Subsec. (a)(46). Pub. L. 103–202, §109(a)(2), amended par. (46) generally. Prior to amendment, par. (46) read as follows: ''The term 'financial institution' means (A) a bank (as such term is defined in paragraph (6) of this subsection), (B) a foreign bank, and (C) an insured institution (as such term is defined in section 1724 of title 12).''

Subsec. (a)(52). Pub. L. 103–202, §109(a)(3), redesignated par. (51) defining ''foreign financial regulatory authority'' as (52).

1990—Subsec. (a)(39)(A). Pub. L. 101–550, §203(b)(1), inserted ''foreign equivalent of a self-regulatory organization, foreign or international securities exchange,'' after ''self-regulatory organization,'', ''or any substantially equivalent foreign statute or regulation,'' after ''(7 U.S.C. 7),'' and ''(7 U.S.C. 21),'', and ''or foreign equivalent'' after ''contract market''.

Subsec. (a)(39)(B). Pub. L. 101–550, §203(b)(2), added subpar. (B) and struck out former subpar. (B) which read as follows: ''is subject to an order of the Commission or other appropriate regulatory agency denying, suspending for a period not exceeding twelve months, or revoking his registration as a broker, dealer, municipal securities dealer, government securities broker, or government securities dealer, or barring or suspending for a period not exceeding 12 months his being associated with a broker, dealer, municipal securities dealer, government securities broker, or government securities dealer, or is subject to 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.);''.

Subsec. (a)(39)(D). Pub. L. 101–550, §203(b)(4), added subpar. (D). Former subpar. (D) redesignated (E).

Subsec. (a)(39)(E). Pub. L. 101–550, §203(b)(3), (5), redesignated subpar. (D) as (E) and substituted ''(A), (B), (C), or (D)'' for ''(A), (B), or (C)''. Former subpar. (E) redesignated (F).

Subsec. (a)(39)(F). Pub. L. 101–550, §203(b)(3), (6), redesignated subpar. (E) as (F), substituted ''(D), (E), or

(G)'' for ''(D) or (E)'', and inserted ''or any other felony'' before ''within ten years''.

Subsec. (a)(51). Pub. L. 101–550, §204, added par. (51) defining ''foreign financial regulatory authority''.

Pub. L. 101–429 added par. (51) defining ''penny stock''.

1989—Subsec. (a)(34). Pub. L. 101–73, §744(u)(1)(B), substituted ''Office of Thrift Supervision'' for ''Federal Home Loan Bank Board'' in concluding provisions.

Subsec. (a)(34)(G)(iv) to (vi). Pub. L. 101–73, §744(u)(1)(A), added cl. (iv), redesignated cl. (vi) as (v), and struck out former cls. (iv) and (v) which read as follows:

''(iv) the Federal Home Loan Bank Board, in the case of a Federal savings and loan association, Federal savings bank, or District of Columbia savings and loan association;

''(v) the Federal Savings and Loan Insurance Corporation, in the case of an institution insured by the Federal Savings and Loan Insurance Corporation (other than a Federal savings and loan association, Federal savings bank, or District of Columbia savings and loan association);''.

1988—Subsec. (a)(50). Pub. L. 100–704 added par. (50).

1987—Subsec. (a)(6)(C). Pub. L. 100–181, §301, substituted ''under the authority of the Comptroller of the Currency pursuant to section 92a of title 12'' for ''under section 11(k) of the Federal Reserve Act, as amended''.

Subsec. (a)(16). Pub. L. 100–181, §302, struck out reference to Canal Zone.

Subsec. (a)(22)(B). Pub. L. 100–181, §303, substituted ''association, or any'' and ''own behalf, in'' for ''association or any'' and ''own behalf in'', respectively.

Subsec. (a)(34)(C)(ii). Pub. L. 100–181, §304, substituted ''State'' for ''state''.

Subsec. (a)(39)(B). Pub. L. 100–181, §305, substituted ''months, or revoking'' for ''months, revoking'' and ''barring or suspending for a period not exceeding 12 months his'' for ''barring his''.

Subsec. (a)(47). Pub. L. 100–181, §306(1), added par. (47).

Subsec. (a)(49). Pub. L. 100–181, §306(2), added par. (49).

1986—Subsec. (a)(12). Pub. L. 99–571, §102(a), in amending par. (12) generally, expanded definition of ''exempted security'' or ''exempted securities'' to include government securities as defined in par. (42) of this subsection, provided that such securities not be deemed exempt for purposes of section 78q–1 of this title, substituted section 78*o*–3(g)(3) of this title for section 78*o*–3(b)(6), (11), and (g)(2) of this title in provision relating to municipal securities as not being ''exempted securities'' and defined ''qualified plan'' to mean qualified stock bonus, pension, or profit-sharing plan, qualified annuity plan, or governmental plan.

Pub. L. 99–514 substituted ''Internal Revenue Code of 1986'' for ''Internal Revenue Code of 1954'', which for purposes of codification was translated as ''title 26'' thus requiring no change in text.

Subsec. (a)(29). Pub. L. 99–514 substituted ''Internal Revenue Code of 1986'' for ''Internal Revenue Code of 1954'', which for purposes of codification was translated as ''title 26'' thus requiring no change in text.

Subsec. (a)(34). Pub. L. 99–571, §102(b)(2), inserted '', and the term 'District of Columbia savings and loan association' means any association subject to examination and supervision by the Federal Home Loan Bank Board under section 1466a of title 12'' in concluding provisions.

Subsec. (a)(34)(G). Pub. L. 99–571, §102(b)(1), added subpar. (G).

Subsec. (a)(39)(B). Pub. L. 99–571, §102(c)(1)(A), which directed insertion of ''or other appropriate regulatory agency'' after ''Commission'' was executed by making the insertion after ''Commission'' the first place appearing as the probable intent of Congress.

Pub. L. 99–571, §102(c)(1)(B), substituted ''municipal securities dealer, government securities broker, or government securities dealer'' for ''or municipal securities dealer'' in two places.

Subsec. (a)(39)(C). Pub. L. 99–571, §102(c)(2), substituted ''municipal securities dealer, government securities broker, or government securities dealer'' for ''or municipal securities dealer'' and inserted '', an appropriate regulatory agency,'' after ''the Commission''.

Subsec. (a)(42) to (46), (48). Pub. L. 99–571, §102(d), added pars. (42) to (46) and (48).

1984—Subsec. (a)(39)(A). Pub. L. 98–376, §6(a)(1), inserted '', contract market designated pursuant to section 5 of the Commodity Exchange Act (7 U.S.C. 7), or futures association registered under section 17 of such Act (7 U.S.C. 21), or has been and is denied trading privileges on any such contract market''.

Subsec. (a)(39)(B). Pub. L. 98–376, §6(a)(2), inserted '', or is subject to 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.)''.

Subsec. (a)(39)(C). Pub. L. 98–376, §6(a)(3), inserted ''or while associated with an entity or person required to be registered under the Commodity Exchange Act,''.

Subsec. (a)(41). Pub. L. 98–440 added par. (41).

1982—Subsec. (a)(10). Pub. L. 97–303 inserted ''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,'' after ''for a security,''.

1980—Subsec. (a)(12). Pub. L. 96–477 included within definition of ''exempted security'' interests or participation in single trust funds, provided that qualifying interests, participation, or securities could be issued in connection with certain governmental plans as defined in section 414(d) of title 26, substituted provisions relating to securities arising out of contracts issued by insurance companies for provisions relating to separate accounts maintained by insurance companies, and excluded from definition of ''exempted security'' any plans described in cls. (A), (B), or (C) of par. (12) which were funded by annuity contracts described in section 403(b) of title 26.

1978—Subsec. (a)(40). Pub. L. 95–283 added par. (40).

1975—Subsec. (a)(3). Pub. L. 94–29, §3(1), redefined term ''member'' to recognize the elimination of fixed commission rates in the case of exchanges, inserted definition of term when used in the case of registered securities associations, expanded definition of term when used with respect to an exchange to include any natural person permitted to effect transactions on the floor of an exchange without the services of another person acting as broker, any registered broker or dealer with which such natural person is associated, any registered broker or dealer permitted to designate a natural person as its representative on the floor of an exchange, and any other registered broker or dealer which agrees to be regulated by an exchange and with respect to whom the exchange has undertaken to enforce compliance with its rules, this chapter, and the rules and regulations thereunder, introduced the concept of including among members any person required to comply with the rules of an exchange to the extent specified by the Commission in accordance with section 78f(f) of this title, and expanded definition of term when used with respect to a registered securities association to include any broker or dealer who has agreed to be regulated and with respect to whom the association undertakes to enforce compliance with its own rules, this chapter, and the rules and regulations thereunder.

Subsec. (a)(9). Pub. L. 94–29, §3(2), substituted ''a natural person, company, government, or political subdivision, agency, or instrumentality of a government'' for ''an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or an unincorporated organization''.

Subsec. (a)(12). Pub. L. 94–29, §3(3), brought brokers and dealers engaged exclusively in municipal securities business within the registration provisions of this chapter by transferring the existing description of municipal securities to subsec. (a)(29) and by inserting in its place provisions revoking the exempt status of mu-

nicipal securities for purposes of sections 78o, 78o–3 (except subsections (b)(6), (b)(11), and (g)(2) thereof) and 78q–1 of this title.

Subsec. (a)(17). Pub. L. 94–29, §3(4), expanded definition of ''interstate commerce'' to establish that the intrastate use of any facility of an exchange, any telephones or other interstate means of communication, or any other interstate instrumentality constitutes a use of the jurisdictional means for purposes of this chapter.

Subsec. (a)(18). Pub. L. 94–29, §3(4), expanded definition to include persons under common control with the broker or dealer and struck out references to the classification of the persons, including employees, controlled by a broker or a dealer.

Subsec. (a)(19). Pub. L. 94–29, §3(4), substituted '' 'separate account', and 'company' '' for ''and 'separate account'.''

Subsec. (a)(21). Pub. L. 94–29, §3(5), broadened definition of term ''person associated with a member'' to encompass a person associated with a broker or dealer which is a member of an exchange by restating directly the definition of a ''person associated with a broker or dealer'' in subsec. (a)(18).

Subsec. (a)(22) to (39). Pub. L. 94–29, §3(6), added pars. (22) to (39).

Subsec. (b). Pub. L. 94–29, §3(7), substituted ''accounting, and other terms used in this chapter, consistently with the provisions and purposes of this chapter'' for ''and accounting terms used in this chapter insofar as such definitions are not inconsistent with the provisions of this chapter''.

Subsec. (d). Pub. L. 94–29, §3(8), added subsec. (d).

1970—Subsec. (a)(12). Pub. L. 91–567 inserted provisions which brought within definition of ''exempted security'' any security which is an industrial development bond the interest on which is excludable from gross income under section 103(a)(1) of title 26 if, by reason of the application of section 103(c)(4) or (6) of title 26, section 103(c)(1) does not apply to such security. Such amendment was also made by Pub. L. 91–373.

Pub. L. 91–547, §28(a), struck out reference to industrial development bonds the interest on which is excludable from gross income under section 103(a)(1) of title 26; and included as exempted securities interests or participations in common trust funds maintained by a bank for collective investment of assets held by it in a fiduciary capacity; interests or participations in bank collective trust funds maintained for funding of employees' stock-bonus, pension, or profit-sharing plans; interests or participations in separate accounts maintained by insurance companies for funding certain stock-bonus, pension, or profit-sharing plans which meet the requirements for qualification under section 401 of title 26; and such other securities as the Commission by rules and regulations deems necessary in the public interest.

Pub. L. 91–373 inserted provisions which brought within definition of ''exempted security'' any security which is an industrial development bond the interest on which is excludable from gross income under section 103(a)(1) of title 26 if, by reason of the application of section 103(c)(4) or (6) of title 26, section 103(c)(1) does not apply to such security. Such amendment was also made by Pub. L. 91–567.

Subsec. (a)(19). Pub. L. 91–547, §28(b), provided for term ''separate account'' the same meaning as in the Investment Company Act of 1940.

1964—Subsec. (a)(18) to (21). Pub. L. 88–467 added pars. (18) to (21).

1960—Subsec. (a)(16). Pub. L. 86–624 struck out reference to Hawaii.

1959—Subsec. (a)(16). Pub. L. 86–70 struck out reference to Alaska.

CHANGE OF NAME

Act Aug. 23, 1935, substituted ''Board of Governors of the Federal Reserve System'' for ''Federal Reserve Board''.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by sections 932(b), 941(a), 944(b), 985(b)(2), and 986(a)(1) of Pub. L. 111–203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as an Effective Date note under section 5301 Title 12, Banks and Banking.

Amendment by section 376(1) of Pub. L. 111–203 effective on the transfer date, see section 351 of Pub. L. 111–203, set out as a note under section 906 of Title 2, The Congress.

Amendment by section 761(a) of Pub. L. 111–203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B (§§761–774) of title VII of Pub. L. 111–203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, see section 774 of Pub. L. 111–203, set out as a note under section 77b of this title.

Amendment by section 939(e) of Pub. L. 111–203 effective 2 years after July 21, 2010, see section 939(g) of Pub. L. 111–203, set out as a note under section 24a of Title 12, Banks and Banking.

EFFECTIVE DATE OF 2004 AMENDMENT

Amendment by Pub. L. 108–386 effective Oct. 30, 2004, and, except as otherwise provided, applicable with respect to fiscal year 2005 and each succeeding fiscal year, see sections 8(i) and 9 of Pub. L. 108–386, set out as notes under section 321 of Title 12, Banks and Banking.

EFFECTIVE DATE OF 1999 AMENDMENT

Amendment by sections 201, 202, 207, and 208 of Pub. L. 106–102 effective at the end of the 18-month period beginning on Nov. 12, 1999, see section 209 of Pub. L. 106–102, set out as a note under section 1828 of Title 12, Banks and Banking.

Amendment by section 221(b) of Pub. L. 106–102 effective 18 months after Nov. 12, 1999, see section 225 of Pub. L. 106–102, set out as a note under section 77c of this title.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–62 applicable as defense to any claim in administrative and judicial actions pending on or commenced after Dec. 8, 1995, that any person, security, interest, or participation of type described in Pub. L. 104–62 is subject to the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, the Investment Advisers Act of 1940, or any State statute or regulation preempted as provided in section 80a–3a of this title, except as specifically provided in such statutes, see section 7 of Pub. L. 104–62, set out as a note under section 77c of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by section 347(a) of Pub. L. 103–325 effective upon date of promulgation of final regulations under section 347(c) of Pub. L. 103–325, see section 347(d) of Pub. L. 103–325, set out as an Effective Date of 1994 Amendment note under section 24 of Title 12, Banks and Banking.

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101–429 effective 12 months after Oct. 15, 1990, with provision to commence rulemaking proceedings to implement such amendment note later than 180 days after Oct. 15, 1990, and with provisions relating to civil penalties and accounting and disgorgement, see section 1(c)(2), (3)(A), (C) of Pub. L. 101–429, set out in a note under section 77g of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–704, except for amendment by section 6, not applicable to actions occurring before Nov. 19, 1988, see section 9 of Pub. L. 100–704, set out as a note under section 78*o* of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–571 effective 270 days after Oct. 28, 1986, see section 401 of Pub. L. 99–571, set out as an Effective Date note under section 78*o*–5 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Section 7 of Pub. L. 98–376 provided that: ''The amendments made by this Act [amending this section and sections 78*o*, 78t, 78u, and 78ff of this title] shall become effective immediately upon enactment of this Act [Aug. 10, 1984].''

EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 94–29 effective June 4, 1975, except for amendment of subsec. (a)(12) by Pub. L. 94–29 to be effective 180 days after June 4, 1975, with provisions of subsec. (a)(3), as amended by Pub. L. 94–29, or rules or regulations thereunder, not to apply in a way so as to deprive any person of membership in any national securities exchange (or its successor) of which such person was, on June 4, 1975, a member or a member firm as defined in the constitution of such exchange, or so as to deny membership in any such exchange (or its successor) to any natural person who is or becomes associated with such member or member firm, see section 31(a) of Pub. L. 94–29, set out as a note under section 78b of this title.

EFFECTIVE DATE OF 1970 AMENDMENTS

For effective date of amendment by Pub. L. 91–567, see section 6(d) of Pub. L. 91–567, set out as a note under section 77c of this title.

Amendment by Pub. L. 91–547 effective Dec. 14, 1970, see section 30 of Pub L. 91–547, set out as a note under section 80a–52 of this title.

For effective date of amendment by Pub. L. 91–373, see section 401(c) of Pub. L. 91–373, set out as a note under section 77c of this title.

EFFECTIVE DATE OF 1964 AMENDMENT

Section 13 of Pub. L. 88–467 provided that: ''The amendments made by this Act shall take effect as follows:

''(1) The effective date of section 12(g)(1) of the Securities Exchange Act of 1934, as added by section 3(c) of this Act [section 78*l*(g)(1) of this title], shall be July 1, 1964.

''(2) The effective date of the amendments to sections 12(b) and 15(a) of the Securities Exchange Act of 1934 [sections 78*l*(b) and 78*o*(a) of this title], contained in sections 3(a) and 6(a), respectively, of this Act shall be July 1, 1964.

''(3) All other amendments contained in this Act [amending this section and sections 77d, 78*l*, 78m, 78n, 78*o*, 78*o*–3, 78p, 78t, 78w, and 78ff of this title] shall take effect on the date of its enactment [Aug. 20, 1964].''

REGULATIONS

Pub. L. 109–351, title I, §101(a)(2)–(c), Oct. 13, 2006, 120 Stat. 1968, provided that:

''(2) TIMING.—Not later than 180 days after the date of the enactment of this Act [Oct. 13, 2006], the Securities and Exchange Commission (in this section [enacting this note and amending 15 U.S.C. 78c] referred to as the 'Commission') and the Board of Governors of the Federal Reserve System (hereafter in this section referred to as the 'Board') shall jointly issue a proposed single set of rules or regulations to define the term 'broker' in accordance with section 3(a)(4) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(4)], as amended by this subsection.

''(3) RULEMAKING SUPERSEDES PREVIOUS RULEMAKING.—A final single set of rules or regulations jointly adopted in accordance with this section shall supersede any other proposed or final rule issued by the Commission on or after the date of enactment of section 201 of the Gramm-Leach-Bliley Act [Nov. 12, 1999] with regard to the exceptions to the definition of a broker under section 3(a)(4)(B) of the Securities Exchange Act of 1934. No such other rule, whether or not issued in final form, shall have any force or effect on or after that date of enactment.

''(b) CONSULTATION.—Prior to jointly adopting the single set of final rules or regulations required by this section, the Commission and the Board shall consult with and seek the concurrence of the Federal banking agencies concerning the content of such rulemaking in implementing section 3(a)(4)(B) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(4)(B)], as amended by this section and section 201 of the Gramm-Leach-Bliley Act [Pub. L. 106–102].

''(c) DEFINITION.—For purposes of this section, the term 'Federal banking agencies' means the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Federal Deposit Insurance Corporation.''

CONSTRUCTION OF 1993 AMENDMENT

Amendment by Pub. L. 103–202 not to be construed to govern initial issuance of any public debt obligation or to grant any authority to (or extend any authority of) the Securities and Exchange Commission, any appropriate regulatory agency, or a self-regulatory organization to prescribe any procedure, term, or condition of such initial issuance, to promulgate any rule or regulation governing such initial issuance, or to otherwise regulate in any manner such initial issuance, see section 111 of Pub. L. 103–202, set out as a note under section 78*o*–5 of this title.

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

STATE OPT OUT

Section 347(e) of Pub. L. 103–325 provided that: ''Notwithstanding the amendments made by this section [amending this section and section 24 of Title 12, Banks and Banking], a note that is directly secured by a first lien on one or more parcels of real estate upon which is located one or more commercial structures shall not be considered to be a mortgage related security under section 3(a)(41) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(41)] in any State that, prior to the expiration of 7 years after the date of enactment of this Act [Sept. 23, 1994], enacts a statute that specifically refers to this section and either prohibits or provides for a more limited authority to purchase, hold, or invest in such securities by any person, trust, corporation, partnership, association, business trust, or business entity or class thereof than is provided by the amendments made by this subsection. The enactment by any State of any statute of the type described in the preceding sentence shall not affect the validity of any contractual commitment to purchase, hold, or invest that was made prior thereto, and shall not require the sale or other disposition of any securities acquired prior thereto.''

DEFINITIONS

Pub. L. 106–554, §1(a)(5) [title III, §301(b)], Dec. 21, 2000, 114 Stat. 2763, 2763A–451, provided that: ''As used in the amendment made by subsection (a) [enacting sections 206A to 206C of Pub. L. 106—102, set out below], the term 'security' has the same meaning as in section 2(a)(1) of the Securities Act of 1933 [15 U.S.C. 77b(a)(1)] or section 3(a)(10) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(10)].''

Pub. L. 106–102, title II, §206, Nov. 12, 1999, 113 Stat. 1393, as amended by Pub. L. 111–203, title VII, §742(b), July 21, 2010, 124 Stat. 1733, provided that:

''(a) DEFINITION OF IDENTIFIED BANKING PRODUCT.—Except as provided in subsection (e) [sic], for purposes of paragraphs (4) and (5) of section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4), (5)), the term 'identified banking product' means—

''(1) a deposit account, savings account, certificate of deposit, or other deposit instrument issued by a bank;

''(2) a banker's acceptance;

''(3) a letter of credit issued or loan made by a bank;

''(4) a debit account at a bank arising from a credit card or similar arrangement;

''(5) a participation in a loan which the bank or an affiliate of the bank (other than a broker or dealer) funds, participates in, or owns that is sold—

''(A) to qualified investors; or

''(B) to other persons that—

''(i) have the opportunity to review and assess any material information, including information regarding the borrower's creditworthiness; and

''(ii) based on such factors as financial sophistication, net worth, and knowledge and experience in financial matters, have the capability to evaluate the information available, as determined under generally applicable banking standards or guidelines; or

''(6) any swap agreement, including credit and equity swaps, except that an equity swap that is sold directly to any person other than a qualified investor (as defined in section 3(a)(54) of the Securities Act of 1934 [15 U.S.C. 78c(a)(54)]) shall not be treated as an identified banking product.

''(b) DEFINITION OF SWAP AGREEMENT.—For purposes of subsection (a)(6), the term 'swap agreement' means any individually negotiated contract, agreement, warrant, note, or option that is based, in whole or in part, on the value of, any interest in, or any quantitative measure or the occurrence of any event relating to, one or more commodities, securities, currencies, interest or other rates, indices, or other assets, but does not include any other identified banking product, as defined in paragraphs (1) through (5) of subsection (a).

''(c) CLASSIFICATION LIMITED.—Classification of a particular product as an identified banking product pursuant to this section shall not be construed as finding or implying that such product is or is not a security for any purpose under the securities laws, or is or is not an account, agreement, contract, or transaction for any purpose under the Commodity Exchange Act [7 U.S.C. 1 et seq.].

''(d) INCORPORATED DEFINITIONS.—For purposes of this section, the terms 'bank' and 'qualified investor' have the same meanings as given in section 3(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)], as amended by this Act.''

Pub. L. 106–102, title II, §§206A—206C, as added by Pub. L. 106–554, §1(a)(5) [title III, §301(a)], Dec. 21, 2000, 114 Stat. 2763, 2763A–449, and amended by Pub. L. 111–203, title VII, §762(a), (b), July 21, 2010, 124 Stat. 1759, provided that:

''SEC. 206A. SWAP AGREEMENT.

''(a) IN GENERAL.—Except as provided in subsection (b), as used in this section, the term 'swap agreement' means any agreement, contract, or transaction between eligible contract participants (as defined in section 1a(12) of the Commodity Exchange Act [7 U.S.C. 1a(12)] as in effect on the date of the enactment of this section [Dec. 21, 2000]), other than a person that is an eligible contract participant under section 1a(12)(C) of the Commodity Exchange Act, the material terms of which (other than price and quantity) are subject to individual negotiation, and that—

''(1) is a put, call, cap, floor, collar, or similar option of any kind for the purchase or sale of, or based on the value of, one or more interest or other rates, currencies, commodities, indices, quantitative measures, or other financial or economic interests or property of any kind;

''(2) provides for any purchase, sale, payment or delivery (other than a dividend on an equity security) that is dependent on the occurrence, non-occurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence;

''(3) provides on an executory basis for the exchange, on a fixed or contingent basis, of one or more payments based on the value or level of one or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind, or any interest therein or based on the value thereof, and that transfers, as between the parties to the transaction, in whole or in part, the financial risk associated with a future change in any such value or level without also conveying a current or future direct or indirect ownership interest in an asset (including any enterprise or investment pool) or liability that incorporates the financial risk so transferred, including any such agreement, contract, or transaction commonly known as an interest rate swap, including a rate floor, rate cap, rate collar, cross-currency rate swap, basis swap, currency swap, equity index swap, equity swap, debt index swap, debt swap, credit spread, credit default swap, credit swap, weather swap, or commodity swap;

''(4) provides for the purchase or sale, on a fixed or contingent basis, of any commodity, currency, instrument, interest, right, service, good, article, or property of any kind; or

''(5) is any combination or permutation of, or option on, any agreement, contract, or transaction described in any of paragraphs (1) through (4).

''(b) EXCLUSIONS.—The term 'swap agreement' does not include—

''(1) 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;

''(2) any put, call, straddle, option, or privilege entered into on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78f(a)] relating to foreign currency;

''(3) any agreement, contract, or transaction providing for the purchase or sale of one or more securities on a fixed basis;

''(4) any agreement, contract, or transaction providing for the purchase or sale of one or more securities on a contingent basis, unless such agreement, contract, or transaction predicates such purchase or sale on the occurrence of a bona fide contingency that might reasonably be expected to affect or be affected by the creditworthiness of a party other than a party to the agreement, contract, or transaction;

''(5) any note, bond, or evidence of indebtedness that is a security as defined in section 2(a)(1) of the Securities Act of 1933 [15 U.S.C. 77b(a)(1)] or section 3(a)(10) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(10)]; or

''(6) any agreement, contract, or transaction that is—

''(A) based on a security; and

''(B) entered into directly or through an underwriter (as defined in section 2(a) of the Securities Act of 1933 [15 U.S.C. 77b(a)]) by the issuer of such security for the purposes of raising capital, unless such agreement, contract, or transaction is entered into to manage a risk associated with capital raising.

''(c) RULE OF CONSTRUCTION REGARDING MASTER AGREEMENTS.—As used in this section, the term 'swap agreement' shall be construed to include a master agreement that provides for an agreement, contract, or transaction that is a swap agreement pursuant to subsections (a) and (b), 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 swap agreement pursuant to subsections (a) and (b), except that the master agreement shall be considered to be a swap agreement only with respect to each agreement, contract, or transaction under the master agreement that is a swap agreement pursuant to subsections (a) and (b).

''SEC. 206B. SECURITY-BASED SWAP AGREEMENT.

''As used in this section, the term 'security-based swap agreement' means a swap agreement (as defined

in section 206A) 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.

''SEC. 206C. NON-SECURITY-BASED SWAP AGREEMENT.

''As used in this section, the term 'non-security-based swap agreement' means any swap agreement (as defined in section 206A) that is not a security-based swap agreement (as defined in section 206B).''

[Pub. L. 111–203, title VII, §§ 762(a), (b), 774, July 21, 2010, 124 Stat. 1759, 1802, provided that, effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B (§§ 761–774) of title VII of Pub. L. 111–203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, Pub. L. 106–102, §§ 206A–206C, set out above, is amended: (1) in section 206A(a) in the material preceding paragraph (1), by striking ''Except as'' and all that follows through ''that—'' and inserting the following: ''Except as provided in subsection (b), as used in this section, the term 'swap agreement' means any agreement, contract, or transaction that—''; and (2) by repealing sections 206B and 206C.]

§ 78c–1. Swap agreements

(a) Non-security-based swap agreements

The definition of ''security'' in section 78c(a)(10) of this title does not include any non-security-based swap agreement (as defined in section 206C of the Gramm-Leach-Bliley Act).

(b) Security-based swap agreements

(1) The definition of ''security'' in section 78c(a)(10) of this title does not include any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act).

(2) The Commission is prohibited from registering, or requiring, recommending, or suggesting, the registration under this chapter of any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act). 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 registration with respect to such a swap agreement shall be void and of no force or effect.

(3) Except as provided in section 78p(a) of this title 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 chapter 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 206B of the Gramm-Leach-Bliley Act).

(4) References in this chapter to the ''purchase'' or ''sale'' of a security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) 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.

(June 6, 1934, ch. 404, title I, § 3A, as added Pub. L. 106–554, § 1(a)(5) [title III, § 303(a)], Dec. 21, 2000, 114 Stat. 2763, 2763A–452; amended Pub. L. 111–203, title VII, § 762(d)(1), July 21, 2010, 124 Stat. 1760.)

AMENDMENT OF SECTION

Pub. L. 111–203, title VII, §§ 762(d)(1), 774, July 21, 2010, 124 Stat. 1760, 1802, provided that, effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B (§§ 761–774) of title VII of Pub. L. 111–203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, this section is amended as follows:

(1) by striking subsection (a) and reserving that subsection; and

(2) by striking ''(as defined in section 206B of the Gramm-Leach-Bliley Act)'' each place that the term appears.

REFERENCES IN TEXT

Sections 206B and 206C of the Gramm-Leach-Bliley Act, referred to in text, are sections 206B and 206C of Pub. L. 106–102, which are set out in a note under section 78c of this title.

This chapter, referred to in subsec. (b)(2) to (4), was in the original ''this title''. See References in Text note set out under section 78a of this title.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B (§§ 761–774) of title VII of Pub. L. 111–203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, see section 774 of Pub. L. 111–203, set out as a note under section 77b of this title.

§ 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 6(c)(1) of title 7 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 6(c)(1) of title 7 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.

(June 6, 1934, ch. 404, title I, § 3B, as added Pub. L. 111–203, title VII, § 717(b), July 21, 2010, 124 Stat. 1651.)

EFFECTIVE DATE

Section effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle A (§§ 711–754) of title VII of Pub. L. 111–203 requires a rulemaking, not less than 60 days after publication of 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 77h(a) or section 77h(c) of this title or the first sentence of section 78*l*(d) of this title; (2) suspends trading in a security pursuant to section 78*l*(k) of this title; or (3) is pursuant to any provision of this chapter in a case of adjudication, as defined in section 551 of title 5, not required by this chapter 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) Finality of delegated action

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.

(June 6, 1934, ch. 404, title I, § 4A, as added Pub. L. 100–181, title III, § 308(a), Dec. 4, 1987, 101 Stat. 1254.)

PRIOR PROVISIONS

A prior section 78d–1, Pub. L. 87–592, § 1, Aug. 20, 1962, 76 Stat. 394; Pub. L. 94–29, § 25, June 4, 1975, 89 Stat. 163; Pub. L. 95–251, § 2(a)(4), Mar. 27, 1978, 92 Stat. 183, provided for subject matter similar to the provisions comprising this section, prior to repeal by section 308(b) of Pub. L. 100–181.

§ 78d–2. Transfer of functions with respect to assignment of personnel to chairman

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 78d–1 of this title.

(June 6, 1934, ch. 404, title I, § 4B, as added Pub. L. 100–181, title III, § 308(a), Dec. 4, 1987, 101 Stat. 1255.)

REFERENCES IN TEXT

Reorganization Plan Numbered 10 of 1950 (64 Stat. 1265), referred to in text, is set out as a note under section 78d of this title.

PRIOR PROVISIONS

A prior section 78d–2, Pub. L. 87–592, § 2, Aug. 20, 1962, 76 Stat. 395, provided for subject matter similar to the provisions comprising this section, prior to repeal by section 308(b) of Pub. L. 100–181.

§ 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 standards, that indicate a lack of competence to practice before the Commission.

(June 6, 1934, ch. 404, title I, § 4C, as added Pub. L. 107–204, title VI, § 602, July 30, 2002, 116 Stat. 794.)

§ 78e. Transactions on unregistered exchanges

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 national securities exchange under section 78f 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.

(June 6, 1934, ch. 404, title I, § 5, 48 Stat. 885.)

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

§ 78f. National securities exchanges

(a) Registration; application

An exchange may be registered as a national securities exchange under the terms and condi-

tions hereinafter provided in this section and in accordance with the provisions of section 78s(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) Determination by Commission requisite to registration of applicant as a national securities exchange

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 chapter and to comply, and (subject to any rule or order of the Commission pursuant to section 78q(d) or 78s(g)(2) of this title) to enforce compliance by its members and persons associated with its members, with the provisions of this chapter, 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 chapter matters not related to the purposes of this chapter 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 78q(d) or 78s(g)(2) of this title) its members and persons associated with its members shall be appropriately disciplined for violation of the provisions of this chapter, 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 chapter.

(9) 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 78n(h) of this title), 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 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;

(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 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.

(c) Denial of membership in national exchanges; denial of association with member; conditions; limitation of membership

(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 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 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 78s(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 chapter.

(d) Discipline of national securities exchange members and persons associated with members; summary proceedings

(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 chapter, 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 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.

(e) Commissions, allowances, discounts, and other fees

(1) On and after June 4, 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 78s(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 chapter, 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 chapter.

(2) Notwithstanding the provisions of section 78s(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 chapter.

(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 concerning 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 deter-

mines 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 section 78y(a) of this title, a reviewing Court may set aside an order of the Commission under section 78s(b) of this title approving an exchange rule imposing a schedule or fixing rates of commissions, allowances, discounts, or other fees, if the Court finds—

(1) 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) 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) Compliance of non-members with exchange rules

The Commission, by rule or order, 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, 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)) [7 U.S.C. 1 et seq.], that—

(i) 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; or

(ii) is registered as a derivative transaction execution facility under section 5a of the Commodity Exchange Act [7 U.S.C. 7a] and such registration is not suspended by 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 [7 U.S.C. 2(a)(1)(C)].

(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 subsection (a) of this section, 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 chapter 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 78h of this title.

(iii) Section 78k of this title.

(iv) Subsections (d), (f), and (k) of section 78q of this title.

(v) Subsections (a), (f), and (h) of section 78s of this title.

(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 78s(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 78s(b)(7) of this title;

(ii) such exchange shall file pursuant to sections 78s(b)(1) and 78s(b)(2) of this title proposed rule changes related to margin, except for changes resulting in higher margin levels; and

(iii) such exchange shall file pursuant to section 78s(b)(1) of this title proposed rule changes that have been abrogated by the Commission pursuant to section 78s(b)(7)(C) of this title.

(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 December 21, 2000; or

(ii) such date that a futures association registered under section 17 of the Commodity Exchange Act [7 U.S.C. 21] has met the requirements set forth in section 78*o*–3(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(12)(B)(ii) of the Commodity Exchange Act [7 U.S.C. 1a(12)(B)(ii)]; and

(II) only between eligible contract participants (as defined in subparagraphs (A), (B)(ii), and (C) of such section 1a(12) [7 U.S.C. 1a(12)(A), (B)(ii), (C)]) 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 December 21, 2000; or

(II) such date that a futures association registered under section 17 of the Commodity Exchange Act [7 U.S.C. 21] has met the requirements set forth in section 78*o*–3(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 78*o*–3(a) of this title.

(2) Listing standards required

Except as otherwise provided in paragraph (7), a national securities exchange or a national securities association registered pursuant to section 78*o*–3(a) of this title may trade only security futures products that (A) conform with listing standards that such exchange or association files with the Commission under section 78s(b) of this title and (B) meet the criteria specified in section 2(a)(1)(D)(i) of the Commodity Exchange Act [7 U.S.C. 2(a)(1)(D)(i)].

(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 78*l* 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 78*o*–3(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 78*o*–3(a) of this title 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 78k(a) of this title and the rules and regulations thereunder, except to the extent otherwise permitted under this chapter 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 78g(c)(2)(B) of this title, 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 78*o*–3(a) of this title) 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 78*o*–3(a) of this title 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 December 21, 2000, 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 chapter and the Commodity Exchange Act [7 U.S.C. 1 et seq.].

(7) Deferral of linked and coordinated clearing

(A) Notwithstanding paragraph (2), until the compliance date, a national securities exchange or national securities association registered pursuant to section 78*o*–3(a) of this title 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 [7 U.S.C. 2(a)(1)(D)(i)(IV)].

(B) The Commission and the Commodity Futures Trading Commission shall jointly pub-

lish 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 78*o*–3(a) of this title, 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 78*o*–3(a) of this title; or

(ii) 2 years after the date on which trading in any security futures product commences under this chapter.

(i) Rules to avoid duplicative regulation of dual registrants

Consistent with this chapter, 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 78*o*(b) of this title (except paragraph (11) thereof), that is also registered with the Commodity Futures Trading Commission pursuant to section 4f(a) of the Commodity Exchange Act [7 U.S.C. 6f(a)] (except paragraph (2) thereof), with respect to the application of—

(1) rules of such national securities exchange of the type specified in section 78*o*(c)(3)(B) of this title involving security futures products; and

(2) similar rules of national securities exchanges registered pursuant to subsection (g) of this section and national securities associations registered pursuant to section 78*o*–3(k) of this title involving security futures products.

(j) Procedures and rules for security future products

A national securities exchange registered pursuant to subsection (a) of this section shall implement the procedures specified in subsection (h)(5)(A) of this section and adopt the rules specified in subparagraphs (B) and (C) of subsection (h)(5) of this section not later than 8 months after the date of receipt of a request from an alternative trading system for such implementation and rules.

(k) Rules relating to security futures products traded on foreign boards of trade

(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.

(June 6, 1934, ch. 404, title I, §6, 48 Stat. 885; Pub. L. 94–29, §4, June 4, 1975, 89 Stat. 104; Pub. L. 100–181, title III, §§309–312, Dec. 4, 1987, 101 Stat. 1255; Pub. L. 103–202, title III, §303(b), Dec. 17, 1993, 107 Stat. 2365; Pub. L. 106–554, §1(a)(5) [title II, §§202(a), 206(a), (i), (k)(2), (*l*)], Dec. 21, 2000, 114 Stat. 2763, 2763A–416, 2763A–426, 2763A–433, 2763A–434.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (b) to (e), (g)(4)(A), (h)(3)(G), (7)(C)(ii), and (i), was in the original ''this title''. This chapter, referred to in subsec. (h)(6), was in the original ''this Act''. See References in Text note set out under section 78a of this title.

The Commodity Exchange Act, referred to in subsecs. (g)(1)(A) and (h)(6), is act Sept. 21, 1922, ch. 369, 42 Stat. 998, as amended, which is classified generally to chapter 1 (§1 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 1 of Title 7 and Tables.

AMENDMENTS

2000—Subsec. (g). Pub. L. 106–554, §1(a)(5) [title II, §202(a)], added subsec. (g).

Subsec. (h). Pub. L. 106–554, §1(a)(5) [title II, §206(a)], added subsec. (h).

Subsec. (i). Pub. L. 106–554, §1(a)(5) [title II, §206(i)], added subsec. (i).

Subsec. (j). Pub. L. 106–554, §1(a)(5) [title II, §206(k)(2)], added subsec. (j).

Subsec. (k). Pub. L. 106–554, §1(a)(5) [title II, §206(*l*)], added subsec. (k).

1993—Subsec. (b)(9). Pub. L. 103–202 added par. (9).

1987—Subsec. (c)(2). Pub. L. 100–181, §309, substituted ''protection of investors shall'' for ''protection shall''.

Subsec. (c)(3)(A). Pub. L. 100–181, §310, substituted ''associated'' for ''association''.

Subsec. (c)(4). Pub. L. 100–181, §311, substituted ''may limit (A)'' for ''may (A) limit''.

Subsec. (e)(1). Pub. L. 100–181, §312(1), substituted ''paragraph (3) of this subsection'' for ''paragraph (4) of this section''.

Subsec. (e)(3), (4). Pub. L. 100–181, §312(2), (3), redesignated par. (4) as (3) and, in subpar. (E), substituted ''fixing'' for ''fixes'' in introductory provisions, ''subparagraph (A) of this paragraph'' for ''paragraph (4)(A) of this subsection'' in cl. (1), and ''subparagraph (B) of this paragraph'' for ''paragraph (4)(B) of this subsection'' in cl. (2), and struck out former par. (3) which read as follows: ''Until December 31, 1976, the Commission, on a regular basis, shall file with the Speaker of the House and the President of the Senate information concerning the effect on the public interest, protection of investors, and maintenance of fair and orderly markets of the absence of any schedule or fixed rates of commissions, allowances, discounts, or other fees to be charged by members of any national securities exchange for effecting transactions on such exchange.''

1975—Pub. L. 94–29 restructured the entire section and, in addition, authorized the Commission to require an exchange to file such documents and information as it deems necessary or appropriate in the public interest or for the protection of investors and to prescribe the form and substance of an exchange's application for registration, expanded to eight the number of explicit statutory requirements that must be satisfied before an exchange may be registered as a national securities exchange, set forth the authority of a national securities exchange to admit or deny persons membership or asso-

ciation with members, prescribed exchange procedures for instituting disciplinary actions, denying membership, and summarily suspending members or persons associated with members, specified the authority of national securities exchanges to impose schedules or fix rates of commissions, allowances, discounts, or other fees to be charged by its members for transacting business on the exchange, and empowered the Commission to regulate any broker or dealer who effects transactions on an exchange on a regular basis but who is not a member of that exchange and any person who effects transactions on an exchange without the services of another person acting as broker.

EFFECTIVE DATE OF 1993 AMENDMENT

Section 304 of title III of Pub. L. 103–202 provided that:

''(a) EFFECTIVE DATE.—

''(1) IN GENERAL.—The amendments made by section 303 [amending this section and section 78*o*–3 of this title] shall become effective 12 months after the date of enactment of this Act [Dec. 17, 1993].

''(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 [amending this section and sections 78n and 78*o*–3 of this title and enacting provisions set out as notes under sections 78a and 78n of 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 [amending this section and sections 78n and 78*o*–3 of 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 [15 U.S.C. 78a et seq.], 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.''

EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 94–29 effective June 4, 1975, except for amendment of subsecs. (a) through (d) by Pub. L. 94–29 to be effective 180 days after June 4, 1975, with provisions of subsecs. (b)(2) and (c)(6), as amended by Pub. L. 94–29, or rules or regulations thereunder, not to apply in a way so as to deprive any person of membership in any national securities exchange (or its successor) of which such person was, on June 4, 1975, a member or a member firm as defined in the constitution of such exchange, or so as to deny membership in any such exchange (or its successor) to a natural person who is or becomes associated with such member or member firm, see section 31(a) of Pub. L. 94–29, set out as a note under section 78b of this title.

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

CHANGES IN ORGANIZATION AND RULES OF NATIONAL SECURITIES EXCHANGES AND REGISTERED SECURITIES ASSOCIATIONS

Section 31(b) of Pub. L. 94–29 provided that: ''If it appears to the Commission at any time within one year of the effective date of any amendment made by this Act [see Short Title of 1975 Amendment note under section 78a of this title] to the Securities Exchange Act of 1934 that the organization or rules of any national securities exchange or registered securities association registered with the Commission on the date of enactment of this Act [June 4, 1975] do not comply with such Act as amended, the Commission shall so notify such exchange or association in writing, specifying the respects in which the exchange or association is not in compliance with such Act. On and after the one hundred eightieth day following the date of receipt of such notice by a national securities exchange or registered securities association, the Commission, without regard to the provisions of section 19(h) of the Securities Exchange Act of 1934 [section 78s(h) of this title], as amended by this Act, is authorized by order, to suspend the registration of any such exchange or association or impose limitations on the activities, functions, and operations of any such exchange or association, if the Commission finds, after notice and opportunity for hearing, that the organization or rules of such exchange or association do not comply with such Act. Any such suspension or limitation shall continue in effect until the Commission, by order, declares that such exchange or association is in compliance with such requirements.''

§ 78g. Margin requirements

(a) Rules and regulations for extension of credit; standard for initial extension; undermargined accounts

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 October 1, 1934, 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) Lower and higher margin requirements

Notwithstanding the provisions of subsection (a) of this section, the Board of Governors of the

change 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 one or more persons conducted for the purpose of raising or depressing the price of such security.''

Subsec. (b)(1). Pub. L. 106–554, §1(a)(5) [title II, §205(a)(1)(A)], inserted ''(A)'' after ''acquires'' and substituted ''; or (B) any security futures product on the security; or'' for ''; or''.

Subsec. (b)(2). Pub. L. 106–554, §1(a)(5) [title II, §205(a)(1)(B)], inserted ''(A)'' after ''interest in any'' and substituted ''; or (B) such security futures product; or'' for ''; or''.

Subsec. (b)(3). Pub. L. 106–554, §1(a)(5) [title II, §205(a)(1)(C)], inserted ''(A)'' after ''interest in any'' and ''; or (B) such security futures product'' after ''privilege''.

Subsec. (g). Pub. L. 106–554, §1(a)(5) [title II, §205(a)(2)], designated existing provisions as par. (1), inserted ''other than a security futures product'' after ''future delivery'', and added par. (2).

Subsec. (i). Pub. L. 106–554, §1(a)(5) [title III, §303(c)], added subsec. (i).

1990—Subsec. (h). Pub. L. 101–432 added subsec. (h).

1982—Subsec. (f). Pub. L. 97–303, §3(1), substituted ''The provisions of subsection (a) of this section shall not apply'' for ''The provisions of this section shall not apply''.

Subsec. (g). Pub. L. 97–303, §3(2), added subsec. (g).

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by sections 929L(1) and 929X(b) of Pub. L. 111–203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as an Effective Date note under section 5301 Title 12, Banks and Banking.

Amendment by sections 762(d)(2) and 763(f), (g) of Pub. L. 111–203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B (§§761–774) of title VII of Pub. L. 111–203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, see section 774 of Pub. L. 111–203, set out as a note under section 77b of this title.

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

§ 78j. Manipulative and deceptive devices

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) Paragraph (1) of this subsection shall not apply to security futures products.

(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[1] 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) 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 1813(q) of title 12), 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) of this section 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) of this section 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 77q(a) of this title and sections 78i, 78*o*, 78p, 78t, and 78u–1 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.

(June 6, 1934, ch. 404, title I, §10, 48 Stat. 891; Pub. L. 106–554, §1(a)(5) [title II, §206(g), title III, §303(d)], Dec. 21, 2000, 114 Stat. 2763, 2763A–432, 2763A–454; Pub. L. 111–203, title VII, §762(d)(3), title IX, §§929L(2), 984(a), July 21, 2010, 124 Stat. 1761, 1861, 1932.)

AMENDMENT OF SECTION

Unless otherwise provided, amendment by subtitle B (§§761–774) of title VII of Pub. L. 111–203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, see 2010 Amendment notes and Effective Date of 2010 Amendment note below.

AMENDMENTS

2010—Pub. L. 111–203, §762(d)(3)(B), which directed amendment of the matter following subsection (b) ''by striking '(as defined in section 206B of the Gramm-Leach-Bliley Act), in each place that such terms appear' '', was executed by striking out ''(as defined in section 206B of the Gramm-Leach-Bliley Act)'' after ''security-based swap agreements'' in two places in concluding provisions following subsec. (c) to reflect the probable intent of Congress.

Subsec. (a)(1). Pub. L. 111–203, §929L(2), substituted ''other than a government security'' for ''registered on a national securities exchange''.

[1] So in original. Probably should be followed by a comma.

Subsec. (b). Pub. L. 111–203, §762(d)(3)(A), struck out ''(as defined in section 206B of the Gramm-Leach-Bliley Act),'' after ''securities-based swap agreement''.

Subsec. (c). Pub. L. 111–203, §984(a), which directed amendment of this section by adding subsec. (c) at the end, was executed by adding subsec. (c) after subsec. (b) to reflect the probable intent of Congress.

2000—Pub. L. 106–554, §1(a)(5) [title III, §303(d)(2)], inserted concluding provisions at end.

Subsec. (a). Pub. L. 106–554, §1(a)(5) [title II, §206(g)], designated existing provisions as par. (1) and added par. (2).

Subsec. (b). Pub. L. 106–554, §1(a)(5) [title III, §303(d)(1)], inserted ''or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act),'' before ''any manipulative or deceptive device''.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by sections 929L(2) and 984(a) of Pub. L. 111–203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as an Effective Date note under section 5301 Title 12, Banks and Banking.

Amendment by section 762(d)(3) of Pub. L. 111–203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B (§§761–774) of title VII of Pub. L. 111–203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, see section 774 of Pub. L. 111–203, set out as a note under section 77b of this title.

REGULATIONS

Pub. L. 111–203, title IX, §984(b), July 21, 2010, 124 Stat. 1933, provided that: ''Not later than 2 years after the date of enactment of this Act [July 21, 2010], the Commission shall promulgate rules that are designed to increase the transparency of information available to brokers, dealers, and investors, with respect to the loan or borrowing of securities.''

[For definitions of terms used in section 984(b) of Pub. L. 111–203, set out above, see section 5301 of Title 12, Banks and Banking.]

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

PROHIBITION OF INSIDER TRADING

Pub. L. 112–105, §4(a), Apr. 4, 2012, 126 Stat. 292, provided that: ''Members of Congress and employees of Congress are not exempt from the insider trading prohibitions arising under the securities laws, including section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. 78j(b)] and Rule 10b–5 thereunder.''

APPLICATION OF INSIDER TRADING LAWS

Pub. L. 112–105, §9(b)(1), Apr. 4, 2012, 126 Stat. 297, provided that: ''Executive branch employees, judicial officers, and judicial employees are not exempt from the insider trading prohibitions arising under the securities laws, including section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. 78j(b)] and Rule 10b–5 thereunder.''

§ 78j–1. Audit requirements

(a) In general

Each audit required pursuant to this chapter 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

(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 chapter to which subsection (a) of this section 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 firm, 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

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.

(June 6, 1934, ch. 404, title I, §11, 48 Stat. 891; Aug. 10, 1954, ch. 667, title II, §201, 68 Stat. 686; Pub. L. 94–29, §6, June 4, 1975, 89 Stat. 110; Pub. L. 95–283, §18(a), May 21, 1978, 92 Stat. 275; Pub. L. 98–440, title I, §104, Oct. 3, 1984, 98 Stat. 1690; Pub. L. 103–68, §1, Aug. 11, 1993, 107 Stat. 691; Pub. L. 103–325, title II, §205, Sept. 23, 1994, 108 Stat. 2199.)

AMENDMENTS

1994—Subsec. (d)(1)(ii). Pub. L. 103–325 inserted ''or any small business related security'' after ''mortgage related security''.

1993—Subsec. (a)(1)(E). Pub. L. 103–68, §1(1), struck out ''(other than an investment company)'' after ''trust''.

Subsec. (a)(1)(H), (I). Pub. L. 103–68, §1(2)–(4), added subpar. (H) and redesignated former subpar. (H) as (I).

1984—Subsec. (d)(1). Pub. L. 98–440 designated existing provisions of par. (1) as cl. (i) and added cl. (ii).

1978—Subsec. (a)(3). Pub. L. 95–283 substituted ''February 1, 1978'' for ''May 1, 1975'', and ''February 1, 1979'' for ''May 1, 1978'' in two places.

1975—Subsec. (a). Pub. L. 94–29, §6(2), prohibited stock exchange members from effecting any transaction on the exchange for its own account, the account of an associated person, or an account with respect to which the member or an associated person exercises investment discretion, exempted from that prohibition 8 types of transactions, and authorized the Commission, as it deems necessary or appropriate in the public interest or for the protection of investors, to regulate or prohibit the specifically exempted transactions, certain transactions otherwise that on a national securities exchange, and transactions on a national securities exchange effected by a broker or dealer not a member thereof for the account of such broker or dealer, the account of an associated person, or an account with respect to which such broker, dealer, or associated person exercises investment discretion.

Subsec. (b). Pub. L. 94–29, §6(2), struck out requirement that specialist's dealings be limited to those transactions reasonably necessary to permit him to maintain a fair and orderly market, expanded the Commission's rulemaking authority in the area of specialist's dealings so that the Commission may define responsibilities and restrict activities of specialists in response to changing conditions in the market, expanded the standards to be followed by the Commission in exercising its rulemaking power to include the maintenance of fair and orderly markets and the removal of impediments to and the perfection of the mechanism of a national market system, and inserted specific reference to the Commission's power to limit the activity of a specialist to that of a broker or dealer.

Subsec. (e). Pub. L. 94–29, §6(3), struck out subsec. (e) which directed the Commission to make a study, to be submitted on or before Jan. 3, 1936, of the feasibility of segregating the functions of dealer and broker.

1954—Subsec. (d). Act Aug. 10, 1954, reduced from 6 months to 30 days the prohibition period against extending credit to purchasers of a new issue by dealers.

EFFECTIVE DATE OF 1978 AMENDMENT

Section 18(b) of Pub. L. 95–283 provided that: ''The amendment made by subsection (a) of this section [amending this section] shall be effective as of May 1, 1978.''

EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 94–29 effective June 4, 1975, see section 31(a) of Pub. L. 94–29, set out as a note under section 78b of this title.

EFFECTIVE DATE OF 1954 AMENDMENT

Amendment by act Aug. 10, 1954, effective 60 days after Aug. 10, 1954, see note under section 77b of this title.

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

§ 78k–1. National market system for securities; securities information processors

(a) Congressional findings; facilitating establishment of national market system for securities; designation of qualified securities

(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 chapter 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[1] in this section referred to as ''qualified securities''.)

[1] So in original. Probably should be ''are hereinafter''.

(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 the Federal Advisory Committee Act (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 chapter 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 chapter so as to adapt it to a national market system.

(b) Securities information processors; registration; withdrawal of registration; access to services; censure; suspension or revocation of registration

(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 chapter 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 chapter 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 limita-

tion 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 chapter 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 chapter, 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 chapter or the rules or regulations thereunder.

(c) Rules and regulations covering use of mails or other means or instrumentalities of interstate commerce; reports of purchase or sale of qualified securities; limiting registered securities transactions to national securities exchanges

(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 chapter 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 instrumentality 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 78*l*(b) of this title 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 chapter.

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 chapter.

(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.

(d) National Market Advisory Board

(1) Not later than one hundred eighty days after June 4, 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 chapter 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) of this section. 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 78f(g) of this title unless the Commodity Futures Trading Commission has issued an order directing that such rule is applicable to such persons.

(June 6, 1934, ch. 404, title I, §11A, as added Pub. L. 94–29, §7, June 4, 1975, 89 Stat. 111; amended Pub. L. 98–620, title IV, §402(14), Nov. 8, 1984, 98 Stat. 3358; Pub. L. 100–181, title III, §§313, 314, Dec. 4, 1987, 101 Stat. 1256; Pub. L. 106–554, §1(a)(5) [title II, §206(c)], Dec. 21, 2000, 114 Stat. 2763, 2763A–430.)

REFERENCES IN TEXT

The Federal Advisory Committee Act, referred to in subsec. (a)(3)(A), is Pub. L. 92–436, Oct. 6, 1972, 86 Stat. 770, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

AMENDMENTS

2000—Subsec. (e). Pub. L. 106–554 added subsec. (e).

1987—Subsec. (b)(2). Pub. L. 100–181, §313(1), substituted ''transactions'' for ''transaction''.

Subsec. (c)(4). Pub. L. 100–181, §313(2), struck out ''On or before the ninetieth day following June 4, 1975, the Commission shall (i) report to the Congress the results of its review, including the effects on competition of such rules, and (ii) commence a proceeding in accordance with the provisions of section 78s(c) of this title to amend any such rule imposing a burden on competition which does not appear to the Commission to be necessary or appropriate in furtherance of the purposes of this chapter. The Commission shall conclude any such proceeding within ninety days of the date of publication of notice of its commencement.''

Subsec. (e). Pub. L. 100–181, §314, struck out subsec. (e) which read as follows: ''The Commission is authorized and directed to make a study of the extent to which persons excluded from the definitions of 'broker' and 'dealer' maintain accounts on behalf of public customers for buying and selling securities registered under section 78*l* of this title and whether such exclusions are consistent with the protection of investors and the other purposes of this chapter. The Commission shall report to the Congress, on or before December 31, 1976, the results of its study together with such recommendations for legislation as it deems advisable.''

1984—Subsec. (c)(4). Pub. L. 98–620 struck out designation ''(A)'' after ''(4)'', and struck out subpar. (B) which provided that review pursuant to section 78y(b) of this title of any rule promulgated by the Commission in accordance with any proceeding commenced pursuant to this paragraph would, except as to causes the court considers of greater importance, take precedence on the docket over all other causes and had to be assigned for consideration at the earliest practicable date and expedited in every way.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–620 not applicable to cases pending on Nov. 8, 1984, see section 403 of Pub. L. 98–620, set out as an Effective Date note under section 1657 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE

Section effective June 4, 1975, except for subsec. (b) which is effective 180 days after June 4, 1975, see section 31(a) of Pub. L. 94–29, set out as a note under section 78b of this title.

TERMINATION OF ADVISORY COMMITTEES

Advisory committees established after Jan. 5, 1973, to terminate not later than the expiration of the 2-year period beginning on the date of their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by the Congress, its duration is otherwise provided for by law. See section 14 of Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 776, set out in the Appendix to Title 5, Government Organization and Employees.

§ 78*l*. Registration requirements for securities

(a) General requirement of registration

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 chapter 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) Procedure for registration; information

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:

(A) the organization, financial structure, 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;

REFERENCES IN TEXT

This Act, referred to in text, is act May 27, 1936, ch. 462, 49 Stat. 1375, popularly known as the Unlisted Securities Trading Act, which enacted sections 78*l*–1, 78*o*–1, 78*o*–2, and 78hh–1 of this title, and amended sections 78*l*, 78*o*, 78q, 78r, 78t, 78u, 78w, and 78ff of this title.

Effective date of this Act, referred to in text, is July 1, 1934. See section 78hh–1 of this title.

CODIFICATION

Section was not enacted as a part of the Securities Exchange Act of 1934 which comprises this chapter.

§ 78*o*–3. Registered securities associations

(a) Registration; application

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 78s(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) Determinations by Commission requisite to registration of applicant as national securities association

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 chapter and to comply, and (subject to any rule or order of the Commission pursuant to section 78q(d) or 78s(g)(2) of this title) to enforce compliance by its members and persons associated with its members, with the provisions of this chapter, 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 chapter matters not related to the purposes of this chapter 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 78q(d) or 78s(g)(2) of this title) its members and persons associated with its members shall be appropriately disciplined for violation of any provision of this chapter, 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 chapter.

(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 78n(h) of this title) 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 78n(h) of this title), 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 78*o*–4(b)(2)(E) of this title, 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) National association rules; provision for registration of affiliated securities association

The Commission may permit or require the rules of an association applying for registration pursuant to subsection (b), to provide for the admission of an association registered as an affiliated securities association pursuant to subsection (d), 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) Registration as affiliated association; prerequisites; association rules

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), will, forthwith upon the registration thereof, be admitted to affiliation with an association registered as a national securities association pursuant to subsection (b), in the manner and under the terms and conditions provided by the rules of said national securities association in accordance with subsection (c); and

(2) such association and its rules satisfy the requirements set forth in paragraphs (2) to (10), inclusive, and paragraph (12),[1] of subsection (b); except that in the case of any such association any restrictions upon membership therein of the type authorized by paragraph (3) of subsection (b) shall not be less stringent than in the case of the national securities association with which such association is to be affiliated.

(e) Dealings with nonmember professionals

(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 a 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 discount, 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 78*o*–4(b)(2)(K) of this title.

(f) Transactions in municipal securities

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) Denial of membership

(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 as-

[1] See References in Text note below.

sociation 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 registered 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) Discipline of registered securities association members and persons associated with members; summary proceedings

(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 chapter, 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 as-

sociation 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 consultation 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 77c(b), 77d(2),[1] or 77d(6)[1] of this title 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 November 12, 1999, 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 21 of title 7 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 78*o*(b)(11) of this title.

(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 78s(g)(2) of this title) 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

(ii) are not designed to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter or the administration of the association;

(C) have rules that provide that (subject to any rule or order of the Commission pursuant to section 78s(g)(2) of this title) 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 78s(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 78s(b)(7) of this title;

(B) the association shall file pursuant to sections 78s(b)(1) and 78s(b)(2) of this title proposed rule changes related to margin, except for changes resulting in higher margin levels; and

(C) the association shall file pursuant to section 78s(b)(1) of this title proposed rule changes that have been abrogated by the Commission pursuant to section 78s(b)(7)(C) of this title.

(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 chapter and the rules thereunder:

(A) Section 78h of this title.

(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)[1] of section 78q of this title.

(D) Subsections (a), (f), and (h) of section 78s of this title.

(*l*) Rules to avoid duplicative regulation of dual registrants

Consistent with this chapter, 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 78*o*(b) of this title (except paragraph (11) thereof), that is also registered with the Commodity Futures Trading Commission pursuant to section 6f(a) of title 7 (except paragraph (2) thereof), with respect to the application of—

(1) rules of such national securities association of the type specified in section 78*o*(c)(3)(B) of this title 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 78f(g) of this title 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 December 21, 2000, implement the procedures specified in section 78f(h)(5)(A) of this title and adopt the rules specified in subparagraphs (B) and (C) of section 78f(h)(5) of this title.

(June 6, 1934, ch. 404, title I, §15A, as added June 25, 1938, ch. 677, §1, 52 Stat. 1070; amended Pub. L. 88–467, §7, Aug. 20, 1964, 78 Stat. 574; Pub. L. 94–29, §12, June 4, 1975, 89 Stat. 127; Pub. L. 99–571, title I, §102(g), Oct. 28, 1986, 100 Stat. 3218; Pub. L. 101–429, title V, §509, Oct. 15, 1990, 104 Stat. 957; Pub. L. 103–202, title I, §106(b)(1), title III, §303(a), (c), Dec. 17, 1993, 107 Stat. 2350, 2364, 2366; Pub. L. 106–102, title II, §203, Nov. 12, 1999, 113 Stat. 1391; Pub. L. 106–554, §1(a)(5) [title II, §§203(c), 206(j), (k)(1)], Dec. 21, 2000, 114 Stat. 2763, 2763A–422, 2763A–433; Pub. L. 109–290, §§5, 6, Sept. 29, 2006, 120 Stat. 1319, 1320; Pub. L. 111–203, title IX, §975(f), July 21, 2010, 124 Stat. 1923.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (b)(2), (6), (7), (9), (h)(1)(B), (k)(2)(B)(ii), (4), and (*l*), was in the original ''this title''. See References in Text note set out under section 78a of this title.

Paragraph (12), of subsection (b) of this section, referred to in subsec. (d)(2), was omitted in the general amendment of subsec. (b) by Pub. L. 94–29, see par. (11) of subsec. (b). A new par. (12) was added by Pub. L. 103–302, §303(a).

Sections 77d(2) and 77d(6) of this title, referred to in subsec. (j), were redesignated sections 77d(a)(2) and 77d(a)(6), respectively, of this title by Pub. L. 112–106, title II, §201(b)(1), (c)(1), Apr. 5, 2012, 126 Stat. 314.

Subsection (k) of section 78q of this title, referred to in subsec. (k)(4)(C), was redesignated subsec. (j) by Pub. L. 111–203, title VI, §617(a)(2), July 21, 2010, 124 Stat. 1616.

AMENDMENTS

2010—Subsec. (b)(15). Pub. L. 111–203 added par. (15).

2006—Subsec. (b)(14). Pub. L. 109–290, §5, added par. (14).

Subsec. (i). Pub. L. 109–290, §6, inserted heading and amended text of subsec. (i) generally. Prior to amendment, text read as follows: ''A registered securities association shall, within one year from October 15, 1990, (1) establish and maintain a toll-free telephone listing to receive inquiries regarding disciplinary actions involving its members and their associated persons, and (2) promptly respond to such inquiries in writing. Such association may charge persons, other than individual investors, reasonable fees for written responses to such inquiries. Such an association shall not have any liability to any person for any actions taken or omitted in good faith under this paragraph.''

2000—Subsec. (k). Pub. L. 106–554, §1(a)(5) [title II, §203(c)], added subsec. (k).

Subsec. (*l*). Pub. L. 106–554, §1(a)(5) [title II, §206(j)], added subsec. (*l*).

Subsec. (m). Pub. L. 106–554, §1(a)(5) [title II, §206(k)(1)], added subsec. (m).

1999—Subsec. (j). Pub. L. 106–102 added subsec. (j).

1993—Subsec. (b)(12). Pub. L. 103–202, §303(a), added par. (12).

Subsec. (b)(13). Pub. L. 103–202, §303(c), added par. (13).

Subsec. (f). Pub. L. 103–202, §106(b)(1)(A), redesignated par. (3) as entire subsec. (f) and struck out pars. (1) and (2) which read as follows:

''(1) Except as provided in paragraph (2) of this subsection, nothing in this section shall be construed to apply with respect to any transaction by a registered broker or dealer in any exempted security.

''(2) A registered securities association may adopt and implement rules applicable to members of such association (A) to enforce compliance by registered brokers and dealers with applicable provisions of this chapter and the rules and regulations thereunder, (B) to provide that its members and persons associated with its members shall be appropriately disciplined, in accordance with subsections (b)(7), (b)(8), and (h) of this section, for violation of applicable provisions of this chapter and the rules and regulations thereunder, (C) to provide for reasonable inspection and examination of the books and records of registered brokers and dealers, (D) to provide for the matters described in paragraphs (b)(3), (b)(4), and (b)(5) of this section, (E) to implement the provisions of subsection (g) of this section, and (F) to prohibit fraudulent, misleading, deceptive, and false advertising.''

Subsec. (g)(3)(D). Pub. L. 103–202, §106(b)(1)(B)(i), substituted ''transactions in municipal securities'' for ''transactions in exempted securities''.

Subsec. (g)(4), (5). Pub. L. 103–202, §106(b)(1)(B)(ii), (iii), redesignated par. (5) as (4) and struck out former par. (4) which allowed a registered securities association to deny membership to, condition the membership of, or to otherwise bar association with, the association, under circumstances where a government securities broker or dealer or other person violated financial responsibility rules adopted under section 78*o*–5(b)(1)(A) of this title, or where it appeared likely that such person or entity had or would engage in conduct which would subject such person or entity to sanctions under section 78*o*–5(c) of this title.

1990—Subsec. (i). Pub. L. 101–429 added subsec. (i).

1986—Subsec. (f). Pub. L. 99–571, §102(g)(1), amended subsec. (f) generally. Prior to amendment, subsec. (f) read as follows: ''Nothing in this section shall be construed to apply with respect to any transaction by a broker or dealer in any exempted security.''

Subsec. (g)(3)(D). Pub. L. 99–571, §102(g)(2)(A), added subpar. (D).

Subsec. (g)(4), (5). Pub. L. 99–571, §102(g)(2)(B), (C), added par. (4) and redesignated former par. (4) as (5).

1975—Subsec. (a). Pub. L. 94–29, §12(2), struck out ''with the Commission'' after ''registered'', inserted reference to section 78s(a) of this title, substituted provisions covering an application for registration in the form prescribed by Commission rule containing the rules of the association and such other information and documents as the Commission prescribes as necessary or appropriate in the public interest or for the protection of investors for provisions covering a statement in the form prescribed by the Commission setting forth specified information and accompanied by specified documents, and struck out provision that registration not be construed as a waiver of constitutional rights or as a waiver of the right to contest the validity of Commission rules or regulations.

Subsec. (b). Pub. L. 94–29, §12(2), amended subsec. (b) generally, to conform its provisions concerning the registration and regulation of national and affiliated securities associations to those covering the registration and regulation of national securities exchanges contained in section 78f of this title and inserted provisions necessary to accommodate the creation of the Municipal Securities Rulemaking Board and to implement its purposes.

Subsec. (e). Pub. L. 94–29, §12(3), redesignated subsec. (i) as (e) and in subsec. (e) as so redesignated substituted ''nonmember professional'' for ''nonmember broker or dealer'' in par. (1), substituted ''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'' for ''term 'nonmember broker or dealer' shall include any broker or dealer who makes use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security otherwise than on a national securities exchange, who is not a member of any registered securities association, except a broker or dealer who deals exclusively in commercial paper, bankers' acceptances, or commercial bills'' and added cl. (B) in par. (2), and, in par. (3), designated existing provisions as cl. (A) and added cl. (B). Former subsec. (e), covering the grant and denial of registration and the revocation of affiliated association registration, was struck out. See section 78s of this title.

Subsec. (f). Pub. L. 94–29, §12(3), redesignated subsec. (m) as (f). Former subsec. (f), covering withdrawal from registration, was struck out. See section 78s of this title.

Subsec. (g). Pub. L. 94–29, §12(3), (4), added subsec. (g). Former subsec. (g), covering review by the Commission of adverse actions against association members and stays of such actions, was struck out. See section 78s of this title.

Subsec. (h). Pub. L. 94–29, §12(3), (4), added subsec. (h). Former subsec. (h), covering the Commission's action upon findings, was struck out. See section 78s of this title.

Subsec. (i). Pub. L. 94–29, §12(3), redesignated subsec. (i) as (e) and amended subsec. (e) as so redesignated.

Subsecs. (j) to (*l*). Pub. L. 94–29, §12(3), struck out subsecs. (j) to (*l*) which covered the filing of changes or additions to association rules and current information, the abrogation and alteration of association rules and supplements to association rules, the suspension of an association or its members, the revocation of registration, the expulsion of members, and the removal of officers or directors. See section 78s of this title.

Subsec. (m). Pub. L. 94–29, §12(3), redesignated subsec. (m) as (f).

Subsec. (n). Pub. L. 94–29, §12(3), struck out subsec. (n) which directed that provisions of this section prevail in the event of any conflict between this section and any other law of the United States in force on June 25, 1938.

1964—Subsec. (b)(1), (2). Pub. L. 88–467, §7(a)(1), substituted a period for the semicolon at end of pars. (1) and (2).

Subsec. (b)(3). Pub. L. 88–467, §7(a)(1), (2), substituted a period for the semicolon at end of par. (3), struck out ''of'' before ''any means'', substituted ''paragraph (4) or (5) of this subsection, or a rule of the association permitted under this paragraph. The rules'' for ''paragraph (4) of this subsection: *Provided*, That the rules'', and inserted provision authorizing a registered securities association to adopt rules under which it might exclude from membership persons who had been suspended or expelled from a national securities exchange or who were barred or suspended from being associated with all brokers or dealers who are members of such an exchange for violation of exchange rules.

Subsec. (b)(4). Pub. L. 88–467, §7(a)(1), (3), substituted a period for the semicolon at end of par. (4), deleted from text preceding cl. (A) the language ''or (2) any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), or any person directly or indirectly controlling or controlled by such broker or dealer, whether prior or subsequent to becoming such'', inserted in cl. (A) ''or has been and is barred or suspended from being associated with all bro-

kers or dealers which are members of such exchange'', inserted in cl. (B) provision for suspension for period not exceeding twelve months or barring or suspending the broker or dealer from being associated with a broker or dealer, inserted at the beginning of cl. (C) ''whether prior or subsequent to becoming a broker or dealer,'' (derived from former cl. (1) of this paragraph) and added to cl. (C) provision conferring jurisdiction upon the Commission, an exchange, or a registered securities association to determine whether an individual is the cause of disciplinary action taken by them against a broker or a dealer, and added cl. (D).

Subsec. (b)(5). Pub. L. 88–467, §7(a)(4), added par. (5). Former par. (5) redesignated (6).

Subsec. (b)(6) to (8). Pub. L. 88–467, §7(a)(1), (4), substituted periods for semicolons at end of paragraphs, and redesignated former pars. (5) to (7) as (6) to (8), respectively. Former pars. (6) to (8) redesignated (7) to (9), respectively.

Subsec. (b)(9). Pub. L. 88–467, §7(a)(1), (4), (5), substituted a period for the semicolon at the end, redesignated former par. (8) as (9), and inserted ''and persons associated with its members'' and ''or being suspended or barred from being associated with all members,'', respectively. Former par. (9) redesignated (10).

Subsec. (b)(10). Pub. L. 88–467, §7(a)(4), (6), redesignated former par. (9) as (10), and inserted in paragraph preceding cl. (A) ''and persons associated with members'', ''or the barring of any person from being associated with a member'', ''or other persons'', and ''or person'', substituted a period for a comma at end of cls. (A) and (B) and a period for '', and'' at end of cl. (C), inserted in cl. (A) ''or other person'' in two places and in concluding sentence ''or whether any person shall be barred from being associated with a member'', ''or person'', ''or bar'' in two places, and substituted a period for ''; and'', respectively. Former par. (10) redesignated (11).

Subsec. (b)(11). Pub. L. 88–467, §7(a)(4), redesignated former par. (10) as (11).

Subsec. (b)(12). Pub. L. 88–467, §7(a)(7), added par. (12). Pub. L. 88–467, §7(a)(7), inserted effective date provisions for application of subsec. (b) prior to its amendment and since its amendment with July 1, 1964 as the guiding date.

Subsec. (d)(2). Pub. L. 88–467, §7(b), substituted ''(10)'' for ''(9)'' and inserted ''and paragraph (12),'' after '', inclusive,''.

Subsec. (g). Pub. L. 88–467, §7(c), provided that disciplinary action taken by a registered securities association against a person associated with a member will be reviewable by the Commission, shortened the period for review by an aggrieved person from sixty days or within such longer period as the Commission may determine to thirty days or within such longer period as the Commission may determine, authorized the Commission, after notice and opportunity for hearing on the question of stay to order no stay of action of a registered securities association pending the Commission's decision on review, and authorized the Commission to limit the hearing on the question of stay to affidavits and oral arguments.

Subsec. (h). Pub. L. 88–467, §7(d), made the procedures and the Commission's authority in reviewing disciplinary action by a registered securities association against members and in reviewing association action in denying membership also applicable to Commission review of disciplinary action against persons associated with members and to the barring by an association of any person from being associated with a member.

Subsec. (k)(2). Pub. L. 88–467, §7(e), inserted '', or with such modifications of such alteration or supplement as it deems necessary'' after ''in the manner theretofore requested'', redesignated cls. (1) to (4) as (A) to (D), respectively, and inserted in cl. (A) ''or the barring from being associated with a member'' and ''or persons associated with members, or the qualifications required for members or natural persons associated with members or any class thereof''.

Subsec. (*l*). Pub. L. 88–467, §7(f), substituted a period for a semicolon at end of par. (1) and inserted in par. (2) preceding cl. (A) '', or to suspend for a period not exceeding twelve months or to bar any person from being associated with a member thereof,''.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective Oct. 1, 2010, see section 975(i) of Pub. L. 111–203, set out as a note under section 78*o* of this title.

EFFECTIVE DATE OF 1999 AMENDMENT

Amendment by Pub. L. 106–102 effective at the end of the 18-month period beginning on Nov. 12, 1999, see section 209 of Pub. L. 106–102, set out as a note under section 1828 of Title 12, Banks and Banking.

EFFECTIVE DATE OF 1993 AMENDMENT

Amendment by section 303(a), (c) of Pub. L. 103–202 effective 12 months after Dec. 17, 1993, with provisions for rulemaking authority and review of filings prior to effective date, see section 304(a) of Pub. L. 103–202, set out as a note under section 78f of this title.

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101–429 effective Oct. 15, 1990, with provisions relating to civil penalties and accounting and disgorgement, see section 1(c)(1), (2) of Pub. L. 101–429, set out in a note under section 77g of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–571 effective 270 days after Oct. 28, 1986, see section 401 of Pub. L. 99–571, set out as an Effective Date note under section 78*o*–5 of this title.

EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 94–29 effective 180 days after June 4, 1975, see section 31(a) of Pub. L. 94–29, set out as a note under section 78b of this title.

EFFECTIVE DATE OF 1964 AMENDMENT

Amendment by Pub. L. 88–467 effective Aug. 20, 1964, see section 13 of Pub. L. 88–467, set out as a note under section 78c of this title.

CONSTRUCTION OF 1993 AMENDMENT

Amendment by section 106(b)(1) of Pub. L. 103–202 not to be construed to govern initial issuance of any public debt obligation or to grant any authority to (or extend any authority of) the Securities and Exchange Commission, any appropriate regulatory agency, or a self-regulatory organization to prescribe any procedure, term, or condition of such initial issuance, to promulgate any rule or regulation governing such initial issuance, or to otherwise regulate in any manner such initial issuance, see section 111 of Pub. L. 103–202, set out as a note under section 78*o*–5 of this title.

Amendment by section 303(a), (c) of Pub. L. 103–202 not to limit authority of Securities and Exchange Commission, a registered securities association or a national securities exchange under any provision of this chapter, or preclude the Commission or such association or exchange from imposing a remedy or procedure required to be imposed under such amendment, see section 304(b) of Pub. L. 103–202, set out in an Effective Date of 1993 Amendment note under section 78f of this title.

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

§ 78*o*–4. Municipal securities

(a) Registration of municipal securities dealers

(1)(A) It shall be unlawful for any municipal securities dealer (other than one registered as a

Subsecs. (i) to (k). Pub. L. 111–203, §617(a), redesignated subsecs. (j) and (k) as (i) and (j), respectively, and struck out former subsec. (i) which related to supervision of investment bank holding companies and recordkeeping and reporting requirements.

2006—Subsec. (a)(1). Pub. L. 109–291 inserted ''nationally recognized statistical rating organization,'' after ''registered transfer agent,'' and inserted at end ''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.''

2004—Subsec. (f)(4)(A). Pub. L. 108–386, §8(f)(5), struck out ''and banks operating under the Code of Law for the District of Columbia'' before semicolon.

Subsec. (f)(4)(B). Pub. L. 108–386, §8(f)(6), struck out ''or a bank operating under the Code of Law for the District of Columbia'' before semicolon.

2002—Subsecs. (e)(1)(A), (i)(3)(A)(ii). Pub. L. 107–204 substituted ''a registered public accounting firm'' for ''an independent public accountant''.

2000—Subsec. (b). Pub. L. 106–554, §1(a)(5) [title II, §204(5)], which directed amendment of subsec. (b) by adding at the end pars. (2) to (4)(B), was executed by making the addition after par. (1), to reflect the probable intent of Congress.

Pub. L. 106–554, §1(a)(5) [title II, §204(1) to (4), (6)], inserted subsec. heading, inserted par. (1) designation and heading before ''All'', substituted ''prior to conducting any such examination of a—'' for ''prior to conducting any such examination of a'', inserted subpar. (A) designation before ''registered clearing'', added subpar. (B), designated last sentence as par. (4)(C) and substituted ''Nothing in the proviso in paragraph (1)'' for ''Nothing in the proviso to the preceding sentence''.

1999—Subsecs. (i) to (k). Pub. L. 106–102 added subsecs. (i) and (j) and redesignated former subsec. (i) as (k).

1998—Subsec. (g). Pub. L. 105–353 substituted ''Board of Governors of the Federal Reserve System'' for ''Federal Reserve Board'' in first sentence.

1996—Subsec. (i). Pub. L. 104–290 added subsec. (i).

1990—Subsec. (h). Pub. L. 101–432 added subsec. (h).

1987—Subsec. (c)(2). Pub. L. 100–181, §321(1), substituted new par. (2) for former par. (2) which read as follows: ''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 such clearing agency, transfer agent, or municipal securities dealer, and the Commission shall file with such appropriate regulatory agency notice of the commencement of any proceeding and a copy of any order entered by the Commission against such clearing agency, transfer agent, or municipal securities dealer.''

Subsec. (f)(1)(A). Pub. L. 100–181, §801(b), substituted ''securities issued pursuant to chapter 31 of title 31'' for ''government securities''.

Subsec. (f)(2). Pub. L. 100–181, §321(2), inserted at end ''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.''

Subsec. (f)(3)(A). Pub. L. 100–181, §321(3), substituted ''paragraph (1)'' for ''paragraphs (1) and (2)''.

1986—Subsec. (c)(4). Pub. L. 99–571, §102(h), added par. (4).

Subsec. (f)(1). Pub. L. 99–571, §102(i)(1), inserted ''government securities broker, government securities dealer,'' in introductory provisions and in subpar. (A).

Subsec. (f)(1)(A). Pub. L. 99–571, §102(i)(2), inserted ''and, in the case of government securities, to the Secretary of the Treasury''.

Subsec. (f)(3). Pub. L. 99–571, §102(i)(3), designated existing provisions as subpar. (A) and added subpar. (B).

1975—Subsec. (a). Pub. L. 94–29 designated existing provisions as par. (1), expanded the coverage to require registered municipal securities dealers, the Municipal Securities Rulemaking Board, registered securities information processors, and registered clearing agencies to make and keep such records, to furnish copies thereof, and to make such reports as the Commission may prescribe and clarified the Commission's authority to require the dissemination of reports submitted pursuant to the rules of the Commission, and added pars. (2) and (3).

Subsecs. (b) to (g). Pub. L. 94–29 added subsecs. (b) to (f) and redesignated former subsec. (b) as (g).

1938—Subsec. (a). Act June 25, 1938, inserted ''every registered securities association''.

1936—Subsec. (a). Act May 27, 1936, substituted ''every broker or dealer registered pursuant to section 78*o* of this title'' for ''every broker or dealer making or creating a market for both the purchase and sale of securities through the use of the mails or of any means or instrumentality of interstate commerce''.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by sections 929D, 929S, 982(e)(2), and 985(b)(7) of Pub. L. 111–203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as an Effective Date note under section 5301 of Title 12, Banks and Banking.

Pub. L. 111–203, title VI, §617(b), July 21, 2010, 124 Stat. 1616, provided that: ''The amendments made by this section [amending this section] shall take effect on the transfer date.''

[For definition of ''transfer date'' as used in section 617(b) of Pub. L. 111–203, set out above, see section 5301 of Title 12, Banks and Banking.]

Amendment by section 975(h) of Pub. L. 111–203 effective Oct. 1, 2010, see section 975(i) of Pub. L. 111–203, set out as a note under section 78*o* of this title.

EFFECTIVE DATE OF 2004 AMENDMENT

Amendment by Pub. L. 108–386 effective Oct. 30, 2004, and, except as otherwise provided, applicable with respect to fiscal year 2005 and each succeeding fiscal year, see sections 8(i) and 9 of Pub. L. 108–386, set out as notes under section 321 of Title 12, Banks and Banking.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–571 effective 270 days after Oct. 28, 1986, see section 401 of Pub. L. 99–571, set out as an Effective Date note under section 78*o*–5 of this title.

EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 94–29 effective June 4, 1975, see section 31(a) of Pub. L. 94–29, set out as a note under section 78b of this title.

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

§ 78q–1. National system for clearance and settlement of securities transactions

(a) Congressional findings; facilitating establishment of system

(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 inves-

tors 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 competition among brokers and dealers, clearing agencies, and transfer agents, to use its authority under this chapter—

(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 chapter to assure equal regulation under this chapter 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) Registration of clearing agencies; application; determinations by Commission requisite to registration of applicant as clearing agency; denial of participation; discipline; summary proceedings; exemption; facilities for handling derivatives

(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 78s(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 chapter and the rules and regulations thereunder, to enforce (subject to any rule or order of the Commission pursuant to section 78q(d) or 78s(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 for 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 chapter 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 78q(d) or 78s(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 person 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 chapter.

(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 78f(g) of this title, 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 per-

forms 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 78f(h)(6)(C)[1] of this title), 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 [7 U.S.C. 1 et seq.], 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 chapter.

(c) Registration of transfer agents

(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 78*l* 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 78*o*(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

[1] So in original. Probably should be ''section 78f(h)(7)(C)''.

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[2] paragraph (4) of section 78*o*(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) Activities of clearing agencies and transfer agents; enforcement by appropriate regulatory agencies

(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 regulations (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 chapter, 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 1818 of title 12, enforce compliance by such clearing agency or transfer agent with the provisions of this section, sections 78q and 78s 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 1818(b) or 1818(c) of title 12, 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 1818(c) of title 12.

(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 78q and 78s of this title.

(B) Nothing in the preceding subparagraph or elsewhere in this chapter 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 chapter or to enforce compliance pursuant to any provision of this chapter by any clearing agency, transfer agent, or person associated with a transfer agent with the provisions of this chapter 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 chapter 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 chapter.

(e) Physical movement of securities certificates

The Commission shall use its authority under this chapter to end the physical movement of securities certificates in connection with the settlement among brokers and dealers of trans-

[2] So in original. Probably should be ''of''.

actions in securities consummated by means of the mails or any means or instrumentalities of interstate commerce.

(f) Rules concerning transfer of securities and rights and obligations of involved or affected parties

(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 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 October 16, 1990, 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 the Federal Advisory Committee Act (5 U.S.C. App.). 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 the Federal Advisory Committee Act; 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 the Federal Advisory Committee Act. 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)[3] 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 subsequently 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.

[3] So in original. Two subsecs. (g) have been enacted.

(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 July 21, 2010. 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)[3] 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 chapter 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 chapter, 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.

(j) Rules

The Commission shall adopt rules governing persons that are registered as clearing agencies for security-based swaps under this chapter.

(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 [7 U.S.C. 1 et seq.] 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 July 21, 2010—

(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.

(June 6, 1934, ch. 404, title I, § 17A, as added Pub. L. 94–29, § 15, June 4, 1975, 89 Stat. 141; amended Pub. L. 100–181, title III, § 322, Dec. 4, 1987, 101 Stat. 1257; Pub. L. 101–429, title II, § 206, Oct. 15, 1990, 104 Stat. 941; Pub. L. 101–432, § 5, Oct. 16, 1990, 104 Stat. 973; Pub. L. 101–550, title II, § 203(c)(1), Nov. 15, 1990, 104 Stat. 2718; Pub. L. 106–554, § 1(a)(5) [title II, §§ 206(d), 207], Dec. 21, 2000, 114 Stat. 2763, 2763A–431, 2763A–434; Pub. L. 107–204, title VI, § 604(c)(1)(C), July 30, 2002, 116 Stat. 796; Pub. L. 111–203, title VII, § 763(b), title IX, §§ 925(a)(3), 929W, July 21, 2010, 124 Stat. 1768, 1851, 1869.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a)(2), (b)(3)(A), (F), (I), (8), (d)(1), (3)(B), (4), (5), (e), and (h) to (j), was

in the original ''this title''. See References in Text note set out under section 78a of this title.

The Commodity Exchange Act, referred to in subsecs. (b)(8) and (*l*)(1), is act Sept. 21, 1922, ch. 369, 42 Stat. 998, which is classified generally to chapter 1 (§1 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 1 of Title 7 and Tables.

The Federal Advisory Committee Act, referred to in subsec. (f)(4), is Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 770, which is set out in the Appendix to Title 5, Government Organization and Employees.

AMENDMENTS

2010—Subsec. (c)(4)(C). Pub. L. 111–203, §925(a)(3), substituted ''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,'' for ''twelve months or bar any such person from being associated with the transfer agent,''.

Subsec. (g). Pub. L. 111–203, §929W, added subsec. (g) relating to due diligence for the delivery of dividends, interest, and other valuable property rights.

Pub. L. 111–203, §763(b), added subsec. (g) relating to registration requirement.

Subsecs. (h) to (m). Pub. L. 111–203, §763(b), added subsecs. (h) to (m).

2002—Subsec. (c)(3)(A), (4)(C). Pub. L. 107–204 inserted '', or is subject to an order or finding,'' before ''enumerated'' and substituted ''(H), or (G)'' for ''or (G)''.

2000—Subsec. (b)(3)(A). Pub. L. 106–554, §1(a)(5) [title II, §207(1)], inserted ''and derivative agreements, contracts, and transactions'' after ''prompt and accurate clearance and settlement of securities transactions''.

Subsec. (b)(3)(F). Pub. L. 106–554, §1(a)(5) [title II, §207(2)], inserted ''and, to the extent applicable, derivative agreements, contracts, and transactions'' after ''designed to promote the prompt and accurate clearance and settlement of securities transactions''.

Subsec. (b)(7). Pub. L. 106–554, §1(a)(5) [title II, §206(d)], added par. (7).

Subsec. (b)(8). Pub. L. 106–554, §1(a)(5) [title II, §207(3)], added par. (8).

1990—Subsec. (a)(2). Pub. L. 101–432, §5(a), amended par. (2) generally. Prior to amendment, par. (2) read as follows: ''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 competition among brokers and dealers, clearing agencies, and transfer agents, to use its authority under this chapter to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of transactions in securities (other than exempted securities) in accordance with the findings and to carry out the objectives set forth in paragraph (1) of this subsection. The Commission shall use its authority under this chapter to assure equal regulation under this chapter of registered clearing agencies and registered transfer agents.''

Subsec. (c)(3)(A), (4)(C). Pub. L. 101–550 substituted ''(A), (D), (E), or (G)'' for ''(A), (D), or (E)''.

Subsec. (d)(5). Pub. L. 101–429 added par. (5).

Subsec. (f). Pub. L. 101–432, §5(b), added subsec. (f).

1987—Subsec. (c)(2). Pub. L. 100–181, §322(1), (2), inserted ''and any persons associated with the transfer agent'' in first sentence and substituted ''45'' for ''thirty'' in second sentence.

Subsec. (c)(3), (4). Pub. L. 100–181, §322(3)–(5), added par. (3), struck out former par. (3)(A) which read as follows: ''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 twelve 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 has willfully violated or is unable to comply with any provision of this section or section 78q of this title or the rules or regulations thereunder.'', redesignated subpars. (B) and (C) of former par. (3) as subpars. (A) and (B), respectively, of new par. (4), and added subpar. (C) to such par. (4).

Subsec. (d)(3)(B). Pub. L. 100–181, §322(6), substituted ''clearing agency, transfer agent, or person associated with a transfer agent'' for ''clearing agency or transfer agent''.

Subsec. (d)(4). Pub. L. 100–181, §322(7), substituted '', transfer agent, or person associated with a transfer agent,'' for ''or transfer agent''.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by sections 925(a)(3) and 929W of Pub. L. 111–203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as an Effective Date note under section 5301 of Title 12, Banks and Banking.

Amendment by section 763(b) of Pub. L. 111–203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B (§§761–774) of title VII of Pub. L. 111–203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, see section 774 of Pub. L. 111–203, set out as a note under section 77b of this title.

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101–429 effective Oct. 15, 1990, with provisions relating to civil penalties and accounting and disgorgement, see section 1(c)(1), (2) of Pub. L. 101–429, set out in a note under section 77g of this title.

EFFECTIVE DATE

Section effective June 4, 1975, except for subsecs. (b) and (c) which are effective 180 days after June 4, 1975, see section 31(a) of Pub. L. 94–29, set out as a note under section 78b of this title.

CLEARANCE AND SETTLEMENT OF TRANSACTIONS; REPORT TO CONGRESS

Section 8(b) of Pub. L. 101–432 directed Securities and Exchange Commission, in consultation with Commodity Futures Trading Commission, Board of Governors of the Federal Reserve System, and other relevant regulatory authorities, to examine progress toward establishing 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, and to submit to Congress, not later than 2 years from Oct. 16, 1990, a report detailing and evaluating such progress.

§ 78q–2. Automated quotation systems for penny stocks

(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 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) of this section, 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) of this section, 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) of this section 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 78w(b)(1) of this title) submitted more than 12 months after October 15, 1990, include a description of the status of the penny stock automated quotation system or systems required by subsection (b) of this section. 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.

(June 6, 1934, ch. 404, title I, § 17B, as added Pub. L. 101–429, title V, § 506, Oct. 15, 1990, 104 Stat. 955.)

REFERENCES IN TEXT

Section 78w(b)(1) of this title, referred to in subsec. (d), was omitted from the Code. For further details related to reports referred to in subsec. (d), see Codification note set out under section 78w of this title.

EFFECTIVE DATE

Section effective Oct. 15, 1990, with provisions relating to civil penalties and accounting and disgorgement, see section 1(c)(1), (2) of Pub. L. 101–429, set out in an Effective Date of 1990 Amendment note under section 77g of this title.

§ 78r. Liability for misleading statements

(a) Persons liable; persons entitled to recover; defense of good faith; suit at law or in equity; costs, etc.

Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* 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) Contribution

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) Period of limitations

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.

(June 6, 1934, ch. 404, title I, § 18, 48 Stat. 897; May 27, 1936, ch. 462, § 5, 49 Stat. 1379.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (a), was in the original ''this title''. See References in Text note set out under section 78a of this title.

AMENDMENTS

1936—Subsec. (a). Act May 27, 1936, inserted ''or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title''.

§ 78s. Registration, responsibilities, and oversight of self-regulatory organizations

(a) Registration procedures; notice of filing; other regulatory agencies

(1) The Commission shall, upon the filing of an application for registration as a national securi-

ties exchange, registered securities association, or registered clearing agency, pursuant to section 78f, 78*o*–3, or 78q–1 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 chapter 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) Proposed rule changes; notice; proceedings

(1) 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, 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 chapter and the rules and regulations issued under this chapter 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 July 21, 2010, after consultation with other regulatory agencies, the Commission shall promulgate rules setting forth the procedural requirements 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 chapter, 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 chapter. 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 78y of this title nor deemed to be ''final agency action'' for purposes of section 704 of title 5.

(4) With respect to a proposed rule change 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 whereof 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)(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 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) SECURITY FUTURES PRODUCT RULE CHANGES.—

(A) FILING REQUIRED.—A self-regulatory organization that is an exchange registered with the Commission pursuant to section 78f(g) of this title or that is a national securities association registered pursuant to section 78*o*–3(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 Com-

mission. Such proposed rule change may take effect upon filing of a written certification with the Commodity Futures Trading Commission under section 7a–2(c) of title 7, 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 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 chapter, 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 7a–2(c) of title 7, 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 78y of this title nor deemed to be a final agency action for purposes of section 704 of title 5.

(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 chapter, 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 78*o*–3(a) of this title or a national securities exchange subject to the provisions of subsection (a) of this section 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 further-

ance of the purposes of this section notwithstanding the Commodity Futures Trading Commission's determination.

(10)[1] 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)[1] 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 8306 of this title.

(c) Amendment by Commission of rules of self-regulatory organizations

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 chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this chapter, 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.

(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 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 chapter.

(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 chapter 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) of this section, 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) Notice of disciplinary action taken by self-regulatory organization against a member or participant; review of action by appropriate regulatory agency; procedure

(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 organiza-

[1] So in original. Two pars. (10) have been enacted.

tion, by rule, may prescribe as necessary or appropriate in furtherance of the purposes of this chapter.

(2) 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 78f(g) of this title or a national securities association registered pursuant to section 78*o*–3(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 this section, 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) Disposition of review; cancellation, reduction, or remission of sanction

(1) 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 chapter, 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 organization, and that such provisions are, and were applied in a manner, consistent with the purposes of this chapter, 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 purposes of this chapter or is excessive or oppressive, the appropriate regulatory agency may cancel, reduce, or require the remission of such sanction.

(f) Dismissal of review proceeding

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 chapter, 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 chapter, 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) Compliance with rules and regulations

(1) Every self-regulatory organization shall comply with the provisions of this chapter, the rules and regulations thereunder, and its own rules, and (subject to the provisions of section 78q(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 chapter, may relieve any self-regulatory organization of any responsibility under this chapter to enforce compliance with any specified provision of this chapter 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) Suspension or revocation of self-regulatory organization's registration; censure; other sanctions

(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 chapter, 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 chapter, 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 chapter, 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 78*o*(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 [15 U.S.C. 77a et seq.], the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 et seq.], the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.], this chapter, 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 chapter, 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 chapter, 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 78*o*(b)(6) of this title 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 chapter, 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 chapter, 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 chapter, 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 chapter, 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) Appointment of trustee

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 78u(d) or 78aa 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.

(June 6, 1934, ch. 404, title I, §19, 48 Stat. 898; Pub. L. 87–196, Sept. 5, 1961, 75 Stat. 465; Pub. L. 87–561, July 27, 1962, 76 Stat. 247; Pub. L. 90–438, July 29, 1968, 82 Stat. 453; Pub. L. 91–94, Oct. 20, 1969, 83 Stat. 141; Pub. L. 91–410, Sept. 25, 1970, 84 Stat. 862; Pub. L. 94–29, §16, June 4, 1975, 89 Stat. 146; Pub. L. 103–202, title I, §106(c), Dec. 17, 1993, 107 Stat. 2350; Pub. L. 105–353, title III, §301(b)(11), Nov. 3, 1998, 112 Stat. 3236; Pub. L. 106–554, §1(a)(5) [title II, §202(b), (c)], Dec. 21, 2000, 114 Stat. 2763, 2763A–418, 2763A–421; Pub. L. 111–203, title VII, §717(c), title IX, §§916, 929F(e), July 21, 2010, 124 Stat. 1652, 1833, 1854.)

AMENDMENT OF SECTION

Unless otherwise provided, amendment by subtitle A (§§711–754) of title VII of Pub. L. 111–203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle A requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle A, see 2010 Amendment notes and Effective Date of 2010 Amendment note below.

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a)(1), (b)(2)(C)(i), (3)(C), (7)(C), (8), (c), (d)(1), (e)(1)(A), (2), (f), (g), and (h), was in the original ''this title''. See References in Text note set out under section 78a of this title.

The Securities Act of 1933, referred to in subsec. (h), is act May 27, 1933, ch. 38, title I, 48 Stat. 74, as amended, which is classified generally to subchapter I (§77a et seq.) of chapter 2A of this title. For complete classification of this Act to the Code, see section 77a of this title and Tables.

The Investment Advisers Act of 1940, referred to in subsec. (h), is title II of act Aug. 22, 1940, ch. 686, 54 Stat. 847, as amended, which is classified generally to subchapter II (§80b–1 et seq.) of chapter 2D of this title. For complete classification of this Act to the Code, see section 80b–20 of this title and Tables.

The Investment Company Act of 1940, referred to in subsec. (h), is title I of act Aug. 22, 1940, ch. 686, 54 Stat. 789, as amended, which is classified generally to subchapter I (§80a–1 et seq.) of chapter 2D of this title. For complete classification of this Act to the Code, see section 80a–51 of this title and Tables.

AMENDMENTS

2010—Subsec. (b)(1). Pub. L. 111–203, §916(b)(2), substituted ''as soon as practicable after the date of the filing'' for ''upon the filing''.

Subsec. (b)(2). Pub. L. 111–203, §916(a), added par. (2) and struck out former par. (2) which related to approval of rule change or institution of proceedings regarding disapproval of such change within thirty-five days of publication of notice or within such longer period as the Commission may designate up to ninety days of such date.

Subsec. (b)(3)(A). Pub. L. 111–203, §916(c)(1), substituted ''shall take effect'' for ''may take effect'' and inserted ''on any person, whether or not the person is a member of the self-regulatory organization'' after ''charge imposed by the self-regulatory organization''.

Subsec. (b)(3)(C). Pub. L. 111–203, §916(c)(2), substituted second sentence for former second sentence which read as follows: ''At any time within sixty days of the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) of this subsection, the Commission summarily may abrogate the change in the rules of the self-regulatory organization made thereby and require that the proposed rule change be refiled in accordance with the provisions of paragraph (1) of this subsection and reviewed in accordance with the provisions of paragraph (2) of this subsection, 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 chapter.'', added third sentence, and substituted ''this subparagraph'' for ''the preceding sentence'' in last sentence.

Subsec. (b)(4)(D). Pub. L. 111–203, §916(d), amended subpar. (D) generally. Prior to amendment, subpar. (D) read as follows: ''The Commission shall abrogate any change in the rules of such a clearing agency made by a proposed rule change which has taken effect pursuant to paragraph (3) of this subsection, require that the proposed rule change be refiled in accordance with the provisions of paragraph (1) of this subsection, and reviewed in accordance with the provisions of paragraph (2) of this subsection, if the appropriate regulatory agency for such clearing agency notifies the Commission within thirty days of the date of filing of such proposed rule change of such appropriate regulatory agency's (i) determination 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) reasons for such determination.''

Subsec. (b)(10). Pub. L. 111–203, §916(b)(1), added par. (10) relating to rule of construction relating to filing date of proposed rule changes.

Pub. L. 111–203, §717(c), added par. (10) relating to stay pending determination whether product is a security pursuant to section 8306 of this title.

Subsec. (h)(4). Pub. L. 111–203, §929F(e), in introductory provisions, substituted ''any person who is, or at

the time of the alleged misconduct was, an officer or director'' for ''any officer or director'' and ''such person'' for ''such officer or director''.

2000—Subsec. (b)(7). Pub. L. 106–554, §1(a)(5) [title II, §202(b)(1)], added par. (7).

Subsec. (b)(8). Pub. L. 106–554, §1(a)(5) [title II, §202(b)(2)], added par. (8).

Subsec. (b)(9). Pub. L. 106–554, §1(a)(5) [title II, §202(b)(3)], added par. (9).

Subsec. (d)(3). Pub. L. 106–554, §1(a)(5) [title II, §202(c)], added par. (3).

1998—Subsec. (c)(5). Pub. L. 105–353 realigned margins.

1993—Subsec. (b)(5), (6). Pub. L. 103–202, §106(c)(1), added pars. (5) and (6).

Subsec. (c)(5). Pub. L. 103–202, §106(c)(2), added par. (5).

1975—Pub. L. 94–29 amended section generally, substituting provisions covering the registration, responsibilities, and oversight of self-regulatory organizations by the Commission for provisions covering only the Commission's powers with respect to exchanges and securities, with a view to consolidating and expanding the Commission's oversight powers with respect to self-regulatory organizations, their members, participants, and officers, and with a view to giving the Commission identical powers over all self-regulatory organizations, including registered clearing agencies, and substantially strengthening the Commission's ability to assure that these organizations carry out their statutory responsibilities.

1970—Subsec. (e)(1). Pub. L. 91–410 substituted ''December 31, 1970'' for ''September 1, 1970''.

1969—Subsec. (e). Pub. L. 91–94 substituted ''September 1, 1970'' for ''September 1, 1969'' in par. (1), and ''$945,000'' for ''$875,000'' in par. (4).

1968—Subsec. (e). Pub. L. 90–438 added subsec. (e).

1962—Subsec. (d). Pub. L. 87–561 substituted ''April 3, 1963'' for ''January 3, 1963'' and ''$950,000'' for ''$750,000''.

1961—Subsec. (d). Pub. L. 87–196 added subsec. (d).

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by sections 916 and 929F(e) of Pub. L. 111–203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as an Effective Date note under section 5301 of Title 12, Banks and Banking.

Amendment by section 717(c) of Pub. L. 111–203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle A (§§711–754) of title VII of Pub. L. 111–203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle A, see section 754 of Pub. L. 111–203, set out as a note under section 1a of Title 7, Agriculture.

EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 94–29 effective June 4, 1975, except for amendment of subsec. (g) by Pub. L. 94–29 which is effective 180 days after June 4, 1975, see section 31(a) of Pub. L. 94–29, set out as a note under section 78b of this title.

CONSTRUCTION OF 1993 AMENDMENT

Amendment by Pub. L. 103–202 not to be construed to govern initial issuance of any public debt obligation or to grant any authority to (or extend any authority of) the Securities and Exchange Commission, any appropriate regulatory agency, or a self-regulatory organization to prescribe any procedure, term, or condition of such initial issuance, to promulgate any rule or regulation governing such initial issuance, or to otherwise regulate in any manner such initial issuance, see section 111 of Pub. L. 103–202, set out as a note under section 78*o*–5 of this title.

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

REVIEW OF REGULATORY STRUCTURES AND PROCEDURES WITH RESPECT TO PENNY STOCKS; REPORT

Pub. L. 101–429, title V, §510, Oct. 15, 1990, 104 Stat. 957, directed Comptroller General, in consultation with Securities and Exchange Commission, to conduct a review of rules, procedures, facilities, and oversight and enforcement activities of self-regulatory organizations under Securities Exchange Act of 1934, with respect to penny stocks (within the meaning of 15 U.S.C. 78c(a)(51)), and, within one year after Oct. 15, 1990, to submit a report on the review including a statement of findings and such recommendations as the Comptroller General considered appropriate with respect to legislative or administrative changes.

§ 78t. Liability of controlling persons and persons who aid and abet violations

(a) Joint and several liability; good faith defense

Every person who, directly or indirectly, controls any person liable under any provision of this chapter 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 78u(d) of this title), 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) Unlawful activity through or by means of any other person

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 chapter or any rule or regulation thereunder through or by means of any other person.

(c) Hindering, delaying, or obstructing the making or filing of any document, report, or information

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 chapter 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) Liability for trading in securities while in possession of material nonpublic information

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 chapter, or any rule or regulation thereunder, such conduct in connection with a purchase or sale of a put, call, straddle, option, privilege 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.

(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

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.

(June 6, 1934, ch. 404, title I, § 21F, as added Pub. L. 111–203, title IX, § 922(a), July 21, 2010, 124 Stat. 1841.)

REFERENCES IN TEXT

The Sarbanes-Oxley Act of 2002, referred to in subsec. (h)(1)(A)(iii), is Pub. L. 107–204, July 30, 2002, 116 Stat. 745. For complete classification of this Act to the Code, see Short Title note set out under section 7201 of this title and Tables.

This chapter, referred to in subsec. (h)(1)(A)(iii), was in the original ''the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.)''. This chapter, referred to in subsec. (h)(2)(D)(i), was in the original ''this Act''. See References in Text note set out under section 78a of this title.

EFFECTIVE DATE

Section effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as a note under section 5301 of Title 12, Banks and Banking.

§ 78u–7. Implementation and transition provisions for whistleblower protection

(a) Implementing rules

The Commission shall issue final regulations implementing the provisions of section 78u–6 of this title, as added by this subtitle, not later than 270 days after July 21, 2010.

(b) Original information

Information provided to the Commission in writing by a whistleblower shall not lose the status of original information (as defined in section 78u–6(a)(3) of this title, as added by this subtitle) solely because the whistleblower provided the information prior to the effective date of the regulations, if the information is provided by the whistleblower after July 21, 2010.

(c) Awards

A whistleblower may receive an award pursuant to section 78u–6 of this title, as added by this subtitle, regardless of whether any violation of a provision of the securities laws, or a rule or regulation thereunder, underlying the judicial or administrative action upon which the award is based, occurred prior to July 21, 2010.

(d) Administration and enforcement

The Securities and Exchange Commission shall establish a separate office within the Commission to administer and enforce the provisions of section 78u–6 of this title (as add[1] by section 922(a)).[2] Such office shall report annually to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives on its activities, whistleblower complaints, and the response of the Commission to such complaints.

(Pub. L. 111–203, title IX, § 924, July 21, 2010, 124 Stat. 1850.)

REFERENCES IN TEXT

This subtitle, referred to in subsecs. (a) to (c), means subtitle B (§§ 921–929Z) of title IX of Pub. L. 111–203.

Section 922(a), referred to in subsec. (d), means section 922(a) of Pub. L. 111–203.

CODIFICATION

Section was enacted as part of the Investor Protection and Securities Reform Act of 2010, and also as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and not as part of the Securities Exchange Act of 1934 which comprises this chapter.

EFFECTIVE DATE

Section effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as a note under section 5301 of Title 12, Banks and Banking.

DEFINITIONS

For definitions of ''Commission'' and ''securities laws'' as used in this section, see section 5301 of Title 12, Banks and Banking.

§ 78v. Hearings by Commission

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.

(June 6, 1934, ch. 404, title I, § 22, 48 Stat. 901.)

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

§ 78w. Rules, regulations, and orders; annual reports

(a) Power to make rules and regulations; considerations; public disclosure

(1) The Commission, the Board of Governors of the Federal Reserve System, and the other agencies enumerated in section 78c(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 chapter for

[1] So in original. Probably should be ''added''.

[2] See References in Text note below.

which they are responsible or for the execution of the functions vested in them by this chapter, 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 chapter 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 78c(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 chapter, 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 chapter. 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 chapter, 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 chapter.

(3) The Commission and the Secretary, in making rules and regulations pursuant to any provision of this chapter, considering any application for registration in accordance with section 78s(a) of this title, or reviewing any proposed rule change of a self-regulatory organization in accordance with section 78s(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.

(b) Annual report to Congress

(1) The Commission, the Board of Governors of the Federal Reserve System, and the other agencies enumerated in section 78c(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 chapter.

(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 chapter with respect to such self-regulatory organization, including a description of any examination conducted as part of such activities of any such organization, any material recommendation presented as part of such activities to such organization for changes in its organization or rules, and any 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 chapter with respect to such municipal securities dealers, including the nature of and reason for any sanction imposed pursuant to this chapter 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 chapter, 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 chapter 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 78m(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 Commission 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 viabil-

ity 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, 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) Procedure for adjudication

The Commission, by rule, shall prescribe the procedure applicable to every case pursuant to this chapter of adjudication (as defined in section 551 of title 5) 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 October 15, 1990, the Commission shall establish regulations providing for the expeditious conduct of hearings and rendering of decisions under section 78u–3 of this title, section 77h–1 of this title, section 80a–9(f) of this title, and section 80b–3(k) of this title.

(June 6, 1934, ch. 404, title I, § 23, 48 Stat. 901; Aug. 23, 1935, ch. 614, § 203(a), 49 Stat. 704; May 27, 1936, ch. 462, § 8, 49 Stat. 1379; Pub. L. 88–467, § 10, Aug. 20, 1964, 78 Stat. 580; Pub. L. 94–29, § 18, June 4, 1975, 89 Stat. 155; Pub. L. 99–571, title I, § 102(j), Oct. 28, 1986, 100 Stat. 3220; Pub. L. 100–181, title III, §§ 324, 325, Dec. 4, 1987, 101 Stat. 1259; Pub. L. 101–429, title II, § 204, Oct. 15, 1990, 104 Stat. 940; Pub. L. 103–202, title I, § 107, Dec. 17, 1993, 107 Stat. 2351; Pub. L. 109–351, title IV, § 401(a)(3), Oct. 13, 2006, 120 Stat. 1973; Pub. L. 111–203, title III, § 376(4), July 21, 2010, 124 Stat. 1569.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a) to (c), was in the original ''this title''. See References in Text note set out under section 78a of this title.

AMENDMENTS

2010—Subsec. (b)(1). Pub. L. 111–203 struck out '', other than the Office of Thrift Supervision,'' before ''shall each make''.

2006—Subsec. (b)(1). Pub. L. 109–351 inserted ''other than the Office of Thrift Supervision,'' before ''shall each''.

1993—Subsec. (b)(4)(C) to (K). Pub. L. 103–202, § 107, redesignated subpars. (E) to (G) and (I) to (K) as (C) to (E) and (F) to (H), respectively, added a new subpar. (I), and struck out former subpars. (C), (D), and (H). Prior to amendment, subpars. (C), (D), and (H) read as follows:

''(C) beginning in 1975 and ending in 1980, information, data, and recommendations with respect to the development of a national system for the prompt and accurate clearance and settlement of securities transactions, including a summary of the regulatory activities, operational capabilities, financial resources, and plans of self-regulatory organizations and registered transfer agents with respect thereto;

''(D) beginning in 1975 and ending in 1980, a description of the steps taken, and an evaluation of the progress made, toward the establishment of a national market system, and recommendations for further legislation it considers advisable with respect to such system;

''(H) beginning in 1975 and ending in 1980, a description of the effect the absence of any schedule or fixed rates of commissions, allowances, discounts, or other fees to be charged by members for effecting transactions on a national securities exchange is having on the maintenance of fair and orderly markets and the development of a national market system for securities;''.

1990—Subsec. (d). Pub. L. 101–429 added subsec. (d).

1987—Subsec. (a)(1). Pub. L. 100–181, § 324(1), inserted ''or'' before ''any self-regulatory organization'' in last sentence.

Subsec. (a)(3). Pub. L. 100–181, § 324(2), inserted ''shall'' after ''section 78s(b) of this title,''.

Subsec. (b)(4)(F). Pub. L. 100–181, § 325, substituted ''the'' for ''The''.

1986—Subsec. (a)(2). Pub. L. 99–571, § 102(j)(1), (2), inserted ''and the Secretary of the Treasury'' in three places and ''or the Secretary's'' in one place.

Subsec. (a)(3). Pub. L. 99–571, § 102(j)(3), (4), inserted ''and the Secretary'' in three places and ''or the Secretary'' in one place.

1975—Subsec. (a). Pub. L. 94–29 designated existing provisions as par. (1), inserted references to other agencies enumerated in section 78c(a)(34) of this title, regulations appropriate to implement the provisions of this chapter for which the agencies are responsible, the classification of persons, transactions, statements, applications, and reports, the prescribing of greater, lesser, or different requirements for different classifications, and the non-liability of self-regulatory organization, and added pars. (2) and (3).

Subsec. (b). Pub. L. 94–29 designated existing provisions as par. (1), substituted ''The Commission, the Board of Governors of the Federal Reserve System, and the other agencies enumerated in section 78c(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 chapter'' for ''The Commission and the Board of Governors of the Federal Reserve System, respectively, shall include in their annual reports to Congress such information, data, and recommendation for further legislation as they may deem advisable with regard to matters within their respective jurisdictions under this chapter. The Commission shall include in its annual reports to the Congress for the fiscal years ended on June 30 of 1965, 1966, and 1967 information, data, and recommendations specifically related to the operation of the amendments to this chapter made by the Securities Acts Amendments of 1964'', and added pars. (2) to (4).

Subsec. (c). Pub. L. 94–29 added subsec. (c).

1964—Subsec. (b). Pub. L. 88–467 required the Commission in its annual reports to Congress for fiscal years ending June 30, 1965, 1966, and 1967, to furnish information, data, and recommendations specifically related to the operations of the amendments to the Securities Ex-

change Act of 1934 made by the Securities Act Amendments of 1964.

1936—Subsec. (a). Act May 27, 1936, inserted second sentence.

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, substituted ''Board of Governors of the Federal Reserve System'' for ''Federal Reserve Board''.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective on the transfer date, see section 351 of Pub. L. 111–203, set out as a note under section 906 of Title 2, The Congress.

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101–429 effective Oct. 15, 1990, with provisions relating to civil penalties and accounting and disgorgement, see section 1(c)(1), (2) of Pub. L. 101–429, set out in a note under section 77g of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–571 effective 270 days after Oct. 28, 1986, see section 401 of Pub. L. 99–571, set out as an Effective Date note under section 78*o*–5 of this title.

EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 94–29 effective June 4, 1975, see section 31(a) of Pub. L. 94–29, set out as a note under section 78b of this title.

EFFECTIVE DATE OF 1964 AMENDMENT

Amendment by Pub. L. 88–467 effective Aug. 20, 1964, see section 13 of Pub. L. 88–467, set out as a note under section 78c of this title.

CONSTRUCTION OF 1993 AMENDMENT

Amendment by Pub. L. 103–202 not to be construed to govern initial issuance of any public debt obligation or to grant any authority to (or extend any authority of) the Securities and Exchange Commission, any appropriate regulatory agency, or a self-regulatory organization to prescribe any procedure, term, or condition of such initial issuance, to promulgate any rule or regulation governing such initial issuance, or to otherwise regulate in any manner such initial issuance, see section 111 of Pub. L. 103–202, set out as a note under section 78*o*–5 of this title.

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions of law requiring submittal to Congress of any annual, semiannual, or other regular periodic report listed in House Document No. 103–7 (in which the 2nd item on page 143, the 18th item on page 167, the 7th item on page 172, and 18th item on page 190 identify a reporting provision which, as subsequently amended, is contained in subsec. (b) of this section), see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance.

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

§ 78x. Public availability of information

(a) "Records" defined

For purposes of section 552 of title 5 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 chapter or otherwise.

(b) Disclosure or personal use

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, 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, 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 (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 chapter 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);

(B) the Public Company Accounting Oversight Board;

(C) any self-regulatory organization;

(D) any foreign securities authority;

(E) any foreign law enforcement authority; or

similar functions) or employees in common with the broker or dealer who can influence the activities of research analysts or the content of research reports and, if so, the identity of those persons.

§ 242.505 Exclusion for news media.

No provision of this Regulation AC shall apply to any person who:

(a) Is the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation; and

(b) Is not registered or required to be registered with the Commission as a broker or dealer or investment adviser.

REGULATION NMS—REGULATION OF THE NATIONAL MARKET SYSTEM

SOURCE: 70 FR 37620, June 29, 2005, unless otherwise noted.

§ 242.600 NMS security designation and definitions.

(a) The term *national market system security* as used in section 11A(a)(2) of the Act (15 U.S.C. 78k–1(a)(2)) shall mean any NMS security as defined in paragraph (b) of this section.

(b) For purposes of Regulation NMS (§§ 242.600 through 242.612), the following definitions shall apply:

(1) *Actionable indication of interest* means any indication of interest that explicitly or implicitly conveys all of the following information with respect to any order available at the venue sending the indication of interest:

(i) Symbol;

(ii) Side (buy or sell);

(iii) A price that is equal to or better than the national best bid for buy orders and the national best offer for sell orders; and

(iv) A size that is at least equal to one round lot.

(2) *Aggregate quotation size* means the sum of the quotation sizes of all responsible brokers or dealers who have communicated on any national securities exchange bids or offers for an NMS security at the same price.

(3) *Alternative trading system* has the meaning provided in § 242.300(a).

(4) *Automated quotation* means a quotation displayed by a trading center that:

(i) Permits an incoming order to be marked as immediate-or-cancel;

(ii) Immediately and automatically executes an order marked as immediate-or-cancel against the displayed quotation up to its full size;

(iii) Immediately and automatically cancels any unexecuted portion of an order marked as immediate-or-cancel without routing the order elsewhere;

(iv) Immediately and automatically transmits a response to the sender of an order marked as immediate-or-cancel indicating the action taken with respect to such order; and

(v) Immediately and automatically displays information that updates the displayed quotation to reflect any change to its material terms.

(5) *Automated trading center* means a trading center that:

(i) Has implemented such systems, procedures, and rules as are necessary to render it capable of displaying quotations that meet the requirements for an automated quotation set forth in paragraph (b)(4) of this section;

(ii) Identifies all quotations other than automated quotations as manual quotations;

(iii) Immediately identifies its quotations as manual quotations whenever it has reason to believe that it is not capable of displaying automated quotations; and

(iv) Has adopted reasonable standards limiting when its quotations change from automated quotations to manual quotations, and vice versa, to specifically defined circumstances that promote fair and efficient access to its automated quotations and are consistent with the maintenance of fair and orderly markets.

(6) *Average effective spread* means the share-weighted average of effective spreads for order executions calculated, for buy orders, as double the amount of difference between the execution price and the midpoint of the national best bid and national best offer at the time of order receipt and, for sell orders, as double the amount of difference between the midpoint of the national best bid and national best offer at the time of order receipt and the execution price.

(7) *Average realized spread* means the share-weighted average of realized

spreads for order executions calculated, for buy orders, as double the amount of difference between the execution price and the midpoint of the national best bid and national best offer five minutes after the time of order execution and, for sell orders, as double the amount of difference between the midpoint of the national best bid and national best offer five minutes after the time of order execution and the execution price; *provided, however*, that the midpoint of the final national best bid and national best offer disseminated for regular trading hours shall be used to calculate a realized spread if it is disseminated less than five minutes after the time of order execution.

(8) *Best bid and best offer* mean the highest priced bid and the lowest priced offer.

(9) *Bid* or *offer* means the bid price or the offer price communicated by a member of a national securities exchange or member of a national securities association to any broker or dealer, or to any customer, at which it is willing to buy or sell one or more round lots of an NMS security, as either principal or agent, but shall not include indications of interest.

(10) *Block size with respect to* an order means it is:

(i) Of at least 10,000 shares; or

(ii) For a quantity of stock having a market value of at least $200,000.

(11) *Categorized by order size* means dividing orders into separate categories for sizes from 100 to 499 shares, from 500 to 1999 shares, from 2000 to 4999 shares, and 5000 or greater shares.

(12) *Categorized by order type* means dividing orders into separate categories for market orders, marketable limit orders, inside-the-quote limit orders, at-the-quote limit orders, and near-the-quote limit orders.

(13) *Categorized by security* means dividing orders into separate categories for each NMS stock that is included in a report.

(14) *Consolidated display* means:

(i) The prices, sizes, and market identifications of the national best bid and national best offer for a security; and

(ii) Consolidated last sale information for a security.

(15) *Consolidated last sale information* means the price, volume, and market identification of the most recent transaction report for a security that is disseminated pursuant to an effective national market system plan.

(16) *Covered order* means any market order or any limit order (including immediate-or-cancel orders) received by a market center during regular trading hours at a time when a national best bid and national best offer is being disseminated, and, if executed, is executed during regular trading hours, but shall exclude any order for which the customer requests special handling for execution, including, but not limited to, orders to be executed at a market opening price or a market closing price, orders submitted with stop prices, orders to be executed only at their full size, orders to be executed on a particular type of tick or bid, orders submitted on a ''not held'' basis, orders for other than regular settlement, and orders to be executed at prices unrelated to the market price of the security at the time of execution.

(17) *Customer* means any person that is not a broker or dealer.

(18) *Customer limit order* means an order to buy or sell an NMS stock at a specified price that is not for the account of either a broker or dealer; *provided, however*, that the term *customer limit* order shall include an order transmitted by a broker or dealer on behalf of a customer.

(19) *Customer order* means an order to buy or sell an NMS security that is not for the account of a broker or dealer, but shall not include any order for a quantity of a security having a market value of at least $50,000 for an NMS security that is an option contract and a market value of at least $200,000 for any other NMS security.

(20) *Directed order* means an order from a customer that the customer specifically instructed the broker or dealer to route to a particular venue for execution.

(21) *Dynamic market monitoring device* means any service provided by a vendor on an interrogation device or other display that:

(i) Permits real-time monitoring, on a dynamic basis, of transaction reports, last sale data, or quotations

with respect to a particular security; and

(ii) Displays the most recent transaction report, last sale data, or quotation with respect to that security until such report, data, or quotation has been superseded or supplemented by the display of a new transaction report, last sale data, or quotation reflecting the next reported transaction or quotation in that security.

(22) *Effective national market system plan* means any national market system plan approved by the Commission (either temporarily or on a permanent basis) pursuant to § 242.608.

(23) *Effective transaction reporting plan* means any transaction reporting plan approved by the Commission pursuant to § 242.601.

(24) *Electronic communications network* means, for the purposes of § 242.602(b)(5), any electronic system that widely disseminates to third parties orders entered therein by an exchange market maker or OTC market maker, and permits such orders to be executed against in whole or in part; except that the term *electronic communications network* shall not include:

(i) Any system that crosses multiple orders at one or more specified times at a single price set by the system (by algorithm or by any derivative pricing mechanism) and does not allow orders to be crossed or executed against directly by participants outside of such times; or

(ii) Any system operated by, or on behalf of, an OTC market maker or exchange market maker that executes customer orders primarily against the account of such market maker as principal, other than riskless principal.

(25) *Exchange market maker* means any member of a national securities exchange that is registered as a specialist or market maker pursuant to the rules of such exchange.

(26) *Exchange-traded security* means any NMS security or class of NMS securities listed and registered, or admitted to unlisted trading privileges, on a national securities exchange; *provided, however*, that securities not listed on any national securities exchange that are traded pursuant to unlisted trading privileges are excluded.

(27) *Executed at the quote* means, for buy orders, execution at a price equal to the national best offer at the time of order receipt and, for sell orders, execution at a price equal to the national best bid at the time of order receipt.

(28) *Executed outside the quote* means, for buy orders, execution at a price higher than the national best offer at the time of order receipt and, for sell orders, execution at a price lower than the national best bid at the time of order receipt.

(29) *Executed with price improvement* means, for buy orders, execution at a price lower than the national best offer at the time of order receipt and, for sell orders, execution at a price higher than the national best bid at the time of order receipt.

(30) *Inside-the-quote limit order*, *at-the-quote limit order*, and *near-the-quote limit order* mean non-marketable buy orders with limit prices that are, respectively, higher than, equal to, and lower by $0.10 or less than the national best bid at the time of order receipt, and non-marketable sell orders with limit prices that are, respectively, lower than, equal to, and higher by $0.10 or less than the national best offer at the time of order receipt.

(31) *Intermarket sweep order* means a limit order for an NMS stock that meets the following requirements:

(i) When routed to a trading center, the limit order is identified as an intermarket sweep order; and

(ii) Simultaneously with the routing of the limit order identified as an intermarket sweep order, one or more additional limit orders, as necessary, are routed to execute against the full displayed size of any protected bid, in the case of a limit order to sell, or the full displayed size of any protected offer, in the case of a limit order to buy, for the NMS stock with a price that is superior to the limit price of the limit order identified as an intermarket sweep order. These additional routed orders also must be marked as intermarket sweep orders.

(32) *Interrogation device* means any securities information retrieval system capable of displaying transaction reports, last sale data, or quotations upon inquiry, on a current basis on a terminal or other device.

(33) *Joint self-regulatory organization* plan means a plan as to which two or more self-regulatory organizations, acting jointly, are sponsors.

(34) *Last sale data* means any price or volume data associated with a transaction.

(35) *Listed equity security* means any equity security listed and registered, or admitted to unlisted trading privileges, on a national securities exchange.

(36) *Listed option* means any option traded on a registered national securities exchange or automated facility of a national securities association.

(37) *Make publicly available* means posting on an Internet Web site that is free and readily accessible to the public, furnishing a written copy to customers on request without charge, and notifying customers at least annually in writing that a written copy will be furnished on request.

(38) *Manual quotation* means any quotation other than an automated quotation.

(39) *Market center* means any exchange market maker, OTC market maker, alternative trading system, national securities exchange, or national securities association.

(40) *Marketable limit order* means any buy order with a limit price equal to or greater than the national best offer at the time of order receipt, or any sell order with a limit price equal to or less than the national best bid at the time of order receipt.

(41) *Moving ticker* means any continuous real-time moving display of transaction reports or last sale data (other than a dynamic market monitoring device) provided on an interrogation or other display device.

(42) *Nasdaq security* means any registered security listed on The Nasdaq Stock Market, Inc.

(43) *National best bid and national best offer* means, with respect to quotations for an NMS security, the best bid and best offer for such security that are calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan; *provided*, that in the event two or more market centers transmit to the plan processor pursuant to such plan identical bids or offers for an NMS security, the best bid or best offer (as the case may be) shall be determined by ranking all such identical bids or offers (as the case may be) first by size (giving the highest ranking to the bid or offer associated with the largest size), and then by time (giving the highest ranking to the bid or offer received first in time).

(44) *National market system plan* means any joint self-regulatory organization plan in connection with:

(i) The planning, development, operation or regulation of a national market system (or a subsystem thereof) or one or more facilities thereof; or

(ii) The development and implementation of procedures and/or facilities designed to achieve compliance by self-regulatory organizations and their members with any section of this Regulation NMS and part 240, subpart A of this chapter promulgated pursuant to section 11A of the Act (15 U.S.C. 78k–1).

(45) *National securities association* means any association of brokers and dealers registered pursuant to section 15A of the Act (15 U.S.C. 78o-3).

(46) *National securities exchange* means any exchange registered pursuant to section 6 of the Act (15 U.S.C. 78f).

(47) *NMS security* means any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.

(48) *NMS stock* means any NMS security other than an option.

(49) *Non-directed order* means any order from a customer other than a directed order.

(50) *Non-marketable limit order* means any limit order other than a marketable limit order.

(51) *Odd-lot* means an order for the purchase or sale of an NMS stock in an amount less than a round lot.

(52) *Options class* means all of the put option or call option series overlying a security, as defined in section 3(a)(10) of the Act (15 U.S.C. 78c(a)(10)).

(53) *Options series* means the contracts in an options class that have the same unit of trade, expiration date, and exercise price, and other terms or conditions.

(54) *Orders providing liquidity* means orders that were executed against after resting at a trading center.

(55) *Orders removing liquidity* means orders that executed against resting trading interest at a trading center.

(56) *OTC market maker* means any dealer that holds itself out as being willing to buy from and sell to its customers, or others, in the United States, an NMS stock for its own account on a regular or continuous basis otherwise than on a national securities exchange in amounts of less than block size.

(57) *Participants*, when used in connection with a national market system plan, means any self-regulatory organization which has agreed to act in accordance with the terms of the plan but which is not a signatory of such plan.

(58) *Payment for order flow* has the meaning provided in § 240.10b–10 of this chapter.

(59) *Plan processor* means any self-regulatory organization or securities information processor acting as an exclusive processor in connection with the development, implementation and/or operation of any facility contemplated by an effective national market system plan.

(60) *Profit-sharing relationship* means any ownership or other type of affiliation under which the broker or dealer, directly or indirectly, may share in any profits that may be derived from the execution of non-directed orders.

(61) *Protected bid* or *protected offer* means a quotation in an NMS stock that:

(i) Is displayed by an automated trading center;

(ii) Is disseminated pursuant to an effective national market system plan; and

(iii) Is an automated quotation that is the best bid or best offer of a national securities exchange, the best bid or best offer of The Nasdaq Stock Market, Inc., or the best bid or best offer of a national securities association other than the best bid or best offer of The Nasdaq Stock Market, Inc.

(62) *Protected quotation* means a protected bid or a protected offer.

(63) *Published aggregate quotation size* means the aggregate quotation size calculated by a national securities exchange and displayed by a vendor on a terminal or other display device at the time an order is presented for execution to a responsible broker or dealer.

(64) *Published bid and published offer* means the bid or offer of a responsible broker or dealer for an NMS security communicated by it to its national securities exchange or association pursuant to § 242.602 and displayed by a vendor on a terminal or other display device at the time an order is presented for execution to such responsible broker or dealer.

(65) *Published quotation size* means the quotation size of a responsible broker or dealer communicated by it to its national securities exchange or association pursuant to § 242.602 and displayed by a vendor on a terminal or other display device at the time an order is presented for execution to such responsible broker or dealer.

(66) *Quotation* means a bid or an offer.

(67) *Quotation size*, when used with respect to a responsible broker's or dealer's bid or offer for an NMS security, means:

(i) The number of shares (or units of trading) of that security which such responsible broker or dealer has specified, for purposes of dissemination to vendors, that it is willing to buy at the bid price or sell at the offer price comprising its bid or offer, as either principal or agent; or

(ii) In the event such responsible broker or dealer has not so specified, a normal unit of trading for that NMS security.

(68) *Regular trading hours* means the time between 9:30 a.m. and 4:00 p.m. Eastern Time, or such other time as is set forth in the procedures established pursuant to § 242.605(a)(2).

(69) *Responsible broker or dealer* means:

(i) When used with respect to bids or offers communicated on a national securities exchange, any member of such national securities exchange who communicates to another member on such national securities exchange, at the location (or locations) or through the facility or facilities designated by such national securities exchange for trading in an NMS security a bid or offer for such NMS security, as either principal or agent; *provided, however*, that,

in the event two or more members of a national securities exchange have communicated on or through such national securities exchange bids or offers for an NMS security at the same price, each such member shall be considered a *responsible broker or dealer* for that bid or offer, subject to the rules of priority and precedence then in effect on that national securities exchange; and further provided, that for a bid or offer which is transmitted from one member of a national securities exchange to another member who undertakes to represent such bid or offer on such national securities exchange as agent, only the last member who undertakes to represent such bid or offer as agent shall be considered the *responsible broker or dealer* for that bid or offer; and

(ii) When used with respect to bids and offers communicated by a member of an association to a broker or dealer or a customer, the member communicating the bid or offer (regardless of whether such bid or offer is for its own account or on behalf of another person).

(70) *Revised bid or offer* means a market maker's bid or offer which supersedes its published bid or published offer.

(71) *Revised quotation size* means a market maker's quotation size which supersedes its published quotation size.

(72) *Self-regulatory organization* means any national securities exchange or national securities association.

(73) *Specified persons*, when used in connection with any notification required to be provided pursuant to § 242.602(a)(3) and any election (or withdrawal thereof) permitted under § 242.602(a)(5), means:

(i) Each vendor;

(ii) Each plan processor; and

(iii) The processor for the Options Price Reporting Authority (in the case of a notification for a subject security which is a class of securities underlying options admitted to trading on any national securities exchange).

(74) *Sponsor*, when used in connection with a national market system plan, means any self-regulatory organization which is a signatory to such plan and has agreed to act in accordance with the terms of the plan.

(75) *SRO display-only facility* means a facility operated by or on behalf of a national securities exchange or national securities association that displays quotations in a security, but does not execute orders against such quotations or present orders to members for execution.

(76) *SRO trading facility* means a facility operated by or on behalf of a national securities exchange or a national securities association that executes orders in a security or presents orders to members for execution.

(77) *Subject security* means:

(i) With respect to a national securities exchange:

(A) Any exchange-traded security other than a security for which the executed volume of such exchange, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported pursuant to an effective transaction reporting plan or effective national market system plan; and

(B) Any other NMS security for which such exchange has in effect an election, pursuant to § 242.602(a)(5)(i), to collect, process, and make available to a vendor bids, offers, quotation sizes, and aggregate quotation sizes communicated on such exchange; and

(ii) With respect to a member of a national securities association:

(A) Any exchange-traded security for which such member acts in the capacity of an OTC market maker unless the executed volume of such member, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported pursuant to an effective transaction reporting plan or effective national market system plan; and

(B) Any other NMS security for which such member acts in the capacity of an OTC market maker and has in effect an election, pursuant to § 242.602(a)(5)(ii), to communicate to its association bids, offers, and quotation sizes for the purpose of making such bids, offers, and quotation sizes available to a vendor.

(78) *Time of order execution* means the time (to the second) that an order was executed at any venue.

(79) *Time of order receipt* means the time (to the second) that an order was received by a market center for execution.

(80) *Time of the transaction* has the meaning provided in § 240.10b–10 of this chapter.

(81) *Trade-through* means the purchase or sale of an NMS stock during regular trading hours, either as principal or agent, at a price that is lower than a protected bid or higher than a protected offer.

(82) *Trading center* means a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent.

(83) *Trading rotation* means, with respect to an options class, the time period on a national securities exchange during which:

(i) Opening, re-opening, or closing transactions in options series in such options class are not yet completed; and

(ii) Continuous trading has not yet commenced or has not yet ended for the day in options series in such options class.

(84) *Transaction report* means a report containing the price and volume associated with a transaction involving the purchase or sale of one or more round lots of a security.

(85) *Transaction reporting association* means any person authorized to implement or administer any transaction reporting plan on behalf of persons acting jointly under § 242.601(a).

(86) *Transaction reporting plan* means any plan for collecting, processing, making available or disseminating transaction reports with respect to transactions in securities filed with the Commission pursuant to, and meeting the requirements of, § 242.601.

(87) *Vendor* means any securities information processor engaged in the business of disseminating transaction reports, last sale data, or quotations with respect to NMS securities to brokers, dealers, or investors on a real-time or other current and continuing basis, whether through an electronic communications network, moving ticker, or interrogation device.

[62 FR 544, Jan. 3, 1997, as amended at 83 FR 58427, Nov. 19, 2018]

§ 242.601 Dissemination of transaction reports and last sale data with respect to transactions in NMS stocks.

(a) *Filing and effectiveness of transaction reporting plans.* (1) Every national securities exchange shall file a transaction reporting plan regarding transactions in listed equity and Nasdaq securities executed through its facilities, and every national securities association shall file a transaction reporting plan regarding transactions in listed equity and Nasdaq securities executed by its members otherwise than on a national securities exchange.

(2) Any transaction reporting plan, or any amendment thereto, filed pursuant to this section shall be filed with the Commission, and considered for approval, in accordance with the procedures set forth in § 242.608(a) and (b). Any such plan, or amendment thereto, shall specify, at a minimum:

(i) The listed equity and Nasdaq securities or classes of such securities for which transaction reports shall be required by the plan;

(ii) Reporting requirements with respect to transactions in listed equity securities and Nasdaq securities, for any broker or dealer subject to the plan;

(iii) The manner of collecting, processing, sequencing, making available and disseminating transaction reports and last sale data reported pursuant to such plan;

(iv) The manner in which such transaction reports reported pursuant to such plan are to be consolidated with transaction reports from national securities exchanges and national securities associations reported pursuant to any other effective transaction reporting plan;

(v) The applicable standards and methods which will be utilized to ensure promptness of reporting, and accuracy and completeness of transaction reports;

(vi) Any rules or procedures which may be adopted to ensure that transaction reports or last sale data will not

(79) *Time of order receipt* means the time (to the second) that an order was received by a market center for execution.

(80) *Time of the transaction* has the meaning provided in § 240.10b–10 of this chapter.

(81) *Trade-through* means the purchase or sale of an NMS stock during regular trading hours, either as principal or agent, at a price that is lower than a protected bid or higher than a protected offer.

(82) *Trading center* means a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent.

(83) *Trading rotation* means, with respect to an options class, the time period on a national securities exchange during which:

(i) Opening, re-opening, or closing transactions in options series in such options class are not yet completed; and

(ii) Continuous trading has not yet commenced or has not yet ended for the day in options series in such options class.

(84) *Transaction report* means a report containing the price and volume associated with a transaction involving the purchase or sale of one or more round lots of a security.

(85) *Transaction reporting association* means any person authorized to implement or administer any transaction reporting plan on behalf of persons acting jointly under § 242.601(a).

(86) *Transaction reporting plan* means any plan for collecting, processing, making available or disseminating transaction reports with respect to transactions in securities filed with the Commission pursuant to, and meeting the requirements of, § 242.601.

(87) *Vendor* means any securities information processor engaged in the business of disseminating transaction reports, last sale data, or quotations with respect to NMS securities to brokers, dealers, or investors on a real-time or other current and continuing basis, whether through an electronic communications network, moving ticker, or interrogation device.

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(2) Any transaction reporting plan, or any amendment thereto, filed pursuant to this section shall be filed with the Commission, and considered for approval, in accordance with the procedures set forth in § 242.608(a) and (b). Any such plan, or amendment thereto, shall specify, at a minimum:

(i) The listed equity and Nasdaq securities or classes of such securities for which transaction reports shall be required by the plan;

(ii) Reporting requirements with respect to transactions in listed equity securities and Nasdaq securities, for any broker or dealer subject to the plan;

(iii) The manner of collecting, processing, sequencing, making available and disseminating transaction reports and last sale data reported pursuant to such plan;

(iv) The manner in which such transaction reports reported pursuant to such plan are to be consolidated with transaction reports from national securities exchanges and national securities associations reported pursuant to any other effective transaction reporting plan;

(v) The applicable standards and methods which will be utilized to ensure promptness of reporting, and accuracy and completeness of transaction reports;

(vi) Any rules or procedures which may be adopted to ensure that transaction reports or last sale data will not

be disseminated in a fraudulent or manipulative manner;

(vii) Specific terms of access to transaction reports made available or disseminated pursuant to the plan; and

(viii) That transaction reports or last sale data made available to any vendor for display on an interrogation device identify the marketplace where each transaction was executed.

(3) No transaction reporting plan filed pursuant to this section, or any amendment to an effective transaction reporting plan, shall become effective unless approved by the Commission or otherwise permitted in accordance with the procedures set forth in § 242.608.

(b) *Prohibitions and reporting requirements.* (1) No broker or dealer may execute any transaction in, or induce or attempt to induce the purchase or sale of, any NMS stock:

(i) On or through the facilities of a national securities exchange unless there is an effective transaction reporting plan with respect to transactions in such security executed on or through such exchange facilities; or

(ii) Otherwise than on a national securities exchange unless there is an effective transaction reporting plan with respect to transactions in such security executed otherwise than on a national securities exchange by such broker or dealer.

(2) Every broker or dealer who is a member of a national securities exchange or national securities association shall promptly transmit to the exchange or association of which it is a member all information required by any effective transaction reporting plan filed by such exchange or association (either individually or jointly with other exchanges and/or associations).

(c) *Retransmission of transaction reports or last sale data.* Notwithstanding any provision of any effective transaction reporting plan, no national securities exchange or national securities association may, either individually or jointly, by rule, stated policy or practice, transaction reporting plan or otherwise, prohibit, condition or otherwise limit, directly or indirectly, the ability of any vendor to retransmit, for display in moving tickers, transaction reports or last sale data made available pursuant to any effective transaction reporting plan; *provided, however,* that a national securities exchange or national securities association may, by means of an effective transaction reporting plan, condition such retransmission upon appropriate undertakings to ensure that any charges for the distribution of transaction reports or last sale data in moving tickers permitted by paragraph (d) of this section are collected.

(d) *Charges.* Nothing in this section shall preclude any national securities exchange or national securities association, separately or jointly, pursuant to the terms of an effective transaction reporting plan, from imposing reasonable, uniform charges (irrespective of geographic location) for distribution of transaction reports or last sale data.

(e) *Appeals.* The Commission may, in its discretion, entertain appeals in connection with the implementation or operation of any effective transaction reporting plan in accordance with the provisions of § 242.608(d).

(f) *Exemptions.* The Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any national securities exchange, national securities association, broker, dealer, or specified security if the Commission determines that such exemption is consistent with the public interest, the protection of investors and the removal of impediments to, and perfection of the mechanisms of, a national market system.

§ 242.602 Dissemination of quotations in NMS securities.

(a) *Dissemination requirements for national securities exchanges and national securities associations.* (1) Every national securities exchange and national securities association shall establish and maintain procedures and mechanisms for collecting bids, offers, quotation sizes, and aggregate quotation sizes from responsible brokers or dealers who are members of such exchange or association, processing such bids, offers, and sizes, and making such bids, offers, and sizes available to vendors, as follows:

(i) Each national securities exchange shall at all times such exchange is open

be disseminated in a fraudulent or manipulative manner;

(vii) Specific terms of access to transaction reports made available or disseminated pursuant to the plan; and

(viii) That transaction reports or last sale data made available to any vendor for display on an interrogation device identify the marketplace where each transaction was executed.

(3) No transaction reporting plan filed pursuant to this section, or any amendment to an effective transaction reporting plan, shall become effective unless approved by the Commission or otherwise permitted in accordance with the procedures set forth in § 242.608.

(b) *Prohibitions and reporting requirements.* (1) No broker or dealer may execute any transaction in, or induce or attempt to induce the purchase or sale of, any NMS stock:

(i) On or through the facilities of a national securities exchange unless there is an effective transaction reporting plan with respect to transactions in such security executed on or through such exchange facilities; or

(ii) Otherwise than on a national securities exchange unless there is an effective transaction reporting plan with respect to transactions in such security executed otherwise than on a national securities exchange by such broker or dealer.

(2) Every broker or dealer who is a member of a national securities exchange or national securities association shall promptly transmit to the exchange or association of which it is a member all information required by any effective transaction reporting plan filed by such exchange or association (either individually or jointly with other exchanges and/or associations).

(c) *Retransmission of transaction reports or last sale data.* Notwithstanding any provision of any effective transaction reporting plan, no national securities exchange or national securities association may, either individually or jointly, by rule, stated policy or practice, transaction reporting plan or otherwise, prohibit, condition or otherwise limit, directly or indirectly, the ability of any vendor to retransmit, for display in moving tickers, transaction reports or last sale data made available pursuant to any effective transaction reporting plan; *provided, however,* that a national securities exchange or national securities association may, by means of an effective transaction reporting plan, condition such retransmission upon appropriate undertakings to ensure that any charges for the distribution of transaction reports or last sale data in moving tickers permitted by paragraph (d) of this section are collected.

(d) *Charges.* Nothing in this section shall preclude any national securities exchange or national securities association, separately or jointly, pursuant to the terms of an effective transaction reporting plan, from imposing reasonable, uniform charges (irrespective of geographic location) for distribution of transaction reports or last sale data.

(e) *Appeals.* The Commission may, in its discretion, entertain appeals in connection with the implementation or operation of any effective transaction reporting plan in accordance with the provisions of § 242.608(d).

(f) *Exemptions.* The Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any national securities exchange, national securities association, broker, dealer, or specified security if the Commission determines that such exemption is consistent with the public interest, the protection of investors and the removal of impediments to, and perfection of the mechanisms of, a national market system.

§ 242.602 Dissemination of quotations in NMS securities.

(a) *Dissemination requirements for national securities exchanges and national securities associations.* (1) Every national securities exchange and national securities association shall establish and maintain procedures and mechanisms for collecting bids, offers, quotation sizes, and aggregate quotation sizes from responsible brokers or dealers who are members of such exchange or association, processing such bids, offers, and sizes, and making such bids, offers, and sizes available to vendors, as follows:

(i) Each national securities exchange shall at all times such exchange is open

for trading, collect, process, and make available to vendors the best bid, the best offer, and aggregate quotation sizes for each subject security listed or admitted to unlisted trading privileges which is communicated on any national securities exchange by any responsible broker or dealer, but shall not include:

(A) Any bid or offer executed immediately after communication and any bid or offer communicated by a responsible broker or dealer other than an exchange market maker which is cancelled or withdrawn if not executed immediately after communication; and

(B) Any bid or offer communicated during a period when trading in that security has been suspended or halted, or prior to the commencement of trading in that security on any trading day, on that exchange.

(ii) Each national securities association shall, at all times that last sale information with respect to NMS securities is reported pursuant to an effective transaction reporting plan, collect, process, and make available to vendors the best bid, best offer, and quotation sizes communicated otherwise than on an exchange by each member of such association acting in the capacity of an OTC market maker for each subject security and the identity of that member (excluding any bid or offer executed immediately after communication), except during any period when over-the-counter trading in that security has been suspended.

(2) Each national securities exchange shall, with respect to each published bid and published offer representing a bid or offer of a member for a subject security, establish and maintain procedures for ascertaining and disclosing to other members of that exchange, upon presentation of orders sought to be executed by them in reliance upon paragraph (b)(2) of this section, the identity of the responsible broker or dealer who made such bid or offer and the quotation size associated with it.

(3)(i) If, at any time a national securities exchange is open for trading, such exchange determines, pursuant to rules approved by the Commission pursuant to section 19(b)(2) of the Act (15 U.S.C. 78s(b)(2)), that the level of trading activities or the existence of unusual market conditions is such that the exchange is incapable of collecting, processing, and making available to vendors the data for a subject security required to be made available pursuant to paragraph (a)(1) of this section in a manner that accurately reflects the current state of the market on such exchange, such exchange shall immediately notify all specified persons of that determination. Upon such notification, responsible brokers or dealers that are members of that exchange shall be relieved of their obligation under paragraphs (b)(2) and (c)(3) of this section and such exchange shall be relieved of its obligations under paragraphs (a)(1) and (2) of this section for that security; *provided, however*, that such exchange will continue, to the maximum extent practicable under the circumstances, to collect, process, and make available to vendors data for that security in accordance with paragraph (a)(1) of this section.

(ii) During any period a national securities exchange, or any responsible broker or dealer that is a member of that exchange, is relieved of any obligation imposed by this section for any subject security by virtue of a notification made pursuant to paragraph (a)(3)(i) of this section, such exchange shall monitor the activity or conditions which formed the basis for such notification and shall immediately renotify all specified persons when that exchange is once again capable of collecting, processing, and making available to vendors the data for that security required to be made available pursuant to paragraph (a)(1) of this section in a manner that accurately reflects the current state of the market on such exchange. Upon such renotification, any exchange or responsible broker or dealer which had been relieved of any obligation imposed by this section as a consequence of the prior notification shall again be subject to such obligation.

(4) Nothing in this section shall preclude any national securities exchange or national securities association from making available to vendors indications of interest or bids and offers for a subject security at any time such exchange or association is not required to

do so pursuant to paragraph (a)(1) of this section.

(5)(i) Any national securities exchange may make an election for purposes of the definition of *subject security* in § 242.600(b)(77) for any NMS security, by collecting, processing, and making available bids, offers, quotation sizes, and aggregate quotation sizes in that security; except that for any NMS security previously listed or admitted to unlisted trading privileges on only one exchange and not traded by any OTC market maker, such election shall be made by notifying all specified persons, and shall be effective at the opening of trading on the business day following notification.

(ii) Any member of a national securities association acting in the capacity of an OTC market maker may make an election for purposes of the definition of *subject security* in § 242.600(b)(77) for any NMS security, by communicating to its association bids, offers, and quotation sizes in that security; except that for any other NMS security listed or admitted to unlisted trading privileges on only one exchange and not traded by any other OTC market maker, such election shall be made by notifying its association and all specified persons, and shall be effective at the opening of trading on the business day following notification.

(iii) The election of a national securities exchange or member of a national securities association for any NMS security pursuant to this paragraph (a)(5) shall cease to be in effect if such exchange or member ceases to make available or communicate bids, offers, and quotation sizes in such security.

(b) *Obligations of responsible brokers and dealers.* (1) Each responsible broker or dealer shall promptly communicate to its national securities exchange or national securities association, pursuant to the procedures established by that exchange or association, its best bids, best offers, and quotation sizes for any subject security.

(2) Subject to the provisions of paragraph (b)(3) of this section, each responsible broker or dealer shall be obligated to execute any order to buy or sell a subject security, other than an odd-lot order, presented to it by another broker or dealer, or any other person belonging to a category of persons with whom such responsible broker or dealer customarily deals, at a price at least as favorable to such buyer or seller as the responsible broker's or dealer's published bid or published offer (exclusive of any commission, commission equivalent or differential customarily charged by such responsible broker or dealer in connection with execution of any such order) in any amount up to its published quotation size.

(3)(i) No responsible broker or dealer shall be obligated to execute a transaction for any subject security as provided in paragraph (b)(2) of this section to purchase or sell that subject security in an amount greater than such revised quotation size if:

(A) Prior to the presentation of an order for the purchase or sale of a subject security, a responsible broker or dealer has communicated to its exchange or association, pursuant to paragraph (b)(1) of this section, a revised quotation size; or

(B) At the time an order for the purchase or sale of a subject security is presented, a responsible broker or dealer is in the process of effecting a transaction in such subject security, and immediately after the completion of such transaction, it communicates to its exchange or association a revised quotation size, such responsible broker or dealer shall not be obligated by paragraph (b)(2) of this section to purchase or sell that subject security in an amount greater than such revised quotation size.

(ii) No responsible broker or dealer shall be obligated to execute a transaction for any subject security as provided in paragraph (b)(2) of this section if:

(A) Before the order sought to be executed is presented, such responsible broker or dealer has communicated to its exchange or association pursuant to paragraph (b)(1) of this section, a revised bid or offer; or

(B) At the time the order sought to be executed is presented, such responsible broker or dealer is in the process of effecting a transaction in such subject security, and, immediately after the completion of such transaction,

such responsible broker or dealer communicates to its exchange or association pursuant to paragraph (b)(1) of this section, a revised bid or offer; *provided, however*, that such responsible broker or dealer shall nonetheless be obligated to execute any such order in such subject security as provided in paragraph (b)(2) of this section at its revised bid or offer in any amount up to its published quotation size or revised quotation size.

(4) Subject to the provisions of paragraph (a)(4) of this section:

(i) No national securities exchange or OTC market maker may make available, disseminate or otherwise communicate to any vendor, directly or indirectly, for display on a terminal or other display device any bid, offer, quotation size, or aggregate quotation size for any NMS security which is not a subject security with respect to such exchange or OTC market maker; and

(ii) No vendor may disseminate or display on a terminal or other display device any bid, offer, quotation size, or aggregate quotation size from any national securities exchange or OTC market maker for any NMS security which is not a subject security with respect to such exchange or OTC market maker.

(5)(i) Entry of any priced order for an NMS security by an exchange market maker or OTC market maker in that security into an electronic communications network that widely disseminates such order shall be deemed to be:

(A) A bid or offer under this section, to be communicated to the market maker's exchange or association pursuant to this paragraph (b) for at least the minimum quotation size that is required by the rules of the market maker's exchange or association if the priced order is for the account of a market maker, or the actual size of the order up to the minimum quotation size required if the priced order is for the account of a customer; and

(B) A communication of a bid or offer to a vendor for display on a display device for purposes of paragraph (b)(4) of this section.

(ii) An exchange market maker or OTC market maker that has entered a priced order for an NMS security into an electronic communications network that widely disseminates such order shall be deemed to be in compliance with paragraph (b)(5)(i)(A) of this section if the electronic communications network:

(A)(*1*) Provides to a national securities exchange or national securities association (or an exclusive processor acting on behalf of one or more exchanges or associations) the prices and sizes of the orders at the highest buy price and the lowest sell price for such security entered in, and widely disseminated by, the electronic communications network by exchange market makers and OTC market makers for the NMS security, and such prices and sizes are included in the quotation data made available by such exchange, association, or exclusive processor to vendors pursuant to this section; and

(*2*) Provides, to any broker or dealer, the ability to effect a transaction with a priced order widely disseminated by the electronic communications network entered therein by an exchange market maker or OTC market maker that is:

(*i*) Equivalent to the ability of any broker or dealer to effect a transaction with an exchange market maker or OTC market maker pursuant to the rules of the national securities exchange or national securities association to which the electronic communications network supplies such bids and offers; and

(*ii*) At the price of the highest priced buy order or lowest priced sell order, or better, for the lesser of the cumulative size of such priced orders entered therein by exchange market makers or OTC market makers at such price, or the size of the execution sought by the broker or dealer, for such security; or

(B) Is an alternative trading system that:

(*1*) Displays orders and provides the ability to effect transactions with such orders under § 242.301(b)(3); and

(*2*) Otherwise is in compliance with Regulation ATS (§ 242.300 through § 242.303).

(c) *Transactions in listed options.* (1) A national securities exchange or national securities association:

(i) Shall not be required, under paragraph (a) of this section, to collect from responsible brokers or dealers

who are members of such exchange or association, or to make available to vendors, the quotation sizes and aggregate quotation sizes for listed options, if such exchange or association establishes by rule and periodically publishes the quotation size for which such responsible brokers or dealers are obligated to execute an order to buy or sell an options series that is a subject security at its published bid or offer under paragraph (b)(2) of this section;

(ii) May establish by rule and periodically publish a quotation size, which shall not be for less than one contract, for which responsible brokers or dealers who are members of such exchange or association are obligated under paragraph (b)(2) of this section to execute an order to buy or sell a listed option for the account of a broker or dealer that is in an amount different from the quotation size for which it is obligated to execute an order for the account of a customer; and

(iii) May establish and maintain procedures and mechanisms for collecting from responsible brokers and dealers who are members of such exchange or association, and making available to vendors, the quotation sizes and aggregate quotation sizes in listed options for which such responsible broker or dealer will be obligated under paragraph (b)(2) of this section to execute an order from a customer to buy or sell a listed option and establish by rule and periodically publish the size, which shall not be less than one contract, for which such responsible brokers or dealers are obligated to execute an order for the account of a broker or dealer.

(2) If, pursuant to paragraph (c)(1) of this section, the rules of a national securities exchange or national securities association do not require its members to communicate to it their quotation sizes for listed options, a responsible broker or dealer that is a member of such exchange or association shall:

(i) Be relieved of its obligations under paragraph (b)(1) of this section to communicate to such exchange or association its quotation sizes for any listed option; and

(ii) Comply with its obligations under paragraph (b)(2) of this section by executing any order to buy or sell a listed option, in an amount up to the size established by such exchange's or association's rules under paragraph (c)(1) of this section.

(3) *Thirty second response.* Each responsible broker or dealer, within thirty seconds of receiving an order to buy or sell a listed option in an amount greater than the quotation size established by a national securities exchange's or national securities association's rules pursuant to paragraph (c)(1) of this section, or its published quotation size must:

(i) Execute the entire order; or

(ii)(A) Execute that portion of the order equal to at least:

(*1*) The quotation size established by a national securities exchange's or national securities association's rules, pursuant to paragraph (c)(1) of this section, to the extent that such exchange or association does not collect and make available to vendors quotation size and aggregate quotation size under paragraph (a) of this section; or

(*2*) Its published quotation size; and

(B) Revise its bid or offer.

(4) Notwithstanding paragraph (c)(3) of this section, no responsible broker or dealer shall be obligated to execute a transaction for any listed option as provided in paragraph (b)(2) of this section if:

(i) Any of the circumstances in paragraph (b)(3) of this section exist; or

(ii) The order for the purchase or sale of a listed option is presented during a trading rotation in that listed option.

(d) *Exemptions.* The Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any responsible broker or dealer, electronic communications network, national securities exchange, or national securities association if the Commission determines that such exemption is consistent with the public interest, the protection of investors and the removal of impediments to and perfection of the mechanism of a national market system.

[62 FR 544, Jan. 3, 1997, as amended at 83 FR 58427, Nov. 19, 2018]

(1) That is executed upon receipt of the order.

(2) That is placed by a customer who expressly requests, either at the time that the order is placed or prior thereto pursuant to an individually negotiated agreement with respect to such customer's orders, that the order not be displayed.

(3) That is an odd-lot order.

(4) That is a block size order, unless a customer placing such order requests that the order be displayed.

(5) That is delivered immediately upon receipt to a national securities exchange or national securities association-sponsored system, or an electronic communications network that complies with the requirements of § 242.602(b)(5)(ii) with respect to that order.

(6) That is delivered immediately upon receipt to another exchange member or OTC market maker that complies with the requirements of this section with respect to that order.

(7) That is an ''all or none'' order.

(c) *Exemptions.* The Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any responsible broker or dealer, electronic communications network, national securities exchange, or national securities association if the Commission determines that such exemption is consistent with the public interest, the protection of investors and the removal of impediments to and perfection of the mechanism of a national market system.

§ 242.605 Disclosure of order execution information.

This section requires market centers to make available standardized, monthly reports of statistical information concerning their order executions. This information is presented in accordance with uniform standards that are based on broad assumptions about order execution and routing practices. The information will provide a starting point to promote visibility and competition on the part of market centers and broker-dealers, particularly on the factors of execution price and speed. The disclosures required by this section do not encompass all of the factors that may be important to investors in evaluating the order routing services of a broker-dealer. In addition, any particular market center's statistics will encompass varying types of orders routed by different broker-dealers on behalf of customers with a wide range of objectives. Accordingly, the statistical information required by this section alone does not create a reliable basis to address whether any particular broker-dealer failed to obtain the most favorable terms reasonably available under the circumstances for customer orders.

(a) *Monthly electronic reports by market centers.* (1) Every market center shall make available for each calendar month, in accordance with the procedures established pursuant to paragraph (a)(2) of this section, a report on the covered orders in NMS stocks that it received for execution from any person. Such report shall be in electronic form; shall be categorized by security, order type, and order size; and shall include the following columns of information:

(i) For market orders, marketable limit orders, inside-the-quote limit orders, at-the-quote limit orders, and near-the-quote limit orders:

(A) The number of covered orders;

(B) The cumulative number of shares of covered orders;

(C) The cumulative number of shares of covered orders cancelled prior to execution;

(D) The cumulative number of shares of covered orders executed at the receiving market center;

(E) The cumulative number of shares of covered orders executed at any other venue;

(F) The cumulative number of shares of covered orders executed from 0 to 9 seconds after the time of order receipt;

(G) The cumulative number of shares of covered orders executed from 10 to 29 seconds after the time of order receipt;

(H) The cumulative number of shares of covered orders executed from 30 seconds to 59 seconds after the time of order receipt;

(I) The cumulative number of shares of covered orders executed from 60 seconds to 299 seconds after the time of order receipt;

(J) The cumulative number of shares of covered orders executed from 5 minutes to 30 minutes after the time of order receipt; and

(K) The average realized spread for executions of covered orders; and

(ii) For market orders and marketable limit orders:

(A) The average effective spread for executions of covered orders;

(B) The cumulative number of shares of covered orders executed with price improvement;

(C) For shares executed with price improvement, the share-weighted average amount per share that prices were improved;

(D) For shares executed with price improvement, the share-weighted average period from the time of order receipt to the time of order execution;

(E) The cumulative number of shares of covered orders executed at the quote;

(F) For shares executed at the quote, the share-weighted average period from the time of order receipt to the time of order execution;

(G) The cumulative number of shares of covered orders executed outside the quote;

(H) For shares executed outside the quote, the share-weighted average amount per share that prices were outside the quote; and

(I) For shares executed outside the quote, the share-weighted average period from the time of order receipt to the time of order execution.

(2) Every national securities exchange on which NMS stocks are traded and each national securities association shall act jointly in establishing procedures for market centers to follow in making available to the public the reports required by paragraph (a)(1) of this section in a uniform, readily accessible, and usable electronic form. In the event there is no effective national market system plan establishing such procedures, market centers shall prepare their reports in a consistent, usable, and machine-readable electronic format, and make such reports available for downloading from an Internet Web site that is free and readily accessible to the public. Every market center shall keep such reports posted on an internet website that is free and readily accessible to the public for a period of three years from the initial date of posting on the internet website.

(3) A market center shall make available the report required by paragraph (a)(1) of this section within one month after the end of the month addressed in the report.

(b) *Exemptions.* The Commission may, by order upon application, 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 section, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

[62 FR 544, Jan. 3, 1997, as amended at 83 FR 58427, Nov. 19, 2018]

§ 242.606 Disclosure of order routing information.

(a) *Quarterly report on order routing.* (1) Every broker or dealer shall make publicly available for each calendar quarter a report on its routing of non-directed orders in NMS stocks that are submitted on a held basis and of non-directed orders that are customer orders in NMS securities that are option contracts during that quarter broken down by calendar month and keep such report posted on an internet website that is free and readily accessible to the public for a period of three years from the initial date of posting on the internet website. Such report shall include a section for NMS stocks—separated by securities that are included in the S&P 500 Index as of the first day of that quarter and other NMS stocks—and a separate section for NMS securities that are option contracts. Such report shall be made available using the most recent versions of the XML schema and the associated PDF renderer as published on the Commission's website for all reports required by this section. Each section in a report shall include the following information:

(i) The percentage of total orders for the section that were non-directed orders, and the percentages of total non-directed orders for the section that were market orders, marketable limit orders, non-marketable limit orders, and other orders;

(J) The cumulative number of shares of covered orders executed from 5 minutes to 30 minutes after the time of order receipt; and

(K) The average realized spread for executions of covered orders; and

(ii) For market orders and marketable limit orders:

(A) The average effective spread for executions of covered orders;

(B) The cumulative number of shares of covered orders executed with price improvement;

(C) For shares executed with price improvement, the share-weighted average amount per share that prices were improved;

(D) For shares executed with price improvement, the share-weighted average period from the time of order receipt to the time of order execution;

(E) The cumulative number of shares of covered orders executed at the quote;

(F) For shares executed at the quote, the share-weighted average period from the time of order receipt to the time of order execution;

(G) The cumulative number of shares of covered orders executed outside the quote;

(H) For shares executed outside the quote, the share-weighted average amount per share that prices were outside the quote; and

(I) For shares executed outside the quote, the share-weighted average period from the time of order receipt to the time of order execution.

(2) Every national securities exchange on which NMS stocks are traded and each national securities association shall act jointly in establishing procedures for market centers to follow in making available to the public the reports required by paragraph (a)(1) of this section in a uniform, readily accessible, and usable electronic form. In the event there is no effective national market system plan establishing such procedures, market centers shall prepare their reports in a consistent, usable, and machine-readable electronic format, and make such reports available for downloading from an Internet Web site that is free and readily accessible to the public. Every market center shall keep such reports posted on an internet website that is free and readily accessible to the public for a period of three years from the initial date of posting on the internet website.

(3) A market center shall make available the report required by paragraph (a)(1) of this section within one month after the end of the month addressed in the report.

(b) *Exemptions.* The Commission may, by order upon application, 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 section, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

[62 FR 544, Jan. 3, 1997, as amended at 83 FR 58427, Nov. 19, 2018]

§ 242.606 Disclosure of order routing information.

(a) *Quarterly report on order routing.* (1) Every broker or dealer shall make publicly available for each calendar quarter a report on its routing of non-directed orders in NMS stocks that are submitted on a held basis and of non-directed orders that are customer orders in NMS securities that are option contracts during that quarter broken down by calendar month and keep such report posted on an internet website that is free and readily accessible to the public for a period of three years from the initial date of posting on the internet website. Such report shall include a section for NMS stocks—separated by securities that are included in the S&P 500 Index as of the first day of that quarter and other NMS stocks—and a separate section for NMS securities that are option contracts. Such report shall be made available using the most recent versions of the XML schema and the associated PDF renderer as published on the Commission's website for all reports required by this section. Each section in a report shall include the following information:

(i) The percentage of total orders for the section that were non-directed orders, and the percentages of total non-directed orders for the section that were market orders, marketable limit orders, non-marketable limit orders, and other orders;

(ii) The identity of the ten venues to which the largest number of total non-directed orders for the section were routed for execution and of any venue to which five percent or more of non-directed orders were routed for execution, the percentage of total non-directed orders for the section routed to the venue, and the percentages of total non-directed market orders, total non-directed marketable limit orders, total non-directed non-marketable limit orders, and total non-directed other orders for the section that were routed to the venue;

(iii) For each venue identified pursuant to paragraph (a)(1)(ii) of this section, the net aggregate amount of any payment for order flow received, payment from any profit-sharing relationship received, transaction fees paid, and transaction rebates received, both as a total dollar amount and per share, for each of the following non-directed order types:

(A) Market orders;

(B) Marketable limit orders;

(C) Non-marketable limit orders; and

(D) Other orders.

(iv) A discussion of the material aspects of the broker's or dealer's relationship with each venue identified pursuant to paragraph (a)(1)(ii) of this section, including a description of any arrangement for payment for order flow and any profit-sharing relationship and a description of any terms of such arrangements, written or oral, that may influence a broker's or dealer's order routing decision including, among other things:

(A) Incentives for equaling or exceeding an agreed upon order flow volume threshold, such as additional payments or a higher rate of payment;

(B) Disincentives for failing to meet an agreed upon minimum order flow threshold, such as lower payments or the requirement to pay a fee;

(C) Volume-based tiered payment schedules; and

(D) Agreements regarding the minimum amount of order flow that the broker-dealer would send to a venue.

(2) A broker or dealer shall make the report required by paragraph (a)(1) of this section publicly available within one month after the end of the quarter addressed in the report.

(b) *Customer requests for information on order routing.* (1) Every broker or dealer shall, on request of a customer, disclose to its customer, for:

(i) Orders in NMS stocks that are submitted on a held basis;

(ii) Orders in NMS stocks that are submitted on a not held basis and the broker or dealer is not required to provide the customer a report under paragraph (b)(3) of this section; and

(iii) Orders in NMS securities that are option contracts, the identity of the venue to which the customer's orders were routed for execution in the six months prior to the request, whether the orders were directed orders or non-directed orders, and the time of the transactions, if any, that resulted from such orders. Such disclosure shall be made available using the most recent versions of the XML schema and the associated PDF renderer as published on the Commission's website for all reports required by this section.

(2) A broker or dealer shall notify customers in writing at least annually of the availability on request of the information specified in paragraph (b)(1) of this section.

(3) Except as provided for in paragraphs (b)(4) and (5) of this section, every broker or dealer shall, on request of a customer that places, directly or indirectly, one or more orders in NMS stocks that are submitted on a not held basis with the broker or dealer, disclose to such customer within seven business days of receiving the request, a report on its handling of such orders for that customer for the prior six months by calendar month. Such report shall be made available using the most recent versions of the XML schema and the associated PDF renderer as published on the Commission's website for all reports required by this section. For purposes of such report, the handling of a NMS stock order submitted by a customer to a broker-dealer on a not held basis includes the handling of all child orders derived from that order. Such report shall be divided into two sections: One for directed orders and one for non-directed orders. Each section of such report shall include, with respect to such order flow sent by the customer to the broker or dealer, the total number of shares sent to the

broker or dealer by the customer during the relevant period; the total number of shares executed by the broker or dealer as principal for its own account; the total number of orders exposed by the broker or dealer through an actionable indication of interest; and the venue or venues to which orders were exposed by the broker or dealer through an actionable indication of interest, provided that, where applicable, a broker or dealer must disclose that it exposed a customer's order through an actionable indication of interest to other customers but need not disclose the identity of such customers. Each section of such report also shall include the following columns of information for each venue to which the broker or dealer routed such orders for the customer, in the aggregate:

(i) *Information on Order Routing*.(A) Total shares routed;

(B) Total shares routed marked immediate or cancel;

(C) Total shares routed that were further routable; and

(D) Average order size routed.

(ii) *Information on Order Execution*. (A) Total shares executed;

(B) Fill rate (shares executed divided by the shares routed);

(C) Average fill size;

(D) Average net execution fee or rebate (cents per 100 shares, specified to four decimal places);

(E) Total number of shares executed at the midpoint;

(F) Percentage of shares executed at the midpoint;

(G) Total number of shares executed that were priced on the side of the spread more favorable to the order;

(H) Percentage of total shares executed that were priced at the side of the spread more favorable to the order;

(I) Total number of shares executed that were priced on the side of the spread less favorable to the order; and

(J) Percentage of total shares executed that were priced on the side of the spread less favorable to the order.

(iii) *Information on Orders that Provided Liquidity*. (A) Total number of shares executed of orders providing liquidity;

(B) Percentage of shares executed of orders providing liquidity;

(C) Average time between order entry and execution or cancellation, for orders providing liquidity (in milliseconds); and

(D) Average net execution rebate or fee for shares of orders providing liquidity (cents per 100 shares, specified to four decimal places).

(iv) *Information on Orders that Removed Liquidity*. (A) Total number of shares executed of orders removing liquidity;

(B) Percentage of shares executed of orders removing liquidity; and

(C) Average net execution fee or rebate for shares of orders removing liquidity (cents per 100 shares, specified to four decimal places).

(4) Except as provided below, no broker or dealer shall be required to provide reports pursuant to paragraph (b)(3) of this section if the percentage of shares of not held orders in NMS stocks the broker or dealer received from its customers over the prior six calendar months was less than five percent of the total shares in NMS stocks the broker or dealer received from its customers during that time (the ''five percent threshold'' for purposes of this paragraph). A broker or dealer that equals or exceeds this five percent threshold shall be required (subject to paragraph (b)(5) of this section) to provide reports pursuant to paragraph (b)(3) of this section for at least six calendar months (''Compliance Period'') regardless of the percentage of shares of not held orders in NMS stocks the broker or dealer receives from its customers during the Compliance Period. The Compliance Period shall begin the first calendar day of the next calendar month after the broker or dealer equaled or exceeded the five percent threshold, unless it is the first time the broker or dealer has equaled or exceeded the five percent threshold, in which case the Compliance Period shall begin the first calendar day four calendar months later. A broker or dealer shall not be required to provide reports pursuant to paragraph (b)(3) of this section for orders that the broker or dealer did not receive during a Compliance Period. If, at any time after the end of a Compliance Period, the percentage of shares of not held orders in NMS stocks the broker or dealer received

from its customers was less than five percent of the total shares in NMS stocks the broker or dealer received from its customers over the prior six calendar months, the broker or dealer shall not be required to provide reports pursuant to paragraph (b)(3) of this section, except for orders that the broker or dealer received during the portion of a Compliance Period that remains covered by paragraph (b)(3) of this section.

(5) No broker or dealer shall be subject to the requirements of paragraph (b)(3) of this section with respect to a customer that traded on average each month for the prior six months less than $1,000,000 of notional value of not held orders in NMS stocks through the broker or dealer.

(c) *Exemptions.* The Commission may, by order upon application, 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 section, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

[62 FR 544, Jan. 3, 1997, as amended at 83 FR 58427, Nov. 19, 2018]

§ 242.607 Customer account statements.

(a) No broker or dealer acting as agent for a customer may effect any transaction in, induce or attempt to induce the purchase or sale of, or direct orders for purchase or sale of, any NMS stock or a security authorized for quotation on an automated inter-dealer quotation system that has the characteristics set forth in section 17B of the Act (15 U.S.C. 78q–2), unless such broker or dealer informs such customer, in writing, upon opening a new account and on an annual basis thereafter, of the following:

(1) The broker's or dealer's policies regarding receipt of payment for order flow from any broker or dealer, national securities exchange, national securities association, or exchange member to which it routes customers' orders for execution, including a statement as to whether any payment for order flow is received for routing customer orders and a detailed description of the nature of the compensation received; and

(2) The broker's or dealer's policies for determining where to route customer orders that are the subject of payment for order flow absent specific instructions from customers, including a description of the extent to which orders can be executed at prices superior to the national best bid and national best offer.

(b) *Exemptions.* The Commission, upon request or upon its own motion, may exempt by rule or by order, any broker or dealer or any class of brokers or dealers, security or class of securities from the requirements of paragraph (a) of this section with respect to any transaction or class of transactions, either unconditionally or on specified terms and conditions, if the Commission determines that such exemption is consistent with the public interest and the protection of investors.

§ 242.608 Filing and amendment of national market system plans.

(a) *Filing of national market system plans and amendments thereto.* (1) Any two or more self-regulatory organizations, acting jointly, may file a national market system plan or may propose an amendment to an effective national market system plan (''proposed amendment'') by submitting the text of the plan or amendment to the Secretary of the Commission, together with a statement of the purpose of such plan or amendment and, to the extent applicable, the documents and information required by paragraphs (a)(4) and (5) of this section.

(2) The Commission may propose amendments to any effective national market system plan by publishing the text thereof, together with a statement of the purpose of such amendment, in accordance with the provisions of paragraph (b) of this section.

(3) Self-regulatory organizations are authorized to act jointly in:

(i) Planning, developing, and operating any national market subsystem or facility contemplated by a national market system plan;

(ii) Preparing and filing a national market system plan or any amendment thereto; or

(c) *Exemptions.* The Commission may, by order upon application, 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 section, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

§ 242.607 Customer account statements.

(a) No broker or dealer acting as agent for a customer may effect any transaction in, induce or attempt to induce the purchase or sale of, or direct orders for purchase or sale of, any NMS stock or a security authorized for quotation on an automated inter-dealer quotation system that has the characteristics set forth in section 17B of the Act (15 U.S.C. 78q–2), unless such broker or dealer informs such customer, in writing, upon opening a new account and on an annual basis thereafter, of the following:

(1) The broker's or dealer's policies regarding receipt of payment for order flow from any broker or dealer, national securities exchange, national securities association, or exchange member to which it routes customers' orders for execution, including a statement as to whether any payment for order flow is received for routing customer orders and a detailed description of the nature of the compensation received; and

(2) The broker's or dealer's policies for determining where to route customer orders that are the subject of payment for order flow absent specific instructions from customers, including a description of the extent to which orders can be executed at prices superior to the national best bid and national best offer.

(b) *Exemptions.* The Commission, upon request or upon its own motion, may exempt by rule or by order, any broker or dealer or any class of brokers or dealers, security or class of securities from the requirements of paragraph (a) of this section with respect to any transaction or class of transactions, either unconditionally or on specified terms and conditions, if the Commission determines that such exemption is consistent with the pubic interest and the protection of investors.

§ 242.608 Filing and amendment of national market system plans.

(a) *Filing of national market system plans and amendments thereto.* (1) Any two or more self-regulatory organizations, acting jointly, may file a national market system plan or may propose an amendment to an effective national market system plan (''proposed amendment'') by submitting the text of the plan or amendment to the Secretary of the Commission, together with a statement of the purpose of such plan or amendment and, to the extent applicable, the documents and information required by paragraphs (a)(4) and (5) of this section.

(2) The Commission may propose amendments to any effective national market system plan by publishing the text thereof, together with a statement of the purpose of such amendment, in accordance with the provisions of paragraph (b) of this section.

(3) Self-regulatory organizations are authorized to act jointly in:

(i) Planning, developing, and operating any national market subsystem or facility contemplated by a national market system plan;

(ii) Preparing and filing a national market system plan or any amendment thereto; or

(iii) Implementing or administering an effective national market system plan.

(4) Every national market system plan filed pursuant to this section, or any amendment thereto, shall be accompanied by:

(i) Copies of all governing or constituent documents relating to any person (other than a self-regulatory organization) authorized to implement or administer such plan on behalf of its sponsors; and

(ii) To the extent applicable:

(A) A detailed description of the manner in which the plan or amendment, and any facility or procedure contemplated by the plan or amendment, will be implemented;

(B) A listing of all significant phases of development and implementation

(including any pilot phase) contemplated by the plan or amendment, together with the projected date of completion of each phase;

(C) An analysis of the impact on competition of implementation of the plan or amendment or of any facility contemplated by the plan or amendment;

(D) A description of any written understandings or agreements between or among plan sponsors or participants relating to interpretations of the plan or conditions for becoming a sponsor or participant in the plan; and

(E) In the case of a proposed amendment, a statement that such amendment has been approved by the sponsors in accordance with the terms of the plan.

(5) Every national market system plan, or any amendment thereto, filed pursuant to this section shall include a description of the manner in which any facility contemplated by the plan or amendment will be operated. Such description shall include, to the extent applicable:

(i) The terms and conditions under which brokers, dealers, and/or self-regulatory organizations will be granted or denied access (including specific procedures and standards governing the granting or denial of access);

(ii) The method by which any fees or charges collected on behalf of all of the sponsors and/or participants in connection with access to, or use of, any facility contemplated by the plan or amendment will be determined and imposed (including any provision for distribution of any net proceeds from such fees or charges to the sponsors and/or participants) and the amount of such fees or charges;

(iii) The method by which, and the frequency with which, the performance of any person acting as plan processor with respect to the implementation and/or operation of the plan will be evaluated; and

(iv) The method by which disputes arising in connection with the operation of the plan will be resolved.

(6) In connection with the selection of any person to act as plan processor with respect to any facility contemplated by a national market system plan (including renewal of any contract for any person to so act), the sponsors shall file with the Commission a statement identifying the person selected, describing the material terms under which such person is to serve as plan processor, and indicating the solicitation efforts, if any, for alternative plan processors, the alternatives considered and the reasons for selection of such person.

(7) Any national market system plan (or any amendment thereto) which is intended by the sponsors to satisfy a plan filing requirement contained in any other section of this Regulation NMS and part 240, subpart A of this chapter shall, in addition to compliance with this section, also comply with the requirements of such other section.

(8)(i) A participant in an effective national market system plan shall ensure that a current and complete version of the plan is posted on a plan Web site or on a Web site designated by plan participants within two business days after notification by the Commission of effectiveness of the plan. Each participant in an effective national market system plan shall ensure that such Web site is updated to reflect amendments to such plan within two business days after the plan participants have been notified by the Commission of its approval of a proposed amendment pursuant to paragraph (b) of this section. If the amendment is not effective for a certain period, the plan participants shall clearly indicate the effective date in the relevant text of the plan. Each plan participant also shall provide a link on its own Web site to the Web site with the current version of the plan.

(ii) The plan participants shall ensure that any proposed amendments filed pursuant to paragraph (a) of this section are posted on a plan Web site or a designated Web site no later than two business days after the filing of the proposed amendments with the Commission. The plan participants shall maintain any proposed amendment to the plan on a plan Web site or a designated Web site until the Commission approves the plan amendment and the plan participants update the Web site to reflect such amendment or the plan participants withdraw the proposed amendment. If the plan participants

withdraw proposed amendments, the plan participants shall remove such amendments from the plan Web site or designated Web site within two business days of withdrawal. Each plan participant shall provide a link to the Web site with the current version of the plan.

(b) *Effectiveness of national market system plans.* (1) The Commission shall publish notice of the filing of any national market system plan, or any proposed amendment to any effective national market system plan (including any amendment initiated by the Commission), together with the terms of substance of the filing or a description of the subjects and issues involved, and shall provide interested persons an opportunity to submit written comments. No national market system plan, or any amendment thereto, shall become effective unless approved by the Commission or otherwise permitted in accordance with paragraph (b)(3) of this section.

(2) Within 120 days of the date of publication of notice of filing of a national market system plan or an amendment to an effective national market system plan, or within such longer period as the Commission may designate up to 180 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the sponsors consent, the Commission shall approve such plan or amendment, with such changes or subject to such conditions as the Commission may deem necessary or appropriate, if it finds that such plan or amendment is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act. Approval of a national market system plan, or an amendment to an effective national market system plan (other than an amendment initiated by the Commission), shall be by order. Promulgation of an amendment to an effective national market system plan initiated by the Commission shall be by rule.

(3) A proposed amendment may be put into effect upon filing with the Commission if designated by the sponsors as:

(i) Establishing or changing a fee or other charge collected on behalf of all of the sponsors and/or participants in connection with access to, or use of, any facility contemplated by the plan or amendment (including changes in any provision with respect to distribution of any net proceeds from such fees or other charges to the sponsors and/or participants);

(ii) Concerned solely with the administration of the plan, or involving the governing or constituent documents relating to any person (other than a self-regulatory organization) authorized to implement or administer such plan on behalf of its sponsors; or

(iii) Involving solely technical or ministerial matters. At any time within 60 days of the filing of any such amendment, the Commission may summarily abrogate the amendment and require that such amendment be refiled in accordance with paragraph (a)(1) of this section and reviewed in accordance with paragraph (b)(2) of this section, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system or otherwise in furtherance of the purposes of the Act.

(4) Notwithstanding the provisions of paragraph (b)(1) of this section, a proposed amendment may be put into effect summarily upon publication of notice of such amendment, on a temporary basis not to exceed 120 days, if the Commission finds that such action is necessary or appropriate in the public interest, for the protection of investors or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system or otherwise in furtherance of the purposes of the Act.

(5) Any plan (or amendment thereto) in connection with:

(i) The planning, development, operation, or regulation of a national market system (or a subsystem thereof) or one or more facilities thereof; or

(ii) The development and implementation of procedures and/or facilities designed to achieve compliance by self-regulatory organizations and/or their members of any section of this Regulation NMS (§§ 242.600 through 242.612) and part 240, subpart A of this chapter promulgated pursuant to section 11A of the Act (15 U.S.C. 78k–1), approved by the Commission pursuant to section 11A of the Act (or pursuant to any rule or regulation thereunder) prior to the effective date of this section (either temporarily or permanently) shall be deemed to have been filed and approved pursuant to this section and no additional filing need be made by the sponsors with respect to such plan or amendment; *provided, however,* that all terms and conditions associated with any such approval (including time limitations) shall continue to be applicable; *provided, further,* that any amendment to such plan filed with or approved by the Commission on or after the effective date of this section shall be subject to the provisions of, and considered in accordance with the procedures specified in, this section.

(c) *Compliance with terms of national market system plans.* Each self-regulatory organization shall comply with the terms of any effective national market system plan of which it is a sponsor or a participant. Each self-regulatory organization also shall, absent reasonable justification or excuse, enforce compliance with any such plan by its members and persons associated with its members.

(d) *Appeals.* The Commission may, in its discretion, entertain appeals in connection with the implementation or operation of any effective national market system plan as follows:

(1) Any action taken or failure to act by any person in connection with an effective national market system plan (other than a prohibition or limitation of access reviewable by the Commission pursuant to section 11A(b)(5) or section 19(d) of the Act (15 U.S.C. 78k–1(b)(5) or 78s(d))) shall be subject to review by the Commission, on its own motion or upon application by any person aggrieved thereby (including, but not limited to, self-regulatory organizations, brokers, dealers, issuers, and vendors), filed not later than 30 days after notice of such action or failure to act or within such longer period as the Commission may determine.

(2) 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 any such action unless the Commission determines otherwise, after notice and opportunity for hearing on the question of a stay (which hearing may consist only of affidavits or oral arguments).

(3) In any proceedings for review, if the Commission, after appropriate notice and opportunity for hearing (which hearing may consist solely of consideration of the record of any proceedings conducted in connection with such action or failure to act and an opportunity for the presentation of reasons supporting or opposing such action or failure to act) and upon consideration of such other data, views, and arguments as it deems relevant, finds that the action or failure to act is in accordance with the applicable provisions of such plan and that the applicable provisions are, and were, applied in a manner consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets, and the removal of impediments to, and the perfection of the mechanisms of a national market system, the Commission, by order, shall dismiss the proceeding. If the Commission does not make any such finding, or if it finds that such action or failure to act imposes any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, the Commission, by order, shall set aside such action and/or require such action with respect to the matter reviewed as the Commission deems necessary or appropriate in the public interest, for the protection of investors, and the maintenance of fair and orderly markets, or to remove impediments to, and perfect the mechanisms of, a national market system.

(e) *Exemptions.* The Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any self-regulatory organization, member thereof, or specified security, if the Commission determines that such exemption is consistent with the public interest, the protection of investors,

the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system.

[70 FR 37620, June 29, 2005; 71 FR 232, Jan. 4, 2006]

§ 242.609 Registration of securities information processors: form of application and amendments.

(a) An application for the registration of a securities information processor shall be filed on Form SIP (§ 249.1001 of this chapter) in accordance with the instructions contained therein.

(b) If any information reported in items 1–13 or item 21 of Form SIP or in any amendment thereto is or becomes inaccurate for any reason, whether before or after the registration has been granted, the securities information processor shall promptly file an amendment on Form SIP correcting such information.

(c) The Commission, upon its own motion or upon application by any securities information processor, may conditionally or unconditionally exempt any securities information processor from any provision of the rules or regulations adopted under section 11A(b) of the Act (15 U.S.C. 78k–1(b)).

(d) Every amendment filed pursuant to this section shall constitute a ''report'' within the meaning of sections 17(a), 18(a) and 32(a) of the Act (15 U.S.C. 78q(a), 78r(a), and 78ff(a)).

§ 242.610 Access to quotations.

(a) *Quotations of SRO trading facility.* A national securities exchange or national securities association shall not impose unfairly discriminatory terms that prevent or inhibit any person from obtaining efficient access through a member of the national securities exchange or national securities association to the quotations in an NMS stock displayed through its SRO trading facility.

(b) *Quotations of SRO display-only facility.* (1) Any trading center that displays quotations in an NMS stock through an SRO display-only facility shall provide a level and cost of access to such quotations that is substantially equivalent to the level and cost of access to quotations displayed by SRO trading facilities in that stock.

(2) Any trading center that displays quotations in an NMS stock through an SRO display-only facility shall not impose unfairly discriminatory terms that prevent or inhibit any person from obtaining efficient access to such quotations through a member, subscriber, or customer of the trading center.

(c) *Fees for access to quotations.* A trading center shall not impose, nor permit to be imposed, any fee or fees for the execution of an order against a protected quotation of the trading center or against any other quotation of the trading center that is the best bid or best offer of a national securities exchange, the best bid or best offer of The Nasdaq Stock Market, Inc., or the best bid or best offer of a national securities association other than the best bid or best offer of The Nasdaq Stock Market, Inc. in an NMS stock that exceed or accumulate to more than the following limits:

(1) If the price of a protected quotation or other quotation is $1.00 or more, the fee or fees cannot exceed or accumulate to more than $0.003 per share; or

(2) If the price of a protected quotation or other quotation is less than $1.00, the fee or fees cannot exceed or accumulate to more than 0.3% of the quotation price per share.

(d) *Locking or crossing quotations.* Each national securities exchange and national securities association shall establish, maintain, and enforce written rules that:

(1) Require its members reasonably to avoid:

(i) Displaying quotations that lock or cross any protected quotation in an NMS stock; and

(ii) Displaying manual quotations that lock or cross any quotation in an NMS stock disseminated pursuant to an effective national market system plan;

(2) Are reasonably designed to assure the reconciliation of locked or crossed quotations in an NMS stock; and

(3) Prohibit its members from engaging in a pattern or practice of displaying quotations that lock or cross any protected quotation in an NMS

such finding, or if it finds that such action or failure to act imposes any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, the Commission, by order, shall set aside such action and/or require such action with respect to the matter reviewed as the Commission deems necessary or appropriate in the public interest, for the protection of investors, and the maintenance of fair and orderly markets, or to remove impediments to, and perfect the mechanisms of, a national market system.

(e) *Exemptions.* The Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any self-regulatory organization, member thereof, or specified security, if the Commission determines that such exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system.

[70 FR 37620, June 29, 2005; 71 FR 232, Jan. 4, 2006]

§ 242.609 Registration of securities information processors: form of application and amendments.

(a) An application for the registration of a securities information processor shall be filed on Form SIP (§ 249.1001 of this chapter) in accordance with the instructions contained therein.

(b) If any information reported in items 1–13 or item 21 of Form SIP or in any amendment thereto is or becomes inaccurate for any reason, whether before or after the registration has been granted, the securities information processor shall promptly file an amendment on Form SIP correcting such information.

(c) The Commission, upon its own motion or upon application by any securities information processor, may conditionally or unconditionally exempt any securities information processor from any provision of the rules or regulations adopted under section 11A(b) of the Act (15 U.S.C. 78k–1(b)).

(d) Every amendment filed pursuant to this section shall constitute a ''report'' within the meaning of sections 17(a), 18(a) and 32(a) of the Act (15 U.S.C. 78q(a), 78r(a), and 78ff(a)).

§ 242.610 Access to quotations.

(a) *Quotations of SRO trading facility.* A national securities exchange or national securities association shall not impose unfairly discriminatory terms that prevent or inhibit any person from obtaining efficient access through a member of the national securities exchange or national securities association to the quotations in an NMS stock displayed through its SRO trading facility.

(b) *Quotations of SRO display-only facility.* (1) Any trading center that displays quotations in an NMS stock through an SRO display-only facility shall provide a level and cost of access to such quotations that is substantially equivalent to the level and cost of access to quotations displayed by SRO trading facilities in that stock.

(2) Any trading center that displays quotations in an NMS stock through an SRO display-only facility shall not impose unfairly discriminatory terms that prevent or inhibit any person from obtaining efficient access to such quotations through a member, subscriber, or customer of the trading center.

(c) *Fees for access to quotations.* A trading center shall not impose, nor permit to be imposed, any fee or fees for the execution of an order against a protected quotation of the trading center or against any other quotation of the trading center that is the best bid or best offer of a national securities exchange, the best bid or best offer of The Nasdaq Stock Market, Inc., or the best bid or best offer of a national securities association other than the best bid or best offer of The Nasdaq Stock Market, Inc. in an NMS stock that exceed or accumulate to more than the following limits:

(1) If the price of a protected quotation or other quotation is $1.00 or more, the fee or fees cannot exceed or accumulate to more than $0.003 per share; or

(2) If the price of a protected quotation or other quotation is less than $1.00, the fee or fees cannot exceed or accumulate to more than 0.3% of the quotation price per share.

(d) *Locking or crossing quotations.* Each national securities exchange and national securities association shall establish, maintain, and enforce written rules that:

(1) Require its members reasonably to avoid:

(i) Displaying quotations that lock or cross any protected quotation in an NMS stock; and

(ii) Displaying manual quotations that lock or cross any quotation in an NMS stock disseminated pursuant to an effective national market system plan;

(2) Are reasonably designed to assure the reconciliation of locked or crossed quotations in an NMS stock; and

(3) Prohibit its members from engaging in a pattern or practice of displaying quotations that lock or cross any protected quotation in an NMS stock, or of displaying manual quotations that lock or cross any quotation in an NMS stock disseminated pursuant to an effective national market system plan, other than displaying quotations that lock or cross any protected or other quotation as permitted by an exception contained in its rules established pursuant to paragraph (d)(1) of this section.

(e) *Exemptions.* The Commission, by order, may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any person, security, quotations, orders, or fees, or any class or classes of persons, securities, quotations, orders, or fees, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

§ 242.610T Equity transaction fee pilot.

(a) *Pilot pricing restrictions.* Notwithstanding § 242.610(c), on a pilot basis for the period specified in paragraph (c) of this section, in connection with a transaction in an NMS stock, a national securities exchange shall not:

(1) For *Test Group 1,* impose, or permit to be imposed, any fee or fees for the display of, or execution against, the displayed best bid or best offer of such market that exceed or accumulate to more than *$0.0010* per share;

(2) For *Test Group 2,* provide to any person, or permit to be provided to any person, a rebate or other remuneration in connection with an execution, or offer, or permit to be offered, any linked pricing that provides a discount or incentive on transaction fees applicable to removing (providing) liquidity that is linked to providing (removing) liquidity, except to the extent the exchange has a rule to provide non-rebate linked pricing to its registered market makers in consideration for meeting market quality metrics; and

(3) For the *Control Group,* impose, or permit to be imposed, any fee or fees in contravention of the limits specified in § 242.610(c).

(b) *Pilot securities*—(1) *Initial List of Pilot Securities.* (i) The Commission shall designate by notice the initial List of Pilot Securities, and shall assign each Pilot Security to one Test Group or the Control Group. Further, the Commission may designate by notice the assignment of NMS stocks that are interlisted on a Canadian securities exchange to Test Group 2 or the Control Group.

(ii) For purposes of this section, ''Pilot Securities'' means the NMS stocks designated by the Commission on the initial List of Pilot Securities pursuant to paragraph (b)(1)(i) of this section and any successors to such NMS stocks. At the time of selection by the Commission, an NMS stock must have a minimum share price of $2 to be included in the Pilot and must have an unlimited duration or a duration beyond the end of the post-Pilot Period. In addition, an NMS stock must have an average daily volume of 30,000 shares or more to be included in the Pilot. If the share price of a Pilot Security in one of the Test Groups or the Control Group closes below $1 at the end of a trading day, it shall be removed from the Pilot.

(iii) For purposes of this section, ''primary listing exchange'' means the national securities exchange on which the NMS stock is listed. If an NMS stock is listed on more than one national securities exchange, the national securities exchange upon which the NMS stock has been listed the longest shall be the primary listing exchange.

(c) The Commission, by order, may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any person, security, quotation, or order, or any class or classes of persons, securities, quotations, or orders, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

§ 242.613 Consolidated audit trail.

(a) *Creation of a national market system plan governing a consolidated audit trail.* (1) Each national securities exchange and national securities association shall jointly file on or before 270 days from the date of publication of the Adopting Release in the FEDERAL REGISTER a national market system plan to govern the creation, implementation, and maintenance of a consolidated audit trail and central repository as required by this section. The national market system plan shall discuss the following considerations:

(i) The method(s) by which data will be reported to the central repository including, but not limited to, the sources of such data and the manner in which the central repository will receive, extract, transform, load, and retain such data; and the basis for selecting such method(s);

(ii) The time and method by which the data in the central repository will be made available to regulators, in accordance with paragraph (e)(1) of this section, to perform surveillance or analyses, or for other purposes as part of their regulatory and oversight responsibilities;

(iii) The reliability and accuracy of the data reported to and maintained by the central repository throughout its lifecycle, including transmission and receipt from market participants; data extraction, transformation and loading at the central repository; data maintenance and management at the central repository; and data access by regulators;

(iv) The security and confidentiality of the information reported to the central repository;

(v) The flexibility and scalability of the systems used by the central repository to collect, consolidate and store consolidated audit trail data, including the capacity of the consolidated audit trail to efficiently incorporate, in a cost-effective manner, improvements in technology, additional capacity, additional order data, information about additional securities or transactions, changes in regulatory requirements, and other developments;

(vi) The feasibility, benefits, and costs of broker-dealers reporting to the consolidated audit trail in a timely manner:

(A) The identity of all market participants (including broker-dealers and customers) that are allocated NMS securities, directly or indirectly, in a primary market transaction;

(B) The number of such securities each such market participant is allocated; and

(C) The identity of the broker-dealer making each such allocation;

(vii) The detailed estimated costs for creating, implementing, and maintaining the consolidated audit trail as contemplated by the national market system plan, which estimated costs should specify:

(A) An estimate of the costs to the plan sponsors for establishing and maintaining the central repository;

(B) An estimate of the costs to members of the plan sponsors, initially and on an ongoing basis, for reporting the data required by the national market system plan;

(C) An estimate of the costs to the plan sponsors, initially and on an ongoing basis, for reporting the data required by the national market system plan; and

(D) How the plan sponsors propose to fund the creation, implementation, and maintenance of the consolidated audit trail, including the proposed allocation of such estimated costs among the plan sponsors, and between the plan sponsors and members of the plan sponsors;

(viii) An analysis of the impact on competition, efficiency and capital formation of creating, implementing, and maintaining of the national market system plan;

(ix) A plan to eliminate existing rules and systems (or components thereof) that will be rendered duplicative by the consolidated audit trail, including identification of such rules and

systems (or components thereof); to the extent that any existing rules or systems related to monitoring quotes, orders, and executions provide information that is not rendered duplicative by the consolidated audit trail, an analysis of:

(A) Whether the collection of such information remains appropriate;

(B) If still appropriate, whether such information should continue to be separately collected or should instead be incorporated into the consolidated audit trail; and

(C) If no longer appropriate, how the collection of such information could be efficiently terminated; the steps the plan sponsors propose to take to seek Commission approval for the elimination of such rules and systems (or components thereof); and a timetable for such elimination, including a description of how the plan sponsors propose to phase in the consolidated audit trail and phase out such existing rules and systems (or components thereof);

(x) Objective milestones to assess progress toward the implementation of the national market system plan;

(xi) The process by which the plan sponsors solicited views of their members and other appropriate parties regarding the creation, implementation, and maintenance of the consolidated audit trail, a summary of the views of such members and other parties, and how the plan sponsors took such views into account in preparing the national market system plan; and

(xii) Any reasonable alternative approaches to creating, implementing, and maintaining a consolidated audit trail that the plan sponsors considered in developing the national market system plan including, but not limited to, a description of any such alternative approach; the relative advantages and disadvantages of each such alternative, including an assessment of the alternative's costs and benefits; and the basis upon which the plan sponsors selected the approach reflected in the national market system plan.

(2) The national market system plan, or any amendment thereto, filed pursuant to this section shall comply with the requirements in § 242.608(a), if applicable, and be filed with the Commission pursuant to § 242.608.

(3) The national market system plan submitted pursuant to this section shall require each national securities exchange and national securities association to:

(i) Within two months after effectiveness of the national market system plan jointly (or under the governance structure described in the plan) select a person to be the plan processor;

(ii) Within four months after effectiveness of the national market system plan synchronize their business clocks and require members of each such exchange and association to synchronize their business clocks in accordance with paragraph (d) of this section;

(iii) Within one year after effectiveness of the national market system plan provide to the central repository the data specified in paragraph (c) of this section;

(iv) Within fourteen months after effectiveness of the national market system plan implement a new or enhanced surveillance system(s) as required by paragraph (f) of this section;

(v) Within two years after effectiveness of the national market system plan require members of each such exchange and association, except those members that qualify as small broker-dealers as defined in § 240.0–10(c) of this chapter, to provide to the central repository the data specified in paragraph (c) of this section; and

(vi) Within three years after effectiveness of the national market system plan require members of each such exchange and association that qualify as small broker-dealers as defined in § 240.0–10(c) of this chapter to provide to the central repository the data specified in paragraph (c) of this section.

(4) Each national securities exchange and national securities association shall be a sponsor of the national market system plan submitted pursuant to this section and approved by the Commission.

(5) No national market system plan filed pursuant to this section, or any amendment thereto, shall become effective unless approved by the Commission or otherwise permitted in accordance with the procedures set forth in § 242.608. In determining whether to approve the national market system plan, or any amendment thereto, and

whether the national market system plan or any amendment thereto is in the public interest under § 242.608(b)(2), the Commission shall consider the impact of the national market system plan or amendment, as applicable, on efficiency, competition, and capital formation.

(b) *Operation and administration of the national market system plan.* (1) The national market system plan submitted pursuant to this section shall include a governance structure to ensure fair representation of the plan sponsors, and administration of the central repository, including the selection of the plan processor.

(2) The national market system plan submitted pursuant to this section shall include a provision addressing the requirements for the admission of new sponsors of the plan and the withdrawal of existing sponsors from the plan.

(3) The national market system plan submitted pursuant to this section shall include a provision addressing the percentage of votes required by the plan sponsors to effectuate amendments to the plan.

(4) The national market system plan submitted pursuant to this section shall include a provision addressing the manner in which the costs of operating the central repository will be allocated among the national securities exchanges and national securities associations that are sponsors of the plan, including a provision addressing the manner in which costs will be allocated to new sponsors to the plan.

(5) The national market system plan submitted pursuant to this section shall require the appointment of a Chief Compliance Officer to regularly review the operation of the central repository to assure its continued effectiveness in light of market and technological developments, and make any appropriate recommendations for enhancements to the nature of the information collected and the manner in which it is processed.

(6) The national market system plan submitted pursuant to this section shall include a provision requiring the plan sponsors to provide to the Commission, at least every two years after effectiveness of the national market system plan, a written assessment of the operation of the consolidated audit trail. Such document shall include, at a minimum:

(i) An evaluation of the performance of the consolidated audit trail including, at a minimum, with respect to data accuracy (consistent with paragraph (e)(6) of this section), timeliness of reporting, comprehensiveness of data elements, efficiency of regulatory access, system speed, system downtime, system security (consistent with paragraph (e)(4) of this section), and other performance metrics to be determined by the Chief Compliance Officer, along with a description of such metrics;

(ii) A detailed plan, based on such evaluation, for any potential improvements to the performance of the consolidated audit trail with respect to any of the following: improving data accuracy; shortening reporting timeframes; expanding data elements; adding granularity and details regarding the scope and nature of Customer-IDs; expanding the scope of the national market system plan to include new instruments and new types of trading and order activities; improving the efficiency of regulatory access; increasing system speed; reducing system downtime; and improving performance under other metrics to be determined by the Chief Compliance Officer;

(iii) An estimate of the costs associated with any such potential improvements to the performance of the consolidated audit trail, including an assessment of the potential impact on competition, efficiency, and capital formation; and

(iv) An estimated implementation timeline for any such potential improvements, if applicable.

(7) The national market system plan submitted pursuant to this section shall include an Advisory Committee which shall function in accordance with the provisions set forth in this paragraph (b)(7). The purpose of the Advisory Committee shall be to advise the plan sponsors on the implementation, operation, and administration of the central repository.

(i) The national market system plan submitted pursuant to this section

shall set forth the term and composition of the Advisory Committee, which composition shall include representatives of the member firms of the plan sponsors.

(ii) Members of the Advisory Committee shall have the right to attend any meetings of the plan sponsors, to receive information concerning the operation of the central repository, and to provide their views to the plan sponsors; provided, however, that the plan sponsors may meet without the Advisory Committee members in executive session if, by affirmative vote of a majority of the plan sponsors, the plan sponsors determine that such an executive session is required.

(c) *Data recording and reporting.* (1) The national market system plan submitted pursuant to this section shall provide for an accurate, time-sequenced record of orders beginning with the receipt or origination of an order by a member of a national securities exchange or national securities association, and further documenting the life of the order through the process of routing, modification, cancellation, and execution (in whole or in part) of the order.

(2) The national market system plan submitted pursuant to this section shall require each national securities exchange, national securities association, and member to report to the central repository the information required by paragraph (c)(7) of this section in a uniform electronic format, or in a manner that would allow the central repository to convert the data to a uniform electronic format, for consolidation and storage.

(3) The national market system plan submitted pursuant to this section shall require each national securities exchange, national securities association, and member to record the information required by paragraphs (c)(7)(i) through (v) of this section contemporaneously with the reportable event. The national market system plan shall require that information recorded pursuant to paragraphs (c)(7)(i) through (v) of this section must be reported to the central repository by 8:00 a.m. Eastern Time on the trading day following the day such information has been recorded by the national securities exchange, national securities association, or member. The national market system plan may accommodate voluntary reporting prior to 8:00 a.m. Eastern Time, but shall not impose an earlier reporting deadline on the reporting parties.

(4) The national market system plan submitted pursuant to this section shall require each member of a national securities exchange or national securities association to record and report to the central repository the information required by paragraphs (c)(7)(vi) through (viii) of this section by 8:00 a.m. Eastern Time on the trading day following the day the member receives such information. The national market system plan may accommodate voluntary reporting prior to 8:00 a.m. Eastern Time, but shall not impose an earlier reporting deadline on the reporting parties.

(5) The national market system plan submitted pursuant to this section shall require each national securities exchange and its members to record and report to the central repository the information required by paragraph (c)(7) of this section for each NMS security registered or listed for trading on such exchange or admitted to unlisted trading privileges on such exchange.

(6) The national market system plan submitted pursuant to this section shall require each national securities association and its members to record and report to the central repository the information required by paragraph (c)(7) of this section for each NMS security for which transaction reports are required to be submitted to the association.

(7) The national market system plan submitted pursuant to this section shall require each national securities exchange, national securities association, and any member of such exchange or association to record and electronically report to the central repository details for each order and each reportable event, including, but not limited to, the following information:

(i) For original receipt or origination of an order:

(A) Customer-ID(s) for each customer;

(B) The CAT–Order-ID;

(C) The CAT–Reporter-ID of the broker-dealer receiving or originating the order;
(D) Date of order receipt or origination;
(E) Time of order receipt or origination (using time stamps pursuant to paragraph (d)(3) of this section); and
(F) Material terms of the order.
(ii) For the routing of an order, the following information:
(A) The CAT-Order-ID;
(B) Date on which the order is routed;
(C) Time at which the order is routed (using time stamps pursuant to paragraph (d)(3) of this section);
(D) The CAT-Reporter-ID of the broker-dealer or national securities exchange routing the order;
(E) The CAT-Reporter-ID of the broker-dealer, national securities exchange, or national securities association to which the order is being routed;
(F) If routed internally at the broker-dealer, the identity and nature of the department or desk to which an order is routed; and
(G) Material terms of the order.
(iii) For the receipt of an order that has been routed, the following information:
(A) The CAT-Order-ID;
(B) Date on which the order is received;
(C) Time at which the order is received (using time stamps pursuant to paragraph (d)(3) of this section);
(D) The CAT-Reporter-ID of the broker-dealer, national securities exchange, or national securities association receiving the order;
(E) The CAT-Reporter-ID of the broker-dealer or national securities exchange routing the order; and
(F) Material terms of the order.
(iv) If the order is modified or cancelled, the following information:
(A) The CAT-Order-ID;
(B) Date the modification or cancellation is received or originated;
(C) Time the modification or cancellation is received or originated (using time stamps pursuant to paragraph (d)(3) of this section);
(D) Price and remaining size of the order, if modified;
(E) Other changes in material terms of the order, if modified; and
(F) The CAT-Reporter-ID of the broker-dealer or Customer-ID of the person giving the modification or cancellation instruction.
(v) If the order is executed, in whole or part, the following information:
(A) The CAT-Order-ID;
(B) Date of execution;
(C) Time of execution (using time stamps pursuant to paragraph (d)(3) of this section);
(D) Execution capacity (principal, agency, riskless principal);
(E) Execution price and size;
(F) The CAT-Reporter-ID of the national securities exchange or broker-dealer executing the order; and
(G) Whether the execution was reported pursuant to an effective transaction reporting plan or the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information.
(vi) If the order is executed, in whole or part, the following information:
(A) The account number for any subaccounts to which the execution is allocated (in whole or part);
(B) The CAT-Reporter-ID of the clearing broker or prime broker, if applicable; and
(C) The CAT-Order-ID of any contraside order(s).
(vii) If the trade is cancelled, a cancelled trade indicator.
(viii) For original receipt or origination of an order, the following information:
(A) Information of sufficient detail to identify the customer; and
(B) Customer account information.
(8) All plan sponsors and their members shall use the same Customer-ID and CAT-Reporter-ID for each customer and broker-dealer.
(d) *Clock synchronization and time stamps.* The national market system plan submitted pursuant to this section shall require:
(1) Each national securities exchange, national securities association, and member of such exchange or association to synchronize its business clocks that are used for the purposes of recording the date and time of any reportable event that must be reported pursuant to this section to the time maintained by the National Institute

of Standards and Technology, consistent with industry standards;

(2) Each national securities exchange and national securities association to evaluate annually the clock synchronization standard to determine whether it should be shortened, consistent with changes in industry standards; and

(3) Each national securities exchange, national securities association, and member of such exchange or association to utilize the time stamps required by paragraph (c)(7) of this section, with at minimum the granularity set forth in the national market system plan submitted pursuant to this section, which shall reflect current industry standards and be at least to the millisecond. To the extent that the relevant order handling and execution systems of any national securities exchange, national securities association, or member of such exchange or association utilize time stamps in increments finer than the minimum required by the national market system plan, the plan shall require such national securities exchange, national securities association, or member to utilize time stamps in such finer increments when providing data to the central repository, so that all reportable events reported to the central repository by any national securities exchange, national securities association, or member can be accurately sequenced. The national market system plan shall require the sponsors of the national market system plan to annually evaluate whether industry standards have evolved such that the required time stamp standard should be in finer increments.

(e) *Central repository.* (1) The national market system plan submitted pursuant to this section shall provide for the creation and maintenance of a central repository. Such central repository shall be responsible for the receipt, consolidation, and retention of all information reported pursuant to paragraph (c)(7) of this section. The central repository shall store and make available to regulators data in a uniform electronic format, and in a form in which all events pertaining to the same originating order are linked together in a manner that ensures timely and accurate retrieval of the information required by paragraph (c)(7) of this section for all reportable events for that order.

(2) Each national securities exchange, national securities association, and the Commission shall have access to the central repository, including all systems operated by the central repository, and access to and use of the data reported to and consolidated by the central repository under paragraph (c) of this section, for the purpose of performing its respective regulatory and oversight responsibilities pursuant to the federal securities laws, rules, and regulations. The national market system plan submitted pursuant to this section shall provide that such access to and use of such data by each national securities exchange, national securities association, and the Commission for the purpose of performing its regulatory and oversight responsibilities pursuant to the federal securities laws, rules, and regulations shall not be limited.

(3) The national market system plan submitted pursuant to this section shall include a provision requiring the creation and maintenance by the plan processor of a method of access to the consolidated data stored in the central repository that includes the ability to run searches and generate reports.

(4) The national market system plan submitted pursuant to this section shall include policies and procedures, including standards, to be used by the plan processor to:

(i) Ensure the security and confidentiality of all information reported to the central repository by requiring that:

(A) All plan sponsors and their employees, as well as all employees of the central repository, agree to use appropriate safeguards to ensure the confidentiality of such data and agree not to use such data for any purpose other than surveillance and regulatory purposes, provided that nothing in this paragraph (e)(4)(i)(A) shall be construed to prevent a plan sponsor from using the data that it reports to the central repository for regulatory, surveillance, commercial, or other purposes as otherwise permitted by applicable law, rule, or regulation;

(B) Each plan sponsor adopt and enforce rules that:

(*1*) Require information barriers between regulatory staff and non-regulatory staff with regard to access and use of data in the central repository; and

(*2*) Permit only persons designated by plan sponsors to have access to the data in the central repository;

(C) The plan processor:

(*1*) Develop and maintain a comprehensive information security program for the central repository, with dedicated staff, that is subject to regular reviews by the Chief Compliance Officer;

(*2*) Have a mechanism to confirm the identity of all persons permitted to access the data; and

(*3*) Maintain a record of all instances where such persons access the data; and

(D) The plan sponsors adopt penalties for non-compliance with any policies and procedures of the plan sponsors or central repository with respect to information security.

(ii) Ensure the timeliness, accuracy, integrity, and completeness of the data provided to the central repository pursuant to paragraph (c) of this section; and

(iii) Ensure the accuracy of the consolidation by the plan processor of the data provided to the central repository pursuant to paragraph (c) of this section.

(5) The national market system plan submitted pursuant to this section shall address whether there will be an annual independent evaluation of the security of the central repository and:

(i) If so, provide a description of the scope of such planned evaluation; and

(ii) If not, provide a detailed explanation of the alternative measures for evaluating the security of the central repository that are planned instead.

(6) The national market system plan submitted pursuant to this section shall:

(i) Specify a maximum error rate to be tolerated by the central repository for any data reported pursuant to paragraphs (c)(3) and (c)(4) of this section; describe the basis for selecting such maximum error rate; explain how the plan sponsors will seek to reduce such maximum error rate over time; describe how the plan will seek to ensure compliance with such maximum error rate and, in the event of noncompliance, will promptly remedy the causes thereof;

(ii) Require the central repository to measure the error rate each business day and promptly take appropriate remedial action, at a minimum, if the error rate exceeds the maximum error rate specified in the plan;

(iii) Specify a process for identifying and correcting errors in the data reported to the central repository pursuant to paragraphs (c)(3) and (c)(4) of this section, including the process for notifying the national securities exchanges, national securities association, and members who reported erroneous data to the central repository of such errors, to help ensure that such errors are promptly corrected by the reporting entity, and for disciplining those who repeatedly report erroneous data; and

(iv) Specify the time by which data that has been corrected will be made available to regulators.

(7) The national market system plan submitted pursuant to this section shall require the central repository to collect and retain on a current and continuing basis and in a format compatible with the information consolidated and stored pursuant to paragraph (c)(7) of this section:

(i) Information, including the size and quote condition, on the national best bid and national best offer for each NMS security;

(ii) Transaction reports reported pursuant to an effective transaction reporting plan filed with the Commission pursuant to, and meeting the requirements of, § 242.601; and

(iii) Last sale reports reported pursuant to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information filed with the Commission pursuant to, and meeting the requirements of, § 242.608.

(8) The national market system plan submitted pursuant to this section shall require the central repository to retain the information collected pursuant to paragraphs (c)(7) and (e)(7) of this section in a convenient and usable standard electronic data format that is

directly available and searchable electronically without any manual intervention for a period of not less than five years.

(f) *Surveillance.* Every national securities exchange and national securities association subject to this section shall develop and implement a surveillance system, or enhance existing surveillance systems, reasonably designed to make use of the consolidated information contained in the consolidated audit trail.

(g) *Compliance by members.* (1) Each national securities exchange and national securities association shall file with the Commission pursuant to section 19(b)(2) of the Act (15 U.S.C. 78s(b)(2)) and § 240.19b–4 of this chapter on or before 60 days from approval of the national market system plan a proposed rule change to require its members to comply with the requirements of this section and the national market system plan approved by the Commission.

(2) Each member of a national securities exchange or national securities association shall comply with all the provisions of any approved national market system plan applicable to members.

(3) The national market system plan submitted pursuant to this section shall include a provision requiring each national securities exchange and national securities association to agree to enforce compliance by its members with the provisions of any approved plan.

(4) The national market system plan submitted pursuant to this section shall include a mechanism to ensure compliance with the requirements of any approved plan by the members of a national securities exchange or national securities association.

(h) *Compliance by national securities exchanges and national securities associations.* (1) Each national securities exchange and national securities association shall comply with the provisions of the national market system plan approved by the Commission.

(2) Any failure by a national securities exchange or national securities association to comply with the provisions of the national market system plan approved by the Commission shall be considered a violation of this section.

(3) The national market system plan submitted pursuant to this section shall include a mechanism to ensure compliance by the sponsors of the plan with the requirements of any approved plan. Such enforcement mechanism may include penalties where appropriate.

(i) *Other securities and other types of transactions.* The national market system plan submitted pursuant to this section shall include a provision requiring each national securities exchange and national securities association to jointly provide to the Commission within six months after effectiveness of the national market system plan a document outlining how such exchanges and associations could incorporate into the consolidated audit trail information with respect to equity securities that are not NMS securities, debt securities, primary market transactions in equity securities that are not NMS securities, and primary market transactions in debt securities, including details for each order and reportable event that may be required to be provided, which market participants may be required to provide the data, an implementation timeline, and a cost estimate.

(j) *Definitions.* As used in this section:

(1) The term *CAT–Order-ID* shall mean a unique order identifier or series of unique order identifiers that allows the central repository to efficiently and accurately link all reportable events for an order, and all orders that result from the aggregation or disaggregation of such order.

(2) The term *CAT–Reporter-ID* shall mean, with respect to each national securities exchange, national securities association, and member of a national securities exchange or national securities association, a code that uniquely and consistently identifies such person for purposes of providing data to the central repository.

(3) The term *customer* shall mean:

(i) The account holder(s) of the account at a registered broker-dealer originating the order; and

(ii) Any person from whom the broker-dealer is authorized to accept

trading instructions for such account, if different from the account holder(s).

(4) The term *customer account information* shall include, but not be limited to, account number, account type, customer type, date account opened, and large trader identifier (if applicable).

(5) The term *Customer-ID* shall mean, with respect to a customer, a code that uniquely and consistently identifies such customer for purposes of providing data to the central repository.

(6) The term *error rate* shall mean the percentage of reportable events collected by the central repository in which the data reported does not fully and accurately reflect the order event that occurred in the market.

(7) The term *material terms of the order* shall include, but not be limited to, the NMS security symbol; security type; price (if applicable); size (displayed and non-displayed); side (buy/sell); order type; if a sell order, whether the order is long, short, short exempt; open/close indicator; time in force (if applicable); if the order is for a listed option, option type (put/call), option symbol or root symbol, underlying symbol, strike price, expiration date, and open/close; and any special handling instructions.

(8) The term *order* shall include:

(i) Any order received by a member of a national securities exchange or national securities association from any person;

(ii) Any order originated by a member of a national securities exchange or national securities association; or

(iii) Any bid or offer.

(9) The term *reportable event* shall include, but not be limited to, the original receipt or origination, modification, cancellation, routing, and execution (in whole or in part) of an order, and receipt of a routed order.

[77 FR 45808, Aug. 1, 2012]

REGULATION SBSR—REGULATORY REPORTING AND PUBLIC DISSEMINATION OF SECURITY-BASED SWAP INFORMATION

SOURCE: 80 FR 14728, Mar. 19, 2015, unless otherwise noted.

§ 242.900 Definitions.

Terms used in §§ 242.900 through 242.909 that appear in Section 3 of the Exchange Act (15 U.S.C. 78c) have the same meaning as in Section 3 of the Exchange Act and the rules or regulations thereunder. In addition, for purposes of Regulation SBSR (§§ 242.900 through 242.909), the following definitions shall apply:

(a) *Affiliate* means any person that, directly or indirectly, controls, is controlled by, or is under common control with, a person.

(b) *Asset class* means those security-based swaps in a particular broad category, including, but not limited to, credit derivatives and equity derivatives.

(c) [Reserved].

(d) *Branch ID* means the UIC assigned to a branch or other unincorporated office of a participant.

(e) *Broker ID* means the UIC assigned to a person acting as a broker for a participant.

(f) *Business day* means a day, based on U.S. Eastern Time, other than a Saturday, Sunday, or a U.S. federal holiday.

(g) *Clearing transaction* means a security-based swap that has a registered clearing agency as a direct counterparty.

(h) *Control* means, for purposes of §§ 242.900 through 242.909, the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. A person is presumed to control another person if the person:

(1) Is a director, general partner or officer exercising executive responsibility (or having similar status or functions);

(2) Directly or indirectly has the right to vote 25 percent or more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities; or

(3) In the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25 percent or more of the capital.

(i) *Counterparty* means a person that is a direct counterparty or indirect counterparty of a security-based swap.

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2020, I caused a true and correct copy of this addendum to be electronically filed through the Court's CM/ECF system, which will send a notice of filing to all registered users.

Dated: November 3, 2020

Respectfully submitted,

/s/ Amir C. Tayrani

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