

The Commission periodically inspects the operations of all funds to ensure their compliance with the provisions of the Act and the rules under the Act. The Commission staff spends a significant portion of their time in these inspections reviewing the information contained in the books and records required to be kept by rule 31a-1 and to be preserved by rule 31a-2.

There are approximately 4,920 funds as of December 31, 2006, all of which are required to comply with rule 31a-2. Based on recent conversations with representatives of the fund industry and past estimates, our staff estimates that each fund currently spends 220 hours per year complying with the records preservation required by rule 31a-2. The hour burden is incurred by a variety of fund staff, and the type of staff position used for compliance with the rule varies widely from fund to fund. Based on these estimates, our staff estimates that the total annual burden of a fund to comply with rule 31a-2, is 220 hours, with a total annual burden for all funds of 1,082,400 hours.<sup>9</sup>

The hour burden estimates for retaining records under rule 31a-2 are based on our experience with registrants and our experience with similar requirements under the Act and the rules under the Act. The number of burden hours may vary depending on, among other things, the complexity of the fund, the issues faced by the fund, and the number of series and classes of the fund. The estimated average burden hours are made solely for purposes of the Paperwork Reduction Act and are not derived from quantitative, comprehensive, or even representative survey or study of the burdens associated with our rules and forms.

The Commission staff estimates the average cost of preserving books and records required by rule 31a-2, to be approximately \$.000035 per \$1.00 of net assets per year.<sup>10</sup> As of December 31,

any medium allowed by this section. In the case of records retained on electronic storage media, the fund, or person that maintains and preserves records on its behalf, must establish and maintain procedures: (i) To maintain and preserve the records, so as to reasonably safeguard them from loss, alteration, or destruction; (ii) to limit access to the records to properly authorized personnel, the directors of the fund, and the Commission (including its examiners and other representatives); and (iii) to reasonably ensure that any reproduction of a non-electronic original record on electronic storage media is complete, true, and legible when retrieved.

<sup>9</sup> This estimate is based on the following calculation: 4,920 registered investment company's × 220 hours = 1,082,400 total hours.

<sup>10</sup> The staff estimated the annual cost of preserving the required books and records by identifying the annual costs for several funds and then relating this total cost to the average net assets of these funds during the year. The staff estimates

2006, our staff estimates total net assets of all funds at about \$10 trillion, and that compliance with rule 31a-2 costs the fund industry approximately \$350 million per year.<sup>11</sup> Our staff estimates, however, based on conversations with representatives of the fund industry, that funds would already spend half of this amount (\$175 million) to preserve these same books and records, as they are also necessary to prepare financial statements, meet various state reporting requirements, and prepare their annual federal and state income tax returns. Therefore, we estimate that the total annual cost burden for registered fund due to compliance with rule 31a-2 is \$175 million per year.

These estimates of average costs are made solely for the purposes of the Paperwork Reduction Act. The estimate is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

General comments regarding the above information should be directed to the following persons: (i) Desk officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or e-mail to: [David\\_Rostker@omb.eop.gov](mailto:David_Rostker@omb.eop.gov); and (ii) R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312, or send an e-mail to [PRA\\_Mailbox@sec.gov](mailto:PRA_Mailbox@sec.gov). Comments must be submitted to OMB within 30 days of this notice.

Dated: April 16, 2007.

**Florence E. Harmon,**  
*Deputy Secretary.*

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that the annual cost of preserving records is \$70,000 per fund; the funds queried in support of this analysis had an average asset base of approximately \$2 billion (70,000/2 billion = .000035).

<sup>11</sup> This estimate is based on the annual cost per dollar of net assets of the average fund as applied to the net assets of all funds (\$10 trillion × .000035 = \$350 million).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-55640; File No. SR-Amex-2007-04]

### Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Its Buy-In Rules

April 17, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on January 8, 2007, the American Stock Exchange LLC ("Amex") filed with the Securities and Exchange Commission ("Commission") the proposed rule change described in Items I, II, and III below, which items have been prepared primarily by Amex. Amex filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>2</sup> and Rule 19b-4(f)(6) thereunder<sup>3</sup> so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The purpose of the proposed rule change is to amend Amex Rules 759, 783, 784, and 789 and to adopt new Rule 798 to standardize Amex's buy-in rules.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Amex included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Amex has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.<sup>4</sup>

##### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Amex is amending its Rules 783, 784, and 789 and is adopting new Rule 798

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

<sup>4</sup> The Commission has modified the text of the summaries prepared by Amex.

to permit buyer executed buy-ins,<sup>5</sup> to reduce the waiting period to execute a buy-in from twenty-one (21) days to three (3) days, and to otherwise provide more standardized and consistent industry buy-in rules and procedures. Amex is also making conforming changes to Rules 759, 784, and 789. This proposal seeks to substantially mirror the recent New York Stock Exchange ("NYSE") amendments to its buy-in rules approved by the Commission, which were made mainly for the purpose of achieving industry uniformity.<sup>6</sup>

### Introduction

The Amex buy-in rules apply to transactions that are not subject to the rules of a qualified clearing agency, such as The Depository Trust Company ("DTC")<sup>7</sup> and the National Securities Clearing Corporation ("NSCC")<sup>8</sup>, including transactions processed in NSCC's Continuous Net Settlement service ("CNS")<sup>9</sup> that settle through them.<sup>10</sup> In the event that a buy-in is sent to the Amex floor for execution, then Amex buy-in rules apply.

However, under current Amex rules that place the responsibility for the actual execution of the buy-in on the defaulting member or member organization ("defaulting member" or "seller"), there are disincentives for the defaulting member to execute the buy-in. For example, the defaulting member could potentially manipulate the extent to which it has market exposure by timing its purchase of the necessary securities to benefit itself. Therefore, an initiating member or member

organization ("initiating member" or "buyer") may receive negative customer reaction if the customer learns that its trade has not been settled and that their securities are not available because a buy-in has not been executed in a timely manner by the defaulting member.

Other self-regulatory organizations ("SROs") have recognized this conflict of interests, and their buy-in rules assign responsibility accordingly by allowing the buyer to execute the buy-in. By allowing buyers to execute their own buy-ins, the defaulting members' conflicts of interest are avoided, and the process is expedited.

The Securities Industry Association ("SIA") Securities Operations Division Buy-In Committee ("Committee")<sup>11</sup> has expressed a strong preference that Amex consider amending its buy-in rules to eliminate its buy-in notice procedures and to change who executes the buy-in to the buyer from the seller. The purpose of the Committee's recommendation is to identify and to standardize various buy-in rules and procedures regarding the buy-in process related to non-CNS transactions and to help formulate uniformity among industry rules. The Committee requested that Amex conform its rules to those of the other exchanges that allow the initiating member to execute buy-ins to close out a contract.

### Current Requirements

Amex Rule 784 sets forth the "mandatory closing of fails" process by which a buyer is required to close-out a contract that has not been completed by the seller for a period of twenty-one (21) business days. A mandatory closing of fails requires that a notice of intention be delivered in quadruplicate and on the twenty-first (21st) business day after the original due date of the contract by the initiating member to the seller. The member organization receiving the notice of intention must indicate its position with respect to the resolution of the failed trade (*e.g.*, doesn't know the trade, knows the trade but cannot deliver, will deliver) and return the notice of intention to the initiating member no later than three business days after the notice was sent. If the notice of intention is not returned when due or is returned with the indication that the contract is not known, the initiating member shall itself close the contract by buying or selling the securities involved through its own floor representative. If the notice of intention is returned when due with

an indication that the contract is known but that delivery cannot be made and if the contract is one which has been designated as acceptable for clearance as a fail item by a registered clearing agency of which both parties are clearing members, it shall be submitted for clearance by the defaulting member. If the notice of intention is returned when due with an indication that the contract is known but that delivery cannot be made and the contract is one which has not been designated as acceptable for clearance as a fail item by a registered clearing agency of which both parties are clearing members, the initiating member shall close the contract according to the procedures in Amex Rule 783. Therefore, the rule currently provides that more than three weeks may lapse before the contract is closed.

Amex Rule 783 sets forth a permissive procedure by which an initiating member may close-out a contract that has not been executed by the defaulting member. The initiating member must provide notice of its intention to make a closing. Pursuant to Amex Rule 783, Amex determines the times for the delivery of such notices of intention to close and orders to close and the time for the closing of contracts. If the times within which securities may be delivered are extended or shortened, the time limits established by Amex may be similarly extended or shortened.<sup>12</sup> Once the initiating member sends the notice to the defaulting member, the defaulting member shall be given a copy of the order to close for execution on that day. If the order is not executed, the defaulting member shall return the original order within fifteen minutes of the close of trading indicating why it cannot be executed, and the buy-in desk will deliver a copy of the floor report to the initiating member. The initiating member may then close the contract and must notify the defaulting party with respect to any money differences that it will claim as damages. If the order is executed by the defaulting member, it shall furnish a copy of the order to close and a copy of the floor report to the buy-in desk on the floor.

Amex Rule 789 requires an initiating member to accept physical delivery of some or all of the securities that are the

<sup>12</sup> Contracts made for cash within one and one-half hour before the close of trading are given different treatment with respect to timing. When a contract made for cash within one and one-half hour before the close of trading is to be closed on the same day, the time of the transaction shall be stated on the order and notice, which shall be delivered within thirty minutes after the time of the transaction, and the contract shall not be closed until thirty-five minutes after the time of the transaction.

<sup>5</sup> A "buy-in" is a transaction between broker-dealers where because the securities are not delivered on time by the broker-dealer on the sell-side, the broker-dealer on the buy-side purchases the securities from another source.

<sup>6</sup> Securities Exchange Act Release No. 52842 (November 28, 2005), 70 FR 72321 (December 2, 2005) [File No. SR-NYSE-2005-50].

<sup>7</sup> DTC is a member of the U.S. Federal Reserve System, a limited-purpose trust company under New York State banking law, and a clearing agency registered with the Commission.

<sup>8</sup> NSCC is a central counterparty that provides centralized clearance, settlement, and information services for virtually all broker-to-broker equity, corporate bond and municipal bond, exchange-traded funds, and unit investment trust trades in the U.S. NSCC provides clearing and settlement, risk management, central counterparty services, and a guarantee of completion for trades. NSCC also nets trades and payments among its members thereby reducing the volume of securities and payments that need to be exchanged each day.

<sup>9</sup> CNS is an automated accounting system that centralizes and nets the settlement of compared security transactions in order to maintain an orderly flow of security and money balances.

<sup>10</sup> See Securities Exchange Act Release No. 53528 (March 21, 2006), 71 FR 15506 (March 28, 2006) [File No. SR-NSCC-2005-15] (approving NSCC's CNS buy-in rules).

<sup>11</sup> The Committee is made up of representatives from a broad cross-section of broker-dealers and industry groups.

subject of a buy-in thereby halting the buy-in execution for those securities if the defaulting member tenders the securities prior to the buy-in. The defaulting member must promptly tender the securities, and if they are not promptly delivered, such member or member organization is liable for any resulting damages.

#### *Proposal*

Amex is amending Rule 784 to allow the member or member organization failing to receive the securities to execute the buy-in and to reduce the waiting period to execute a buy-in from twenty-one (21) days to three (3) days after delivery on the contract was due. The elimination of Commentary .01 through .06 to Rule 784 is intended to facilitate the amendments to the buy-in procedures. The amendments to these procedures are largely proposed in the text of Rule 784. Amex believes that once the responsibility is shifted to the buy-side of the transaction, the buy-in process will work more efficiently.

The amendments to Rule 784 provide that the initiating member may close a contract no sooner than three business days after the original due date for delivery ("Effective Date"). The initiating member must deliver a written notice to the defaulting member at least two days before the proposed buy-in. After receipt of the buy-in notice, the defaulting member must then send a signed, written response to the initiating member stating its position. If the response is not received by 5 p.m. ET on the day of receipt of the buy-in notice or it is returned with an indication that the contract is not known or that it is known but that delivery cannot be made, the buy-in may be executed on the Effective Date. The initiating member shall be required to accept any portion of the securities called for by the contract from the defaulting member that the defaulting member submits prior to the execution of the buy-in, but the initiating member shall not be required to accept any securities from the defaulting member if the buy-in has already been executed and if the buy-in could not have been reasonably cancelled by the initiating member. Once the buy-in has been executed, the initiating member shall notify the defaulting member confirming the purchase along with a bill or payment.

Amex is also eliminating the requirements for quadruplicate paper notices and will permit electronic notices, including notices from a computerized network facility, or the electronic functionality of a Qualified Clearing Agency, such as DTC and

NSCC. The amendments also change the existing time deadlines for delivering notices, securities, and executions and adopt those used by other self-regulatory organizations.

Amex is also adopting new Commentary .01 to Rule 784 to help ensure that members and member organizations comply with the requirements of Regulation SHO.<sup>13</sup> Members and member organizations are obligated to comply with the marking, locate, and delivery requirements of Regulation SHO for short sales of equity securities. As a result, members and member organizations should have policies and procedures in place to comply with these requirements, including close-out procedures.<sup>14</sup>

Amex is rescinding Rule 783 and has incorporated the permissive buy-in procedures of Rule 783 into Rule 784. Amex is also amending Rule 789 to conform it to this proposal to permit buyer executed buy-ins and to create a Rule 798 to clarify the requirements and time frames upon which a defaulting member may deliver against a buy-in notice. Finally, Amex is making technical amendments to Rules 759, 784 and 789 to better coordinate the rules with industry practice.

Amex believes that the revisions to its buy-in rules will help standardize Amex's procedure and practice by allowing members and member organizations to clean-up fails and efficiently deliver Amex-listed securities. Amex believes that the proposed rule change is consistent with Section 6 of the Act in general and furthers the objectives of Section 6(b)(5) in particular in that it is 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 perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. By amending the Amex buy-in rules to permit buyers to execute buy-ins, firms

are expected to find it easier to execute buy-ins of Amex-listed securities. In addition, the amendments seek to remove inefficient requirements and amend time deadlines to conform to current industry practice.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

Amex does not believe that the proposed rule change will impose any burden on competition.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change (1) Does not significantly affect the protection of investors or the public interest, (2) does not impose any significant burden on competition, and (3) does not become operative for 30 days from the date of filing or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>15</sup> and Rule 19b-4(f)(6) thereunder.<sup>16</sup> As required by Rule 19b-4(f)(6)(iii), Amex provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to filing the proposal with the Commission or within such shorter period as designated by the Commission.

At any time within sixty (60) days of the filing of the proposed rule change, the Commission could have summarily abrogated such rule change if it appeared to the Commission that such action was necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

<sup>13</sup> 17 CFR 242.200 through 242.203. Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (August 6, 2004), [File No. S7-23-03] (adoption of Regulation SHO).

<sup>14</sup> At the same time the changes noted above were being developed, the SEC implemented Regulation SHO, Regulation of Short Sales, which shares a similar purpose, the reduction of fails to deliver, with the buy-in rules. Rule 203 to Regulation SHO imposes locate and borrowing/ delivery requirements on broker-dealers that sell equity securities, including close-out requirements on certain open fail to deliver positions.

<sup>15</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>16</sup> 17 CFR 240.19b-4(f)(6).

*Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>) or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Amex-2007-04 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-Amex-2007-04. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549. The text of the proposed rule change is available at Amex, the Commission's Public Reference Room, and [http://www.amex.com/atamex/ruleFilings/at\\_rulefilings.html](http://www.amex.com/atamex/ruleFilings/at_rulefilings.html). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Amex-2007-04 and should be submitted on or before May 15, 2007.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>17</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-55642; File No. SR-NASDAQ-2006-032]

**Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendments No. 1, 2, and 3 Thereto, To Revise The Nasdaq Capital Market Listing Requirements**

April 18, 2007.

**I. Introduction**

On August 23, 2006, The NASDAQ Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to revise certain listing requirements applicable to the Nasdaq Capital Market ("NCM"). On August 28, 2006, Nasdaq filed Amendment No. 1 ("Amendment No. 1") to the proposed rule change.<sup>3</sup> The proposed rule change, as amended by Amendment No. 1, was published for comment in the **Federal Register** on September 5, 2006.<sup>4</sup> The Commission received no comments on the proposal, as amended by Amendment No. 1. On December 4, 2006, Nasdaq filed Amendment No. 2 ("Amendment No. 2") to the proposed rule change.<sup>5</sup> On February 15, 2007, Nasdaq filed Amendment No. 3 ("Amendment No. 3") to the proposed rule change.<sup>6</sup> This order provides notice of Amendment No. 3 and approves the proposed rule

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b 4.

<sup>3</sup> In Amendment No. 1, Nasdaq made clarifying changes to the rule text in the NCM convertible debt listing standards. Nasdaq also made clarifying changes to the purpose section regarding convertible debt, rights and warrants, and non-Canadian foreign securities and American Depository Receipts.

<sup>4</sup> See Securities Exchange Act Release No. 54378 (August 28, 2006), 71 FR 52351 (September 5, 2006) ("Notice").

<sup>5</sup> In Amendment No. 2, Nasdaq made minor clarifying changes to the purpose section to explain the application of the new NCM listing standards as they relate to the grace period for non-compliance with the bid requirement pursuant to Nasdaq Rules 4310(c)(8)(D), 4320(e)(2)(E)(ii), and 4450(i). This is a technical amendment and is not subject to notice and comment.

<sup>6</sup> In Amendment No. 3, Nasdaq amended its initial and continuing listing standards for convertible debt to require that current last sale information be available in the United States for the underlying security into which a convertible debt issue is convertible.

change on an accelerated basis, as amended.

**II. Discussion**

Nasdaq proposes to increase the initial and continued listing requirements for companies seeking to list, or that are already listed, on the NCM, as set forth in Nasdaq Rule 4310 (for domestic and Canadian securities) and Nasdaq Rule 4320 (for non-Canadian foreign securities and American Depository Receipts).<sup>7</sup>

The Commission finds that these proposed changes are consistent with Section 6(b) of the Act,<sup>8</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>9</sup> In particular, the Commission finds that these proposed rule changes are consistent with Section 6(b)(5) of the Act,<sup>10</sup> which requires, among other things, that the Exchange's rules be designed to promote just and equitable principles of trade, 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.

The development and enforcement of adequate standards governing the initial listing and maintenance of listing of securities is an activity of critical importance to financial markets and the investing public. Listing standards serve as a means for a marketplace to screen issuers and to provide listed status only to bona fide companies with sufficient float, investor base, and trading interest to maintain fair and orderly markets. Once an issuer has been approved for initial listing, the maintenance criteria allow a marketplace to monitor the status and trading characteristics of that issuer to ensure that it continues to meet standards for market depth and liquidity.

The changes to the continued listing requirements will be effective 30 days after the proposed rule change is approved by the Commission. Nasdaq represents that as of February 9, 2006, it is not aware of any issuer currently listing on NCM that would fail to meet the new continued listing requirements.<sup>11</sup> In the case of

<sup>7</sup> For a full description of the proposed rule change, see Notice, *supra* note 4 and Amendments No. 2 and 3, *supra* notes 5 and 6.

<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> In approving this proposal, as amended, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

<sup>11</sup> See letter from Arnold Golub, Associate General Counsel, Nasdaq, to Elizabeth K. King, Associate Director, Division ("Division"),

<sup>17</sup> 17 CFR 200.30-3(a)(12).