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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230 and 240

[Release Nos. 33-10842; 34-89891; File No. S7-14-19]

RIN 3235–AM54

Publication or Submission of Quotations Without Specified Information

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (the "SEC" or the "Commission") is adopting amendments to Rule 15c2-11 (the "Rule") under the Securities Exchange Act of 1934 (the "Exchange Act"), which governs the publication of quotations for securities in a quotation medium other than a national securities exchange, i.e., over-the-counter ("OTC") securities. The amendments are designed to modernize the Rule, promote investor protection, and curb incidents of fraud and manipulation by, among other things: requiring information about issuers to be current and publicly available for broker-dealers to quote their securities in the OTC market; narrowing reliance on certain exceptions from the Rule's requirements, including the piggyback exception; adding new exceptions for the quotations of securities that may be less susceptible to fraud and manipulation; removing obsolete provisions; adding new definitions; and making technical amendments.

DATES: *Effective date*: [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. *Compliance date*: The compliance dates are discussed in Part II.P of this release.

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SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to Rule 15c2-11 under the Exchange Act [15 U.S.C. 78a *et seq*.] and a conforming amendment to 17 CFR 230.144(c)(2) under the Securities Act of 1933 (the "Securities Act") [15 U.S.C. 77a *et seq.*].

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I. Overview

The Commission is adopting amendments to Rule 15c2-11, which sets out certain requirements for a broker-dealer seeking to initiate (or resume) quotations for securities in the OTC market.[1] The amendments are designed to modernize the Rule and to enhance investor

[1] For purposes of this release, Rule 15c2-11, as amended, is referred to as the "amended Rule." A "quotation" is defined as any bid or offer at a specified price with respect to a security, or any indication of interest by a broker-dealer in receiving bids or offers from others for a security, or any indication by a broker-dealer that wishes to advertise its general interest in buying or selling a particular security. Amended Rule 15c2-11(e)(7). A "quotation medium" is defined as any "interdealer quotation system" or any publication or electronic communications network or other device that is used by broker-dealers to make known to others their interest in transactions in any security, including offers to buy or sell at a stated price or otherwise, or invitations of offers to buy or sell. Amended Rule

protection by requiring that current and publicly available issuer information be accessible to investors. Specifically, the amendments provide greater transparency to the investing public by requiring information about the issuer and its security[2] to be current and publicly available before a broker-dealer can begin quoting that security.

Securities that trade in the OTC market are primarily owned by retail investors.[3] Many issuers of quoted OTC securities publicly disclose current information about themselves.[4] However, in other cases, there is no or limited current public information available about certain issuers of quoted OTC securities to allow investors or other market participants to make informed investment decisions. A lack of current and public information about these companies disadvantages retail investors because it may prevent them from estimating return probabilities and generating positive returns in OTC stocks.[5] It can contribute to incidents of fraud and manipulation by preventing retail investors from being able to counteract misinformation.[6] A

15c2-11(e)(8). An "interdealer quotation system" is defined as any system of general circulation to brokers or dealers that regularly disseminates quotations of identified broker-dealers. Amended Rule 15c2-11(e)(3). A "national securities exchange" is an exchange, as defined under Section 3(a)(1) of the Exchange Act and Rule 3b-16 thereunder, that is registered with the Commission under Sections 5 and 6 of the Exchange Act. The amendments adopted do not change the definitions of the terms "quotation," "quotation medium," and "interdealer quotation system" under the Rule.

[2] This information is listed in paragraph (a) of the former Rule and in paragraph (b) of the proposed Rule and amended Rule. For purposes of this release, the documents and information specified in paragraph (b) of the proposed Rule and amended Rule are referred to as "paragraph (b) information."

[3] *See* Andrew Ang *et al.*, *Asset Pricing in the Dark: The Cross-Section of OTC Stocks*, 26 Rev. Fin. Studs. 2985–3028 (2013).

[4] *See infra* Part VI.B.2.b, Table 3 (describing how, of the 9,895 companies that issue securities that are quoted in the OTC market, 6,886 of those issuers have public information available).

[5] *See, e.g.*, Joshua T. White, Outcomes of Investing in OTC Stocks (Dec. 16, 2016), https://www.sec.gov/files/White_OutcomesOTCinvesting.pdf.

[6] *See* Rajesh Aggarwal & Guojun Wu, *Stock Market Manipulations*, 79 J. Bus. 1915 (2006); Thomas Renault, *Market Manipulation and Suspicious Stock Recommendations on Social Media*, Universite Paris I Pantheon-Sorbonne—Centre d'Economie de la Sorbonne (Dec 20, 2017), https://ssrn.com/abstract=3010850; *infra* Part VI.C.1.a.

majority of the Commission enforcement cases involving allegations of fraudulent behavior in the OTC securities market has involved delinquent filings, which result in a lack of current, accurate, or adequate information about an issuer.[7] As broker-dealers play an integral role in facilitating investor access to OTC securities and serve an important gatekeeper function, Rule 15c2-11 is designed to prevent fraud and manipulation by requiring that broker-dealers review key, basic information about an issuer before initiating a quoted market in an OTC security. In practice, however, certain of the Rule's outdated exceptions often have resulted in a quoted market for the securities of issuers for which there is no current and publicly available information for analysis by market participants, including broker-dealers and retail investors. In some cases, a quoted market may continue for the securities of issuers that no longer exist or have ceased operations.[8] Providing greater transparency of OTC issuers to retail investors so that they can make better-informed investment decisions and counteract misinformation promotes the Commission's important mission of protecting investors.[9]

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[7] For instance, one study looked at a broad sample of litigated securities cases between January 2005 and June 2011 and identified 1,880 cases involving OTC securities and 1,157 cases involving securities listed on national securities exchanges in the United States. Of the OTC securities cases, the majority—1,148 cases, or 61 percent—were related to delinquent filings, 151 (eight percent) were related to a pump-and-dump scheme, 159 (eight percent) were related to financial fraud, 12 (one percent) were related to insider trading, and 212 (11 percent) were related to other fraudulent misrepresentation or disclosure. *See* Douglas J. Cumming & Sofia Johan, *Listing Standards and Fraud*, 34 Managerial & Decision Econ. 451–70 (2013) ("We stress the fact that litigated cases of fraud are not necessarily representative of actual cases of fraud. The difference between actual cases and litigated cases depend on rule setting (listing standards and exchange trading rules), surveillance (the people and technology available to detect fraud), and the quality of enforcement (the process and expenditures to enable cases to go forward and the effectiveness of courts)."); *see also infra* Part VI.B.2.c.

[8] *See Publication or Submission of Quotations Without Specified Information*, Exchange Act Release No. 87115, at 7–8 (Sept. 25, 2019), 84 FR 58206, 58207 (Oct. 30, 2019) ("Proposing Release" or the "proposal").

[9] *See* Proposing Release at 58210–11 (discussing key regulatory approaches that the Commission has implemented to combat retail investor fraud).

Further, the OTC market has changed significantly since the Rule was initially adopted in 1971[10] (approximately 49 years ago) and last substantively amended in 1991 (over 29 years ago).[11] For example, use of the Internet is much more widespread today than it was when the Rule was last substantively amended. In 1991, it was significantly more difficult to obtain information about issuers of OTC securities and to continuously update and widely disseminate quotations for OTC securities. The Internet and other forms of electronic communication and innovation have made it far less costly and burdensome to access, update, and disseminate information on a global scale.

Responding to these developments, and as part of the Commission's overall efforts to protect retail investors from fraud and manipulation,[12] the Commission is adopting amendments that are designed to modernize the Rule to: (1) promote investor protection by providing greater transparency to the investing public regarding issuers of OTC securities, (2) facilitate capital formation for issuers for which information is current and publicly available, and (3) reduce unnecessary burdens on broker-dealers and enhance the efficiency of the OTC market.

The amended Rule continues to require a broker-dealer to obtain and review basic information about an issuer of an OTC security before initiating or resuming a quoted market in the issuer's security.[13] The amended Rule also continues to require the broker-dealer to have a reasonable basis for believing that the information about the issuer, when considered along with

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[10] *See Initiation or Resumption of Quotations by a Broker or Dealer Who Lacks Certain Information*, Exchange Act Release No. 9310 (Sept. 13, 1971), 36 FR 18641 (Sept. 18, 1971).

[11] *See Initiation or Resumption of Quotations Without Specified Information*, Exchange Act Release No. 29094 (Apr. 17, 1991), 56 FR 19148 (Apr. 25, 1991) ("1991 Adopting Release").

[12] *See supra* note 9.

[13] For purposes of this release, the term "information review requirement" refers to the requirement for broker-dealers and qualified interdealer quotation systems to obtain and review certain issuer information before a broker-dealer publishes a quotation for a security in the absence of an exception.

any supplemental information, is accurate and from a reliable source. In addition to broker-dealers, under the amended Rule, qualified interdealer quotation systems (each, a "qualified IDQS")[14] are permitted to comply with the information review requirement, and broker-dealers may rely upon a qualified IDQS's publicly available determination that it has complied with the information review requirement to publish or submit a quotation to initiate or resume a quoted market in an issuer's security.

The information review requirement in the amended Rule includes additional provisions that are designed to enhance transparency of issuer information and help to foster the integrity of the OTC market. Importantly, the amended Rule requires that the documents and information that a broker-dealer or qualified IDQS reviews generally must be current and publicly available. The amended Rule specifies under paragraph (b) the documents and information that must be reviewed with respect to issuers, including a new provision to recognize companies that issue securities in reliance on Regulation Crowdfunding ("crowdfunding issuers"), and expands the list of documents and information that must be reviewed for certain other types of issuers. In addition, the amended Rule requires that a broker-dealer or qualified IDQS identify whether the quotation is published on behalf of the issuer or a company insider and also expands the list of market participants that must review supplemental information to comply with the information review requirement to include qualified IDQSs.

The amended Rule contains several exceptions to the information review requirement. The amended Rule continues to provide an exception that permits broker-dealers to publish a quotation for unsolicited customer orders without complying with the information review

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[14] See *infra* Part II.J.4 for a discussion of the proposed definition of the term "qualified interdealer quotation system" and how that term is defined in the amended Rule.

requirement.[15] However, the amendments to the Rule prohibit broker-dealers from relying on this exception for an affiliate of the issuer or a company insider, unless information about the issuer is current and publicly available. This exception, as amended, permits a broker-dealer to rely on a representation from the customer's broker that such customer is not an affiliate of the issuer or a company insider.

The amended Rule also adds three new exceptions. First, the amended Rule adds an exception for highly liquid securities of well-capitalized issuers if the security meets a multi-prong test involving the security's worldwide average daily trading volume value and its issuer's total assets and shareholders' equity.[16] Second, the amended Rule adds an underwritten offerings exception for quotations for a security by a broker-dealer that is named as an underwriter in the registration statement or offering statement for such security.[17] Finally, the amended Rule adds an exception to permit broker-dealers to rely on publicly available determinations by a qualified IDQS or a registered national securities association that the requirements of certain other exceptions are met.[18] The qualified IDQS or registered national securities association must establish, maintain, and enforce reasonably designed written policies and procedures with respect to making the determinations.

In addition, the amended Rule modifies the "piggyback" exception, which allows a broker-dealer to rely on the quotations of another broker-dealer that initially complied with the

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[15] *See* Amended Rule 15c2-11(f)(2).

[16] *See* Amended Rule 15c2-11(f)(5).

[17] *See* Amended Rule 15c2-11(f)(6).

[18] These exceptions are the exchange-traded security exception, the municipal security exception, the "piggyback" exception, and the exception for the highly liquid securities of well-capitalized issuers. *See* Amended Rule 15c2-11(f)(7).

information review requirement.[19] The amended Rule permits broker-dealers to rely on the piggyback exception based on at least a one-way priced quotation, so long as there are no more than four business days in succession without a quotation,[20] and prohibits reliance on the exception if the issuer of the security is a shell company after a certain prescribed period or was the subject of a trading suspension order issued by the Commission until 60 calendar days after the expiration of such order.[21] The exception also now requires issuer information to be, depending on the regulatory status of the issuer, one of the following: (1) current and publicly available, as defined by the amended Rule; (2) timely filed (i.e., filed by the prescribed due date for a report or statement as required by an Exchange Act or Securities Act reporting obligation); or (3) filed within 180 calendar days from a specified period. The exception also now includes a grace period that permits broker-dealers to continue quoting the securities for a limited period of up to 15 calendar days once a qualified IDQS or register national securities association makes a publicly available determination that issuer information is no longer current and publicly available, timely filed, or filed within 180 calendar days from the applicable specified time frame. The piggyback exception no longer requires that there be quotations on each of at least 12 days within the previous 30 calendar days to establish piggyback eligibility.

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[19] *See* Amended Rule 15c2-11(f)(3). Once the requirements of this exception are met, a broker-dealer can "piggyback" on either its own or other broker-dealers' previously published quotations.

[20] *See* Amended Rule 15c2-11(f)(3)(i)(A). The piggyback exception under the amended Rule no longer includes provisions contained in the piggyback exception under the former Rule for: (1) a broker-dealer quotation in an IDQS that does not identify the quotation as an unsolicited quotation, which provision permitted broker-dealers to publish or submit quotations in reliance on the piggyback exception in an IDQS that did not make known to others unsolicited quotations; and (2) self-piggybacking by market makers, which provision permitted broker-dealers to publish or submit quotations in reliance on their own quotations if all of the other requirements of the piggyback exception were met.

[21] *See* Amended Rule 15c2-11(f)(3)(i)(B).

Generally, under the amended Rule, broker-dealers, qualified IDQSs, and a national securities association must preserve the applicable documents and information they reviewed, including to demonstrate reliance on an exception and in relation to publicly available determinations, for at least three years, the first two years in an easily accessible place.[22] These entities are not required to preserve documents and information available on the Commission's Electronic Data Gathering, Analysis, and Retrieval System ("EDGAR").[23] A broker-dealer that publishes a quotation in reliance on a publicly available determination of a qualified IDQS or a registered national securities association need only preserve a record of the name of such qualified IDQS or registered national securities association.[24]

The amended Rule also adds definitions for the terms "company insider," "current," "publicly available," "qualified interdealer quotation system," and "shell company."[25] Finally, the Commission is providing guidance regarding source reliability and the information review requirement, with modifications to incorporate and update the red flags guidance provided in 1999.[26]

II. Discussion of the Final Amendments

In general, the final amendments: (1) provide greater transparency to retail investors and other market participants regarding issuers of quoted OTC securities, (2) limit the use of certain

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[22] The requirement for broker-dealers and other entities to keep certain records that support their compliance with the information review requirement or reliance on an exception, as applicable, is referred to throughout this release as the "recordkeeping requirement."

[23] *See* Amended Rule 15c2-11(d)(1), (2).

[24] *See* Amended Rule 15c2-11(d)(2)(ii).

[25] *See* Amended Rule 15c2-11(e).

[26] *See Publication or Submission of Quotations Without Specified Information*, Exchange Act Release No. 41110 (Feb. 25, 1999), 64 FR 11126 (Mar. 8, 1999) ("1999 Reproposing Release").

exceptions under the Rule to better protect retail investors from fraud and manipulation, and (3) add new exceptions to reduce unnecessary burdens on broker-dealers and to enhance the efficiency of the OTC market. As discussed in greater detail below, commenters supported many aspects of the proposal. For example, commenters stated that the proposal would help to modernize the Rule, better protect investors by facilitating increased availability of issuer information for OTC securities and their issuers,[27] and make the OTC market more efficient.[28] Some commenters supported the amendments as proposed.[29] Many commenters generally supported amending the Rule to better protect investors but suggested certain changes to the proposal,[30] including, for example, to permit broker-dealers to publish quotations for securities

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[27] Letter from Marcia E. Asquith, Executive Vice President, Board and External Relations, Financial Industry Regulatory Authority, Inc., to Vanessa Countryman, Sec'y, SEC (Feb. 11, 2020) ("FINRA Letter"); Letter from Ted Haberfield, Chairman & President, MZHCI, LLC, to SEC (Sept. 2, 2020) ("MZ Letter"); Letter from John B. Lowy, P.C., to SEC (July 26, 2020) ("Lowy Letter"); *see* Letter from Gerald Adler, Adler Silverberg PLLC, to SEC (Mar. 3, 2020) ("Adler Silverberg Letter"); Sherwood E. Neiss, Co-founder, GUARDD and Principal, Crowdfund Capital Advisors, Douglass S. Ellenoff, Esq., Co-founder, GUARDD and Founding Partner, Ellenoff Grossman & Schole LLP, James P. Dowd, CPA, CFA, Co-founder GUARDD and CEO North Capital Private Securities Corporation, GUARDD, Inc., to Div. Trading & Mkts., SEC (Jan. 13, 2020) ("GUARDD Letter"); Letter from Aseel M. Rabie, Managing Director and Associate General Counsel, and Bernard V. Canepa, Vice President and Assistant General Counsel, Securities Industry and Financial Markets Association, to Vanessa Countryman, Sec'y, SEC (Dec. 23, 2019) ("SIFMA Letter"); Letter from James Toes, President and CEO, and Chris Halverson, Chairman of the Board, Security Traders Association, to Vanessa Countryman, Sec'y, SEC (Jan. 23, 2020) ("STA Letter"); Letter from Robert Verderese, Head of Cash Trading, Virtu Financial, to Vanessa Countryman, Sec'y, SEC (Feb. 7, 2020) ("Virtu Letter") (stating that stocks that meet the definition of a penny stock and are not providing current information would not be eligible for quoting under the Rule); Letter from Andrew F. Viles, U.S. General Counsel, Canaccord Genuity LLC, to Vanessa Countryman, Sec'y, SEC (Mar. 20, 2020) ("Canaccord Letter").

[28] Letter from William F. Galvin, Sec'y of the Commonwealth, Commonwealth of Massachusetts, to Vanessa Countryman, Sec'y, SEC (Dec. 30, 2019) ("Massachusetts Letter"); Letter from Sherry J. Sandler, Global OTC, to Vanessa Countryman, Sec'y, SEC (Mar. 3, 2020) ("Global OTC Letter"); *see* MZ Letter.

[29] Steven Barber (Dec. 30, 2019); Barry Gleicher (Nov. 7, 2019); Massachusetts Letter.

[30] *See, e.g.*, R. Cromwell Coulson, CEO, OTC Mkts. Grp. Inc. (May 6, 2020) (citing R. Cromwell Coulson, *Exploring the Investor Impact of an SEC Rule Proposal*, Traders Magazine (May 1, 2020), *available at*

of issuers whose paragraph (b) information is current and publicly available on an annual basis, as opposed to on a six-month basis, to maintain a quoted market in such issuers' securities.[31]

Other commenters, however, believed that the proposal would not be effective in deterring fraud and manipulation, including pump-and-dump schemes,[32] and stated that the proposal was too broad and overly expansive.[33] For example, one commenter stated its belief that the proposal would not effectively deter fraud but would negatively affect liquidity in the OTC market, which, according to this commenter, ultimately would impair capital formation.[34]

As discussed further below, the Commission agrees that there may be a negative impact on liquidity for dark issuers (i.e., issuers that do not make their information publicly available) as a result of broker-dealers not being able to continuously quote their securities and understands that existing shareholders of non-reporting issuers may be negatively impacted from the loss of a

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https://www.tradersmagazine.com/departments/regulation/exploring-the-investor-impact-of-an-sec-rule-proposal/) ("Coulson Comment"); FINRA Letter; Global OTC Letter; Letter from Peter Goldstein, Managing Member, Exchange Listing LLC, to Vanessa Countryman, Sec'y, SEC (May 8, 2020) ("Exchange Listing Letter"); Letter from Sara Hanks, CEO, CrowdCheck, Inc., to Vanessa Countryman, Sec'y, SEC (May 22, 2020) ("CrowdCheck Letter"); Letter from Joseph M. Lucosky, Managing Partner, Lawrence Metelitsa, Partner, and Scot E. Linsky, Counsel, Lucosky Brookman LLP, to SEC (May 29, 2020) ("Lucosky Brookman Letter"); Letter from David Menn, CEO, MCAP LLC, to Vanessa Countryman, Sec'y, SEC (May 15, 2020) ("MCAP Letter"); Richard Revelins, Executive Director, Peregrine Corporate Limited (July 10, 2020) ("Peregrine Comment"); Letter from Robin Sosnow, Managing Partner, & Manuel Pesendorfer, Attorney, Sosnow & Associates PLLC, to Vanessa Countryman, Sec'y, SEC (May 14, 2020) ("Sosnow & Associates Letter"); SIFMA Letter; STA Letter; Letter from Louis Taubman, Partner, Hunter Taubman Fischer & Li LLC, to Vanessa Countryman, Sec'y, SEC (May 28, 2020) ("HTFL Letter"); Virtu Letter.

[31] *See, e.g.*, Letter from Stephen M. Brophy, President, Aztec Land and Cattle Company, Limited, to SEC (Dec. 27, 2019) ("Aztec Letter"); Brett Dorendorf (Nov. 23, 2019); Al Gonzalez, President, Beacon Redevelopment Industrial Corp. (Dec. 8, 2019) ("Beacon Redevelopment Letter"); Michael Hess (Sept. 27, 2019); Doug Mohn (Nov. 8, 2019); Ariel Ozick (Dec. 30, 2019); Robert E. Schermer, Jr. (Dec. 20, 2019); Tom H. Sleeter, Chief Investment Officer, Total Clarity Wealth Management, Inc. ("Total Clarity Comment"); Letter from David Waters, President, Alluvial Capital Management, LLC (Oct. 9, 2019) ("Alluvial Letter").

[32] Laura Coffman (Nov. 7, 2019); Alexandra Elliott (Oct. 10, 2019); Christian Gabis (Nov. 26, 2019); Letter from Ari Rubenstein, Co-Founder and Chief Executive Officer, Global Trading Systems, LLC, to Vanessa Countryman, Sec'y, SEC (Feb. 26, 2020) ("GTS Letter"); Reid McKenzie (Oct. 31, 2019); Joshua Marino (Oct. 4, 2019); Letter from James E. Mitchell, General Partner, Mitchell Partners, L.P., to Vanessa Countryman, Sec'y, SEC (Oct. 9, 2019) ("Mitchell Partners Letter 1"); Letter from Erik S. Nelson, President, Coral Capital Partners, Inc., to Vanessa Countryman, Sec'y, SEC (Dec. 30, 2019) ("Coral Capital Letter"); Virtu Letter; *see* Christopher J. DiIorio (Feb. 4, 2020).

quoted market for such securities, even if the securities migrate to the grey market.[35] The Commission, however, believes that the amendments should incentivize issuers to make their information current and publicly available to allow broker-dealers to continuously quote their securities.[36] As discussed further below, the Commission believes the amendments will enhance transparency overall, which will facilitate price discovery, provide investors with information that will allow them to make better-informed investment decisions and help counteract misinformation about the issuers of such securities that can contribute to incidents of fraud and manipulation.[37] The Commission further believes that this requirement, in combination with the addition of new, targeted exceptions, will enhance the efficiency of the OTC market.[38]

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[33] Coral Capital Letter; Ron Lefton (Nov. 11, 2019); Letter from Jon Norberg, to Chairman Clayton (Nov. 19, 2019) ("Norberg Letter"); Debby Valentijn (Dec. 21, 2020). Another commenter highlighted that, because there are many different types of companies in the OTC market, the proposed regulatory solutions are not always effective. Mitchell Partners Letter 1; *see* John Gardiner, President and CEO, Taranis Resources, Inc. (Mar. 4, 2020) ("Taranis Comment"); GTS Letter.

[34] Coral Capital Letter.

[35] The Commission, however, believes that the potential for such harm would be limited by the ability of broker-dealers to rely on exceptions to publish quotations, including the unsolicited quotation exception, and the ability of existing shareholders to continue to trade their securities. *See infra* note 216 and accompanying text.

The Commission does not expect the amended Rule to affect the liquidity and pricing of securities in the entire OTC market, as this commenter stated. A delinquent reporting issuer's security could experience a discount in price resulting from the risk that the issuer may not file its required report within 180 days from the end of a specified period. In such case, as discussed below in Part II.D.1, broker-dealers would not be able to rely on the piggyback exception to publish or submit quotations for such issuer's security if its paragraph (b) information were not "current" and "publicly available." This scenario involving a particular subset of OTC securities is not expected to affect the liquidity and pricing of all quoted securities in the OTC market because individual securities in the OTC market generally are not included in a market index or benchmark that would be affected by any one security's liquidity or pricing. Further, to the extent an OTC security is included in an index or benchmark, such an index or benchmark would require that issuer information be current and publicly available. *See, e.g.*, *OTC Markets Indices*, OTC Mkts. Grp. Inc., https://www.otcmarkets.com/market-activity/indices (last visited Aug. 31, 2020).

Other commenters stated that additional regulation would make it more expensive to trade OTC securities.[39] The Commission believes, as discussed below, that the amended Rule contains provisions that help mitigate costs associated with quoting OTC securities (e.g., the ability for a broker-dealer to rely on publicly available determinations of a qualified IDQS or a registered national securities association, new exceptions to broker-dealers' compliance with the information review requirement, and flexibility to make current information about an issuer publicly available on any of several different websites).

Some commenters stated that the Rule should be left as is.[40] Specifically, some commenters stated that the amendments are unnecessary because, according to these commenters, investors are aware of the risks when they buy OTC securities,[41] other Commission rules and regulations have superseded the original purpose of Rule 15c2-11,[42] and state law

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[36] *See infra* Part VI.C.1.a.

[37] Several academic studies have found that higher levels of disclosure are associated with higher levels of liquidity in the OTC markets. *See infra* Part VI.C.1.

[38] *See infra* Part VI.C.1.a, c.

[39] Frank Danna, III (Nov. 10, 2019); James Duade (Dec. 26, 2019); Christian Gabis.

[40] Letter from Steven Erickson, CFA, Anbec Partners, LP, to Hon. Jay Clayton, Chairman, SEC (Oct. 23, 2019) ("Anbec Partners Letter"); Ariel Ozick; Michael E. Reiss (Oct. 25, 2019).

[41] David Aldridge (Oct. 1, 2019); R. Berkvens (Oct. 3, 2019); Dana Blanc (Oct. 10, 2019); Joe Helmer, CFA, Caldwell Sutter Capital (Dec. 24, 2019) ("Caldwell Sutter Capital Comment"); Frank Danna, III; Ralf Erz (Oct. 8, 2019); Philippe Goodwill (Oct. 1, 2019); Letter from Matthew Kerchner, CFA, Terravoir Venture, to Hon, Jay Clayton, Chairman, SEC (Nov. 25, 2019) ("Terravoir Venture Letter"); Richard Kogut (Oct. 8, 2019); Aharon Levy (Oct. 12, 2019); Tracy Michaels (Sept. 30, 2019); Michael E. Reiss; Robert Ringelberg (Oct. 13, 2019); Jim Rivest (Sept. 29, 2019); Letter from David Sanders, to SEC (Oct. 10, 2019) ("Sanders Letter"); Thomas Schiessling (Oct. 30, 2019); Lucas H. Selvidge (Oct. 23, 2019); Kevin Ward (Oct. 8, 2019); *see* Philippe Goodwill. Another commenter specified that broker-dealers require purchasers of OTC stocks to sign multiple agreements and disclaimers before they are eligible to purchase OTC stocks and that broker-dealers require annual income qualifications and tax bracket verification when opening accounts. Letter from Darian Andersen, General Counsel, P.C., to Vanessa Countryman, Sec'y, SEC (Dec. 23, 2019) ("Andersen Letter").

[42] *See* Letter from James J. Angel, Ph.D., CFA, Associate Professor of Finance, Georgetown University, McDonough School of Business, to SEC (Jan. 24, 2020) ("Professor Angel Letter").

already provides investor protections that the proposal seeks to provide.[43] While investor protections can be provided through a variety of means (e.g., from sales practice rules to registration requirements), the specific manner in which Rule 15c2-11 governs the publication or submission of broker-dealers' quotations in a quotation medium serves to cement the broker-dealer's role as a gatekeeper for many investors, including retail investors, to the OTC market. Further, as discussed above, in light of technological developments that have transformed the OTC market since the Rule was adopted and last substantively amended, the Commission believes that it is appropriate to update and modernize the Rule with the goals of providing greater transparency and better combatting fraud.

Another commenter stated that, instead of amending the Rule, the Commission should focus on enforcing rules governing market makers.[44] Some commenters stated that the Commission should instead focus its enforcement efforts on bad actors.[45] For example, one commenter stated that the most effective way to protect retail investors is by suspending trading in securities that are implicated in conduct that appears suspicious or "illegitimate."[46] For the reasons discussed throughout this release, the Commission believes that the amended Rule is an important tool to combat fraud and manipulation and enhance investor protection, in addition to trading suspensions and other enforcement actions.

While certain of the Commission's initiatives to protect investors involve addressing fraudulent conduct that has already occurred, such as through the Commission's examination and

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[43] Letter from Douglas Raymond, Drinker Biddle & Reath (Nov. 21, 2019) ("Drinker Letter").

[44] Hans Brost (Nov. 15, 2019).

[45] *See, e.g.*, Caldwell Sutter Capital Comment; Exchange Listing Letter; Braxton Gann (Oct. 11, 2019); Joshua Marino; Daniel Raider (Oct. 2, 2019); *see* Canaccord Letter.

[46] Canaccord Letter.

enforcement programs, the Commission has also been proactive in taking measures that are designed to prevent fraudulent activity before it occurs.[47] The Commission believes that the amendments facilitate such efforts by, for example, addressing the lack of current and publicly available information about companies to the disadvantage of retail investors in comparison to other market participants.[48] The amendments are narrowly tailored to further the Commission's ongoing effort to protect retail investors from fraud and manipulation in the OTC market, maintain the integrity of the OTC market, promote a more efficient and effective OTC market, and facilitate capital formation for issuers that make their information current and publicly available.[49]

The Commission is adopting substantially as proposed several amendments to the Rule, as discussed above. However, the Commission has modified the proposed Rule in a number of respects. Summarized below are key modifications from the proposal:

- *Piggyback Exception.* The Commission is adopting the proposed amendments to the piggyback exception with several targeted modifications: requiring at least a one-way priced quotation (as opposed to two-way priced quotations);[50] removing from the exception the 30-calendar-day window but still requiring that no more than four days in

[47] *See* Proposing Release at 58210.

[48] *Id.* For example, the Commission stated in the Proposing Release its concern that market participants can take advantage of exceptions from the Rule's information review requirement to the detriment of retail investors. Without current public information about an issuer, it is difficult for an investor or other market participant to evaluate the issuer and the risks involved in purchasing or selling its securities. *See id.* at 58208.

[49] *See infra* Part VI.C.2.

[50] Amended Rule 15c2-11(f)(3)(i)(A).

succession elapse without a quotation;[51] permitting broker-dealers to rely on the piggyback exception to publish quotations for the security of a shell company for the 18 months following the initial priced quotation for an issuer's security that is published or submitted in an IDQS;[52] and providing a limited, conditional grace period to permit broker-dealers to continue to rely on the piggyback exception to publish quotations for an issuer in certain instances when the issuer's paragraph (b) information ceases to be, depending on the regulatory status of the issuer, current and publicly available, timely filed, or filed within 180 calendar days from a specified time frame.[53]

- *Specified Information.* The Commission is adopting a provision to clarify that issuers that make filings pursuant to Regulation Crowdfunding are reporting issuers for purposes of the Rule.[54] For catch-all issuers, the Commission is also: (1) expanding the list of information specified in paragraph (b) to include the address of the issuer's principal place of business, the state of incorporation of each of the issuer's predecessors (if any), the ticker symbol of the issuer's security (if assigned), and the title of each company insider;[55] and (2) requiring the issuer's most recent balance sheet to be as of a date less than 16 months before the publication or submission of a broker-dealer's quotation and

[51] Amended Rule 15c2-11(f)(3)(i)(A). As discussed above, the former Rule required that quotations must have appeared on each of at least 12 days during the previous 30 calendar days, with no more than four consecutive business days in succession without a quotation. Former Rule 15c2-11(f)(3)(i), (ii).

[52] *See* Amended Rule 15c2-11(f)(3)(i)(B)(2).

[53] *See* Amended Rule 15c2-11(f)(3)(ii).

[54] Amended Rule 15c2-11(b)(3)(iii).

[55] See paragraphs (b)(5)(i)(B), (C), (D), and (K) of the amended Rule, respectively, for such requirements.

the issuer's profit and loss and retained earnings statements to be for the 12 months preceding the date of the most recent balance sheet.[56]

- *Unsolicited Quotation Exception.* The Commission is limiting reliance on the exception for a quotation on behalf of either a company insider, as proposed, or an affiliate of the issuer if the issuer's paragraph (b) information is not current and publicly available; modifying the exception to permit broker-dealers to rely on a written representation from a customer's broker that such customer is not a company insider or an affiliate;[57] and clarifying that broker-dealers may rely on a publicly available determination by a qualified IDQS or a registered national securities association that an issuer's information is current and publicly available.[58]
- *ADTV and Asset Test Exception.* The Commission is clarifying in the rule text that the worldwide ADTV value must be "reported" and eliminating the term "unaffiliated" from the shareholders' equity prong of the three-part test.[59]
- *Publicly Available Determination That an Exception Applies.* The Commission is adopting the proposed exception for a broker-dealer to rely on a qualified IDQS's or registered national securities association's publicly available determination that an exception applies; however, the Commission is not adopting the provision in the

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[56] *See* Amended Rule 15c2-11(b)(5)(i)(L). As discussed below in Part II.B.3, the Commission has determined not to adopt the proposed requirement for a catch-all issuer's balance sheet that is not as of a date less than six months before the publication or submission of the broker-dealer's quotation to be accompanied with profit and loss and retained earnings statements for the period from the date of such balance sheet to a date that is less than six months before the publication or submission of the quotation.

[57] *See* Amended Rule 15c2-11(f)(2)(iii)(A). While the Commission proposed this limitation with respect to quotations that are published or submitted on behalf of company insiders, the amended Rule also applies this limitation with respect to affiliates of the issuer.

[58] *See* Amended Rule 15c2-11(f)(2)(iii)(B).

[59] *See infra* Part II.F.

exception that would have required a qualified IDQS or registered national securities association to make a publicly available determination that an issuer's information is current and publicly available in addition to its determination that an exception applies.[60] The Commission is adding a new provision that a qualified IDQS or a registered national securities association that makes certain publicly available determinations must establish, maintain, and enforce certain reasonably designed written policies and procedures.[61] The Commission is making conforming changes in the rule text to clarify that a broker-dealer may rely on publicly available determinations regarding the exception for exchange-traded securities, the piggyback exception, the exception for municipal securities, and the ADTV and asset test exception.[62]

- *Location of Publicly Available Specified Information.* The Commission is expanding the list of locations where issuer information may be made publicly available to include (in addition to EDGAR and the website of a qualified IDQS, a registered national securities association, an issuer, and a broker-dealer) the website of: (1) a state or federal agency, and (2) an electronic delivery system that is generally available to the public in the primary trading market of a foreign private issuer.[63]

A. Unlawful Activity

1. Current and Publicly Available Issuer Information—Rule 15c2-11(a)(1)(i)(B), (a)(2)(ii)

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[60] *See* Proposed Rule 15c2-11(f)(8)(i).

[61] Amended Rule 15c2-11(a)(3). The Commission, therefore, is not adopting in each of the exceptions that reference a publicly available determination the proposed requirement for a qualified IDQS or a national securities association to make a publicly available determination that it "has" certain reasonably designed written policies and procedures, as proposed paragraph (f)(8)(iii) would have required.

[62] *See* Amended Rule 15c2-11(f)(7).

[63] Amended Rule 15c2-11(e)(5).

The Commission is adopting, largely as proposed, the amendment that requires an issuer's paragraph (b) information to be current and publicly available[64] for a broker-dealer to publish or submit an initial quotation for that issuer's security. Consistent with the proposed Rule, the amended Rule provides that the particular information that a broker-dealer must obtain and review is determined by an issuer's regulatory status: whether the issuer (1) filed a registration statement under the Securities of Act of 1933 (a "prospectus issuer"), (2) filed an offering statement under Regulation A[65] (a "Reg. A issuer"), (3) is subject to the periodic reporting requirements of the Exchange Act, Regulation A or Regulation Crowdfunding, or is the issuer of a security covered by Section 12(g)(2)(G) of the Exchange Act (a "reporting issuer"), or (4) is a foreign private issuer that is exempt from registration under Exchange Act Section 12(g) pursuant to Rule 12g3-2(b) (an "exempt foreign private issuer"). Such issuers are subject to statute- or rule-based disclosure and reporting requirements under the federal securities laws. An issuer that does not fall within any of these categories and is generally not subject to similar statute- or rule-based disclosure and reporting requirements under the federal securities laws is referred to as a "catch-all issuer."[66] Consistent with the proposed Rule, the amended Rule

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[64] For purposes of this release, the terms "current" and "publicly available" have the same meaning as their definitions in paragraphs (e)(2) and (e)(5) of the amended Rule, respectively. *See infra* Part II.J.1. The definition of the term "current" as used in this release may differ from its meaning in other Commission rules (e.g., Securities Act Rule 144).

[65] *See* Rules 251 and 252 of Regulation A. The proposal used the term "notification" instead of "offering statement" to refer to the specified information for a Reg. A issuer, and the Commission is making a technical edit in the amended Rule to use the term "offering statement" to be consistent with Regulation A. *See* Amended Rule 15c2-11(b)(2).

[66] For purposes of this release, the term "catch-all issuer" refers to issuers for which documents and information are specified in paragraph (b)(5) of the proposed Rule and amended Rule. As discussed in more detail below, this term refers to an issuer for which the documents and information specified in paragraphs (b)(1) through (b)(4) of the proposed Rule or amended Rule do not apply. As discussed below in Part II.B.5, the amended Rule treats reporting issuers that are delinquent in their filing obligations (i.e., their paragraph (b) information is not "current") as catch-all issuers only for purposes of initiating or resuming a quoted market in these issuers' securities. However, other catch-all issuers may have no Exchange Act or Securities Act reporting or disclosure obligation whatsoever.

requires that an issuer's paragraph (b) information be current and publicly available for all issuers, including catch-all issuers, for a broker-dealer to initiate or resume a quoted market in an issuer's security.[67]

The Commission sought comment about the proposal's requirement that an issuer's paragraph (b) information be current and publicly available for a broker-dealer to publish or submit, after complying with the information review requirement or after relying on the review performed by a qualified IDQS,[68] an initial quotation for that issuer's security in a quotation medium.[69] Certain commenters supported the principle of increased access to issuer information to support informed investment decisions,[70] observing that the Internet has created new ways of accessing and storing information, as well as the rise of online brokerages, which has made trading securities easier and less expensive than it was when the Rule was last substantively

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[67] Specifically, the amended Rule requires an issuer's paragraph (b) information (excluding, in the case of a catch-all issuer, the documents and information specified in paragraphs (b)(5)(i)(N) through (P)) to be current and publicly available. *See* Amended Rule 15c2-11(a)(1)(i)(B), (a)(2)(ii). Paragraph (b) information must be current and publicly available, consistent with (1) a broker-dealer's determination, as part of its compliance with the information review requirement, that an issuer's paragraph (b) information is current and publicly available or a qualified IDQS's publicly available determination that it has complied with the information review requirement, including the requirement in paragraph (a)(2)(ii) that the issuer's paragraph (b) information is current and publicly available; and (2) the broker-dealer publishing or submitting a quotation within three business days after it complies with the information review requirement or the qualified IDQS makes such publicly available determination. As discussed below in Part II.A.3, this three-business-day requirement is designed to promote the commencement of a quoted market in a security concomitant with current information about the issuer of that security.

[68] For purposes of this release, the "proposed qualified IDQS review exception" refers to the proposed exception provided in paragraph (f)(7) of the proposed Rule. The ability of a broker-dealer to initiate or resume a quoted market in a security in response to a qualified IDQS's publicly available determination that it complied with the information review requirement is substantively adopted; however, this provision no longer appears as an exception under paragraph (f) of the amended Rule and, instead, appears in the amended Rule's unlawful activity provision under paragraph (a)(1)(ii). For a discussion of this amendment, see *infra* Part II.A.3.

[69] Proposed Rule 15c2-11(a)(1)(ii), (a)(2)(ii). While the Commission proposed to require that an issuer's paragraph (b) information be current and publicly available for a broker-dealer to rely on certain exceptions to publish or submit quotations for that issuer's security (e.g., the proposed amendments to the piggyback exception), paragraph (a) of the proposed Rule and the amended Rule address broker-dealers' initial quotations that are published or submitted to commence a quoted market once they have either complied with the information review requirement or relied on a qualified IDQS's publicly available determination that it complied with the information review requirement.

amended.[71] The Commission also received comments that did not support increased transparency; in particular, the Commission received numerous comments on the proposed requirement for an issuer's paragraph (b) information to be current and publicly available to remain eligible for the piggyback exception, as discussed below in Part II.D.1. However, the Commission did not receive any comments specifically relating to the proposed requirement for current and publicly available information in the context of publishing or submitting an initial quotation for an issuer's security. The Commission is adopting this provision related to broker-dealers' initial quotations largely as proposed.

As discussed below in relation to the piggyback exception, the Commission believes that the public availability of an issuer's paragraph (b) information helps to alleviate concerns that limited or no information for certain OTC issuers, such as catch-all issuers, exists or that such information is difficult for retail investors to find.[72] However, the Commission also believes that the amended Rule's requirement that an issuer's paragraph (b) information be current and publicly available for a broker-dealer to quote the issuer's security should not result in an obligation for the public availability of current information for catch-all issuers that is more

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[70] *See, e.g.*, Letter from Christopher Gerold, President, North American Securities Administrators Association, Inc., to Vanessa Countryman, SEC (Dec. 27, 2019) ("NASAA Letter"); Letter from Brenda Hamilton, Hamilton & Associates Law Group, P.A., to Vanessa Countryman, Sec'y, SEC (Oct. 15, 2019) ("Hamilton & Associates Letter"); Josh Lawler, Partner, Zuber Lawler & Del Duca LLP (Feb. 24, 2020) ("Zuber Lawler Letter"); Michael E. Reiss; Jim Rivest; Robert E. Schermer, Jr.; Michael Tofias (Oct. 21, 2019); *see* Peter Kniffin (Oct. 12, 2019); Sosnow & Associates Letter.

[71] *See* Hamilton & Associates Letter ("The result has been the entry of large numbers of new investors into the once-obscure OTC market. Revisions to the Rule are long overdue."); *see* Dana Blanc; Doug Mohn.

[72] *See, e.g.*, Ulf Brüggemann *et al.*, *The Twilight Zone: OTC Regulatory Regimes and Market Quality*, 31 Rev. Fin. Stud. 898, 907 (2018) (noting difficulties in accessing information about companies, even information filed with state regulators); Jeff Swartz, *The Twilight of Equity Liquidity*, 34 Cardozo L. Rev. 531, 573 (2012) (stating that this situation is particularly problematic because unsophisticated investors make up a large portion of OTC market participants); *see also* Michael K. Molitor, *Will More Sunlight Fade the Pink Sheets? Increasing Public Information About Non-Reporting Issuers with Quoted Securities*, 39 Ind. L. Rev. 309, 311, 337 (2006). In addition, increasing the public availability of current information about OTC issuers has the potential to counteract misinformation, which can proliferate through promotions and other channels. *See infra* Part VI.B.2.c.

onerous than the disclosure obligations for reporting issuers under the federal securities laws. The Commission believes that this is important because not all catch-all issuers have a reporting or disclosure obligation under the federal securities laws, and catch-all issuers' paragraph (b) information might not be updated more frequently than annually if the issuer's state or local disclosure regulations do not impose such a requirement. Accordingly, the Commission has made a modification to the proposed information review requirement for broker-dealers to publish or submit initial quotations. For broker-dealers to publish or submit initial quotations (and also for broker-dealers to rely on the piggyback exception, as discussed below), the Commission is not requiring certain financial information for catch-all issuers to be as of a date less than six months of the publication or submission of a broker-dealer's quotation for a catch-all issuer's security.[73] Instead, the Commission is requiring that the issuer's: (1) most recent balance sheet must be as of a date less than 16 months before the publication or submission of the broker-dealer's quotation, and (2) profit and loss and retained earnings statements must be as of a date for the 12 months preceding the date of such balance sheet.[74] Consistent with the proposed Rule, the amended Rule provides that, for a broker-dealer to initiate or resume a quoted market in a catch-all issuer's security, the catch-all issuer information specified in paragraph (b)(5)(i), excluding the issuer's financial information described above, must be as of a date within 12 months before the publication or submission of the quotation.[75]

2. Qualified IDQS That Complies with the Information Review Requirement—Rule 15c2-11(a)(2)(i) through (iv)

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[73] *See infra* Part II.B.3.

[74] *See* Amended Rule 15c2-11(b)(5)(i)(L); *see also infra* Part II.J.1.

[75] *See* Amended Rule 15c2-11(b)(5)(i).

The Commission is expanding the scope of market participants that may comply with the information review requirement.[76] Paragraph (a)(2) of the amended Rule permits a qualified IDQS to make known to others the publication or submission of a quotation by a broker-dealer that relies on a qualified IDQS's compliance with the information review requirement, so long as certain criteria are met (a "qualified IDQS review quotation").[77] The qualified IDQS that makes known to others the quotation of a broker-dealer that is published or submitted pursuant to paragraph (a)(1)(ii) of the amended Rule must first have complied with paragraphs (a), (b), and (c) of the amended Rule, which require the qualified IDQS to review the issuer's paragraph (b) information and any of its supplemental information in compliance with the information review requirement. In addition, a qualified IDQS that complies with the information review requirement must also comply with the recordkeeping requirement in paragraph (d)(1)(i)(B) of the amended Rule.

The Commission proposed to permit a qualified IDQS to make known to others the publication or submission of a qualified IDQS review quotation.[78] The Commission also proposed to define the term "qualified interdealer quotation system" to mean any IDQS that meets the definition of an "alternative trading system" (an "ATS") under Rule 300(a) of Regulation ATS and operates pursuant to the exemption from the definition of an "exchange"

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[76] *See* Proposing Release at 58212. Consistent with the proposal, paragraph (a)(2) of the amended Rule does not impose an affirmative obligation on a qualified IDQS to comply with the information review requirement; rather, paragraph (a)(2) makes it an unlawful activity for a qualified IDQS to make known to others the publication or submission of a quotation by a broker-dealer that relies on the qualified IDQS's compliance with the information review requirement, unless the qualified IDQS has obtained and reviewed the applicable specified issuer documents and information in compliance with the information review requirement and made a publicly available determination of such compliance.

[77] Amended Rule 15c2-11(a)(2). The definition of the term "qualified interdealer quotation system" under the amended Rule is discussed below in Part II.J.4.

[78] *See* Proposing Release at 58213.

under Rule 3a1-1(a)(2) of the Exchange Act."[79] Under the proposed Rule, broker-dealers would have been able to publish or submit quotations based on their reliance on a qualified IDQS's publicly available determination that it complied with the information review requirement.[80] In addition, under the proposed Rule, the activities that satisfy the information review requirement that would apply to a qualified IDQS (i.e., obtaining and reviewing the applicable paragraph (b) information and supplemental information) would be the same as those that would apply to a broker-dealer.[81]

The Commission sought comment about the proposed amendment to permit qualified IDQSs to comply with the information review requirement.[82] This aspect of the proposal received no comment in opposition, and commenters who supported the proposal stated that it expands the types of entities that may comply with the information review requirement, modernizes the information review process, and makes the process more efficient.[83] The Commission has determined to adopt this provision substantially as proposed, with technical edits.[84]

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[79] Proposed Rule 15c2-11(e)(5).

[80] *See* Proposing Release at 58213; *see also* Proposed Rule 15c2-11(f)(7).

[81] *See* Proposing Release at 58213.

[82] Proposed Rule 15c2-11(a)(2).

[83] *See, e.g.*, Letter from James Berns, Berns & Berns, to Vanessa Countryman, Sec'y, SEC (Aug. 31, 2020); Coral Capital Letter; CrowdCheck Letter; *see also* HTFL Letter; Lowy Letter.

[84] The amended Rule replaces the phrase "required by" with "specified in" and adds the word "the" to the requirement that "[s]uch qualified interdealer quotation system ha[ve] in its records *the* documents and information *specified in* paragraph (b) of this section . . . ." Amended Rule 15c2-11(a)(2)(i) (emphasis added). Paragraph (a)(2) of the amended Rule also includes the phrase "for publication" to mirror the text of paragraph (a)(1), updates the cross-reference to paragraph (a)(1)(ii) of the amended Rule, and removes in three instances the word "and."

A qualified IDQS's requirements under paragraph (a)(2) of the amended Rule mirror the requirements for broker-dealers under paragraph (a)(1) of the amended Rule.[85] The amended Rule's recordkeeping requirements for broker-dealers and qualified IDQSs should aid in Commission oversight of compliance with the Rule's provisions. Finally, the notice and reporting requirements for an IDQS that operates as an ATS under the Exchange Act contribute to the Commission's effective oversight of ATSs.

3. Broker-Dealer That Relies on a Qualified IDQS's Publicly Available Determination That It Complied with the Information Review Requirement—Rule 15c2-11(a)(1)(ii)

The Commission is adopting a new provision in the amended Rule to allow broker-dealers to rely on a qualified IDQS's publicly available determination that it complied with the information review requirement.[86] The amended Rule, consistent with the proposed Rule, sets forth certain criteria for a broker-dealer to publish or submit a quotation in reliance on a qualified IDQS's compliance with the information review requirement.

The Commission sought comment about the proposal for an exception to permit a broker-dealer to publish or submit a qualified IDQS review quotation.[87] The Commission received

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[85] The shell company limitation in paragraph (f)(7)(i) of the proposed qualified IDQS review exception is not incorporated into the information review requirement for qualified IDQSs under the amended Rule. The Commission believes that the investor protections provided from a qualified IDQS's compliance with the information review requirement for a shell company helps to ensure that a quoted market for its security is less susceptible to fraudulent or manipulative schemes because the qualified IDQS must have a reasonable basis for believing that the shell company's information is accurate in all material respects and from a reliable source before a broker-dealer can initiate or resume a quoted market in the shell company's security.

[86] *See* Amended Rule 15c2-11(a)(1)(ii).

[87] Proposed Rule 15c2-11(f)(7). The Commission stated that the proposed exception would have reduced the burden on broker-dealers in connection with initiating or resuming a quoted market in an OTC security. Under the proposed exception: (1) a broker-dealer would need to have published or submitted a quotation within three business days after the qualified IDQS made its determination publicly available, and (2) broker-dealers could rely on the exception only during the 30 calendar days after the first quotation was published or submitted in reliance on the proposed exception. These timing requirements were intended, among other things, to ensure that the broker-dealer would commence a quoted market shortly after the qualified IDQS makes the applicable publicly available determination and to provide an opportunity for the broker-dealer to establish the frequency of quotations that the proposed amendments to the piggyback exception would require. *See* Proposing Release at 58231. Further, the

comment supporting this provision.[88] Commenters who supported the proposed exception stated that it would: (1) reduce burdens for broker-dealers by expanding the scope of entities that may comply with the information review requirement, (2) modernize and make the Rule more efficient, and (3) promote more competition to improve the overall process.[89] One commenter also stated that the qualified IDQS review exception should be collapsed into the Rule's unlawful activity provision to simplify the Rule.[90]

The Commission is adopting new paragraph (a)(1)(ii) of the amended Rule,[91] which substantively is the same as the proposed exception to permit broker-dealers to rely on a qualified IDQS's publicly available determination that it complied with the information review requirement.[92] Specifically, this provision requires a broker-dealer's quotation to be published or submitted within three business days after the qualified IDQS makes a publicly available

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proposed exception would not have applied if the issuer of a security were a shell company. *See* Proposed Rule 15c2-11(f)(7)(i).

[88] Coral Capital Letter (stating that the exception should apply to the securities of shell companies and penny stocks); Canaccord Letter; Letter from Daniel Zinn, General Counsel, and Cass Sanford, Associate General Counsel, OTC Mkts. Grp. Inc., to SEC (Nov. 25, 2019) ("OTC Markets Group Letter 1"); Letter from Daniel Zinn, General Counsel, and Cass Sanford, Associate General Counsel, OTC Mkts. Grp. Inc., to SEC (Dec. 30, 2019) ("OTC Markets Group Letter 2"); Letter from F. Mark Reuter, Partner, Keating, Muething & Klekamp (Dec. 13, 2019) ("Keating Letter"); SIFMA Letter. Commenters also supported the proposal with respect to publicly available determinations that issuer information is current and publicly available. Zuber Lawler Letter.

[89] Coral Capital Letter; *see* Keating Letter.

[90] *See* Letter from Daniel Zinn, General Counsel, and Cass Sanford, Associate General Counsel, OTC Mkts. Grp. Inc., to SEC (Apr. 8, 2020) ("OTC Markets Group Letter 3"). This commenter also suggested a reordering of the Rule such that there would no longer exist a need to distinguish between initial versus ongoing quoting requirements, according to the commenter. *Id*.

[91] This provision is substantively the same as that in the proposed exception but is achieved through different means; the amended Rule provides this ability in a single place, under the unlawful activity provision, while the proposed Rule largely provided this through an exception. The amendments as modified are designed to streamline the amended Rule and facilitate compliance.

[92] *See* Proposed Rule 15c2-11(f)(7).

determination.[93] Unlike the proposed Rule, the amended Rule does not include a 30-calendar-day limitation for broker-dealers to rely on a qualified IDQS's publicly available determination.[94] To ensure that there is current issuer information at the initiation of a quoted market in such issuer's security, the Commission has determined to adopt the proposed requirement that a broker-dealer's quotation must be published within three business days of the qualified IDQS making publicly available its determination. This three-business-day window is designed to help ensure that there is a very limited time period between the information review conducted by the qualified IDQS and the first quotation published or submitted by a broker-dealer in reliance on the qualified IDQS's publicly available determination that it complied with the information review requirement.[95] As discussed below, broker-dealers that publish quotations pursuant to paragraph (a)(1)(ii) need only to preserve the name of the qualified IDQS that made the publicly available determination that it has complied with the information review requirement.[96]

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[93] *See infra* note 95 (stating that this three-business-day window is consistent with the time frame specified for the required manner in which current reports must be obtained under paragraph (b)(3) of the amended Rule).

[94] As discussed below in Part II.D.5, the piggyback exception under the amended Rule no longer has a timing requirement of 30 calendar days following the initiation (or resumption) of a quoted market for securities to establish piggyback eligibility.

[95] The requirement for a broker-dealer's quotation to be published within three business days of the qualified IDQS making publicly available its determination is consistent with the time frame specified for the required manner in which current reports must be obtained under amended Rule 15c2-11(b)(3), as discussed below in Part II.B.1. Further, this three-business-day window is designed to take account of the fact that certain issuer information (e.g., a current report) is not filed at regular intervals. Accordingly, the three-business-day window provides a limited time frame during which a quoted market for an issuer's security can be initiated following the potential disclosure of new information about the issuer. This requirement that a broker-dealer's quotation be published within three business days of the qualified IDQS making its publicly available determination applies equally for publicly available determinations across all issuers, including those that do not have a reporting or disclosure obligation under the federal securities laws, to promote the investor protections that result from the commencement of a quoted market in a security concomitant with current information about the issuer of that security.

[96] *See infra* Part II.I (discussing the recordkeeping requirement).

In response to a comment stating that entities other than a broker-dealer or a qualified IDQS should be able to comply with the information review requirement,[97] the Commission does not believe that it would be appropriate to further expand the scope of entities that may comply with the Rule's information review requirement. The Commission's oversight of, and regulatory requirements for, broker-dealers and qualified IDQSs under the Exchange Act would help to promote compliance with the information review requirement and enhance investor protection.[98] Other commenters stated that the Rule should permit broker-dealers to rely on the determination of a qualified IDQS: (1) to initiate quotes in these securities without requiring a broker-dealer or qualified IDQS to file a separate Form 211 with the Financial Industry Regulatory Authority ("FINRA"),[99] and (2) to publish subsequent quotations without the 30-calendar-day "piggyback eligibility" period following the initial quotation.[100] One commenter requested clarification on whether a qualified IDQS would need to submit a Form 211 to FINRA for a broker-dealer to rely on a qualified IDQS's publicly available determination that it complied with the information review requirement before it could publish a quotation for some or all categories of securities.[101] The requirement to file a Form 211 falls under FINRA Rule 6432. The amended Rule does not impose obligations with respect to FINRA Rule 6432 and does not require qualified IDQSs, or

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[97] Coral Capital Letter.

[98] *See* Proposing Release at 58236.

[99] Canaccord Letter; STA Letter; Virtu Letter.

[100] Letter from Laura Anthony, Anthony L.G., PLLC, to SEC (Feb. 26, 2020) ("Anthony Letter"); Letter from Leonard Burningham to SEC (Dec. 30, 2019), and Letter from Leonard Burningham to SEC (Dec. 30, 2019) (collectively, the "Leonard Burningham Letters"); OTC Markets Group Letter 2; OTC Markets Group Letter 3 (advocating for an elimination of the three-business-day requirement for reliance on the exception); SIFMA Letter.

[101] FINRA Letter (stating that its current rules do not contemplate that a qualified IDQS would be required to submit a Form 211 to FINRA and that the Form 211 includes a certification attesting that the submitting broker-dealer has not accepted and will not accept payments from the issuer of the security to be quoted for market making, which applies to the filing of a Form 211).

broker-dealers relying on a qualified IDQS's publicly available determination that an exception applies, to file Forms 211 with FINRA. During and after the transition period, the Commission will continue to monitor the operation of this market and expects FINRA to do the same, including through examinations of qualified IDQSs. The Commission's staff expects to work with FINRA on an ongoing basis regarding the implementation of the amended Rule.[102]

4. Policies and Procedures for Making Certain Publicly Available Determinations—Rule 15c2-11(a)(3)

The Commission has determined to require a qualified IDQS or registered national securities association that makes certain publicly available determinations in accordance with the amended Rule to establish, maintain, and enforce reasonably designed written policies and procedures associated with making such a determination. Such publicly available determinations may pertain to whether: (1) an issuer's paragraph (b) information is current and publicly available for purposes of the unsolicited quotation exception,[103] (2) the piggyback exception's grace period applies,[104] or (3) the requirements of a certain exception (i.e., the exchange-traded security exception, the piggyback exception, the municipal security exception, or the ADTV and asset test exception) are met.[105] Under the proposed Rule, the qualified IDQS or registered national securities association would have had to make a publicly available determination that it has reasonably designed policies and procedures in place and being maintained and enforced to

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[102] As discussed below in Part II.P, the Commission staff intends to offer assistance and support to covered entities during the transition period and thereafter, with the aim of helping to ensure that the investor protections and other benefits of the amended Rule are implemented in an efficient and effective manner.

[103] *See* Amended Rule 15c2-11(f)(2)(iii)(B).

[104] *See* Amended Rule 15c2-11(f)(3)(ii)(A).

[105] *See* Amended Rule 15c2-11(f)(7).

determine whether the applicable paragraph (b) information is current and publicly available, and that the requirements of an exception are met.[106]

Commenters expressed general concern that the proposal would weaken Commission oversight of compliance with the Rule.[107] The Commission is strengthening the proposed Rule's policies and procedures requirements for making such publicly available determinations. Instead of requiring a qualified IDQS or registered national securities association to make a publicly available determination that it "has" reasonably designed policies and procedures, the amended Rule requires such entities to establish, maintain, and enforce reasonably designed written policies and procedures to make the particular publicly available determination.

Specifically, paragraph (a)(3) under the amended Rule requires a qualified IDQS or registered national securities association that makes a publicly available determination regarding whether issuer information is current and publicly available, and, in some instances, whether the requirements of an exception are met, to establish, maintain, and enforce reasonably designed written policies and procedures to determine whether: (1) paragraph (b) information is current and publicly available, and (2) the requirements of the paragraph (f)(7) exception are met.[108] The obligation to establish, maintain, and enforce written policies and procedures specified in paragraph (a)(3) of the amended Rule is designed to help promote the integrity of such publicly available determinations and to facilitate Commission oversight of the qualified IDQS or registered national securities association that makes them.

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[106] Proposing Release at 58232; *see* Proposed Rule 15c2-11(f)(8)(iii).

[107] *See, e.g.*, Steven Gereau, Mayfair Plastics Inc. (Sept. 30, 2019); Tom Prenger (Sept. 30, 2019).

[108] Amended Rule 15c2-11(a)(3). Paragraph (a)(3) of the amended Rule applies to registered national securities associations (and qualified IDQSs) that make publicly available determinations, but a registered national securities association is not eligible to comply with the information review requirement, as provided in paragraphs (a)(1)(i)(A) through (C) and (a)(2)(i) through (iii) of the amended Rule.

B. Specified Information

1. Current Reports—Rule 15c2-11(b)(3)(i) through (iv)

The Commission is adopting as proposed[109] the requirement that a broker-dealer or a qualified IDQS obtain current reports as of a date up to three business days before the publication or submission of the quotation in connection with the information review requirement.[110] The Commission proposed to update and streamline the timing requirement for obtaining certain reports about material events affecting the issuer of a quoted security, such as a Form 8-K or Form 6-K, in connection with the information review requirement.[111] Prior to the amendment, the Rule required that a broker-dealer obtain such reports on the earlier of five business days before: (1) the initial publication or submission of a quotation; or (2) the date of submission of certain information pursuant to applicable rules of FINRA or its successor.[112]

In response to the proposal, one commenter expressed concern that the proposal imposed a requirement to wait three business days before publishing quotations,[113] while another

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[109] *See* Proposing Release at 58214. The proposed Rule would revise the timing requirement from five business days to three business days and would streamline the timing standard associated with obtaining current reports by removing the requirement regarding a broker-dealer's demonstration of its compliance with the Rule by filing a form (i.e., a Form 211) with FINRA, which must be received at least three business days before the broker-dealer's quotation is published or displayed in a quotation medium. Thus, the proposed Rule would require that a broker-dealer or qualified IDQS obtain all current reports as of a date up to three business days before the initial publication or submission of a quotation. The proposed timing requirement was intended to reflect that, in today's market, reports, such as a Form 8-K, are easily accessible and can be obtained in a timely manner. In addition, the proposed requirement to obtain all current reports as of a certain date is related to the initiation or resumption of a quoted market for a security, not to the requirements of applicable FINRA rules for a broker-dealer to submit certain information to FINRA. *See id.* These changes were intended to require broker-dealers and qualified IDQSs to obtain current reports closer in time to the initial publication or submission of a quotation.

[110] Amended Rule 15c2-11(b)(3)(i) through (iii).

[111] Proposed Rule 15c2-11(b)(3)(i) through (iii). Current reports filed with the Commission include, but are not limited to, current reports on Form 8-K pursuant to Section 13 or 15(d) of the Exchange Act and current reports on Form 1-U pursuant to Rule 257(b)(4) of Regulation A. *See* Proposing Release at 58214 n.58.

[112] Former Rule 15c2-11(d)(2)(i). The timing standard for obtaining current reports in paragraph (d)(2)(i) of the former Rule was incorporated, with a modification, into paragraphs (b)(3)(i) through (iii) of the proposed Rule.

[113] *See* Coral Capital Letter.

suggested that the Commission remove the three-day-window.[114] After consideration of these comments, the Commission has determined to adopt the provision as proposed. As discussed in the Proposing Release, events that require the filing of current reports, such as a Form 8-K or Form 6-K, generally involve material events affecting an issuer.[115] The three-business-day period recognizes that current reports are not filed at regular intervals, and thus removing the entire period would be impractical. For example, a reporting issuer might file a current report, such as a Form 8-K, minutes before a broker-dealer publishes a quotation for such security. Therefore, the amended Rule, like the proposed Rule, provides a period during which such recently filed current reports will not be required paragraph (b) information for issuers that have a reporting obligation under Section 13 or 15(d) of the Exchange Act or Regulation A, although the amended Rule shortens the former Rule's five-day period to a three-day period.

This amendment is not designed to serve as a waiting period, as one commenter suggested,[116] but rather as a cutoff date at which a broker-dealer is not required to consider a more recently filed current report to comply with the information review requirement prior to publishing or submitting a quote. For example, a broker-dealer could publish a quotation on the same day that it complies with the information review requirement or on the same day that a qualified IDQS makes a publicly available determination that it has complied with the information review requirement. The Commission believes that removing the three-business-day period would create an impractical result and require broker-dealers and qualified IDQSs to continuously monitor for the filing of current reports with the Commission in the three business

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[114] OTC Markets Group Letter 3.

[115] *See* Proposing Release at 58214.

[116] *See* Coral Capital Letter.

days leading up to the publication or submission of a broker-dealer's quotation. The three-business-day period provides a degree of certainty in regard to compliance burdens for the uncertain timing surrounding current reports, while at the same time shortening the previously existing period to better achieve the Commission's goals.

2. Reporting Issuer Provision—Rule 15c2-11(b)(3)

To simplify the amended Rule and improve its readability, the Commission is breaking out the provisions governing paragraph (b) information for reporting issuers by addressing each type of issuer in a separate paragraph. This amendment would not have changed any substantive obligations for a broker-dealer under the Rule and would remove from the list of issuers those that are covered by Section 12(g)(2)(B) under the Exchange Act because such issuers have a reporting obligation under Section 13 or 15(d) under the Exchange Act and would, therefore, already be covered by paragraph (b)(3)(i) under the proposed Rule.[117] The Commission sought comment about this aspect of the proposal but did not receive any comment. The Commission is adopting the reorganized structure, as proposed.[118]

3. Catch-All Issuer Information—Rule 15c2-11(b)(5)(i)

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[117] *See* Proposing Release at 58214.

[118] *See* Amended Rule 15c2-11(b)(3)(i) through (v). To make the amended Rule easier to read, the Commission is making a streamlining edit from the proposal by not adopting the proposed requirement in paragraphs (b)(3)(i)(B), (b)(3)(ii)(B), and (b)(3)(iii)(B) for a broker-dealer or qualified IDQS to have a reasonable basis for believing that the issuer is current in filing the applicable specified information. This requirement was redundant with the proposed Rule's information review requirement—and would have been redundant with the amended Rule's information review requirement—that a broker-dealer or a qualified IDQS must have a reasonable basis for believing that the specified information is "current and publicly available." *See* Amended Rule 15c2-11(a)(1)(i)(B) and (C), (a)(2)(ii) and (iii); Proposed Rule 15c2-11(a)(1)(ii) and (iii), (a)(2)(iii); *see also infra* Parts II.J.1 and 3 (discussing how paragraph (b) information that is filed by the applicable time frames specified in paragraph (b) for the issuer is current and publicly available for purposes of the amended Rule). Instead, paragraph (b)(3) of the amended Rule provides that the specified information for reporting issuers is a current copy of the documents and information that are listed under the applicable subparagraph under paragraph (b). This technical edit is appropriate because the definition of current for purposes of the amended Rule pertains to an issuer's paragraph (b) information and not to the issuer itself. *See* Amended Rule 15c2-11(e)(2); *infra* Part II.J.1. For a description of non-structural changes to the specified information provision for reporting issuers, see *infra* Part II.B.6, which discusses the addition of a specified information provision for crowdfunding issuers under the amended Rule.

The Commission is also expanding the list of specified paragraph (b) information for catch-all issuers to include the identity of company officers and large shareholders, along with additional information that commenters suggested, and is lengthening the amount of time for all catch-all issuer information to be updated for such information to meet the definition of "current."[119] The Commission proposed to expand the list of specified paragraph (b) information associated with catch-all issuers to include the identity of company officers and large shareholders of the company.[120] The proposed requirement to make such information publicly available was designed to make it easier for investors and other market participants to identify a more complete list of persons who are associated with the issuer and to research their backgrounds.[121]

The Commission sought comment about the proposal to expand the list of paragraph (b) information for catch-all issuers to include the identity of company insiders and larger shareholders of the company; the ticker symbol of the security being quoted; the address of the issuer's principal place of business if that address differs from the address of the issuer's principal executive offices; and any additional information to help accurately identify company insiders (e.g., job title). One commenter stated that a variety of securities trade in the OTC market and advocated for greater flexibility in the specified information that is required to be current and publicly available.[122] The Commission believes that, by requiring different types of

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[119] *See* Amended Rule 15c2-11(b)(5)(i).

[120] Proposed Rule 15c2-11(b)(5)(i)(K).

[121] *See* Proposing Release at 58214–15.

[122] Mitchell Partners Letter 1; *see* Letter from Philip Milner, Jr., to Hon. Jay Clayton (Nov. 26, 2019) ("Milner Letter"); Norberg Letter; Kyle M. Peeples (Dec. 1, 2019); Debby Valentijn.

paragraph (b) information to address the wide variety of OTC issuers[123] and by providing flexible requirements for such information to be current and publicly available,[124] the amended Rule is appropriately tailored to each type of covered issuer. Further, the Commission believes that the list of catch-all issuer information that is required to be current and publicly available appropriately balances the fact that some catch-all issuers do not have a reporting obligation while protecting investors through the disclosure of a relatively limited amount of information that could help investors access information about the catch-all issuer before making an investment decision.

Another commenter stated that the Rule's requirements for paragraph (b) information for catch-all issuers to be current and publicly available should not be as onerous as the disclosure obligations imposed on reporting companies and that information that is required to be current and publicly available should not be too complicated for an investor to read.[125] The Commission believes that the information that is required to be current and publicly available for catch-all issuers includes basic information about the issuer and does not include the type of detail or complexity as is required for reporting issuers under the federal securities laws. For example, the amended Rule's specified information for catch-all issuers does not require that the issuer's balance sheet be audited. Other commenters requested that paragraph (b) information for catch-

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[123] This specified information ranges from a registration statement for prospectus issuers to a list of specified information for a catch-all issuer. *See* Amended Rule 15c2-11(b)(1) through (5). Further, the paragraph (b) information for catch-all issuers that must be obtained and reviewed for a broker-dealer to initiate a quoted market does not approach the level of comprehensiveness that is required with respect to a company with reporting obligations under the federal securities laws. As discussed above, except for certain financial information, most paragraph (b) information for catch-all issuers is current if it is publicly available on an annual basis. In contrast, certain reporting issuers may have an obligation to file a report on a quarterly basis.

[124] For example, certain information for a catch-all issuer is not required to be current and publicly available for a broker-dealer to rely on the piggyback exception. *See* Amended Rule 15c2-11(f)(3)(i)(C)(3).

[125] Beacon Redevelopment Letter.

all issuers also include: any trade sanctions to which the issuer is subject;[126] the security's ticker symbol and CUSIP number;[127] the address of the issuer's principal place of business if that address differs from the address of the issuer's principal executive office;[128] the job titles of company insiders;[129] the number of freely tradeable securities;[130] and additional information with regard to an issuer's recent predecessors (over the prior five years), along with their state of incorporation and the CUSIP numbers of any equity securities issued by those predecessors.[131] The Commission agrees that it is appropriate that some of this information be required to be disclosed to the investing public regarding catch-all issuers before a broker-dealer can publish or submit a quotation for securities of such issuers and, therefore, has determined to expand the former Rule's list of paragraph (b) information for catch-all issuers to include, in paragraph (b)(5)(i) of the amended Rule, the identity of company officers and large shareholders, as proposed, along with certain additional information that commenters suggested: (1) job titles for company insiders, (2) the names of all of an issuer's predecessors during the past five years, (3) the issuer's principal place of business, (4) the state of incorporation or registration of each of the issuer's predecessors (if any) during the past five years, and (5) the ticker symbol (if assigned) during the past five years.[132] The Commission has determined not to require all of the information suggested by commenters because the Commission believes that the catch-all issuer

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[126] Jean-Paul Tres (Dec. 29, 2019).

[127] Coral Capital Letter.

[128] *Id.*

[129] *Id.*

[130] FINRA Letter.

[131] *Id.*

[132] *See* Amended Rule 15c2-11(b)(5)(i).

information required in paragraph (b) of the amended Rule strikes an appropriate balance between (1) ensuring that important basic information about an issuer is current and publicly available to commence a quoted market or rely on many of the amended Rule's exceptions (e.g., the piggyback exception), and (2) allowing broker-dealers to facilitate demand in a quoted market for OTC securities without an overly burdensome list of information to prepare, obtain, and review.[133] The public availability of this additional information about catch-all issuers will provide a more comprehensive look at the company and its operations for those making investment decisions before a broker-dealer can publish quotations for such issuers' securities.

One commenter suggested that the list of persons described in paragraph (b)(5)(i)(K) of the proposed Rule include the word "executive" in front of the word "officer" because, according to the commenter, an issuer may employ many persons with the title of "officer" who do not direct company-wide policies and do not manage the company.[134] As stated in the proposal, the Commission believes that investors could benefit from knowing the identity of officers who manage a company.[135] Further, the term "officer" refers to a person's management functions as opposed to his or her title. For example, under the amended Rule, while the term "officer" could be used to refer to a president, vice president, secretary, treasurer or principal financial officer, comptroller or principal accounting officer of a company, it can also refer to any person routinely performing corresponding functions with respect to the company.[136] In complying with the information review requirement, a broker-dealer or qualified IDQS may rely on information

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[133] *See infra* Part VI.C.1.a.

[134] Brian Brown, Chief Financial Officer and Treasurer, Computer Services, Inc. (Mar. 10, 2020) ("Computer Services Letter").

[135] *See* Proposing Release at 58214.

[136] *See* Exchange Act Rule 3b-2.

regarding officers provided by a person whom the broker-dealer has a reasonable basis for believing is a reliable source, such as the issuer.[137] Paragraph (b)(5)(i)(K) of the amended Rule uses the newly defined term "company insider" to replace the list of persons delineated in paragraph (b)(5)(i)(K) of the proposed Rule.[138] As discussed below in Part II.L.5, this term is designed to capture persons who manage a company or have a greater degree of access to issuer information and who may have a heightened incentive to engage in fraudulent or manipulative conduct.[139]

Finally, the Commission has determined not to adopt the proposed requirement that would have required certain catch-all issuer financial information—the issuer's profit and loss and retained earnings statements—to be as of a date less than six months before the publication or submission of a broker-dealer's quotation for a catch-all issuer's security if the issuer's balance sheet were not as of a date within six months before such publication or submission of a quotation.[140] As discussed below in Part II.D.1, the Commission also has lengthened the time period for financial information of catch-all issuers to be current and publicly available under the piggyback exception. Among other reasons, including those discussed below, the Commission believes that requiring such financial information for catch-all issuers to be compiled and published more frequently than annually would require an allocation of resources to the preparation of financial statements that is not justified in light of the facts that a catch-all issuer generally does not have any reporting or disclosure obligation under the federal securities laws

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[137] *See infra* Part II.O.

[138] Amended Rule 15c2-11(e)(1).

[139] For example, company insiders may stand to profit by selling the company shares they own during a pump-and-dump scheme. Proposing Release at 58225.

[140] Amended Rule 15c2-11(b)(5)(i)(L).

and that an issuer's reporting obligations under state law generally are annual. In addition, the Commission believes that this time frame, in addition to the expansion of the list of specified information for catch-all issuers, as discussed above, will help provide investors with the appropriate tools to make better-informed investment decisions. Accordingly, the amended Rule specifies that, for a broker-dealer to initiate, resume, or maintain a quoted market in a catch-all issuer's security:[141] (1) such issuer's balance sheet is current if its most recent balance sheet is as of a date less than 16 months before the publication or submission of the broker-dealer's quotation,[142] and (2) the issuer's profit and loss and retained earnings statements are current if they are for the 12 months preceding the date of such balance sheet.[143] Consistent with the proposed Rule, the amended Rule also provides that catch-all issuer information specified in paragraph (b)(5)(i), excluding the issuer's financial information, is current if it is as of a date within 12 months before the publication or submission of the quotation.[144]

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[141] The timing requirements for a catch-all issuer's paragraph (b) information to be current (and publicly available) are the same notwithstanding whether a broker-dealer is initiating or resuming a quoted market in a catch-all issuer's security pursuant to paragraph (a) of the amended Rule or whether it is relying on the piggyback exception to maintain a quoted market in a catch-all issuer's security. For a discussion of the requirement for catch-all issuer information to be current and publicly available for a broker-dealer to initiate or resume a quoted market in a catch-all issuer's security, see *supra* Part II.A.1. For a discussion of the requirement for catch-all issuer information to be current and publicly available for a broker-dealer to maintain a quoted market in a catch-all issuer's security by relying on the piggyback exception, see *infra* Part II.D.1.

[142] As discussed above, the Commission is not requiring such financial information for catch-all issuers to be current and publicly available on a six-month basis, as proposed, because such a requirement would result in a catch-all issuer's financial information being compiled and published on a more frequent basis than the information of certain issuers that have a reporting or disclosure obligation under the federal securities laws, such as crowdfunding issuers. A period of 16 months allows time to finalize and make publicly available an annual balance sheet.

[143] *See* Amended Rule 15c2-11(b)(5)(i)(L).

[144] Amended Rule 15c2-11(b)(5)(i); *see* Amended Rule 15c2-11(e)(2). The Commission is also making technical edits to the proposed Rule so that the amended Rule is easier to read. First, while the proposed Rule would have used the phrase "the documents and information required by paragraph (b)," the amended Rule uses the term "the documents and information specified in paragraph (b)." This technical edit is intended to reflect that paragraph (b) specifies the documents and information regarding an issuer that a broker-dealer or qualified IDQS must obtain and review to comply with the information review requirement or determine that the requirements of an exception are met. Second, the Commission is not adopting the requirement in proposed paragraph (b)(5)(i) that catch-all issuer information must be "current and made publicly available." The Commission believes that this change from the proposal is appropriate, given the requirement that such information be current and publicly available for a broker-

4. Requirement to Make Catch-All Issuer Information Available Upon Request—Rule 15c2-11(b)(5)(ii)

To facilitate investor access to information, the amended Rule requires broker-dealers that comply with the information review requirement to make catch-all issuer information available upon the request of a person expressing an interest in a proposed transaction in the issuer's security, such as by providing the requesting person with appropriate instructions regarding how to obtain publicly available information electronically.[145] The Commission proposed to permit broker-dealers to provide persons who express an interest in a proposed transaction involving a catch-all issuer with instructions regarding how to obtain publicly available information electronically.[146] This proposed amendment was intended to make it easier for retail investors to locate and easily access catch-all issuer information.[147] This proposed amendment would not limit other ways in which a broker-dealer could make information available to persons expressing an interest in a proposed transaction in a security of a catch-all issuer; it simply recognized that the Internet provides a cost-effective means to distribute catch-all issuer information to such persons.[148]

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dealer or qualified IDQS to comply with the information review requirement, or for a broker-dealer to rely on certain of the amended Rule's exceptions. This streamlining amendment does not change any of the timing components for such information to be considered current and publicly available.

[145] Amended Rule 15c2-11(b)(5)(ii).

[146] Proposed Rule 15c2-11(b)(5)(ii). Proposed Rule 15c2-11(b)(4) included a similar requirement to permit a broker-dealer to provide to persons who express an interest in a proposed transaction in a security of an exempt foreign private issuer appropriate instructions regarding how to obtain the information electronically.

[147] *See* Proposing Release at 58215.

[148] *See id.* Additionally, as the Commission explained in the Proposing Release, "to the extent the broker-dealer has information regarding proposed paragraphs (b)(5)(i)(N) through (P), the broker-dealer would be required to make such information available to persons who request the information pursuant to proposed paragraph (b)(5)(ii)." *Id*.

The Commission sought comment on this aspect of the proposal and received support.[149] The Commission has determined to adopt the proposed amendment regarding the manner in which a broker-dealer may provide this information. To alleviate the concern that issuer information may be difficult for investors to locate on their own, this amendment is designed to make such information easier to find while providing a cost-effective means for broker-dealers to distribute catch-all issuer information to all investors, not just those that request such information.[150] In this regard, if such information is located on different websites, broker-dealers may provide the website addresses at which investors can find the information that is required to be publicly available. The Commission is also adopting a technical edit.[151] Consistent with the proposal, the amended Rule requires that, to the extent the broker-dealer also has catch-all issuer information, the broker-dealer must make such information available to persons who request such information.[152] A broker-dealer that publishes a quotation in reliance on a publicly available determination of a qualified IDQS that the qualified IDQS complied with the information review requirement, therefore, is not required to make catch-all issuer information available upon request because such broker-dealer is not itself complying with the information review requirement.

5. Application of the Catch-All Issuer Provision—Rule 15c2-11(b)(5)(ii)

Consistent with the Commission's efforts to increase transparency about OTC securities for all investors, the Commission is adopting, as proposed, the provision that specifies that an

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[149] Coral Capital Letter.

[150] *See* Proposing Release at 58215.

[151] Paragraph (b)(5)(ii) of the amended Rule replaces the words "required by" with the words "specified in" and includes the word "the" so that the broker-dealer "must make *the* information *specified in* paragraph (b)(5)(i) of this section" available upon request. *See* Amended Rule 15c2-11(b)(5)(ii) (emphasis added).

[152] *See* Amended Rule 15c2-11(b)(5)(ii).

issuer would be a "catch-all issuer" if the documents and information specified in paragraphs (b)(1) through (b)(4) of the amended Rule do not apply to the issuer.[153] As discussed below, however, the amended Rule treats reporting issuers that are delinquent in their filing obligations (i.e., their paragraph (b) information is not "current," as that term is defined in paragraph (e)(2) of the amended Rule) as catch-all issuers only for purposes of initiating or resuming a quoted market in these issuers' securities.

The Commission sought comment about the provision in paragraph (b)(5)(ii) of the proposed Rule that specified the two circumstances in which an issuer would be a catch-all issuer: (1) if an issuer is not a type of reporting issuer enumerated in (b)(1) through (b)(4) of the proposed Rule, and (2) if the information required to be reported by the particular type of reporting issuer is not current because, for example, it is not timely filed. One commenter stated that a company with a reporting obligation that files a Form NT and provides notice that it will not file a periodic report on a timely basis may become a catch-all issuer and thus be ineligible for quoting pursuant to the piggyback exception because, under paragraph (b)(5)(i)(L) of the proposed Rule, its financial information would be older than six months.[154]

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[153] *See* Amended Rule 15c2-11(b)(5)(ii). While proposed Rule 15c2-11(b)(5)(ii) would have applied "*to any security* of an issuer that is not included in paragraphs (b)(1) through (b)(4) of [the Rule]," amended Rule 15c2-11(b)(5)(ii) requires that "[t]he documents and information specified in paragraph (b)(5) of [the amended Rule] must be reviewed where paragraphs (b)(1) through (b)(4) of [the amended Rule] do not apply to such issuer." This technical change from the proposal addresses the fact that paragraph (b) specifies an issuer's documents and information.

One commenter stated that the term "catch-all issuer" is a term that many market participants will not understand. Hamilton & Associates Letter. This term, however, is used only for purposes of this release to refer to issuers for which documents and information are specified in paragraph (b)(5) of the amended Rule.

[154] OTC Markets Group Letter 2 (recommending that the Commission align references in paragraph (b) to the timing of disclosure with relevant Commission rules that apply to smaller reporting companies). The amended Rule's timing requirements for piggyback eligibility provide a longer window than reporting issuers have to comply with their Exchange Act reporting obligations, and are aligned with the requirements of Commission rules that apply to smaller reporting companies, by requiring that the documents and information specified in paragraph (b) be either filed within 180 calendar days from a specified period, for issuers with an Exchange Act reporting obligation, or timely filed for issuers with a reporting obligation under Regulation A or Regulation Crowdfunding. *See infra* Part II.D.1. In addition, the piggyback exception under the amended Rule includes a grace period that permits broker-

The Commission has determined to modify the proposed provision that specified that a reporting issuer would be a catch-all issuer if its information is no longer "current,"[155] by limiting its application to compliance with the information review requirement for a broker-dealer to initiate a quoted market for an issuer's security. Accordingly, the amended Rule treats reporting issuers that are delinquent in their filing obligations as catch-all issuers only for purposes of initiating or resuming a quoted market in these issuers' securities, and thus a broker-dealer or a qualified IDQS would be required to comply with the information review requirement using the catch-all issuer's information required under the amended Rule only if a broker-dealer were initiating or resuming a quoted market in the issuer's security.[156] Notably, the amended Rule does not treat delinquent reporting issuers as catch-all issuers for purposes of the piggyback exception, as discussed below in Part II.D.1.

In the context of maintaining a quoted market for an issuer's security, this change from the proposal (i.e., limiting the treatment of delinquent reporting issuers as catch-all issuers to the initiation or resumption of a quoted market for an issuer's security) enhances the Rule's investor

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dealers to continue to rely on the piggyback exception for a time-limited period if a report that must be filed pursuant to an Exchange Act or Securities Act reporting obligation has not been timely filed or filed within 180 days from the end of the specified period. *See infra* Part II.D.6.

[155] *See* Amended Rule 15c2-11(e)(2); *infra* Part II.J.1.

[156] Specifically, paragraph (b)(5)(ii) of the amended Rule provides that, for purposes of compliance with paragraph (a)(1)(i)(C) (broker-dealer complies with the information review requirement) or (a)(2)(ii) (qualified IDQS complies with the information review requirement) of the amended Rule, the documents and information specified in paragraph (b)(5) must be reviewed for an issuer for which the documents and information specified in paragraph (b)(1), (b)(2), (b)(3), or (b)(4) of the amended Rule regarding such issuer are not current. *See* Amended Rule 15c2-11(b)(5)(ii).

While proposed Rule 15c2-11(b)(5)(ii) would have required that "[p]aragraph (b)(5) of this section [] apply to *any security of an issuer* if information described in paragraphs (b)(1) through (b)(4) of [the proposed Rule] is not current," amended Rule 15c2-11(b)(5)(ii) requires that "the documents and information specified in paragraph (b)(5) of [the amended Rule] must be reviewed for an issuer for which the documents and information specified in paragraph (b)(1), (b)(2), (b)(3), or (b)(4) of [the amended Rule] regarding such issuer are not current." This technical change from the proposal addresses the fact that paragraph (b) specifies an issuer's documents and information.

protections by reducing the potential for broker-dealers to sustain the false appearance of an active market in the securities of issuers that remain delinquent in their reporting obligations or no longer exist.[157] Consistent with the proposed amendment, the amended Rule does not change an issuer's statute- or rule-based reporting or disclosure obligation.[158] In response to a comment regarding an issuer that is granted an extension to file its annual report, and as discussed below, such an issuer will remain a reporting issuer[159] for purposes of the amended Rule's piggyback exception, and thus the broker-dealer would need to comply with the provisions of the piggyback exception that apply to reporting issuers (i.e., paragraph (f)(3)(i)(C)(1) or (2)), depending on the category of reporting issuer, and not the provision that applies to catch-all issuers (i.e., paragraph (f)(3)(i)(C)(3)).[160]

6. Specified Information Provision for Crowdfunding Issuers—Rule 15c2-11(b)(3)(iii)

The Commission has determined to add paragraph (b)(3)(iii) to the amended Rule as a technical amendment to align the amended Rule with Regulation Crowdfunding[161] and to tailor the provision to the specific regulatory status and existing disclosure and reporting obligations of a crowdfunding issuer, similar to how the amended Rule is tailored to recognize issuers that have an ongoing reporting obligation under the Exchange Act and Regulation A. Before the

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[157] *See infra* Part II.D.1.a (discussing the time frame requirements associated with the transparency of reporting issuer information under the amended Rule's piggyback exception).

[158] *See* Amended Rule 15c2-11(b)(5)(ii) (using the phrase "specified in" instead of "required by" to clarify that the Rule does not impose any obligation on issuers).

[159] *See* Exchange Act Rule 12b-25(b) (providing that a registrant's report shall be deemed to be filed on the prescribed due date for such report if, among other things, the issuer represents in the Form 12b-25 that the subject annual report will be filed no later than the fifteenth calendar day following the prescribed due date).

[160] *See infra* Part II.D.1.

[161] *E.g.*, Rules 201 through 203 of Regulation Crowdfunding.

amendments, the Rule did not contain a provision tailored to the specific regulatory status and existing disclosure and reporting obligations of a crowdfunding issuer. A broker-dealer, therefore, would have been able to review the documents and information for a catch-all issuer to comply with the information review requirement before a broker-dealer could publish a quotation for the crowdfunding issuer's security. However, under the amended Rule, a crowdfunding issuer would not be treated as a catch-all issuer, and thus a broker-dealer or qualified IDQS would need to obtain and review the documents and information specified in the specific provision for crowdfunding issuer information to comply with the information review requirement (assuming the issuer is not delinquent in its reporting obligations, as discussed above).[162] In light of the addition of a specified information provision for crowdfunding issuers, a broker-dealer or qualified IDQS would need to obtain and review the documents and information in paragraph (b)(3)(iii) of the amended Rule (rather than paragraph (b)(5) for catch-all issuers, as proposed) to determine if the requirements of certain exceptions are met.

Paragraph (b)(3)(iii) of the amended Rule specifies that the applicable information for a crowdfunding issuer is the issuer's most recent annual report[163] because such report is the only periodic report required by Regulation Crowdfunding to be filed with the Commission.[164] The amended Rule also provides that, until a crowdfunding issuer files an annual report, the

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[162] This new provision regarding the documents and information of crowdfunding issuers is provided in paragraph (b)(3)(iii) of the amended Rule. Paragraphs (b)(3)(iii) and (iv) of the proposed Rule pertained to the documents and information regarding (1) issuers that file annual statements referred to in Section 12(g)(2)(G)(i) of the Exchange Act and any periodic and current reports pursuant to Section 13 or 15(d) of the Exchange Act and (2) issuers of securities that fall within the provisions of Section 12(g)(2)(G) of the Exchange Act and that file annual statements referred to in Section 12(g)(2)(G)(i) of the Exchange Act, respectively. Such paragraphs are now contained in paragraphs (b)(3)(iv) and (b)(3)(v) of the amended Rule, respectively, in light of the addition of the specified information provision for crowdfunding issuers in paragraph (b)(3)(iii) of the amended Rule.

[163] *See* Amended Rule 15c2-11(b)(3)(iii).

[164] *See* Rule 202 of Regulation Crowdfunding.

applicable paragraph (b) information is the Form C (the offering statement for securities offered under Regulation Crowdfunding)[165] filed by the issuer within the prior 16 months, together with any Form C/A (amendments to the offering statement)[166] and Form CU (updates on meeting targeted offering amounts)[167] filed thereafter.[168] The amended Rule allows broker-dealers and qualified IDQSs to review the issuer's Form C, together with any Form C/A and Form CU filed thereafter as an alternative to obtaining and reviewing the issuer's annual report when the issuer's first annual report may not have been filed due to a gap between: (1) the end of the issuer's fiscal year after initially offering securities pursuant to Regulation Crowdfunding, and (2) the prescribed due date for the issuer to file its first annual report. Form C, together with Form C/A and Form C/U, includes substantially the same information that is required by an annual report.[169] In addition, paragraph (b)(3)(iii) of the amended Rule requires that a broker-dealer or qualified IDQS have a reasonable basis under the circumstances for believing that the issuer is current in filing such reports described in this paragraph (b)(3)(iii).[170] Paragraph (b)(3)(iii) of the amended Rule closely tracks the document and information provisions regarding issuers with an Exchange Act or Securities Act reporting or disclosure obligation, and includes provisions specific to crowdfunding issuers in accordance with the thrust of the amended Rule to separate information requirements by the type of issuer.

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[165] *See* Rule 203(a)(1) of Regulation Crowdfunding.

[166] *See* Rule 203(a)(2) of Regulation Crowdfunding.

[167] *See* Rule 203(a)(3) of Regulation Crowdfunding.

[168] Amended Rule 15c2-11(b)(3)(iii). Under the amended Rule, a recently filed Form C offering statement is not specified as paragraph (b) information because securities sold under Regulation Crowdfunding are generally not transferable for one year from issuance.

[169] *See* Rule 202 of Regulation Crowdfunding.

[170] Amended Rule 15c2-11(b)(3)(iii)(B).

C. Supplemental Information Requirement—Rule 15c2-11(c)

To help support the integrity of the OTC market and to promote investor protection by helping to ensure that market participants consider material information prior to the initiation of a quoted market for an issuer's security, the Commission is extending the application of the Rule's obligations regarding supplemental information[171] to cover all market participants that comply with the Rule's information review requirement, including broker-dealers and qualified IDQSs alike.[172] Under the amended Rule, a broker-dealer and a qualified IDQS, in complying with the information review requirement, must consider supplemental information about the issuer of an OTC security as part of its evaluation of whether the amended Rule's specified information is materially accurate. The type of information that is considered to be supplemental information (e.g., a copy of a trading suspension order issued by the Commission pursuant to Exchange Act Section 12(k)) includes information about the issuer of the security that comes to the knowledge or possession of the broker-dealer before the broker-dealer publishes or submits a quotation for the issuer's security,[173] including records of transactions involving the issuer and

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[171] For purposes of this release, this requirement is referred to as the "supplemental information requirement."

[172] *See* Proposing Release at 58217. As stated in the Proposing Release, this modification was designed to help ensure that all market participants that comply with the information review requirement would be subject to the same requirements regarding supplemental information. *See* Proposing Release at 58218. Proposed paragraph (c) would not require that a qualified IDQS (or a broker-dealer) affirmatively seek additional information about the issuer. Rather, proposed paragraph (c) would require that a qualified IDQS (or broker-dealer) that complies with the information review requirement keep records of the documents and information specified in proposed paragraphs (c)(1) through (c)(3) (excluding documents and information available on EDGAR), including any information regarding the transactions actually provided to the qualified IDQS (or broker-dealer).

[173] *See* Proposed Rule 15c2-11(c); 1999 Reproposing Release at 11146–47 (explaining that, while a broker-dealer is not required to affirmatively seek out information about the issuer beyond that specifically required by the Rule, material information about the issuer that comes to the broker-dealer's knowledge or possession—orally or in writing—must be taken into account by the broker-dealer in assessing whether the issuer information is accurate and from a reliable source).

company insiders.[174] The Commission has determined to adopt paragraph (c) as proposed, with one technical modification.[175]

The Commission sought comment on its proposed changes to the supplemental information requirement, including extending the requirement to qualified IDQSs and requiring records of transactions involving issuers and company insiders.[176] One commenter stated that broker-dealers and qualified IDQSs that comply with the information review requirement should not be required to affirmatively seek additional information about the issuer because such a requirement would effectively turn broker-dealers into a combination of due diligence firms and private investigative agencies.[177] While the supplemental information requirement places an affirmative obligation on broker-dealers and qualified IDQSs that comply with the information review requirement to consider and record information beyond the paragraph (b) information, the Commission believes that this provision will help to support the integrity of the OTC market and promote investor protection by requiring that broker-dealers and qualified IDQSs consider

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[174] As stated in the Proposing Release, such information is important to consider, in conjunction with the issuer's paragraph (b) information and any other supplemental information, because persons such as company insiders might be able to exert control over the issuer of an OTC security and have a heightened incentive to manipulate the price of the security. *See* Proposing Release at 58218. The proposed Rule would not have required that company insider status automatically lead a broker-dealer or qualified IDQS to conclude that the issuer's information is not accurate in all material respects or from a reliable source. Instead, such information would need to have been evaluated in conjunction with the issuer's paragraph (b) information, along with any other supplemental information that has come to the knowledge or possession of the broker-dealer or qualified IDQS, in forming a reasonable basis to believe that the issuer's information is accurate and from a reliable source. The Commission stated that the knowledge that a quotation is by or on behalf of a company insider could aid investors by alerting the broker-dealer or qualified IDQS to the possibility that the quotation is being made on behalf of a person who may have a heightened incentive to manipulate the price of an issuer's security. *See id.*

[175] Specifically, paragraph (c)(3) of the amended Rule uses the newly defined term "company insider" to capture persons who are associated with an issuer, manage the company, or have heightened access to issuer information and who may have a heightened incentive to engage in fraudulent or manipulative conduct. *See infra* Part II.J.5.

[176] *See* Proposing Release at 58216–17.

[177] *See* Coral Capital Letter.

material information before commencing a quoted market.[178] The Commission also believes that the provision, as amended, is appropriately tailored to minimize burdens on broker-dealers and qualified IDQSs. Broker-dealers and qualified IDQSs are required to seek out only certain supplemental information (e.g., the identity of the person on whose behalf the quotation is made, company insider status, and recent trading suspensions). The requirement to obtain information regarding for whom a quotation is being published and whether the security has been subject to a trading suspension is not a new requirement. Obtaining such information does not require any particular due diligence or private investigation skills. For example, the broker-dealer can ascertain the identity of a person who is requesting that an initial quotation for a security be published or submitted by asking the person when the person contacts the broker-dealer. Additionally, whether a security has been the subject of a trading suspension is available on the Commission's website and is easily accessible.[179]

A broker-dealer or qualified IDQS is required to consider and record other supplemental information only if such information: (1) is provided to the broker-dealer or qualified IDQS by the person on whose behalf the quotation is published (e.g., information regarding transactions),[180] or (2) comes to the knowledge or possession of the broker-dealer or qualified

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[178] As discussed below in Part II.O, the supplemental information requirement places an affirmative requirement on such broker-dealers and qualified IDQSs to consider and have in their records the following documents and information: (1) records related to the identity of the person or persons for whom the quotation is being published or submitted, whether such person or persons is the issuer or a company insider, and any information regarding the transactions that such person or person has provided to the broker-dealer or qualified IDQS; and (2) a copy of any trading suspension order issued by the Commission pursuant to Section 12(k) of the Exchange Act regarding any securities of the issuer or its predecessor (if any) during the 12 months preceding the date of the publication or submission of the quotation or a copy of the public release issued by the Commission announcing such trading suspension order. However, such broker-dealers or qualified IDQSs must consider and record a copy or a written record of any other material information (including adverse information) regarding the issuer only if it comes to the knowledge or possession of the broker-dealer or qualified IDQS before the quotation is published or submitted.

[179] Trading Suspensions, https://www.sec.gov/litigation/suspensions.shtml (last visited Aug. 27, 2020).

[180] Amended Rule 15c2-11(c)(1).

IDQS (e.g., other material information regarding the issuer).[181] Considering and recording such information does not require a broker-dealer or qualified IDQS to conduct a due diligence review or a private investigation into facts that have not otherwise been provided to the broker-dealer or qualified IDQS, or that have not come to the knowledge or possession of the broker-dealer or qualified IDQS. The Commission believes structuring the supplemental information provision in this way strikes an appropriate balance of achieving the objectives of the Rule without placing unduly burdensome obligations on broker-dealers and qualified IDQSs.

Another commenter stated that information regarding the identity of the retail end-customer is not required to be publicly disclosed, so it is difficult for a broker-dealer that receives orders from correspondent brokers to have this information in its records on a transaction-by-transaction basis.[182] The Commission appreciates that a broker-dealer that publishes a quotation may not have a direct relationship with the retail customer on whose behalf the quotation is published and that such customer's broker is not required to publicly disclose the customer's identity.[183] Prior to the amendment, the Rule already required that a broker-dealer that complies with the information review requirement retain a record of the identity of the person or persons for whom the quotation is submitted or published. The Commission believes that it is operationally feasible for a broker-dealer to obtain this information (e.g., the customer's retail broker might provide information to the broker-dealer about the identity of its customer) when such broker-dealer is reviewing the issuer's information and commencing a quoted market at the behest of a customer. While the amended Rule requires that broker-dealers and qualified

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[181] Amended Rule 15c2-11(c)(3).

[182] OTC Markets Group Letter 3.

[183] *See infra* Part II.E (discussing the final amendments to the unsolicited quotation exception).

IDQSs record the identity of the person on whose behalf the initial quotation is made, the Commission believes that requiring a record of the identity of the person on whose behalf the quotation is made when commencing a quoted market furthers the objectives of the Rule without imposing undue burdens associated with individual quotations and may aid Commission oversight of broker-dealers' and qualified IDQSs' compliance with the amended Rule. Further, the Commission understands that the majority of quotations are currently, and expects that they will continue to be, published in reliance on exceptions to the amended Rule and not in reliance on the performance of the information review requirement.

This commenter also requested that the supplemental information regarding company insiders be limited to information that has come to the knowledge or possession of the broker-dealer or qualified IDQS.[184] The Commission has determined not to limit the amended Rule's specified supplemental information regarding status as an issuer and company insider to information that has come to the knowledge or possession of the broker-dealer or qualified IDQS. Because the amended Rule requires a broker-dealer or qualified IDQS to consider supplemental information only for initial quotations when initiating or resuming a quoted market, the Commission does not believe that it is unreasonable to require a broker-dealer or qualified IDQS to know the identity of the person making the request to commence a quoted market in this limited circumstance. Issuers and company insiders can have a heightened incentive to engage in misconduct to artificially affect the price and trading volume of the issuer's security. The Commission believes that application of the supplemental information requirement only to information that has come to the knowledge or possession of the broker-dealer or qualified IDQS would be inconsistent with the Commission's goal of enhancing the

[184] OTC Markets Group Letter 3.

Rule to better protect retail investors from fraud and manipulation orchestrated by company insiders.

The Commission continues to believe that certain supplemental information is relevant for a broker-dealer or qualified IDQS to evaluate in establishing a reasonable basis under the circumstances for believing that an issuer's paragraph (b) information is accurate in all material respects and from a reliable source.[185] Consequently, paragraph (c) of the amended Rule adds qualified IDQSs to the Rule's list of market participants that must have in their records supplemental information to help ensure that all market participants that comply with the information review requirement are subject to the same requirements.[186] Under the amended Rule, broker-dealers and qualified IDQSs that comply with the information review requirement must retain a copy or a written record of three categories of supplemental information: (1) records related to the publication or submission of the quotation, including the identity of the person on whose behalf the quotation is made, whether such person is an issuer or a company insider, and any information regarding the transaction provided to the broker-dealer or qualified IDQS; (2) a copy of any trading suspension order issued by the Commission during the 12 months preceding the date of publication or submission of the quotation or a copy of the press release announcing such suspension; and (3) any other material information regarding the issuer that comes onto the knowledge or possession of broker-dealer or qualified IDQS.[187]

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[185] Amended Rule 15c2-11(c).

[186] Paragraph (c) of the amended Rule also adds to the former Rule's list of records related to the submission or publication of a quotation for a security a record of whether such submission or publication is on behalf of an issuer or company insider because such individuals might be able to influence or control the issuer of an OTC security. *See* Amended Rule 15c2-11(c), (c)(1); Proposing Release at 58218.

[187] Amended Rule 15c2-11(c)(1) through (3).

The Commission is amending the Rule as proposed to require that the entity that complies with the information review requirement must have in its records the documents and information related to the identity of the person or persons for whom the quotation is being submitted or published, including whether such person is the issuer or a company insider[188] because the knowledge that a quotation is by or on behalf of the issuer or a company insider could promote investor protection by alerting the broker-dealer or qualified IDQS conducting the required review to the possibility that the quotation is being made on behalf of a person who may have a heightened incentive to manipulate the price of the security.[189] Whether the quotation is being made on behalf of such person is information that must be considered, together with any other supplemental information or paragraph (b) information, by the broker-dealer or qualified IDQS in forming a reasonable basis under the circumstances for believing that the issuer's paragraph (b) information is accurate in all material respects and from a reliable source.[190]

D. Piggyback Exception

The Commission is adopting various amendments to the piggyback exception, paragraph (f)(3), as discussed below.

1. Increased Transparency of Issuer Information—Rule 15c2-11(f)(3)(i)(C)(1) through (3)

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[188] Amended Rule 15c2-11(c)(1).

[189] *See* Proposing Release at 58218.

[190] *See* Amended Rule 15c2-11(a)(1)(i)(C), (a)(2)(iii) (requiring a broker-dealer or qualified IDQS that complies with the information review requirement to have a reasonable basis under the circumstances for believing that the issuer's paragraph (b) information is accurate in all material respects and that the sources of such paragraph (b) information are reliable based upon a review of the issuer's paragraph (b) information, together with any other supplemental information, as applicable); *see also supra* notes 174–175 and accompanying text (discussing how this requirement helps to promote the Rule's investor protection goals).

The Commission is requiring that an issuer's paragraph (b) information be current and publicly available, timely filed, or filed within 180 calendar days from a specified time frame,[191] in reference to the underlying timing obligations for each of the types of issuers under paragraph (b), for a broker-dealer to rely on the piggyback exception to publish quotations for the issuer's security.[192]

a) Current and Publicly Available Issuer Information

The Commission sought comment about the proposed amendment, including whether to permit a broker-dealer to rely on the piggyback exception to publish or submit quotations for the securities of catch-all issuers only where the issuer's proposed paragraph (b) information is current and has been made publicly available within six months before the date of publication or submission of such quotation. Commenters who supported this aspect of the proposal stated that it would help to strengthen investor protections by offering the investing public access to information about OTC companies[193] and to enhance market efficiency and transparency.[194]

One commenter stated that it is inconsistent for the proposal to both: (1) state that the piggyback exception's historical basis is that regular and continual priced quotations are an appropriate substitute for information about the issuer that would otherwise be relevant in

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[191] As discussed below, this requirement with respect to the paragraph (b) information of certain types of reporting issuers is measured from the end of the issuer's most recent fiscal year or any quarterly reporting period that is covered by a report required by Exchange Act Section 13 or 15(d), as applicable. *See* Amended Rule 15c2-11(f)(3)(i)(C)(1). For purposes of this release, the phrase "filed within 180 calendar days from [a/the] specified period" refers to the phrase "filed within 180 calendar days from the end of the issuer's most recent fiscal year or any quarterly reporting period that is covered by a report required by [S]ection 13 or 15(d) of the [Exchange] Act), as applicable," as specified in the rule text. *See* Amended Rule 15c2-11(f)(3)(i)(C)(1).

[192] *See* Amended Rule 15c2-11(f)(3)(i)(C)(1) through (3). For a discussion of the requirements for an issuer's paragraph (b) information to be current and publicly available before an issuer's security is initially quoted, see *supra* Part II.A.1.

[193] *See, e.g.*, Hamilton & Associates Letter; Massachusetts Letter; NASAA Letter.

[194] *E.g.*, OTC Markets Group Letter 2; SIFMA Letter; *see* FINRA Letter; Letter from J. Brad Wiggins, President and Legal Counsel, Securities Law USA ("Securities Law USA Letter"); Zuber Lawler Letter.

establishing a quotation, and (2) require that issuer information be current and publicly available for a broker-dealer to rely on the piggyback exception.[195] The Commission continues to believe that the piggyback exception serves an important purpose in helping to facilitate liquidity. The Commission, however, does not believe that the historical basis for the piggyback exception—that "regular and continual priced quotations are an appropriate substitute for information about the issuer which would otherwise be relevant in establishing a quotation"[196]—adequately takes account of current industry and investor practices in today's OTC market, nor does it sufficiently promote investor protection or the broker-dealer's role as a gatekeeper to the OTC market.[197] In particular, prior to the amendments, the piggyback exception resulted in quoted markets persisting for securities of issuers that no longer exist and certain securities of issuers that do not make their information publicly available sustaining the false appearance of an active market.[198] These securities, which primarily are owned by retail customers,[199] historically have been more susceptible to fraud and manipulation.[200] The Commission believes that transparency of issuer

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[195] Letter from Larry E. Bergmann, Partner, Murphy & McGonigle, P.C., to Vanessa Countryman, Sec'y, SEC (Dec 10, 2019) ("Murphy & McGonigle Letter"). This commenter wrote that, because the proposal's discussion about the policy rationale behind the piggyback exception—that regular and frequent quotations, including regular and frequent two-sided market making, reflect independent supply and demand forces—draws no distinction among the types of securities that are the subject of trading suspensions, it is unclear if the "current and publicly available" information requirement for catch-all issuers in the proposed provision would apply to catch-all issuers that were the subject of a trading suspension. *Id.* The paragraph (b) information of a catch-all issuer must be current and publicly available for a broker-dealer to publish or submit quotations for the catch-all issuer's security following the termination of a trading suspension for the issuer's security. *See* Amended Rule 15c2-11(f)(3)(i)(C)(3).

[196] *See Initiation or Resumption of Quotations Without Specified Information*, Exchange Act Release No. 21470 (Nov. 8, 1984), 49 FR 45117 (Nov. 15, 1984).

[197] *See, e.g.*, *supra* Part I.

[198] *See* Proposing Release at 58219; *see also infra* Part VI.B.2.c (discussing how OTC market may attract those seeking to engage in fraudulent practices, such as pump-and-dump schemes, due to a lack of publicly available current information about certain issuers of quoted OTC securities).

[199] *See* Proposing Release at 58207; *see also* Ang *et al.*, supra note 3.

[200] Douglas Cumming *et al.*, *Financial Market Misconduct and Agency Conflicts: A Synthesis and Future Directions*, 34 J. Corp. Fin 150–68 (2015).

information is essential for investors to be able to effectively analyze the issuer, its security, and the market for its security, particularly in light of the substantial reductions in information acquisition and dissemination costs due to the Internet and modern technology. The Commission believes that the modern ease of accessing and disseminating information allows investors to more easily form inferences about the value of OTC securities based upon current and publicly available information rather than relying principally upon inferences based on the prices of piggybacked quotes.[201]

One commenter suggested that the Commission should repeal the piggyback exception because, as the commenter stated, it is "a loophole that has permitted broker-dealers to solicit interest from and sell OTC securities to retail investors without verifying any of the details of the security, including, whether the issuer actually exists."[202] Another commenter stated that repealing the piggyback exception entirely would harm existing shareholders in OTC securities because it would cause many broker-dealers to cease market making or quoting prices in many OTC securities, draining or even eliminating liquidity in the OTC market.[203] The Commission believes that the piggyback exception serves an important purpose in helping to facilitate liquidity but remains concerned that the OTC market may attract those seeking to engage in fraudulent practices, such as pump-and-dump schemes, due to a lack of publicly available current information about certain issuers of quoted OTC securities.[204] This concern is amplified

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[201] *See infra* Part VI.A. In this regard, increasing the public availability of current information about OTC issuers has the potential to counteract misinformation, which can proliferate through promotions and other channels. *See infra* Part VI.B.2.c.

[202] Letter from Dennis M. Kelleher, President and CEO, and Lev Bagramian, Senior Securities Policy Advisor, Better Markets, Inc., to Vanessa Countryman, Sec'y, SEC (Dec. 30, 2020) ("Better Markets Letter").

[203] NASAA Letter.

[204] Proposing Release at 58282.

by the fact that the primary investors in the OTC market are retail investors. The amendments to the piggyback exception under the amended Rule are designed to facilitate liquidity in the OTC market while making narrowly tailored updates that promote investor protection and market efficiency, including the prevention of fraud and manipulation.[205]

Some commenters stated their concern that prohibiting quotations for securities of companies that do not provide current and publicly available information would not prevent fraud and manipulation[206] but would destroy liquidity,[207] be inconsistent with the proposal's goal of promoting a fair and orderly market for OTC securities,[208] and make dark companies' shares "worthless."[209] Commenters stated that some of these companies have longstanding histories of

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[205] *See infra* Part VI.C.1.b.

[206] *See* Anbec Partners Letter; Franklin Antonio; Caldwell Sutter Capital Comment; Alexandra Elliott; Braxton Gann; Han Han (Oct. 15, 2019); Peter Hayman; Norberg Letter; Daniel Raider; Jim Rivest; Mark Schepers (Oct. 15, 2019); STA Letter; Terravoir Venture Letter; Tiercel Capital Comment; Michael Tofias; Alex Toppan (Oct. 14, 2019); Debby Valentijn; Virtu Letter; Don C. Whitaker; *see also* Coral Capital Letter (stating that the loss of a quoted market would harm the ability of an issuer to become current in its reporting obligations by reducing access to capital that is necessary to pay expenses associated with regaining its current status). One commenter argued that closed-end funds that hold securities of issuers that are not current in their reporting requirements would need to fair value those securities rather than calculate net asset value using recent trades. Sanders Letter (arguing that such a result could provide investors with less reliable information to make informed investment decisions). The Investment Company Act of 1940 prescribes the method for closed-end funds to value their portfolio securities, whether or not market quotations are readily available. *See, e.g.*, Investment Company Act Section 2(a)(41); *see also Good Faith Determinations of Fair Value*, Investment Company Release No. 33845 (Apr. 21, 2020), 85 FR 28734 (May 13, 2020).

[207] *See, e.g.*, Alluvial Letter; Andersen Letter; Franklin Antonio (Dec. 27, 2019); Hank Armested (Oct. 24, 2019); Thomas M. Amenda (Oct. 23, 2019); R. Berkvens; Tyler Black (Nov. 25, 2019); J.H. Broekhoven (Nov. 16, 2019); Brad Christensen (Oct. 3, 2019); Caldwell Sutter Capital Comment; Laura Coffman; Connor Davis, Founder and Principal, Lake Highlands Capital Management ("Lake Highlands Comment"); Douglas DiSanti (Nov. 18, 2019); Brett Dorendorf; Drinker Letter; Alexandra Elliott; David J. Flood (Oct. 8, 2019); Braxton Gann; Letter from Matt Geiger, Managing Partner, MJG Capital Fund, LP, to Chairman Clayton (Oct. 28, 2019) ("MJG Capital Fund Letter"); Carlton Getz, Winter Harbor Advisors, LLC ("Winter Harbor Advisors Comment"); Chris Girand (Oct. 25, 2019); Bradley Grasl, Chief Investment Officer, Tiercel Capital Texas ("Tiercel Capital Comment"); Peter Hayman (Dec. 31, 2019); Gary Huscher (Nov. 1, 2019); Matt Jester (Oct. 8, 2019); Richard Krejcarek (Jan. 2, 2020); Ron

operation and profit, and suggested that issuers of securities with certain characteristics should be exempt from the requirement that their information be current and publicly available.[210]

The Commission understands commenters' concern regarding the proposed Rule's impact on certain OTC companies that do not make their information publicly available. Under the amended Rule, the potential reduction in public price discovery in an OTC security due to the loss of a quoted market can reduce an issuer's ability to raise capital through stock issuances or through other channels, such as debt,[211] and existing shareholders of non-reporting issuers can be negatively impacted from the loss of a quoted market for such securities, even if the securities migrate to the grey market.[212] The Commission believes, however, that undertaking to try to determine what constitutes a "legitimate" issuer, as suggested by commenters,[213] may require the

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Lefton (Nov. 11, 2020); Aharon Levy; Guarang Merani (Oct. 15, 2019); Michael Milchen (Oct. 10, 2019); Milner Letter; Mitchell Partners Letter 1; William E. Mitchell (Oct. 24, 2019); Norberg Letter; Peter Quagliano (Nov. 1, 2019); Daniel Raider; Charles M. Rardon (Oct. 1, 2019); Michael E. Reiss; Ronald Ringelberg; Jim Rivest; GTS Letter; David Schiff (Oct. 22, 2019); Eric Schleien, Investment Manager, Granite State Capital Management ("Granite State Capital Comment"); Dan Schum (Oct. 7, 2019); Lucas H. Selvidge (Oct. 23, 2019); Chris Soule (Oct. 10, 2019); Andrew Summers, CFA, Managing Partner, Summers Value Partners LLC ("Summers Value Partners Comment"); Total Clarity Comment; Franklin Urdaneta (Dec. 3, 2019); Debby Valentijn (Dec. 21, 2019); S. Van den Hoogenhoff (Dec. 9, 2019); Virtu Letter; Don C. Whitaker (Sept. 29, 2019); Samuel J. Yake (Oct. 5, 2019); *see generally* Logan Kemper (Nov. 6, 2019) Professor Angel Letter; Winter Harbor Advisors Comment.

[208] Brett Dorendorf; Peter Hayman; Kyle M. Peeples; Norberg Letter; S. Van den Hoogenhoff; Debby Valentijn.

[209] Andersen Letter. Other commenters were primarily concerned with the proposed amendments' effect on liquidity of securities of dark companies and what they perceived as potential harm to shareholders of those companies. *E.g.*, Exchange Listing Letter; GTS Letter; Virtu Letter; *see* OTC Markets Group Letter 3. Comments regarding a general opposition to the proposed amendments with respect to this perceived impact are discussed above, in Part II.

[210] *See* Aztec Letter; Caldwell Sutter Capital Comment; Lawrence Goldstein, President, SMP Asset Management LLC ("SMP Asset Management Comment"); Ron Lefton; William E. Mitchell; Mitchell Partners Letter 1; Doug Mohn; Norberg Letter; Peter Quagliano; Michael E. Reiss; Jim Rivest; Mark Schepers; Total Clarity Comment; Debby Valentijn; Don C. Whitaker; David Wright (Dec. 16, 2019); Michael A. Zgayb (Oct. 23, 2019); *see also* James Duade; Eric Speron (Nov. 27, 2019); Michael Tofias; Virtu Letter.

[211] *See infra* Part VI.C.2 (discussing how issuers may nevertheless be able to access capital through transactions in the grey market).

[212] *See infra* Part VI.C.1.a.

[213] *See, e.g.*, Doug Mohn; Taranis Comment.

Commission to make a merit-based determination that weighs certain characteristics of OTC issuers in relation to, or to the exclusion of, other characteristics of other OTC issuers. In addition, the limited available data regarding dark issuers would hamper analysis.

Further, the Commission does not believe the fact that such companies have longstanding histories of operation and profit obviates the need for their information to be current and publicly available for a broker-dealer to publish quotations for such securities. The Commission does not believe that these issuers with operations and profitability will become "worthless"[214] as a result of the amendments. The amendments can adversely affect these issuers and their shareholders; however, these issuers, even without a quotation for their securities by a broker-dealer, presumably would continue to operate and generate profits for their shareholders. These OTC securities would continue to represent an ownership interest on these profits and the issuer's assets. For newer issuers with prospective future profits, OTC shares would similarly represent a claim on these prospective profits. The Commission also believes that the potential harm to existing shareholders is (1) limited by the ability of broker-dealers to rely on exceptions to publish quotations, including the unsolicited quotation exception,[215] and the ability of existing shareholders to continue to trade their securities; and (2) mitigated by the decrease in exposure to fraudulent activity involving the securities of non-transparent companies (due to broker-dealers' inability to rely on the piggyback exception) to engage in manipulative schemes, such as pump-and-dump schemes.[216]

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[214] Andersen Letter.

[215] *See infra* Part VI.C.1.a.

[216] *See infra* Part VI.C.2; *see also* Proposing Release at 58258, 58259 (stating that requirements for the transparency of issuer information could have a deterrent effect in inhibiting fraudulent activity related to quoted OTC securities). In addition, as discussed below in this Part II.D.1, the formation of an "expert market," *see infra* note 269 and accompanying text, may alleviate these concerns, as well.

However, the Commission understands that market participants may have unique facts and circumstances as to how the amended Rule affects their activities, and the Commission will consider requests from market participants, including issuers, investors, or broker-dealers, for exemptive relief from the amended Rule for OTC securities that are currently eligible for the piggyback exception yet may lose piggyback eligibility due to the amendments to the Rule.[217] In considering whether an exemption from the Rule (pursuant to Section 36 of the Exchange Act and paragraph (g) of the amended Rule)[218] under these circumstances is necessary or appropriate and in the public interest, and is consistent with the protection of investors, the Commission may consider a number of factors, such as whether, based on data or other facts and circumstances provided by requestors, the issuers and/or securities are less susceptible to fraud or manipulation. In this regard, the Commission may consider, among other things, securities that have an established prior history of regular quoting and trading activity; issuers that do not have an adverse regulatory history; issuers that have complied with any applicable state or local disclosure regulations that require that the issuer provide its financial information to its shareholders on a regular basis, such as annually; issuers that have complied with any tax obligations as of the most recent tax year; issuers that have recently made material disclosures as part of a reverse merger; or facts and circumstances that present other features that are consistent with the goals of the amended Rule of enhancing protections for investors, particularly retail

[217] Issuers and investors that may be interested in requesting any such exemptive relief may coordinate with broker-dealers to submit requests. Because the amended Rule governs publications or submissions by broker-dealers, the requirements of the amended Rule and any conditions of any such exemptive relief would likely be undertaken to be complied with by a broker-dealer rather than an investor or issuer.

[218] *See infra* Part II.L. Paragraph (g) of the amended Rule states that "[u]pon written application or upon its own motion, the Commission may, conditionally or unconditionally, exempt by order any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this section, to the extent that that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors."

investors. The Commission encourages requests to be submitted expeditiously during the nine-month transition period of the amended Rule to avert potential interruptions in quotations in such securities that may occur on or after implementation.[219]

In addition, the Commission believes that the amendments are appropriate to help protect investors against potential exposure to fraud and manipulation that can occur when current information about an issuer is not publicly available. The Commission recognizes that shareholders of OTC securities may incur costs related to a loss of liquidity when broker-dealers cannot rely on the piggyback exception because there is no current and publicly available paragraph (b) information. However, on balance, the Commission believes that any such costs would be warranted by the attendant benefits. The Commission continues to believe that requiring issuer information to be current and publicly available will facilitate investor protection and transparency that will assist retail investors in making better-informed investment decisions and will counteract misinformation that can proliferate through promotions and other channels, thereby helping to prevent fraud and manipulation. More specifically, the amended Rule's requirements could have a deterrent effect in inhibiting fraudulent activity related to quoted OTC securities. Investors could benefit from decreased exposure to investment losses as a result of diminished fraudulent activity in the OTC market.[220] Further, academic studies have highlighted the relationship between the breadth and quality of firm disclosures and liquidity in the OTC

[219] The amended Rule has a compliance date that is nine months after the effective date of the amended Rule, and the compliance date for paragraph (b)(5)(i)(M) of the amended Rule is two years after the effective date of the amended Rule.. *See infra* Part II.P. Prior to the compliance date, broker-dealers may continue to publish quotations in reliance on the piggyback exception even if an issuer's paragraph (b) information is not current and publicly available.

[220] *See infra* Part VI.C.1.a; *see also* Proposing Release at 58255.

market.[221] The Commission also believes that, because prices may become less susceptible to manipulation as a result of the trading activity of informed investors who have access to paragraph (b) information, the efficiency of prices (i.e., the degree to which prices reflect the fundamental value of the security) could improve in the OTC market. These investors could buy underpriced securities and sell overpriced securities, pushing mispriced securities toward fundamental values.[222]

Another commenter suggested that the Rule should explicitly except market makers who do not solicit retail customers and that other broker-dealers should not be permitted to piggyback on market makers relying on the piggyback exception.[223] Although such market makers may not directly solicit retail customers, retail investors may access these market makers' quotations that are published or submitted in an IDQS. Such quotations may thereby serve as an advertisement (for interest in a particular security) to these retail investors to purchase shares in the quoted company, which could be a dark issuer. Accordingly, this suggested exception would undermine the amended Rule's goal of providing transparency of the OTC market because it would allow broker-dealers that provide liquidity as market makers to publish or submit quotations for any security, including the security of an issuer for which information is not current and publicly available. Because the investor protection goals of this requirement are achieved, in part, by greater transparency and the public availability of current issuer information, and not by the mere fact that a broker-dealer provides liquidity as a market maker, the Commission does not believe

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[221] *See supra* note 6 and accompanying text.

[222] *See infra* Part VI.C.2.

[223] Professor Angel Letter (stating that market makers provide important liquidity to the market and produce important price information that is useful to investors and as a tool for enforcement).

that it would be appropriate to except broker-dealers who do not solicit retail customers, as suggested by the commenter.

Other commenters stated that the elimination of a quoted market for securities of issuers for which paragraph (b) information is not current and publicly available would disadvantage minority shareholders[224] or non-company insiders.[225] For example, some commenters believed that the proposal could encourage companies to go dark to destroy a public market in their stock.[226] The Commission acknowledges that existing shareholders, including minority shareholders, of companies that do not have current and publicly available paragraph (b) information will be negatively impacted if broker-dealers cease publishing quotations for the securities of such companies and OTC firm insiders repurchase shares from outside investors at lower stock prices.[227] However, the Commission believes that such impact would affect a limited number of existing shareholders in the overall market because the Commission expects a majority of issuers may not engage in such activity. To the extent that issuers engage in such activity, however, the Commission believes that any such impact is justified by the benefits of deterring potential fraud and manipulation, incentivizing greater issuer transparency and contributing to more efficient price formation.[228] In addition, the requirement for current and publicly available issuer information for a broker-dealer to rely on the piggyback exception to

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[224] Caldwell Sutter Capital Comment; Ron Lefton; Milner Letter; Professor Angel Letter.

[225] Caldwell Sutter Capital Comment; Brad Christensen; James Duade; Michael Hess; Richard Krejcarek; Ron Lefton; Milner Letter; William E. Mitchell; MJG Capital Fund Letter; Doug Mohn; Ariel Ozick; Peter Quagliano; Dan Schum; Eric Speron; Michael Tofias; Don C. Whitaker.

[226] Anbec Partners Letter; Tim Bergin (Oct. 9, 2019); Lucas Elliott (Oct. 9, 2019); Ralf Erz; Braxton Gann; James Gibson (Oct. 25, 2019); Han Han; William E. Mitchell; Daniel Raider; Michael E. Reiss; Mark Schepers; Dan Schum ("These companies enjoy operating in the shadows."); Michael Tofias; Raymond Webb (Oct. 7, 2019).

[227] *See infra* Part VI.C.1.a.

[228] *See infra* Part VI.C.1.a. Further, as discussed above, the Commission will consider requests for exemptive relief regarding issuers that currently do not make their information publicly available.

maintain a quoted market could also benefit existing shareholders, including minority shareholders or non-company insiders, due to more efficient pricing of securities of issuers for which information is current and publicly available.

Another commenter stated that certain OTC companies have decades of profits and cash yields without any operations or staff to manage the distribution of financial information, so the public distribution of financial information through a website, for example, would come directly at the expense of the cash yield to investors.[229] The Commission recognizes that the requirement for current and publicly available issuer information could come at the expense of cash yield to investors but believes that this requirement will promote investor protection by facilitating investors' access to information that they could use to make better-informed investment decisions. While an issuer may choose to make its financial information publicly available on its website using its own operations, an issuer may also choose to make information "publicly available" on a wide range of venues, including on the website of, and using the services of, a qualified IDQS, a registered national securities association, or a registered broker-dealer. Indeed, an investor may choose to coordinate with a broker-dealer or a qualified IDQS to have an issuer's current information made publicly available on, for example, the website of a broker-dealer or qualified IDQS.[230]

Some commenters opposed the requirement for current and publicly available information because, according to them, it is inconsistent with the fact that not all issuers have a reporting or disclosure obligation under the federal securities laws.[231] The amended Rule,

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[229] William E. Mitchell.

[230] *See infra* Part II.J.3.

[231] David Aldridge; R. Berkvens; Tyler Black; J.H. Broekhoven; Brandon Cline (Dec. 7, 2019); David A. Moeller, CIMA, Director of Investment Planning, Symphony Financial, Ltd., Co. ("Symphony Financial Comment"); Anthony Perala (Oct. 25, 2019); Michael E. Reiss; Jim Rivest; Robert Schmidt (Nov. 5, 2019); Michael Tofias; Alex

however, does not place any obligation on an issuer to file or furnish information with the Commission—any such obligation already would exist for the issuer—and some issuers may choose to make current information about themselves publicly available while others may not.[232]

Commenters expressed concern regarding the potential for reduced access to capital for small companies that have chosen to "go dark" to reduce compliance costs.[233] While the Commission recognizes that these companies could be negatively affected by the amended Rule, the Commission is unable to quantify the potential impact on liquidity and value.[234] Further, as discussed above, the Commission recognizes that the loss of a quoted market and the information embedded in prices may reduce an issuer's ability to raise capital through stock issuances or through other channels, such as debt.[235] The Commission recognizes that some companies may choose to remain dark over the objections of minority shareholders whose shares could lose value as a result of the amendments. However, non-transparent issuers with productive investment opportunities could opt to disclose information to maintain a quoted market and alleviate effects on capital formation. Therefore, a decision by the issuer to remain non-transparent may result in the issuer being less likely to have productive investment opportunities because the issuer may have less access to capital to use for productive investments than those

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Toppan; Debby Valentijn; S. Van den Hoogenhoff. *But see* Peregrine Comment ("I[n] the case of companies who say that the cost of providing basic reporting and accounting information is overly complex or expensive, then these companies are probably too small, unprofessional and/or under resourced to be publicly traded in the first place and should probably remain private.").

[232] Further, the Rule does not prevent an issuer from terminating or suspending its reporting obligations under the Exchange Act. Such an issuer, however, would become a catch-all issuer for purposes of the amended Rule. Under those circumstances, a broker-dealer would only be able to initiate a quoted market in that issuer's security if certain information specified in amended Rule 15c2-11(b)(5)(i) is current and publicly available.

[233] *See, e.g.*, Anbec Partners Letter; Caldwell Sutter Capital Comment; Laura Coffman; Paul Lucot (Oct. 16, 2019); Michael Tofias; Michael A. Zgayb; *see* James Duade; Terravoir Venture Letter.

[234] *See infra* Part VI.C.1.a.

[235] *See infra* Part VI.C.2.

that opt to disclose.[236] In addition, the Commission believes that the amendments could result in reduced investment in securities more susceptible to fraud and increased investment in securities less susceptible to fraud.[237]

Some commenters stated that broker-dealers should not be prohibited from relying on the piggyback exception to publish quotations for securities of delinquent reporting companies because, according to the commenter, price discovery that is created by publishing a quotation is "a significant and important function of the market."[238] The Commission agrees that price discovery is an important function of the market and, therefore, has adopted an amendment to the piggyback exception allowing broker-dealers to rely on the exception based on one-way priced quotations (so long as the other requirements of the exception are met) that will help to facilitate price discovery in the OTC market.[239] Further, as discussed above[240] and below in Part VI.C.2, the Commission believes that efficiency of prices could improve in the OTC market as a result of greater issuer transparency. However, the Commission believes that investor protection requires that broker-dealers be prohibited from relying on the piggyback exception for an unlimited period to quote securities of reporting issuers that do not have current and publicly available information or are delinquent in their filing obligations. The Commission's belief is informed by studies that show a greater incidence of litigated cases involving pump-and-dump schemes

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[236] *See infra* Part VI.C.1.a.

[237] *See infra* Part VI.C.1.a.

[238] Coral Capital Letter; *see* Coulson Comment.

[239] *See infra* Part II.D.2.

[240] *See supra* note 222 and accompanying text.

brought against issuers of OTC securities relative to cases brought against issuers of exchange-listed securities.[241]

One commenter stated that the proposal would hurt valuation multiples for OTC securities because investors would be reluctant to invest in a company that might fall two quarters behind in its public disclosure requirements, which would lower share prices and trading volumes, thereby making it more difficult to meet the listing standards of exchanges.[242] While the Commission acknowledges, as discussed in the Economic Analysis below, that the proposed amendments may cause capital to migrate from opaque to more transparent companies,[243] the Commission does not believe that the requirement for issuer information to be current and publicly available makes it more difficult for issuers whose information is not current and publicly available to meet the listing standards of national securities exchanges because, in part, exchange listing standards already require such issuer information to be current and publicly available.[244] As discussed below in the Economic Analysis, securities of issuers with higher levels of disclosure typically experience an increase in liquidity, while the securities of issuers

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[241] *See* Cumming & Johan, *supra* note 7.

[242] Coral Capital Letter.

[243] *See infra* Part VI.C.2 (citing James J. Angel, *et al.*, *From Pink Slips to Pink Sheets: Liquidity and Shareholder Wealth Consequences of NASDAQ Delistings* (Working Paper, Nov. 4, 2004), *available a*t https://www.researchgate.net/profile/Jeffrey_Harris7/publication/4893245_From_Pink_Slips_to_Pink_Sheets_Liquidity_and_Shareholder_Wealth_Consequences_of_Nasdaq_Delistings/links/02e7e527daa56e7612000000.pdf (explaining that less liquid OTC securities could migrate away from the quoted OTC market as a result of the proposed restrictions on the piggyback exception)); *see also* Proposing Release at 58259.

[244] The listing standards of national securities exchanges are more extensive than the amended Rule's requirement regarding current and publicly available information. *See, e.g.*, Original Listing Application for Equity Securities, New York Stock Exchange, *available at* https://www.nyse.com/publicdocs/nyse/listing/Full_Application.pdf (last visited June 13, 2020) (requiring, among other things, that the applicant issuer agree to file all required periodic financial reports with the Commission, including annual reports, and where applicable, quarterly or semi-annual reports, by the due dates established by the Commission).

that do not disclose information typically experience a decrease in liquidity,[245] and liquid securities often trade at higher prices based on lower costs associated with their resale.[246] The amended Rule's requirement that issuer information be current and publicly available for a broker-dealer to maintain a quoted market in an issuer's security has the potential to increase the liquidity and price of securities of issuers for which information is current and publicly available, thereby benefiting such issuers such that they may consider seeking to list on a national securities exchange.[247]

Another commenter stated that to require yet another reporting layer at the holding company level for community banks could lead many to "decide they cannot afford to trade at all."[248] The Commission recognizes that broker-dealers may not publish quotations pursuant to the piggyback exception (but may publish quotations pursuant to the unsolicited quotation exception, as discussed in the next paragraph) for the securities of issuers if issuer information, including that of holding companies for community banks,[249] is not current and publicly available, and that investors may incur costs associated with a loss of liquidity and possible

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[245] *See infra* Part VI.C.1.a.

[246] *See* Ang *et al.*, *supra* note 3 (finding that the return premium for illiquid stocks is much higher in OTC markets than in listed markets).

[247] *See, e.g.*, *infra* note 690 and accompanying text.

[248] William E. Mitchell. Under the amended Rule, catch-all issuer information must be current and publicly available on an annual basis, with the exception of certain financial information, not on a quarterly basis, as this commenter suggested. *See* Amended Rule 15c2-11(f)(3)(i)(C)(3); Amended Rule 15c2-11(b)(5)(i).

[249] Financial information that is posted on the website of a federal banking regulator, such as https://cdr.ffiec.gov/ and https://www.ffiec.gov/, generally includes the following financial information for companies that is specified in paragraph (b)(5)(i)(L) of the amended Rule: the issuer's balance sheet, income statements, and retained earnings statement. However, the Commission notes that a bank's financial information provided on such a website might not include the relevant financial information of the bank's holding company (i.e., the issuer of the security), which would have to be current and publicly available for a broker-dealer to publish a quotation.

associated decrease in share value.[250] However, the Commission believes that, on balance, by requiring current and publicly available issuer information—information regarding the holding company that is the issuer of the quoted security, not information limited to the bank that is the issuer's subsidiary—for a broker-dealer to maintain a quoted market in an issuer's security, the amended Rule promotes investor protection and facilitates efficiencies in price discovery by providing greater access to issuer information that investors can use to make more informed investment decisions. Moreover, fraudsters could have more difficulty in driving up the price for an OTC security in pump-and-dump and other manipulative schemes, which may be facilitated by investors' inability to analyze information contained in promotion campaigns when issuer information is not current and publicly available, because quotations for such issuers' securities would not be published or submitted for retail investors to access.[251] Further, a promoter may be less likely to engage in a fraudulent or manipulative scheme for the security of an issuer for which there is current and publicly available information; the presence of current and publicly available issuer information can be a deterrent to a potential fraudster.[252]

Trading in the grey market, where no quoted prices are available for buyers and sellers to transact, will result in some costs from loss of liquidity[253] for certain securities because it

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[250] *See infra* Part VI.C.1.a (stating that the cessation of published quotations and the migration to the grey market for some OTC securities can be followed by subsequent drops in price and trading volume but that a causal relationship is difficult to establish because of other contemporaneous factors, such as financial distress).

[251] *See infra* Part VI.C.1.b; Proposing Release at 58255 n.267 and accompanying text.

[252] *Cf.* Karen K. Nelson *et al.*, *Are Individual Investors Influenced by the Optimism and Credibility of Stock Spam Recommendations?*, 40 J. Business Fin. & Acct. 1155–83 (2013) (stating that "stock spam invariably targets small securities with relatively little publicly available financial or other information").

[253] *See, e.g.*, Brüggemann *et al.*, *supra* note 72 (stating that "both market quality proxies change monotonically when moving from the [quoted market] to the [g]rey [m]arket" and that "[t]he decline in liquidity and increase in crash risk are consistent with a ranking of these venues in terms of their regulatory strictness and disclosure requirements").

involves manual efforts to locate the other side of a trade. However, these increased search costs associated with grey market trading may be limited or avoided if broker-dealers are able to rely on the unsolicited quotation exception to publish quotations on behalf of an investor that is not a company insider or affiliate of the issuer.[254] Rule 15c2-11 governs broker-dealers' publications or submissions of quotations for OTC securities in a quotation medium; the Rule does not govern trading in OTC securities altogether (e.g., in the grey market, without quotations).[255]

Some commenters who opposed a requirement for current and publicly available information stated that some dark companies provide information,[256] such as an audited annual report, on an annual basis to their existing shareholders[257] or by request,[258] and that these dark issuers may not make this information more widely available to avoid revealing confidential financial and business information to competitors, to allow insiders to be the buyer of last resort at low prices, to have fewer shareholders, and to take advantage of tax benefits.[259] The Commission recognizes that compliance with this requirement, including with respect to the financial information for an issuer that does not have a statute- or rule-based reporting obligation, such as a catch-all issuer, may reveal confidential financial or business information to competitors. The Commission acknowledges there may be costs associated with potentially

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[254] *See* Amended Rule 15c2-11(f)(2).

[255] *See* Amended Rule 15c2-11(a).

[256] Such catch-all issuer information is discussed above in Part II.B.3.

[257] *See* Duane DeYoung (Oct. 26, 2019); Brett Dorendorf; Christian Gabis; Michael Hess; Matt Jester; Lake Highlands Comment; Dave Peirce (Oct. 16, 2019); Anthony Perala.

[258] Anbec Partners Letter; Gary Huscher (Nov. 1, 2019); *see* Duane DeYoung; SMP Asset Management Comment; Michael P. Kruger (Oct. 10, 2019); Lucas Selvidge (Oct. 23, 2019).

[259] Peter Quagliano; Michael Tofias; *see* Alluvial Letter; Drinker Letter. *But see* NASAA Letter (stating that paragraph (b) information does not involve trade secrets, proprietary business operations, or other highly sensitive business information).

revealing (or revealing more widely) confidential information, but requiring the public availability of current issuer information can help to better facilitate informed investment decisions by both existing investors[260] and potential investors in addition to potentially limiting incidents of fraud and manipulation in OTC securities. The public availability of current issuer information improves the overall mix of information about issuers that is readily and easily accessible to investors. Further, the public availability of current issuer information can also promote market efficiency and pricing integrity of catch-all issuers' securities, which may facilitate capital formation and lead to more efficient prices that are less susceptible to manipulation.[261]

In response to the Commission's request for comment, one commenter stated that the securities of issuers that have undergone a reorganization, any major merger or acquisition, reverse merger, or significant restructuring should be eligible for the piggyback exception,[262] stating that companies that have undergone reverse mergers already are required to disclose "a significant amount of information" publicly by filing a "[F]orm 8-K12(g)," which the commenter stated is "nearly identical" to a Form 10, and that the Commission should require the disclosure of more information on this form if it is not satisfied with the amount of information a Form 8-K filer must disclose if it engages in a reverse merger.[263] The amended Rule does not prevent broker-dealers from relying on the piggyback exception for the securities of issuers that undergo

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[260] Securities of well-established issuers that provide information to existing shareholders can still be subject to fraud and manipulation. *See infra* Part VI.C.1.a.

[261] *See infra* Part VI.C.1.a. Rule 15c2-11 does not impose any disclosure obligations upon issuers.

[262] Coral Capital Letter. *But see* NASAA Letter (encouraging the Commission to amend the Rule so that broker-dealers cannot rely on the piggyback exception to publish quotations for securities of issuers that undergo material business developments, including, but not limited to, declarations of bankruptcy, re-organizations, and mergers, unless information regarding such development "has been disclosed").

[263] Coral Capital Letter.

major corporate transactions, so long as certain requirements are met. To the extent that the reports and filings specified in paragraph (b) require the disclosure of any major corporate action, such as a reorganization, merger, acquisition, or reverse merger, and such paragraph (b) information is current and publicly available, timely filed, or filed within 180 calendar days from the specified period, as applicable, for an issuer that has undergone such transaction, a broker-dealer would be able to rely on the piggyback exception for that issuer's security, so long as the other requirements of the piggyback exception are met.

Another commenter stated that the proposal would not increase the availability of information that would help investors.[264] The Commission believes, however, that some market participants, such as a qualified IDQS or broker-dealer, may choose to make current issuer information publicly available in response to the amended Rule and that doing so would increase access to issuer information that could help investors to make better-informed investment decisions.[265] Further, allowing broker-dealers only to quote securities when information is "publicly available" (consistent with the amended Rule's requirements) on any online location within a broad list of regulated market participants' websites and an issuer's website, in addition to EDGAR or the website of a state or federal agency, would increase access to issuer information, such as balance sheets, profit and loss statements, and retained earnings statements that investors could use to analyze in making better-informed investment decisions. The public availability of current information, in addition to the expansion of the Rule's specified paragraph (b) information for catch-all issuers, could enable investors to better assess information

[264] John Sheehy (Oct. 15, 2019).

[265] *See, e.g.*, Aztec Letter (stating that "Aztec . . . could, and is willing to, publish on its website the annual information required by Rule 15c2-11(b)[(5)(i)(A) through (M)]").

contained in promotion campaigns and, therefore, could have a deterrent effect in inhibiting fraudulent activity related to quoted OTC securities.[266]

Some commenters provided examples of where they believed paragraph (b) information would be unnecessary to make an informed decision: sophisticated investors with sufficient investment experience; active, self-directed traders that use professional products offered by electronic brokers; institutions and regulated investment advisers; broker-to-broker transactions; sales by all non-affiliate, retail investors;[267] and existing shareholders or short-term traders or speculators.[268] The Commission recognizes that investors may have varying needs for an issuer's paragraph (b) information to be current and publicly available due to different approaches in analyzing the issuer and the market for its security. The Commission also does not believe that the requirement for an issuer's paragraph (b) information to be current and publicly available would prevent investors from utilizing their own methods for analyzing issuers and their securities. Instead, the Commission believes that, on balance, by requiring paragraph (b) information to be current and publicly available for a broker-dealer to be able to publish quotations for issuers' securities, the amendments will require that a minimum amount of information be available about these quoted securities, which can be used by investors to make better-informed investment decisions. In addition, the public availability of paragraph (b) information should help to alleviate concerns that limited or no information for certain issuers of quoted OTC securities exists or that such information is difficult or impossible for retail investors to find.

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[266] *See infra* Part VI.C.1.b; Proposing Release at 58255.

[267] OTC Markets Group Letter 2; *see also* Securities Law USA Letter; Zuber Lawler Letter.

[268] Coral Capital Letter.

Some commenters suggested that securities of companies that do not make their information publicly available or otherwise fail to meet an exception should be eligible for quoting on a market where quote distribution would be limited to "professional investors" and certain non-institutional investors would only be allowed to liquidate holdings.[269] These comments do not provide sufficient detail to address how such a market would function while ensuring that the Rule's goals would be achieved through such alternative means. The Commission recognizes, however, that investors in securities that migrate to the grey market (as a result of the amendments) may be more susceptible to fraud and less efficient pricing, and, as one commenter stated, may lack electronic mechanisms to facilitate best execution.[270] The Commission believes that, under certain conditions and circumstances, it could be beneficial to establish an "expert market" that would enhance liquidity for sophisticated or professional investors in grey market securities, as well as for small companies seeking growth opportunities that might prefer to be quoted in a market limited to such persons. To facilitate the formation and implementation of such a market, the Commission has the authority to issue exemptive relief by order pursuant to Section 36 of the Exchange Act and paragraph (g) of the amended Rule[271]

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[269] *E.g.*, OTC Markets Group Letter 2. Specifically, this commenter suggested that (what the commenter called) an "Expert Market" should be exempt from the definition of an IDQS under the Rule. OTC Markets Group Letter 2; OTC Markets Group Letter 3 (mentioning Qualified Institutional Buyers, accredited investors, certain registered entities, and banks); *see* Coulson Comment. Several commenters agreed that there should be a way to trade securities that would no longer be eligible for a quoted public market, including such an "Expert Market." OTC Markets Group Letter 1; *see* Canaccord Letter; CrowdCheck Letter; HTFL Letter; Lucosky Brookman Letter; MCAP Letter; Sosnow & Associates Letter; Securities Law USA Letter; Zuber Lawler Letter; *see also* Caldwell Sutter Capital Comment; Taranis Comment; Ron Lefton; Letter from James E. Mitchell, General Partner, Mitchell Partners, L.P., to Hon. Jay Clayton, Chairman, SEC (Mar. 13, 2020) ("Mitchell Partners Letter 3"); STA Letter; Virtu Letter. One commenter stated that such a market, however, could compound systemic risks. Jean-Paul Tres.

[270] *See* OTC Markets Group Letter 2.

[271] *See infra* Part II.L. Paragraph (g) of the amended Rule states that "[u]pon written application or upon its own motion, the Commission may, conditionally or unconditionally, exempt by order any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this section, to the extent that that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors."

that is necessary or appropriate in the public interest, and is consistent with the protection of investors. In this regard, the Commission may consider, among other things, the types of investors who could access quotations in this market and the types of securities that would be quoted in such a market.

In considering any such exemptive relief, the Commission preliminarily believes that any such expert market must not have the potential to develop into a parallel market for which quotations are accessible by retail investors and the general public. To protect retail investors from the harms resulting from incidents of fraud and manipulation in OTC securities for which no or limited publicly available information about the issuers exists to help counteract misinformation, such exemptive relief could focus on the types of investors that have the ability to assess an investment opportunity, including the ability to analyze the risks and rewards.[272] Thus, the Commission preliminarily believes that any such exemptive relief should be narrowly tailored to limit access to sophisticated investors, such as qualified institutional buyers, as defined in Securities Act Rule 144A(a)(1); accredited investors, as defined in Securities Act Rule 501(a); investment companies registered under the Investment Company Act of 1940; investment advisers registered under Section 203 of the Investment Advisers Act of 1940; banks, bank holding companies, savings associations, depository institutions, or foreign banks, as defined in Section 3 of the Federal Deposit Insurance Act; and broker-dealers.

The Commission may consider any appropriate factors or conditions for any such expert market including certain safeguards such as, for example, requiring that any participating security: (1) is of an issuer that has an active license from its state of incorporation or domicile

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[272] *See, e.g.*, *Amending the "Accredited Investor" Definition*, Securities Act Release No. 10824 (Aug. 26, 2020), __ FR ____ (___. __, 2020).

to carry on any business for which a license is required; and (2) was the subject of a quotation that was published or submitted pursuant to either paragraph (f)(1) (the exchange-traded security exception) or (f)(3) (the piggyback exception) of the amended Rule on the business day preceding the initial quotation in any such expert market.

Some commenters stated that certain catch-all issuers provide their paragraph (b) information to their shareholders (e.g., on an annual basis), and so questioned the requirement for public availability of issuer information.[273] The amended Rule seeks to equalize opportunities for informed investment decisions based on information access between existing and potential shareholders by requiring that an issuer's financial information be current and publicly available before a broker-dealer can publish or submit a quotation for that issuer. The Commission recognizes that the type of information that investors may require to make an informed investment decision may vary based on their investment objectives, as well as on other factors. The Commission, however, believes that allowing quotations absent current and publicly available financial information, regardless of investment strategy, would benefit existing shareholders who may have access to information that potential investors may lack because existing shareholders, for example, may be sent such information on a regular basis or upon request. Further, such an outcome could facilitate a market where demand is based on significant information asymmetries.

One commenter stated that the proposed piggyback exception would not be available for foreign private issuers that restrict access by U.S. persons to their disclosure documents,[274] and the Commission agrees. However, this restriction on the ability of a broker-dealer to maintain a

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[273] *E.g.*, Duane DeYoung; Brett Dorendorf; Michael Hess; Matt Jester; Lake Highlands Comment; Dave Peirce; Anthony Perala; *see* Christian Gabis.

[274] Murphy & McGonigle Letter.

quoted market in the securities of such foreign private issuers, in the absence of current and publicly available issuer information, aligns with the amendments' objective of providing additional transparency to investors, including retail investors, so that they can make better-informed investment decisions and more easily evaluate the issuer, its security, and the market for the security.[275]

As discussed above, the proposed Rule would have required that a catch-all issuer's financial information be current and publicly available within six months from a broker-dealer's publication or submission of a quotation for a broker-dealer to rely on the piggyback exception for the catch-all issuer. Some commenters specifically addressed the six-month requirement in the proposed Rule as too short an amount of time for a catch-all issuer's information to be current and publicly available.[276] One commenter opposed the six-month time frame because, according to the commenter, such an amount of time would place an undue burden on small issuers, create a compliance burden on broker-dealers, and negatively impact the ability of small issuers to raise capital.[277] Some commenters stated that certain well-established, thinly traded non-reporting issuers make their financial information[278] available to their existing shareholders only on an annual basis, which would not meet the standard of "current" for purposes of paragraph (b)(5)(i)(L) of the proposed Rule.[279]

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[275] The amended Rule also expands the definition of the term "publicly available" to align the Rule with Exchange Act Rule 12g3-2(b) and include an electronic information delivery system that is generally available to the public in the primary trading market of a foreign private issuer, which accommodates information that is available on a foreign regulator's website. *See infra* Part II.J.3.

[276] *See* Coral Capital Letter; Joshua Marino.

[277] Coral Capital Letter.

[278] See *infra* Part II.B.3 for a discussion of such issuer information.

[279] *See, e.g.,* Alluvial Letter; Aztec Letter; Beacon Redevelopment Letter; Brett Dorendorf; Michael Hess; Doug Mohn; Ariel Ozick; Robert E. Schermer, Jr.; Total Clarity Comment.

The Commission has determined not to require catch-all issuer information to be current and publicly available within six months before the date of publication or submission of a broker-dealer's quotation for the broker-dealer to rely on the piggyback exception. Instead, for a broker-dealer to rely on the piggyback exception to publish or submit a quotation for a catch-all issuer's security, such issuer's balance sheet is current if its most recent balance sheet is as of a date less than 16 months[280] before the publication or submission of the broker-dealer's quotation, and the issuer's profit and loss and retained earnings statements are current if they are for the 12 months preceding the date of such balance sheet.[281] Such catch-all issuer's other information specified in paragraph (b)(5)(i), except for the information specified in paragraphs (b)(5)(i)(N) through (P), must be as of a date within 12 months before the publication or submission of the quotation.[282]

While the Commission recognizes investors' need for current financial information, the Commission is also cognizant of the anticipated costs to issuers of producing and updating paragraph (b) information. As discussed in Part II.B.3, a more frequent disclosure requirement for catch-all issuer financial information would require an allocation of resources to the preparation of financial statements that the Commission does not believe is justified in light of the fact that catch-all issuers may not have an ongoing reporting or disclosure obligation. In addition, the Commission believes that catch-all issuer information made publicly available on

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[280] *See supra* note 142.

[281] *See* Amended Rule 15c2-11(b)(5)(i)(L); *infra* Part II.J.1 (discussing the amended Rule's definition of the term "current").

[282] *See* Amended Rule 15c2-11(b)(5)(i). Consistent with the proposed Rule, the amended Rule does not require the information specified in paragraphs (b)(5)(i)(N) through (P) to be current and publicly available because those paragraphs are not issuer-specific and, instead, refer to information about the publication or submission of the quotation and the broker-dealer publishing or submitting the quotation.

an annual basis, in addition to the expansion of the list of specified information for catch-all issuers,[283] will help provide investors with appropriate information to make better-informed investment decisions. Furthermore, as some commenters observed, the extension of time for catch-all issuer financial information to be current and publicly available aligns with current industry standards and practices regarding when issuers provide information to their investors[284] and certain requirements under state law to provide financial information to investors on an annual basis.[285] Therefore, the Commission believes the extension of time for the disclosure of catch-all issuer financial information (as compared to the proposed Rule's semi-annual requirement) strikes an appropriate balance between facilitating capital formation and issuer and market transparency to provide investors with information to make better-informed investment decisions.

As discussed above, the proposed Rule would have treated an issuer as a catch-all issuer if it were delinquent in its reporting or disclosure obligations as a result of not timely filing a report, as required by the Exchange Act or Securities Act. Accordingly, if an issuer had not timely filed a required report by the prescribed due date for such report, its information would not be current for purposes of the proposed Rule, and the issuer would be treated as a catch-all issuer until the issuer were to file its required report. In this instance, a broker-dealer would not have been able to rely on the piggyback exception to publish or submit a quotation for the issuer's security if the information specified in proposed paragraph (b)(5)(i)(L) for such issuer were not current and publicly available as of a date within six months from the publication or

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[283] *See supra* Part II.B.3.

[284] *See, e.g.,* Alluvial Letter; Aztec Letter; Beacon Redevelopment Letter; Brett Dorendorf; Michael Hess; Doug Mohn; Ariel Ozick; Robert E. Schermer, Jr.; Total Clarity Comment.

[285] *See* Drinker Letter.

submission of the broker-dealer's quotation. This treatment of delinquent reporting issuers as catch-all issuers in the proposed Rule would have created different outcomes with respect to when information is current and publicly available for purposes of relying on the piggyback exception based on the frequency of Exchange Act or Securities Act reporting and disclosure obligations. For example, if an issuer did not file a required quarterly report by its prescribed due date, broker-dealers would continue to be able to publish a quotation in reliance on the piggyback exception so long as the last day of the reporting period covered by the issuer's most recently filed quarterly report were as of a date within six months from the date of the publication or submission of the broker-dealers' quotations; the delinquent reporting issuer would have been treated as a catch-all issuer, but it would not immediately have lost its quoted market. In contrast, a broker-dealer would not have been able to publish a quotation in reliance on the piggyback exception for an issuer with a reporting obligation under Regulation A if the issuer failed to file its semi-annual or annual report by the prescribed due date for such report. Here, even though the issuer is delinquent in its reporting and would be treated as a catch-all issuer, its information would not be current and publicly available within the six-month time frame for the piggyback exception, and its quoted market must be discontinued, unless its information were made current and publicly available. To simplify the application of the piggyback exception, and to address the potential for disparate treatment under the piggyback exception of issuers that may have different reporting obligations, the piggyback exception under the amended Rule groups issuers based on their regulatory status in regard to Exchange Act or Securities Act reporting obligations. Accordingly, issuers with Exchange Act or Securities Act

reporting or disclosure obligations are not treated as catch-all issuers for purposes of the piggyback exception.[286]

b) Time Frame Requirements for Issuer Information

The following table summarizes the time frames for which paragraph (b) information must be current and publicly available, timely filed, or filed within 180 calendar days from the specified period, as applicable, for purposes of piggyback exception eligibility:

Table 1: Piggyback Exception Requirements Regarding Paragraph (b) Information

Documents and Information Specified in:	**Paragraph (b) Information Must Be:**
Paragraphs (b)(3)(i), (b)(3)(iv), and (b)(3)(v) for reporting issuers that have an Exchange Act reporting obligation	Filed within 180 calendar days following the end of the reporting period (e.g., the fiscal year or fiscal quarter, as applicable)
Paragraph (b)(3)(ii) for reporting issuers that have a reporting obligation under Regulation A	Filed within 120 calendar days following the end of the issuer's fiscal year[a] and 90 calendar days after the end of a semi-annual period[b]
Paragraph (b)(3)(iii) for crowdfunding issuers	Filed within 120 calendar days following the end of the issuer's fiscal year[c]
Paragraph (b)(4) for exempt foreign private issuers	Since the first day of its most recently completed fiscal year, information that has been made public as required by the laws of the country of the issuer's incorporation, organization or domicile; or has filed with the principal stock exchange in its primary trading market on which its securities are traded[d]
Paragraph (b)(5) for catch-all issuers	Current and publicly available annually, except for certain financial information: the issuer's most recent balance sheet must be as of a date less than 16 months before the publication or submission of a broker-dealer's quotation, and the issuer's profit and loss and retained earnings statements for the 12 months preceding the date of the most recent balance sheet

a. *See* Form 1-K., General Instructions, A.(2) (specifying that annual reports filed on Form 1-K shall be filed within 120 calendar days after the end of the fiscal year covered by the report).
b. *See* Form 1-SA, General Instructions, A.(2).
c. *See* Rule 203(b) of Regulation Crowdfunding.
d. *See* Exchange Act Rule 12g3-2(b)(1)(iii), (b)(3)(ii).

[286] *See* Amended Rule 15c2-11(f)(3)(i)(C).

To facilitate issuer transparency in connection with a broker-dealer's reliance on the piggyback exception to maintain a quoted market in the issuer's security, the amended Rule requires that an issuer's documents and information be filed within 180 calendar days from the end of the issuer's most recent fiscal year or any quarterly reporting period that is covered by a report required by Section 13 or 15(d) of the Exchange Act for reporting issuers for which documents and information are specified in paragraphs (b)(3)(i), (b)(3)(iv), and (b)(3)(v) of the amended Rule. The requirement under the amended Rule that an issuer's documents and information be filed within 180 calendar days from the specified period allows broker-dealers to continue to rely, for a limited period, on the piggyback exception to publish or submit quotations for securities of issuers that have not filed a required report by the prescribed due date for such report. Consistent with the proposed Rule, the amended Rule allows a broker-dealer to continue to rely on the piggyback exception to publish quotations, for a limited period, for a delinquent reporting issuer's security.[287] The provision of this limited time period balances the Rule's goals of preventing fraudulent and manipulative activity (specifically, in this case, in delinquent issuers' securities) while preserving liquidity in the OTC market.[288] By providing a specific, limited period for these reporting issuers to file reports before a broker-dealer can no longer rely on the piggyback exception for the issuer's security, the amended Rule limits the potential for the disruption and loss of a broker-dealer quoted market resulting from the failure of such issuer to file a required report by the prescribed due date for the report, which, at the same time, provides time for: (1) the issuer's paragraph (b) information to become current and publicly available for

[287] *See infra* note 291.

[288] *See infra* Part VI.B.2.c.

investors to access and utilize to make investment decisions, and (2) investors to sell securities if they so choose in a market that is maintained by broker-dealer quotations for a limited time.

The reports referenced in the amended Rule for issuers with a reporting obligation under Regulation A (i.e., paragraph (b)(3)(ii)) and for crowdfunding issuers (i.e., paragraph (b)(3)(iii)) must be "timely filed" for a broker-dealer to rely on the piggyback exception. Because issuers with a reporting obligation under Regulation A and crowdfunding issuers are not required to file reports more frequently than on a semi-annual or annual basis,[289] the due date for filing such reports will always be greater than 180 days from the end of the prior reporting period covered by such a report. By requiring that issuer information be timely filed (i.e., by the prescribed due date for a form or as required by Regulation A or Regulation Crowdfunding), the piggyback exception under the amended Rule is consistent with the time frames for issuers' Exchange Act or Securities Act reporting obligations.

Paragraph (f)(3)(i)(C)(1) under the amended Rule provides that the piggyback exception shall apply to the publication or submission of a quotation for a security of a reporting issuer (other than a crowdfunding issuer or an issuer that has a reporting obligation under Regulation A)[290] if the applicable paragraph (b) information is current and publicly available within 180 calendar days from the end of the issuer's most recent fiscal year or any quarterly reporting

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[289] *See* Form 1-SA, General Instructions, A.(2) (specifying that semi-annual reports on Form 1-SA shall be filed within 90 calendar days after the end of the semi-annual period covered by the report, which would result in a report being filed 270 calendar days (180 calendar days + 90 calendar days) from the end of the prior reporting period); Rule 203(b) of Regulation Crowdfunding (specifying that annual reports filed on Form C-AR shall be filed no later than 120 days after the end of the fiscal year covered by the report, which would result in a report being filed 485 days (365 days + 120 days) from the end of the prior reporting period).

[290] As discussed below, the requirements for the paragraph (b) information of such issuers are included in paragraph (f)(3)(i)(C)(2) of the amended Rule and provide that: (1) a crowdfunding issuer's paragraph (b) information would be timely filed if it were filed within 120 calendar days following the end of the issuer's fiscal year, or (2) paragraph (b) information for an issuer with a reporting obligation under Regulation A would be timely filed if it were filed within 120 calendar days following the end of the issuer's fiscal year and 90 calendar days after the end of semi-annual period.

period.[291] For example, if an issuer with a quarterly reporting obligation, such as an issuer that has information specified in paragraph (b)(3)(i), (b)(3)(iv), or (b)(3)(v), were to file an annual report for a fiscal year that ended on December 31, 2020, a quotation for that issuer's security that was published or submitted by a broker-dealer in an IDQS, between January 1, 2021, and, inclusive of, June 29, 2021, would comply with the requirements in paragraph (f)(3)(i)(C) of the piggyback exception. If, however, the same issuer were to file a quarterly report for the quarters ending on March 31, 2021, and June 30, 2021, and was required but failed to file a quarterly report for the quarter that ended on September 30, 2021, a quotation for such issuer's security that was published or submitted, by a broker-dealer in an IDQS, between July 1, 2021, and, inclusive of, December 27, 2021, would meet the requirements of paragraph (f)(3)(i)(C) of the piggyback exception. In this same scenario, where the issuer failed to file a quarterly report for the quarter that ended on September 30, 2021, a quotation for such issuer's security that was published or submitted, by a broker-dealer in an IDQS, on December 28, 2021, would not meet the requirements of paragraph (f)(3)(i)(C) of the piggyback exception because the applicable

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[291] Amended Rule 15c2-11(f)(3)(i)(C)(1). As proposed, a reporting issuer that was delinquent in its reporting obligation would have been treated as a catch-all issuer. *See* Proposed Rule 15c2-11(b)(5)(ii). As such, the issuer's information would need to have been current and made publicly available within six months (or 180 calendar days) before the date of publication or submission of such quotation for a broker-dealer to rely on the piggyback exception to publish quotations for its security. *See* Proposed Rule 15c2-11(f)(3)(ii). As discussed above, the amended Rule's piggyback exception does not impose the proposed six-month requirement for catch-all issuer information to be current and publicly available. In addition, the amended Rule treats delinquent reporting issuers as catch-all issuers only with respect to compliance with the information review requirement so that a broker-dealer can publish or submit an initial quotation to commence a quoted market in an issuer's security. *See* amended Rule 15c2-11(b)(5)(ii). In light of these changes from the proposal, the amended Rule's piggyback exception requires that an issuer's information specified in paragraph (b)(3)(i), (b)(3)(iv), or (b)(3)(v) be filed within 180 calendar days from the end of the issuer's most recent fiscal year or any quarterly reporting period that is covered by a report required by section 13 or 15(d) of the Exchange Act, as applicable, to avoid disparate treatment of issuers by imposing a requirement for such information that has an unduly short time frame. Although decreased access to current issuer information may have the potential to hamper an investor's ability to counteract misinformation, the Commission believes that the amendments to the piggyback exception appropriately balance these concerns (i.e., disparate treatment of issuers and transparency of issuer information) by permitting broker-dealers to quote the securities of certain reporting issuers for a time-limited period (i.e., so long as their paragraph (b) information is filed within 180 calendar days from the end of the issuer's most recent fiscal year or any quarterly reporting period that is covered by a report required by section 13 or 15(d) of the Exchange Act).

paragraph (b) information was not current and publicly available with respect to any reporting period that ended 180 calendar days before the publication or submission of the quotation.[292]

If an issuer with an annual filing obligation (i.e., an issuer for which documents and information are specified in paragraph (b)(3)(v) of the amended Rule) were to file its annual statement, pursuant to the requirements of section 12(g)(2)(G)(i) of the Exchange Act, for the period that ended on December 31, 2020, the quotation for such issuer's security that was published or submitted, by a broker-dealer in an IDQS, between January 1, 2021, and, inclusive of, June 29, 2022, would comply with the requirements in paragraph (f)(3)(i)(C) of the piggyback exception. If, however, the same (b)(3)(v) issuer failed to file an annual statement for the period that ended on December 31, 2020, a quotation for such issuer's security that was published or submitted, by a broker-dealer in an IDQS after June 29, 2021 (i.e., 180 days after the end of issuer's fiscal year), would not comply with the requirements of paragraph (f)(3)(i)(C) of the piggyback exception.

Paragraph (f)(3)(i)(C)(2) under the amended Rule provides that the piggyback exception shall apply to the publication or submission of a quotation for a security of an issuer with a reporting obligation under Regulation A or a crowdfunding issuer so long as the applicable paragraph (b) information is timely filed.[293] If an issuer for which documents and information are specified in paragraph (b)(3)(ii) of the amended Rule that has reporting obligations under Regulation A were to file an annual report within 120 calendar days from the end of a fiscal year

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[292] A broker-dealer or qualified IDQS may comply with the information review requirement by reviewing the specified information for a catch-all issuer in paragraph (b)(5) of the amended Rule so that a broker-dealer can publish a quotation for the issuer's security if such issuer's information is current and publicly available. *See* Amended Rule 15c2-11(b)(5)(ii); *supra* Part II.B.5 (discussing the application of the catch-all issuer provision). Until the issuer's required report is filed, however, the broker-dealer would not be able to maintain a quoted market for such issuer's security in reliance on the piggyback exception.

[293] Amended Rule 15c2-11(f)(3)(i)(C)(2).

that ended on December 31, 2020,[294] the quotation for such issuer's security that was published or submitted, by a broker-dealer in an IDQS, between January 1, 2021, and, inclusive of, September 28, 2021,[295] would comply with the requirements of paragraph (f)(3)(i)(C) of the piggyback exception. If, however, the same issuer were to fail to timely file a semi-annual report by September 28, 2021, for the period that ended June 30, 2021, the quotation for such issuer's security that was published or submitted, by a broker-dealer in an IDQS, on September 29, 2021, would not comply with paragraph (f)(3)(i)(C) of the piggyback exception. In this example, a broker-dealer would not be able to rely on the piggyback exception to publish a quotation for the issuer's security beginning on September 29, 2021, because the issuer failed to timely file its semi-annual report pursuant to Rule 257(b)(3).[296] If, however, the same issuer were to timely file its semi-annual report by September 28, 2021, a broker-dealer could rely on the piggyback exception to publish or submit a quotation for the issuer's security through, and inclusive of, April 30, 2022 (i.e., 120 days from the end of the issuer's 2021 annual reporting period).

If a crowdfunding issuer, which has documents and information specified in paragraph (b)(3)(iii) under the amended Rule, were to timely file by April 30, 2021, an annual report for a fiscal year that ended on December 31, 2020 (i.e., 120 days after the end of the issuer's most recent fiscal year), a quotation for the issuer's security that was published or submitted, by a broker-dealer in an IDQS, between January 1, 2021, and, inclusive of, April 30, 2022, would

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[294] For purposes of this example, this date represents the deadline for this issuer to file an annual report pursuant to Rule 257(b)(1) of Regulation A.

[295] In this example, September 28, 2020, is 90 calendar days after the end of the issuer's semi-annual reporting period, the deadline to file its semi-annual report.

[296] As discussed below, amended Rule 15c2-11(f)(3)(ii) provides a limited grace period that would allow broker-dealers to continue to rely on the piggyback exception for a time-limited period to quote the security of an issuer that files a tardy report. Further, if the required report is filed during the grace period, broker-dealers could continue to rely on the piggyback exception even after the expiration of such grace period. *See* Rule 15c2-11(f)(3)(ii)(C); *see also infra* Part II.D.6.

comply with the requirements of paragraph (f)(3)(i)(C) of the piggyback exception. The 120-day requirement in the piggyback exception under the amended Rule—and, in this example, the period January 1, 2021, through April 30, 2022—reflects the requirements of a crowdfunding issuer to file a report within 120 days from the end of its fiscal year. If, however, the same crowdfunding issuer were to fail to timely file by April 30, 2021, an annual report for its fiscal year that ended on December 31, 2020, the quotation for such issuer's security that was published or submitted, by a broker-dealer in an IDQS, beginning on May 1, 2021, would not comply with the requirements of paragraph (f)(3)(i)(C) of the piggyback exception because the issuer's paragraph (b) information would not be timely filed within 120 days from the end of the issuer's most recent fiscal year.

Paragraph (f)(3)(i)(C)(3) under the amended Rule provides that the piggyback exception shall apply to the publication or submission of a quotation for a security of an exempt foreign private issuer or a catch-all issuer, so long as the applicable paragraph (b) information is current and publicly available.[297] If an exempt foreign private issuer, which has documents and information specified in paragraph (b)(4) of the amended Rule, were to publish its annual report, pursuant to a requirement of the laws of the country of the issuer's incorporation or the rules of its primary trading market, for the period that ended on December 31, 2020, the quotation for such issuer's security that was published or submitted, by a broker-dealer in an IDQS, between January 1, 2021, and the day the issuer is required to publish its next annual report, would comply with the requirements of paragraph (f)(3)(i)(C) of the piggyback exception. If, however, the same exempt foreign private issuer failed to publish its annual report pursuant to a requirement of the laws of the country of the issuer's incorporation or the rules of its primary

[297] Amended Rule 15c2-11(f)(3)(i)(C)(2).

trading market, the quotation for such issuer's security that was published or submitted on the day after such issuer was required to publish its annual report would not comply with the requirements of paragraph (f)(3)(i)(C) of the piggyback exception because the information specified in paragraph (b)(4) of the amended Rule would not be current and publicly available.

Finally, for a broker-dealer to publish or submit in an IDQS a quotation for the security of a catch-all issuer, which has documents and information specified in paragraph (b)(5) of the amended Rule, on or before February 1, 2023, the broker-dealer would comply with the requirements of paragraph (f)(3)(i)(C) of the piggyback exception if the information specified in paragraph (b)(5) of the amended Rule for such issuer were current and publicly available as of February 1, 2022 (a date that is within 12 months prior to the publication or submission of the broker-dealer's quotation), including if its balance sheet were dated as of October 1, 2021 (a date less than 16 months before the publication or submission of the quotation), and its profit and loss and retained earnings statements were for the 12 months preceding the date of the balance sheet. However, the broker-dealer's quotation for such issuer's security that was published or submitted on or after February 1, 2022, would not meet the requirements of paragraph (f)(3)(i)(C) of the piggyback exception if the issuer's paragraph (b) information were not current and publicly available as of February 1, 2021, including if its balance sheet were dated before October 1, 2020, and its profit and loss and retained earnings statements were for a period older than the 12 months preceding the date of the balance sheet, the specified information would not be current and publicly available within the time frame specified in paragraph (b)(5) of the amended Rule.

c) Publicly Available Determinations Regarding Issuer Information

As discussed below, a qualified IDQS may make a publicly available determination that issuer information is current and publicly available, and broker-dealers may rely upon such publicly available determinations to submit or publish a quotation in an OTC security. In response to a comment requesting clarification as to whether a qualified IDQS's obligation to determine whether an issuer's paragraph (b) information is current and publicly available is ongoing,[298] the Commission clarifies that a qualified IDQS that makes a publicly available determination that the piggyback exception is available must establish, maintain, and enforce reasonably designed written policies and procedures to determine, on an ongoing basis, whether the documents and information specified in paragraph (b) are, depending on the type of issuer, current and publicly available, timely filed, or filed within 180 days from the end of a reporting period, as applicable.[299] While the obligation is ongoing, the frequency with which a qualified IDQS or registered national securities association must make such determination depends on the frequency with which an issuer's reports are required to (1) be filed with the Commission, according to the issuer's Exchange Act or Securities Act reporting obligation, or (2) be as of a certain date and publicly available (in the case of a catch-all issuer).[300] For example, a qualified IDQS or registered national securities association may determine that an issuer's paragraph (b) information, such as a required annual or semi-annual report, is timely filed once or twice a year, respectively, based on the prescribed due date for such issuer's report in compliance with its

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[298] FINRA Letter.

[299] *See supra* Part II.A.4 (discussing policies and procedures for qualified IDQSs and registered national securities associations that make publicly available determinations, including requirements for ongoing obligations).

[300] Amended Rule 15c2-11(a)(3) (stating that a qualified IDQS that makes a publicly available determination must establish, maintain, and enforce reasonably designed written policies and procedures to determine "whether" the requirements of an exception are met); *see supra* Part II.A.4 (discussing the policies and procedures requirements for publicly available determinations to be made by a qualified IDQS or registered national securities association).

reporting obligation under Regulation A.[301] A broker-dealer relying on a publicly available determination made by a qualified IDQS or registered national securities association, however, does not have an independent obligation to confirm the continued public availability of current issuer information, though such broker-dealer would have a recordkeeping requirement to support its reliance on the piggyback exception,[302] including its reliance on the piggyback exception's grace period.[303]

2. One-Way Priced Quotations—Rule 15c2-11(f)(3)(i)(A)

To facilitate price discovery in a quoted market, the Commission is modifying the piggyback exception to require at least a one-way priced quotation (as opposed to adopting the proposed requirement that quotations represent both a bid and an offer at specified prices) for broker-dealers to rely on the piggyback exception. The Commission sought comment about the proposal to require that a security be the subject of both a bid and an offer at specified prices, in an IDQS, for a broker-dealer to rely on the piggyback exception to publish or submit a quotation for such security. Two commenters provided general support for this aspect of the proposal.[304] Commenters who opposed this aspect of this proposal stated that securities with a one-sided priced quotation should be eligible for the piggyback exception. Some stated that a one-sided priced bid should be eligible for the piggyback exception because, according to one commenter,

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[301] *See* Form 1-SA, General Instructions, A.(2).

[302] *See* Amended Rule 15c2-11(d)(2).

[303] *See infra* Part II.D.6.

[304] FINRA Letter (stating that two-way priced quotations are appropriate to support broker-dealers' reliance on the piggyback exception because, by entering priced quotations, the broker-dealer provides substantive market information concerning its view about the value of the security); Massachusetts Letter.

one-sided priced bids provide sufficient evidence of legitimate, independent market interest,[305] while other commenters stated that allowing broker-dealers to rely on the piggyback exception based on one-sided priced quotations helps to protect minority shareholders[306] and provides price discovery and market development.[307]

The Commission has determined to permit broker-dealers to rely on the piggyback exception for securities that have at least either a bid quotation at a specified price or an offer quotation at a specified price[308] instead of requiring that both bid and offer quotations be at specified prices, as proposed. After considering the comments, and in light of other requirements of the piggyback exception and self-regulatory organization ("SRO") rules that apply to the quotations of a broker-dealer,[309] the Commission believes that the requirement for at least a one-sided quotation at a specified price is an appropriate element of a multi-prong exception that strikes the right balance of updating the piggyback exception to reduce the likelihood that its use could facilitate a potential fraudulent or manipulative scheme without unduly hampering the development of liquidity in the OTC market.

A one-sided quotation at a specified price can contribute to price discovery and the commencement of a quoted market, each of which are important, especially in a thinly traded

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[305] OTC Markets Group Letter 2; *see* Securities Law USA Letter; Zuber Lawler Letter. One commenter stated that there is value in permitting piggyback eligibility for securities with a one-sided priced bid quotation. OTC Markets Group Letter 1.

[306] Mitchell Partners Letter 1. While permitting broker-dealers to rely on the piggyback exception based on one-sided quotations could protect minority shareholders, as this commenter suggested, the amendments are designed to provide protections to all investors. *See, e.g.*, *supra* Part I (discussing the objectives of the amended Rule).

[307] Coral Capital Letter; OTC Markets Group Letter 2 ("A priced bid indicates a firm desire to buy the security, which itself acts as a valid price discovery mechanism."); *see* Securities Law USA Letter; Zuber Lawler Letter.

[308] Amended Rule 15c2-11(f)(3)(i)(A). The Commission is making a technical edit from the proposal to use the word "offer" instead of the word "ask" to make the wording of the piggyback exception consistent with the Rule's definition of "quotation," which uses the word "offer" instead of the word "ask."

[309] *See, e.g.*, FINRA Rule 5220.

market, to an efficient and liquid OTC market. The Commission believes that expanding this part of the piggyback exception to require a one-sided quotation at a specified price rather than two-sided quotations at specified prices may avoid unduly impeding liquidity for investors and capital formation for issuers while still addressing the vulnerability of the piggyback exception to be used to facilitate potential fraud and manipulation. As amended, the multiple prongs of the piggyback exception, including the paragraph (f)(3)(i)(B) provision regarding shell companies and the paragraph (f)(3)(i)(C) provision regarding current and publicly available information for all issuers, both of which are discussed below, are designed to work together to help reduce the potential for fraudulent and manipulative activity when a broker-dealer relies on the piggyback exception, without unduly hampering liquidity in the OTC market.[310]

In response to a Commission solicitation of comment about whether there is a certain price threshold below which the piggyback exception should not apply, one commenter stated it was generally opposed to the establishment of a price threshold because, according to the commenter, price thresholds interfere with the normal functioning of a market.[311] The Commission has determined that a price threshold test would be inappropriate for the piggyback exception in light of its concerns that such a test could be subject to abuse through, for example, reverse stock splits.

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[310] While the provision in proposed Rule 15c2-11(f)(3)(ii) referenced "an issuer included in paragraph (b)(5)," the provision in amended Rule 15c2-11 references the documents and information regarding an issuer that are specified in the applicable subparagraph of the amended Rule regarding such documents and information. This technical change from the proposal addresses the fact that paragraph (b) specifies an issuer's documents and information. In addition, while the proposed Rule's provision in the piggyback exception regarding shell companies, trading suspensions, and current and publicly available catch-all issuer information was contained in a single paragraph under proposed Rule 15c2-11(f)(3)(ii), the amended Rule has split the provision into multiple paragraphs. Amended Rule 15c2-11(f)(3)(i)(B) provides a provision regarding shell companies and trading suspensions, while amended Rule 15c2-11(f)(3)(i)(C)(1) through (3) provides a provision regarding an issuer's paragraph (b) information that is current and publicly available, timely filed, or filed within 180 calendar days from a specified period. This clarifying edit from the proposal has been made to make the provision easier to read.

[311] Coral Capital Letter.

3. Following a Trading Suspension—Rule 15c2-11(f)(3)(i)(B)

The Commission is eliminating the ability of a broker-dealer to rely on the piggyback exception during the first 60 calendar days after the termination of a Commission trading suspension under Section 12(k) of the Exchange Act, as proposed. The Commission sought comment on this aspect of the proposal. One commenter stated that requiring current and publicly available issuer information for a broker-dealer to rely on the piggyback exception, in conjunction with the proposed 60-calendar-day "cooling off" period following a trading suspension, should serve to enhance market transparency.[312]

The Commission has determined to adopt, without modification, the proposal to eliminate the ability of a broker-dealer to rely on the piggyback exception during the first 60 calendar days after the termination of a trading suspension order issued by the Commission under Section 12(k) of the Exchange Act.[313] The Commission continues to believe that such a period provides the appropriate amount of time for investors to consider new or additional information about an issuer that may arise following the expiration of a trading suspension order issued by the Commission. Among other things, a Commission trading suspension could indicate uncertainty about the accuracy of publicly available issuer information or questions about trading in the issuer's security.[314] The ability of investors to analyze information about an

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[312] SIFMA Letter.

[313] Amended Rule 15c2-11(f)(3)(i)(B). As the Commission explained in the Proposing Release, "adding 30 days to the piggyback exception's existing timing requirement of 30 days," which would result in "a longer period of 60 calendar days[,] should provide investors with a better opportunity to consider new or additional information that may arise in the period following the conclusion of the issuer's trading suspension. The Commission believes that this proposed limitation would help to ensure that regular and frequent quotations for the securities of formerly suspended issuers generally reflect market supply and demand and are based on informed pricing decisions rather than on pricing decisions that are based on information that is no longer accurate or that (potentially) had led the issuer to be suspended." Proposing Release at 58222.

[314] *See id.*

issuer is crucial to making informed investment decisions about the security of an issuer, and transparency into the market for an issuer's security for which trading has been suspended is especially important following the circumstances that lead to a trading suspension, such as the occurrence of deceptive or manipulative conduct.

Although the 60-calendar-day period, as proposed, was intended to incorporate the 30-calendar-day timing requirement to establish piggyback eligibility under the proposed Rule,[315] and although the amended Rule no longer includes such a requirement,[316] the Commission continues to believe that the process of re-establishing eligibility for the piggyback exception should not occur any sooner than 60 calendar days following the termination of a suspension order issued by the Commission. The Commission believes that the 60-calendar-day period before a broker-dealer may rely on the piggyback exception remains an appropriate period during which new or additional information about an issuer could be reviewed, which should promote informed investment decisions following a trading suspension. The Commission believes that a shorter amount of time would be inconsistent with the promotion of investor protection and the integrity of the OTC market.

4. Shell Company Exclusion—Rule 15c2-11(f)(3)(i)(B)

The Commission has determined to adopt, with some modification, the proposal to prohibit broker-dealers from relying on the piggyback exception for shell companies. Specifically, under this modified approach, a broker-dealer may rely on the piggyback exception to quote the security of an issuer that the broker-dealer has a reasonable basis under the

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[315] Proposing Release at 58222. After the expiration of a trading suspension at the conclusion of the 10-day period, the trading suspension no longer applies (i.e., trading can resume, even if quoting does not automatically do so). *See* Exchange Act Section 12(k)(1)(A).

[316] *Compare* Amended Rule 15c2-11(f)(3)(i)(A), *with* Proposed Rule 15c2-11(f)(3)(i)(A), (B).

circumstances for believing is a shell company[317] for the 18 months following the initial priced quotation for an issuer's security that is published or submitted in an IDQS. This approach will help protect retail investors by preventing such companies, which can be used as vehicles for fraud, from maintaining a quoted market indefinitely,[318] while promoting capital formation by preserving for a time-limited period a cost-effective means for companies to maintain a broker-dealer quoted market. The Commission remains concerned about the potential that a continuously quoted market facilitated by the piggyback exception could be used to entice investors to make an investment decision based on what appears to be an active and independent market when, in fact, the investor may be considering an artificially increased price for the shell company's security due to inaccurate and misleading promotional information.[319] The Commission, however, is also concerned that a blanket prohibition on broker-dealers' ability to rely on the piggyback exception for shell companies may negatively impact capital formation opportunities for privately held companies that seek to merge into OTC shell companies (through reverse mergers) as an alternative to an initial public offering ("IPO").[320] The amended Rule appropriately balances the promotion of investor protection and the facilitation of capital

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[317] Alternatively, a broker-dealer may rely on the publicly available determination of a qualified IDQS or registered national securities association that the exception is available. However, such qualified IDQS or registered national securities association must have a reasonable basis for believing that the issuer is a shell company in making a publicly available determination that the requirements of the piggyback exception are met. The Commission is also making a technical edit from the provision in the proposed Rule's piggyback exception to focus on the broker-dealer, rather than the issuer. Whereas the proposed Rule specified that the piggyback exception "shall not apply to the security of an issuer," *see* Proposed Rule 15c2-11(f)(3)(ii), the provision in the amended Rule's piggyback exception specifies that the piggyback exception "shall not apply to a quotation that is published or submitted by a broker or dealer for the security of an issuer," *see* Amended Rule 15c2-11(f)(3)(i)(B).

[318] Proposed Rule 15c2-11(f)(3)(ii). As explained in the Proposing Release, "[a] continuously quoted market can increase the share price of a shell company that may have been promoted using inaccurate or misleading representations and could allow fraudsters to more easily fool new investors into believing there is an active and independent market for its security." Proposing Release at 58222.

[319] *See id.*

[320] *See* Coral Capital Letter; *see also* Anthony Letter.

formation by allowing broker-dealers to maintain a quoted market in the securities of shell companies to provide opportunities for privately held companies to engage in reverse mergers with such publicly quoted shell companies, for a limited period of 18 months.

The Commission sought comment about the proposal to eliminate the ability of a broker-dealer to rely on the piggyback exception for the securities of "shell companies." Commenters who supported this limitation stated that it should reduce fraud and abuse of OTC securities,[321] especially in the context of reverse mergers.[322] Those who opposed this aspect of the proposal stated that it would be difficult to implement, leaving room for interpretation and potentially harming capital formation for those companies and their securities' liquidity.[323] The Commission appreciates that a security's liquidity may be negatively impacted if a broker-dealer declines to rely on the piggyback exception under the amended Rule because it believes that a determination (that the issuer of a security is not a shell company) cannot be made with certainty. As discussed more fully below, the definition of a shell company in the amended Rule tracks the definition of shell company in Rule 405 of Regulation C and in Exchange Act Rule 12b-2, the provisions of which apply to registrants, and comports with the provisions of Securities Act Rule 144(i)(1)(i) regarding the availability of that safe harbor for the resale of securities initially issued by certain issuers.[324] In light of the concern that such determination cannot be made with

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[321] *See* Massachusetts Letter; *see also* Peregrine Comment.

[322] FINRA Letter (requesting that, given the fluidity of corporate actions, the Commission clarify how often a broker-dealer or qualified IDQS is expected to confirm that a company is not a shell company); Michael Goode, Managing Member, Morning Light Mountain, LLC (Dec. 16, 2019) ("Morning Light Mountain Comment"); Hamilton & Associates Letter.

[323] Coral Capital Letter; *see* Leonard Burningham Letters; Letter from William T. Hart, Hart & Hart, LLC, to SEC (Feb. 24, 2020); Sosnow & Associates Letter.

[324] *See* Proposing Release at 58236. While the definition of "shell company" in amended Rule 15c2-11 mirrors the definition of "shell company" in Rule 405 of Regulation C and in Rule 12b-2, these provisions apply to registrants, and the definition of shell company for purposes of Rule 15c2-11 is not limited to companies that have filed a registration statement or have an obligation to file reports under Section 13 or Section 15(d) of the Exchange Act.

certainty, however, the amended Rule applies a "reasonable basis" standard for making such determination. Accordingly, a broker-dealer may rely on the piggyback exception to quote the security of an issuer that the broker-dealer has a reasonable basis under the circumstances for believing is a shell company for the 18 months following the initial priced quotation for an issuer's security.[325] In addition, a qualified IDQS or registered national securities association may make a publicly available determination that the requirements of the piggyback exception are met based, in part, on its having a reasonable basis under the circumstances for believing that the issuer is a shell company.[326]

As discussed below in Part II.J.2, a broker-dealer, qualified IDQS, or registered national securities association has a reasonable basis under the circumstances for determining that an entity is a shell company by relying on an issuer's self-identification as a shell company (or not) by reviewing, for example, the issuer's financial information, or, alternatively, by reviewing a description of its business, as specified in paragraph (b)(5)(i)(H) of the amended Rule or in any disclosures provided to the Commission pursuant to reporting obligations under the federal securities laws, without reviewing the issuer's financial information.[327] Broker-dealers have experience in making determinations of shell company status in other contexts that should help to provide increased certainty regarding shell company determinations for purposes of the Rule.[328] Further, as discussed more fully below, the amended Rule provides a new exception

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Instead, the definition of "shell company" covers all issuers of securities because the provisions of Rule 15c2-11 apply to publications and submissions of quotations for securities of reporting issuers as well as catch-all issuers. *Id.*

[325] *See* Amended Rule 15c2-11(f)(3)(i)(B)(*2*).

[326] *See* Amended Rule 15c2-11(f)(3)(i)(B)(*2*); Amended Rule 15c2-11(f)(7).

[327] *See infra* note 473 and accompanying text.

[328] For example, broker-dealers have experience in making such determination in deciding whether Securities Act Rule 144 is available for the resale of securities. *See infra* note 333 and accompanying text.

that permits broker-dealers to publish or submit quotations in reliance on the publicly available determination of a qualified IDQS or a registered national securities association that certain exceptions are available, including the piggyback exception.[329] This new exception may help to alleviate burdens on broker-dealers associated with determining whether an issuer is a shell company. How often a broker-dealer, qualified IDQS, or registered national securities association may need to determine whether an issuer is a shell company for a broker-dealer to rely on the piggyback exception is based on how frequently information for that issuer is filed or made current and publicly available.[330] For example, a broker-dealer, qualified IDQS, or registered national securities association may determine that a reporting issuer is a shell company when its annual or periodic reports are filed. Similarly, a broker-dealer, qualified IDQS, or registered national securities association may determine that a catch-all issuer is a shell company on an annual basis.[331]

Further, consistent with Commission guidance regarding the definition of "shell company" for purposes of Rule 144(i)(1)(i), the Commission believes that it is appropriate in the context of this Rule to reiterate that startup companies, or companies that have a limited operating history, such as early-stage biotechnology companies with no or limited assets and revenues and substantial expenses,[332] are not intended to be captured by the definition of "shell company" because the Commission believes that such companies do not meet the condition of

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[329] Amended Rule 15c2-11(f)(7).

[330] *See infra* Part V.C.2.b.

[331] For example, a broker-dealer, qualified IDQS, or registered national securities association could make such determination based on a review of the description of the issuer's business, as specified in paragraph (b)(5)(i)(H) of the amended Rule.

[332] *See, e.g.*, Wendy Tsai & Stanford Erickson, *Early-Stage Biotech Companies: Strategies for Survival and Growth*, 3 Biotech. Healthcare 49–53 (2006).

having "no or nominal operations."[333] A startup company that has limited operating history would not meet the condition of having "no or nominal operations" in paragraph (e)(9)(i) of the amended Rule's definition of shell company. This is consistent with the Commission's recognition that providing avenues for liquidity encourages investment in companies,[334] to promote opportunities for liquidity in the securities of such start-up companies.

As discussed above, the Commission believes that the amended Rule appropriately balances the promotion of investor protection and the facilitation of capital formation with respect to broker-dealers' reliance on the piggyback exception to publish or submit quotations for the securities of shell companies. For example, the Commission believes that permitting broker-dealers to publish or submit quotations for the securities of shell companies for a time-limited period of 18 months following the publication or submission of the initial priced quotation for such issuers' securities in an IDQS would facilitate capital formation and liquidity by permitting broker-dealers to maintain a quoted market in these securities during a defined period while limiting the risk that they could become the subject of a pump-and-dump scheme(s) if such quotations were permitted for an indefinite period. Further, even during the 18-month period that broker-dealers may rely on the piggyback exception to quote the securities of shell companies, broker-dealers are nevertheless subject to liability under the antifraud provisions of the securities laws, such as Exchange Act Section 10(b) and Rule 10b-5, if they publish quotations for the securities of shell companies with the intent to further a fraudulent or manipulative scheme.

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[333] *See Revisions to Rules 144 and 145*, Securities Act Release No. 8869 (Dec. 6, 2007), 72 FR 71546, 71557 n.172 *Dec. 17, 2007) ("Rules 144 and 145 Release").

[334] *See Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A)*, Securities Act Release No. 9741 (Mar. 25, 2015), 80 FR 21806, 21814 (Apr. 20, 2015).

Other commenters who opposed this part of the proposal stated that the proposal would prevent existing shareholders from being able to recover losses from investing in companies that become shell companies subsequent to purchasing shares in those companies.[335] Shell companies can be used for valid reasons; however, the Commission has noted that unregistered reverse mergers between privately held companies and publicly traded shell companies commonly are used to develop a market for the merged entity's securities, often as part of a pump-and-dump scheme.[336] The Commission recognizes that shareholders of shell companies may suffer a loss on their investment as a result of broker-dealers not being able to rely indefinitely on the piggyback exception to publish or submit quotations for the shell company's security,[337] but the Commission also recognizes the potential for investor harm as a result of the securities of shell companies being used in fraudulent and manipulative schemes, such as pump-and-dump schemes. Therefore, the Commission has determined to preclude a broker-dealer from relying on the piggyback exception to maintain a market in the security of an issuer that the broker-dealer (or any qualified IDQS or registered national securities association pursuant to a publicly available determination) has a reasonable basis for believing is a shell company unless such quotation is published or submitted within the 18 months following the initial quotation for such issuer's security that is the subject of a bid or offer quotation in an IDQS at a specified price.[338] Other commenters believed that broker-dealers should be able to maintain a quoted

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[335] *See, e.g.*, Tom Amenda; Letter from Ronald A. Woessner, Principal, Woessner & Associates, to SEC (Apr. 16, 2020) ("Woessner & Associates Letter").

[336] *See, e.g.*, *Registration of Securities on Form S-8*, Securities Act Release No. 7646 (Feb. 25, 1999), 64 FR 11103, 11106 (Mar. 8, 1999).

[337] *See infra* Part VI.C.1.b.

[338] *See* Amended Rule 15c2-11(f)(3)(B)(2).

market in the securities of shell companies so long as their paragraph (b) information is current and publicly available.[339]

Under the amended Rule, a broker-dealer may maintain a quoted market for the security of an issuer that the broker-dealer has a reasonable basis under the circumstances for believing is a shell company by relying on the piggyback exception during the 18-month period following the initial publication or submission of a priced bid or offer quotation for the security in an IDQS, assuming all other requirements of the piggyback exception are met.[340] After such period ends, the broker-dealer may publish or submit a quotation for the issuer's security if the broker-dealer complies with the information review requirement or relies on a publicly available determination of a qualified IDQS that the qualified IDQS complied with the information review requirement.[341] Such compliance involves, among other things, the broker-dealer or qualified IDQS having a reasonable basis under the circumstances for believing that such issuer's paragraph (b) information is accurate in all material respects and is from a reliable source.[342] Thereafter, the broker-dealer may continue to publish or submit a quotation for the issuer's security so long as either the broker-dealer continues to comply with the information review requirement or relies on a publicly available determination of a qualified IDQS that such qualified IDQS complied with the information review requirement. The Commission believes that compliance with the information review requirement is needed following the 18-month period to appropriately balance the facilitation of capital formation and the promotion of investor

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[339] Woessner & Associates Letter; *see* OTC Markets Group Letter 3.

[340] *See* Amended Rule 15c2-11(f)(3)(i)(B)(2).

[341] *See* Amended Rule 15c2-11(a)(1)(i), (ii).

[342] *See* Amended Rule 15c2-11(a)(1)(i)(C), (a)(2)(iii).

protection. In this regard, compliance with the information review requirement before a broker-dealer may publish a subsequent quotation for the security of an issuer that the broker-dealer has a reasonable basis under the circumstances for believing is a shell company helps to promote the Rule's investor protection goals. Specifically, such compliance is designed to prevent the security of an issuer that has yet to engage in a reverse merger with a privately held company during the 18-month period from being used in a pump-and-dump scheme. As part of such compliance, the broker-dealer must continuously monitor the amended Rule's specified information regarding such issuer to form a reasonable basis that the issuer's paragraph (b) information is accurate in all material respects and is from a reliable source.

Further, one commenter stated that this aspect of the proposal would harm the ability of privately held companies to become publicly traded issuers by engaging in a reverse merger,[343] while other commenters who advocated for broker-dealers to be able to rely on the piggyback exception for self-identified shell companies stated that the reverse merger process, as opposed to the IPO process, is an economical and attractive alternative for companies seeking to become publicly traded and gain greater access to capital markets.[344] The amended Rule does not affect a private operating company's ability to become a publicly traded company by engaging in a reverse merger with a quoted shell company. Although there can be significant existence of and potential for fraud arising from shell companies in the context of reverse mergers,[345] reverse

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[343] Woessner & Associates Letter.

[344] Coral Capital Letter; *see* Anthony Letter.

[345] *See* Proposing Release at 58223. As stated in the Proposing Release, a Commission staff analysis of 4,000 SEC litigation releases between 2003 and 2012 found that the majority of alleged violations involving issuers of OTC securities were primarily classified as reverse mergers of shell companies or as market manipulation. *See id.* at 58252 (citing Spotlight on Microcap Fraud (Feb. 22, 2019), https://www.sec.gov/spotlight/microcap-fraud.shtml).

mergers are also an important tool for capital formation.[346] The piggyback exception under the amended Rule appropriately balances these concerns by permitting broker-dealers to publish quotations for the securities of shell companies but only for a limited period. Investor protection will be furthered by preventing broker-dealers from relying on the piggyback exception to publish quotations for the securities of shell companies indefinitely.[347] However, in response to capital formation concerns raised by commenters, the Commission is permitting broker-dealers to rely on the piggyback exception to quote the security of a shell company for the 18 months following the initial priced bid or offer quotation for an issuer's security that is published or submitted in an IDQS.[348]

The Commission believes that permitting broker-dealers to rely on the piggyback exception for the 18 months following the initial publication or submission of a bid or offer quotation at a specified price for an issuer's security provides a sufficient amount of time for a quoted shell company to engage in a reverse merger with a private operating company and is similar to the time frame specified in other Commission rules governing acquisitions and mergers.[349] Following the merger of an operating company into a shell company, the combined entity would not meet the definition of a shell company, and broker-dealers may continue to rely

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[346] Proposing Release at 58223 (stating that the Commission has previously brought enforcement actions involving fraud arising from shell companies, often in the context of reverse mergers).

[347] *See, e.g.*, *id.* at 58223.

[348] *See* Amended Rule 15c2-11(f)(3)(i)(B)(2).

[349] *See, e.g.*, Securities Act Rule 419(e)(2)(iv) (requiring that funds held in an escrow or trust account be returned if a consummated acquisition(s) meeting the requirements of Rule 419 has not occurred by a date 18 months after the effective date of the initial registration statement).

on the piggyback exception to publish or submit quotations for the issuer's security so long as the other requirements of the piggyback exception are met.[350]

Other commenters suggested, instead, that the regulation of quotations for shell companies should focus on insiders, affiliates, and enhanced corporate governance because the problems that the Commission identified in the proposal regarding shell companies are driven by insiders and affiliates.[351] According to this commenter, such an approach would involve the restriction of trading by company insiders and stronger corporate governance requirements to promote transparency.[352] This commenter stated that the Rule should require additional disclosure from shell companies regarding their operations and insider and affiliate activities.[353] The Commission agrees with commenters that much of the risk regarding shell companies involves activities of individuals closely associated with the company using public markets to distribute unregistered shares. The Commission will continue to monitor the operation of this market, including the quoting and trading of shell companies' securities, to consider whether any further amendments to Rule 15c2-11, or any amendments to other Commission rules involving issuer disclosure, enhanced corporate governance, or trading restrictions by company insiders, are warranted.

5. Frequency of Quotation Requirement—Rule 15c2-11(f)(3)(i)(A)

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[350] For a discussion of this process, see Proposing Release at 58222–23.

[351] OTC Markets Group Letter 2*;* OTC Markets Group Letter 3; *see* Securities Law USA Letter; Zuber Lawler Letter. Commenters stated that much of the risk arising from shell companies concerns activities of individuals closely associated with the company using public markets to distribute unregistered shares. OTC Markets Group Letter 2; *see* Adler Silverberg Letter; Securities Law USA Letter; Sosnow & Associates Letter; Zuber Lawler Letter.

[352] OTC Markets Group Letter 2.

[353] OTC Markets Group Letter 3; *see* Sosnow & Associates Letter.

In light of technological advances that have taken place since the Rule was last amended, the Commission is eliminating both the 12-business-day requirement and the 30-calendar-day window from the frequency of quotation requirement. The proposal would have replaced the requirement that quotations occur on each of at least 12 days within the previous 30 calendar days, with no more than four business days in succession without a quotation, with a requirement that quotations occur within the previous 30 calendar days, with no more than four business days in succession without a quotation. Commenters on this aspect of the proposal also requested the removal of the 30-calendar-day piggyback-eligibility period following an initial quotation for a security, given market-based solutions that render obsolete the need for a 30-calendar-day window.[354] Commenters also stated that there should be no limit on the number of broker-dealers that are permitted to publish quotations for a security after a qualified IDQS makes a publicly available determination to allow the initiation for a quoted market because, according to the commenter, the 30-calendar-day period delays and impedes the creation of a larger, more efficient public market for a security, and allowing multiple broker-dealers to publish quotations for such securities would remove an "artificial barrier" to price transparency, promoting competition, and enhancing liquidity.[355]

The Commission has determined to adopt the proposed amendment to eliminate the 12-business-days frequency of quotation requirement because technological advances that have taken place since this provision was adopted have obviated the need for it, given that it is now easier for broker-dealers to continuously update and widely disseminate quotations and

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[354] OTC Markets Group Letter 1; OTC Markets Group Letter 2; *see* Securities Law USA Letter; Zuber Lawler Letter. One commenter represented that it already performs, and would continue to perform, an ongoing review of issuer disclosure to make determinations as to whether broker-dealers should be allowed to continue to quote in accordance with the Rule. OTC Markets Group Letter 2.

[355] OTC Markets Group Letter 2; *see* Securities Law USA Letter; Zuber Lawler Letter.

information about issuers to investors.[356] As suggested by commenters, the Commission has also determined to eliminate the 30-calendar-day window from the frequency of quotation requirement in the amended Rule. Under the amended Rule, for a broker-dealer to rely on the piggyback exception, a quoted OTC security of an issuer would need to be the subject of a bid or offer quotation, in an IDQS, at a specified price, with no more than four business days in succession without such a quotation.[357]

The frequency of quotation requirement is designed to permit a broker-dealer to rely on the piggyback exception only when quotations are continuous. A requirement that quotations occur with no more than four business days in succession without such a quotation generally requires one quotation per week. The presence or elimination of the 30-calendar-day window does not alter this requirement. For that reason, the Commission believes that the 30-calendar-day window is not necessary to ensure that quotations are continuous for purposes of the piggyback exception (assuming all other requirements of the exception are met).

The Commission believes that the elimination of the 30-calendar-day window could contribute to a more liquid, efficient market because broker-dealers could rely on the piggyback exception to publish or submit quotations immediately after a quoted market is initiated (i.e., after a broker-dealer publishes an initial quotation after complying with the information review requirement).[358] Further, the Commission does not believe that the elimination of the 30-calendar-day window would lessen the effects of the amended Rule's investor protections

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[356] Proposing Release at 58223.

[357] Amended Rule 15c2-11(f)(3)(i)(A).

[358] The amended Rule does not impose any limit on the number of broker-dealers that are permitted to publish quotations for a security after a qualified IDQS makes a publicly available determination to allow the initiation for a quoted market. *See* Amended Rule 15c2-11(f)(7).

because the remaining requirements of the piggyback exception under the amended Rule are sufficient to help prevent misuse of the exception.

6. Grace Period—Rule 15c2-11(f)(3)(ii)

The Commission posed a question in the Proposing Release about whether the piggyback exception should include a grace period during which a broker-dealer could continue to publish or submit quotations following the expiration of the proposed six-month period specified in paragraph (f)(3)(ii) of the proposed Rule.[359] The Commission inquired about the length of such a grace period and the role of an IDQS or the use of tags to identify quotations for any security of an issuer if its information has not been made publicly available within a specified time frame.

Several commenters offered solutions to address broker-dealer quotations that are no longer eligible for the piggyback exception. These commenters supported the idea of a "grace period" with respect to companies that are no longer eligible to be publicly quoted (e.g., because their information is no longer "current" or because a broker-dealer cannot rely on any exception to the Rule) to serve as a notice to investors and issuers, allow time to take appropriate action before the loss of quote eligibility (e.g., remedy the absence of current and publicly available information),[360] and facilitate investor transactions in the securities.[361] One commenter advocated for a minimum of 90 days for such a grace period.[362] Another commenter requested clarification as to, if such a grace period were implemented, when a broker-dealer would be

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[359] Proposed paragraph (f)(3)(ii) would have required catch-all issuer information, including financial information, to be current and publicly available within six months of the date of the publication or submission of a broker-dealer's quotation in reliance on the piggyback exception.

[360] OTC Markets Group Letter 2; *see* Securities Law USA Letter; Zuber Lawler Letter.

[361] SIFMA Letter (suggesting also that a "tag" on a quotation and notice on the website of a qualified IDQS would help in these types of scenarios).

[362] Coral Capital Letter.

required to cease publishing or submitting quotations (e.g., whether the broker-dealer would be required to cease publishing or submitting quotations on the next business day rather than intra-day).[363]

The Commission has determined to adopt a grace period in the piggyback exception to permit broker-dealers to continue quoting securities of any issuer for a limited period once the requisite information for such issuer is, depending on the regulatory status of the issuer, no longer current and publicly available, timely filed, or filed within 180 calendar days from a specified period.[364] This limited, conditional grace period is designed to provide the opportunity for investors to liquidate positions into a broker-dealer-quoted market for up to 15 calendar days from the publicly available determination that the issuer's information is no longer current and publicly available, timely filed, or filed within 180 calendar days from a specified period. A longer period of time, such as 90 days, as suggested by one commenter, would allow a quoted market for an issuer's security to be maintained in the absence of issuer transparency, which is inconsistent with the objective of the amendments to the Rule.

Specifically, paragraph (f)(3)(ii) of the amended Rule provides a limited grace period to rely on the piggyback exception if issuer information is, depending on the regulatory status of the issuer, no longer current and publicly available, timely filed, or filed within 180 calendar days from a specified period—or, the time frames specified in paragraph (f)(3)(i)(C) of the amended Rule—so long as three conditions are met. First, a qualified IDQS or registered national securities association must make a publicly available determination that the specified

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[363] FINRA Letter.

[364] The grace period under the amended Rule extends to all issuers because the piggyback exception's requirement under the amended Rule for an issuer's information to be current and publicly available, timely filed, or filed within 180 calendar days from a certain reporting period, and publicly available similarly extends to all issuers. *See* Amended Rule 15c2-11(f)(3)(i)(C)(1) through (3).

information for such issuer is no longer current and publicly available, timely filed (with respect to an issuer for which documents and information are specified in paragraph (b)(3)(ii) or (b)(3)(iii) of the amended Rule), or filed within 180 calendar days from a specified period (with respect to an issuer for which documents and information are specified in paragraph (b)(3)(i), (b)(3)(iv), or (b)(3)(v) of the amended Rule)[365] within the first four business days that such information is no longer current and publicly available, timely filed, or filed within 180 calendar days from the specified period, as applicable.[366] Accordingly, if the qualified IDQS or registered national securities association were to make a publicly available determination five business days after the issuer's information is, depending on the regulatory status of the issuer, no longer current and publicly available, timely filed, or filed within 180 calendar days from the specified period, broker-dealers would not be afforded a grace period to quote the issuer's security. The Commission believes that this condition is important to facilitate immediate notice to market participants—including retail investors—that an issuer's information is no longer current and publicly available, timely filed, or filed within 180 calendar days from the specified period, as applicable.[367]

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[365] This requirement is measured from the end of the issuer's most recent fiscal year or any quarterly reporting period that is covered by a report required by Exchange Act Section 13 or 15(d), as applicable. *See* Amended Rule 15c2-11(f)(3)(ii) (referencing the applicable paragraph (f)(3)(i)(C)(1) of the amended Rule for this category of issuer).

[366] Amended Rule 15c2-11(f)(3)(ii)(A). This four-business-day window mirrors the time frame provided in the requirement in the piggyback exception that quotations occur with no more than four business days in succession without a priced quotation. *See* Amended Rule 15c2-11(f)(3)(i). Accordingly, the requirement that such publicly available determination be made during this four-business-day window allows broker-dealers to maintain the frequency of quotation requirement of the piggyback exception, as specified in paragraph (f)(3)(i)(A) of the amended Rule. Because such publicly available determinations are likely to be made through an automated process, the Commission expects that such publicly available determinations generally will be made on the business day following the date on which issuer information is no longer current and publicly available, timely filed, or filed within 180 calendar days from the specified period, as applicable.

[367] While only a qualified IDQS or registered national securities association must make any such publicly available determination, an investor or broker-dealer may choose to alert a qualified IDQS or national securities association that the issuer's paragraph (b) information is no longer current and publicly available, timely filed, or filed within 180 calendar days from the specified period, as applicable. In such scenario, the qualified IDQS or registered

Further, as discussed below in Part II.H, the Commission is requiring that any qualified IDQS or registered national securities association that makes a publicly available determination that a broker-dealer may rely on the piggyback exception must subsequently make a publicly available determination if that issuer's paragraph (b) information is no longer current and publicly available, timely filed, or filed within 180 calendar days from the specified period, as applicable. The qualified IDQS or registered national securities association must make such subsequent publicly available determination within the first four business days that such documents and information are no longer current and publicly available, timely filed, or filed within 180 calendar days.[368] To ensure the wide availability of such notice to market participants, the Commission strongly encourages, and Commission staff intends to offer assistance and support to,[369] qualified IDQSs and the registered national securities association to establish a means to tag, or otherwise provide freely available public indication of notice, that an issuer's paragraph (b) information is no longer current and publicly available, and that, as a result, the security has entered the 15-calendar-day grace period before it is ineligible to maintain its quoted market through reliance on the piggyback exception. However, the Commission also recognizes the importance of accommodating the flexibility of qualified IDQSs and national securities associations in displaying notices and information to broker-dealers, market participants, and investors; therefore, the indication of such notice may take different forms. In this regard, a registered national securities association could append a fifth letter identifier to the security's symbol, or an indicator could be displayed on the website of a qualified IDQS or a

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national securities association must comply with its policies and procedures, as required under paragraph (a)(3) of the amended Rule, for making such publicly available determination.

[368] *See* Amended Rule 15c2-11(f)(7); *infra* Part II.H.

[369] *See infra* Part II.P.

registered national securities association next to the security's name or quote, to provide sufficient notice to investors and other market participants that the issuer's security has entered the 15-calendar-day grace period.

Second, the grace period is conditioned on the broker-dealer's compliance with the requirements of paragraphs (d)(2) and (f)(3)(i), except for the requirement regarding the public availability of current issuer information, timely filed issuer information, or issuer information that is filed within 180 calendar days from the specified period, as applicable.[370] In other words, under the amended Rule, a broker-dealer may rely on the piggyback exception during the grace period only if each of the other conditions in the piggyback exception is met—the quotation must not be for the security of a shell company (unless the quotation is published or submitted within 18 months of the initial priced quotation for such issuer's security in an IDQS), the quotation must represent a bid or an offer at a specified price, and no more than four days in succession may elapse without a quotation for the security—and the broker-dealer must comply with the recordkeeping requirements in paragraph (d)(2).

Lastly, paragraph (f)(3)(ii)(C) of the amended Rule specifies the duration of the grace period: the shorter of the period beginning with the date on which a qualified IDQS or registered national securities association makes a publicly available determination identified in paragraph (f)(3)(ii)(A) and ending on either (1) the specified issuer information being current and made publicly available or filed, or (2) the fourteenth calendar day following the date on which such publicly available determination was made.[371] Therefore, if the specified issuer information is current and made publicly available, or is filed, during the fourteen calendar days following the

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[370] Amended Rule 15c2-11(f)(3)(ii)(B).

[371] Amended Rule 15c2-11(f)(3)(ii)(C).

publicly available determination identified in paragraph (f)(3)(ii)(A), the grace period ends on that date. While the grace period ends on such date, piggyback eligibility under paragraph (f)(3)(i)(A) of the amended Rule resumes on such date, assuming all conditions in that paragraph are met.[372] Specifically, broker-dealers may continue to rely on the piggyback exception to publish quotations after the grace period ceases to apply if: (1) the documents and information specified in paragraph (b)(3) of the amended Rule for a reporting issuer were filed within 15 calendar days starting on the date on which the qualified IDQS or registered national securities association makes a publicly available determination that the issuer's paragraph (b) information is no longer timely filed or filed within 180 calendar days from a specified period,[373] and (2) all other requirements in paragraph (f)(3)(i) were met. Similarly, broker-dealers may continue to rely on the piggyback exception to publish quotations after the grace period ceases to apply if: (1) the documents and information specified in paragraph (b)(4) or paragraph (b)(5)(i) are current and publicly available within 15 calendar days starting on the date on which the qualified IDQS or registered national securities association makes a publicly available determination that the issuer's paragraph (b) information is no longer current and publicly available, and (2) all other requirements in paragraph (f)(3)(i) were met. However, if the specified issuer information is not made current and publicly available, or is not filed, during the 15 calendar days starting on the date of a publicly available determination identified in paragraph (f)(3)(ii)(A), a broker-dealer may no longer rely on the piggyback exception and would need to either comply with the information review requirement or rely on another of the amended Rule's exceptions to resume a quoted market in the security.

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[372] Broker-dealer quotations that are published or submitted in reliance on the grace period are not required to cease intra-day upon such public availability of current issuer information.

[373] *See* Amended Rule 15c2-11(f)(3)(i)(C)(*4*).

7. Removal of Certain Piggyback Exception Provisions Under the Former Rule

The Commission is removing certain provisions of the former Rule's piggyback exception to streamline the piggyback exception under the amended Rule. The Commission sought comment about eliminating paragraphs (f)(3)(ii) and (f)(3)(iii) of the former Rule.[374] Paragraph (f)(3)(ii) of the former Rule allowed broker-dealers to rely on the piggyback exception to publish or submit quotations in an IDQS that does not identify unsolicited customer indications of interest. In addition, paragraph (f)(3)(iii) of the former Rule allowed broker-dealers to piggyback off their own quotations. Commenters did not address the issue of eliminating such paragraphs and did not raise any concerns about any potential negative consequences that could result from removing these paragraphs from the piggyback exception. Further, no comment was received regarding the Commission's understanding that broker-dealers tend to rely on the piggyback exception as provided in paragraph (f)(3)(i) of the former Rule.[375] In light of the above, the Commission has determined to eliminate paragraphs (f)(3)(ii) and (f)(3)(iii) of the former Rule.

E. Unsolicited Quotation Exception—Rule 15c2-11(f)(2)

The Commission has determined to adopt the unsolicited quotation exception, substantially as proposed, with modifications from the proposal to enhance the effectiveness of the proposed amendments' investor protections and, specifically, to: (1) prohibit reliance on the exception for a quotation on behalf of an affiliate of the issuer if the issuer's information is not current and publicly available, and (2) permit reliance on written representations that a customer is not a company insider or an affiliate of the issuer. The Commission sought comment about the

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[374] *See* Proposing Release at 58225.

[375] *See id.*

proposal to require that certain issuer information be current and publicly available for a broker-dealer to rely on the unsolicited quotation exception to publish or submit a quotation on behalf of a company insider.[376] The Commission also solicited comment about whether affiliates of the issuer should be specified as persons for whom the unsolicited quotation exception would be unavailable, unless the issuer's paragraph (b) information is current and publicly available.

Some commenters supported this aspect of the proposal,[377] one of whom suggested easing the burden on broker-dealers by removing the obligation to identify company insiders from the exception and requiring additional disclosures (in Commission rules other than Rule 15c2-11) from certain market participants.[378] In the Proposing Release, the Commission did not propose to require the identification of company insiders and affiliates in Commission rules other than Rule 15c2-11. However, the Commission believes that permitting reliance on a written representation from the customer's broker that such customer is not a company insider or an affiliate of the issuer would help to alleviate burdens on broker-dealers associated with the identification of company insiders and affiliates.

The Commission believes that imposing a limitation, such that the customer requesting that a quote be published is not a company insider or affiliate, helps to prevent misuse of the unsolicited quotation exception by company insiders and affiliates who may take advantage of access to information about the company that is not available to non-insiders. Therefore, the Commission has determined to make the unsolicited quotation exception in the amended Rule

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[376] The proposed amendment was intended to help prevent the potential misuse of the exception by company insiders who might create the appearance of an active market in quoted OTC securities to entice new investors to invest, or to facilitate pump-and-dump schemes. *See id.*

[377] *See, e.g.*, SIFMA Letter.

[378] OTC Markets Group Letter 1; OTC Markets Group Letter 2.

unavailable for company insiders and affiliates if the information required to be reviewed under the Rule is not current and publicly available.[379] This limitation, under paragraph (f)(2)(ii)(B) of the amended Rule, is being adopted with modifications.[380] The exception, as adopted, adds the term "affiliate" for the same reasons the Commission believes the exception should be unavailable to company insiders. The definition of the term "affiliate" in the rule text is the same as the definition of that term in Securities Act Rule 144(a)(1) because the Commission believes that the definition appropriately captures the scope of persons other than company insiders, as that term is defined in paragraph (e)(1) of the amended Rule, who also may have the potential for a heightened incentive to manipulate the price of a security. In addition, the Commission believes that broker-dealers, qualified IDQSs, and registered national securities associations have experience in applying this definition to determine whether a person is an affiliate because it is a well-established and broadly used definition in other areas of the federal securities laws. The Commission remains concerned about the increased potential for fraud and manipulation when securities trade in the absence of information about the issuer and the heightened incentive for company insiders and affiliates to engage in misconduct to artificially affect the price and trading volume of an OTC security. The Commission believes that protecting retail investors from fraud and manipulation in the OTC market requires a limitation on quotations on behalf of company insiders and affiliates when certain information is not current and publicly available. In response to a comment requesting that the Commission "reinforce the principle that allowing insiders to trade in dark companies results in an uneven playing field and often constitutes a Rule 10b-5

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[379] *See* Proposing Release at 58225.

[380] The adopted exception uses the newly defined term "company insider," which is defined in paragraph (e)(1) of the amended Rule.

violation,"[381] the Commission reiterates to market participants that any transaction by a company insider or an affiliate is subject to applicable anti-fraud and anti-manipulation rules.

Other commenters expressed the concern that the broker-dealer publishing a quotation might not have a direct relationship with a customer (e.g., when a retail customer order is routed from a retail broker to a broker-dealer acting as a market maker), which commenters stated would make it difficult to know whether that customer is a company insider.[382] Some commenters suggested that the Rule permit a broker-dealer to rely on an affidavit from the investor regarding whether that investor is an accredited investor, unaffiliated with the issuer, and not listed in the SEC Action Lookup for Individuals,[383] or by relying on a negative consent letter or similar approach from the broker-dealer that has the relationship with the ultimate customer to meet this requirement of the exception.[384] The Commission appreciates that the customer on whose behalf a quotation is published or submitted may not be the direct customer of the broker-dealer. Therefore, the amended Rule includes a provision designed to ease the burden on broker-dealers obligated to determine whether the person on whose behalf the

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[381] OTC Markets Group Letter 2. This commenter also stated that insiders, affiliates, and employees should not be permitted to transact in securities of companies for which paragraph (b) information is not current and publicly available because market makers are unable to distinguish between affiliate and non-affiliate quotations. OTC Markets Group Letter 3.

[382] *E.g.*, Canaccord Letter; CrowdCheck Letter; STA Letter. *But see* Leonard Burningham Letters (stating that gatekeepers—broker-dealers, lawyers, transfer agents, and issuers—should be able to determine when transactions of insiders are affiliates).

[383] Mitchell Partners Letter 1 (stating that the display of unsolicited orders increases competition but that accredited investors do not need the Rule's investor protections). Launched in 2018, the SEC Action Lookup for Individuals is a search feature on the Commission's website that allows users to look up information about individuals who have been named as defendants in SEC federal court actions or respondents in SEC administrative hearings. *See* SEC Action Lookup—Individuals, https://www.sec.gov/litigations/sec-action-look-up (last visited June 13, 2020); *see also* Press Release, SEC Launches Additional Investor Protection Search Tool, (May 2, 2018), https://www.sec.gov/news/press-release/2018-78. While this tool allows for respondents' information to be researched, it may not necessarily provide information about insider or affiliate status.

[384] Canaccord Letter.

quotation is published or submitted is a company insider or an affiliate. For purposes of the unsolicited quotation exception, the amended Rule permits a broker-dealer to rely on a written representation from the customer's broker that such customer is not a company insider or an affiliate if two conditions are met.[385] The written representation and the reasonable basis requirements provide a degree of assurance with regard to who the customer is, without imposing the higher burden that would result from mandating an affidavit or other sworn statement.

The first condition is that the broker-dealer publishing or submitting the quotation receives the written representation before, and on the same day that, the quotation representing the customer's unsolicited indication of interest is published or submitted. This condition is designed to promote the accuracy of the representation because a person's status as a company insider or an affiliate may change over time. The second condition is that the broker-dealer publishing or submitting the quotation has a reasonable basis under the circumstances for believing that the customer's broker is a reliable source.[386] For example, the broker-dealer publishing or submitting the quotation may receive information or a certification from the customer's broker regarding the reasonable steps that the customer's broker takes to determine whether its customers are company insiders or affiliates. Moreover, the broker-dealer publishing or submitting the quotation should question the reliability of the customer's broker if circumstances indicate that the customer's broker may be an unreliable source.

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[385] Amended Rule 15c2-11(f)(2)(iii)(A).

[386] The condition mirrors the requirement to have "a reasonable basis under the circumstances for believing" that is used elsewhere in the Rule. Former Rule 15c2-11(a); Proposed Rule 15c2-11(a)(1)(iii), (a)(2)(iii); Amended Rule 15-11(a)(1)(iii), (a)(2)(iii).

The Commission believes that permitting a broker-dealer to rely on a written representation from the customer's broker that such customer is not a company insider or an affiliate is a more narrowly tailored approach to achieve the objectives of these amendments than requiring issuers or other market participants to comply with new disclosure requirements in other rules in an effort to alleviate burdens on broker-dealers for purposes of the unsolicited quotation exception. Further, as one commenter acknowledged, the suggestion to revise the disclosure requirements in other Commission rules is outside the scope of the amendments.[387] The Commission believes that the use of a written representation, as provided in paragraph (f)(2)(iii)(A) of the amended Rule, responds to comments about easing broker-dealer burdens in connection with the publication or submission of quotations without necessitating amendments to Commission rules other than Rule 15c2-11 and that could require disclosure of information even in circumstances where a broker-dealer is not publishing or submitting a quotation. Moreover, the customer's broker and the broker-dealer acting as a market maker typically already have processes in place for sharing information, such as information about the quotation, and the Commission believes broker-dealers have a variety of ways to share information related to the written statement. The Commission has determined to narrowly tailor the written representation to require the broker-dealer to provide only a statement that the customer is not a

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[387] *See* OTC Markets Group Letter 2. This commenter stated that, because "Rule 15c2-11 is fairly limited in scope, regulating only the publication of quotations by broker-dealers[,] . . . the Rule on its own cannot solve the breakdown in the information 'supply chain.'" *Id.* The commenter suggested the following for the Commission to "more effectively address these issues outside the scope of the Rule, in large part by requiring additional disclosure from powerful market participants": (1) affiliates, insiders, and paid promoters should not be afforded the ability to hide their positions in anonymous objecting beneficial owner accounts; (2) disclosure of transaction information for officers and affiliates of non-reporting issuers should be required in a manner similar to Forms 3, 4, and 5; (3) institutions should be required to disclose their holdings in non-exchange listed securities under Exchange Act Section 13(f); (4) Securities Act Section 17(b) should be amended to require additional disclosure from paid stock promoters; and (5) transfer agent regulations should be updated to require disclosure of share issuance and transfer information, and broker-dealers should be permitted to rely on this information in facilitating transactions in restricted and control securities. *Id.*

company insider or an affiliate. The Commission believes limiting the representation to a simple statement, without imposing additional costs and burdens associated with supplying extra information in the written representation that may not be needed by the broker-dealer, helps to prevent misuse of the unsolicited quotation exception while balancing considerations related to the benefits and burdens of affidavits or other additional types of disclosures in other Commission rules.

One commenter sought clarity regarding the ability of a broker-dealer that publishes or submits a quotation pursuant to the unsolicited quotation exception to rely on a qualified IDQS's determination that issuer information is current and publicly available for purposes of the unsolicited quotation exception.[388] The Commission is modifying the unsolicited quotation exception text to allow a broker-dealer to rely on publicly available determinations by a qualified IDQS or a registered national securities association that paragraph (b) information is current and publicly available. This revision is designed to clarify that a broker-dealer may rely on a publicly available determination by a qualified IDQS or a registered national securities association that paragraph (b) information is current and publicly available when relying on the unsolicited quotation exception, specifically.

F. ADTV and Asset Test Exception—Rule 15c2-11(f)(5)

To provide retail investors with greater price transparency, and to reduce burdens on broker-dealers in publishing quotations for highly liquid securities of well-capitalized issuers where the Rule's goals can be achieved through alternative means, the Commission is adopting the ADTV and asset test exception substantially as proposed, with modifications, as discussed below. Specifically, the proposed exception would have permitted a broker-dealer to publish or

[388] SIFMA Letter.

submit quotations without complying with the information review requirement where: (1) a security has a worldwide average daily trading volume value (the "ADTV value") of at least $100,000 during the 60 calendar days immediately before the publication of a quotation for such security, and (2) the issuer of such security has at least $50 million in total assets and $10 million in unaffiliated shareholders' equity as reflected in the issuer's publicly available audited balance sheet issued within six months after the end of its most recent fiscal year.[389] In addition, the proposed exception would also have required that paragraph (b) information about the issuer be current and publicly available.[390] The Commission sought comment on such an exception. Commenters expressed support for an exception for highly liquid securities of well-capitalized issuers.[391]

Because a pump-and-dump scheme often involves a thinly traded security of an issuer with limited assets, this exception recognizes that such fraudulent and manipulative activity generally does not involve issuers with substantial assets.[392] The Commission believes that the exception (i.e., one that is based on a security's ADTV value and the issuer's total assets and shareholders' equity) will help to ensure that the Rule's policy goal of deterring broker-dealers from commencing quotations for quoted OTC securities that may facilitate a fraudulent or manipulative scheme is not undermined.[393] Further, the Commission believes that the exception's three thresholds of ADTV value, total assets, and shareholders' equity are tailored to

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[389] Proposed Rule 15c2-11(f)(5).

[390] Proposed Rule 15c2-11(f)(5)(ii).

[391] *See* MCAP Letter; OTC Markets Group Letter 2; SIFMA Letter; Virtu Letter (stating, however, its concern that the proposal would not reach enough securities, specifically those of issuers that have not been involved in market manipulation and fraud).

[392] *See* Proposing Release at 58226.

[393] *See id.* at 58228.

appropriately capture issuers of securities that are less susceptible to fraud and manipulation based on the liquidity of the security and size of the issuer.[394]

Some commenters stated their view that identifying "unaffiliated" shareholders' equity can be difficult, if not impossible.[395] Commenters also stated that using the proposed requirement of $10 million in unaffiliated shareholders' equity may be difficult to measure in practice because information regarding affiliated versus unaffiliated shareholders' equity may be unavailable[396] or that this proposed requirement was problematic because large companies can have negative shareholders' equity.[397] In response to these commenters, paragraph (f)(5) of the amended Rules uses a "shareholders' equity" prong instead of "unaffiliated shareholders' equity" as proposed. With this modification, the Commission intends to address commenters' concerns regarding the operational difficulty in determining unaffiliated shareholders' equity, particularly where unaffiliated shareholders' equity is not disclosed by the issuer. The shareholders' equity must also be as reflected in the issuer's publicly available audited balance sheet.[398] One commenter, however, expressed concern that financial statements may not be reliable, such as

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[394] *See infra* Part VI.C.1.c.

[395] OTC Markets Group Letter 2; OTC Markets Group Letter 3; SIFMA Letter.

[396] Canaccord Letter; SIFMA Letter.

[397] Professor Angel Letter (stating that it is not uncommon for large companies to have negative equity in certain cases, such as legitimate start-ups with losses or after a leveraged recapitalization). The Commission does not believe that the exception should apply to the securities of companies with negative equity because such securities may be more prone to manipulation as a result of being inexpensive to acquire for fraudulent purposes, which could possibly allow for more issuers that could be vulnerable to pump-and-dump schemes to be admitted within the exception, thus increasing investor exposure to fraud. *See infra* Part VI.C.1.c.

[398] The shareholders' equity prong is based on total permanent equity and includes noncontrolling interests presented within permanent equity in the issuer's consolidated financial statements. *See, e.g.*, Financial Accounting Standards Board Accounting Standards Codification (ASC) 505-10-05-3; ASC 810-10-45-15 through 45-16; paragraph 54 of International Accounting Standard 1, *Presentation of Financial Statements*; and Rule 5-02 of Regulation S-X.

when the issuer finds a mistake and states that the financial statements cannot be relied upon.[399] Depending on the facts and circumstances, a broker-dealer may no longer be able to rely on the ADTV and asset test exception to publish or submit quotations if the issuer finds a mistake and states that the financial statements cannot be relied upon. The asset test and shareholders' equity prong under amended Rule, however, require use of an audited balance sheet, which should help mitigate any potential concerns about the reliability of the financial information.

Some commenters suggested that certain parts of the test be replaced. One commenter suggested that market capitalization of $150 million should replace the unaffiliated shareholders' equity prong of the exception,[400] while another suggested that the asset test should be replaced with a market capitalization test.[401] The Commission does not believe that market capitalization is an appropriate alternative for either of these two prongs of the exception because market capitalization fluctuates based on share price. In the "pump" phase of a pump-and-dump scheme, a security's market price may rise to an artificially high level. As a result, market capitalization (which rises as market price rises) may quickly exceed this $150 million threshold. Shareholders' equity, however, is independent of market price and thus less susceptible to pump-and-dump schemes that may impact the price of a security.

Paragraph (f)(5)(i) of the amended Rule has been modified from the proposed rule text to clarify that a security must have a "reported" worldwide ADTV value of at least $100,000 during the 60 calendar days immediately before the publication or submission of a quotation of such security. The addition of the term "reported" clarifies that the exception requires that the

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[399] *See* Professor Angel Letter.

[400] OTC Markets Group Letter 2.

[401] Professor Angel Letter.

standard for determining ADTV value be based on information that is publicly available.[402] This modification is consistent with and clarifies the Commission statement in the Proposing Release that ADTV value could be determined from information that is publicly available and from a reliable source (i.e., trading volume as reported by a self-regulatory organization or comparable entity, or an electronic information system that regularly provides information regarding securities in markets around the world).[403] Thus, to satisfy the ADTV value prong in the amended Rule, a broker-dealer or qualified IDQS would need to determine the value of a security's ADTV from information that is publicly available. Further, the amended Rule permits that any reasonable and verifiable method may be used, as proposed.[404]

Further, the requirements of the exception, as adopted, have been streamlined. While paragraph (f)(5)(ii) of the proposed Rule also would have expressly required that the issuer's paragraph (b) information be current and publicly available,[405] this requirement is unnecessary in paragraph (f)(5) of the amended Rule because, in addition to requiring a security's ADTV to be based on information that is publicly available during a specific 60-calendar-day period, paragraph (f)(5)(ii) of the amended Rule expressly requires that an issuer's audited balance sheet be publicly available and issued within six months after the end of its most recent fiscal year, which results in the public availability of financial information that is specified in paragraph (b).

The Commission has determined not to adopt certain other modifications suggested by commenters. One commenter requested a 30-calendar-day period to review the information

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[402] *See* Proposing Release at 58227.

[403] *See id.* at 58227 nn.119, 120.

[404] *See id.* at 58227 n.120.

[405] *See* OTC Markets Group Letter 3 (suggesting that the requirement in the exception that paragraph (b) information be current and publicly available should be removed).

required by the Rule if a quoted OTC security ceases to qualify for the ADTV and asset test exception and if the piggyback exception is unavailable.[406] The Commission believes that permitting a 30-calendar-day period to comply with the information review requirement if the conditions of the ADTV and asset test exception were not met and no other exception were available would be inconsistent with investor protection because the targets of pump-and-dump schemes are often thinly traded securities of issuers with limited assets, and such an extension could provide the opportunity for a pump-and-dump scheme to be carried out where the Rule's objectives cannot be achieved through the requirements of this exception, any of the amended Rule's other exceptions, or the Rule's information review requirement being met.[407]

One commenter suggested that the Rule exempt securities of issuers with over $10 million in equity, as demonstrated by audited financial statements no older than 18 months, and that have been trading for more than $10 per share since January 1, 2017.[408] As discussed in the Economic Analysis, the Commission considered alternatives based on other thresholds, including

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[406] Coral Capital Letter.

[407] *See, e.g.*, Andreas Hackethal *et al.*, *Who Falls Prey to the Wolf of Wall Street? Investor Participation in Market Manipulation* (ECGI, Working Paper No. 446, 2019), *available* at https://ecgi.global/sites/defalt/files/working-_papers/douments/finalleuzmeyermulhnsolteshackethal.pdf (stating that, in pump-and-dump schemes, promoters often target thinly traded penny stocks for which limited liquidity leads to fast price increases when demand rises); *see also* Michael Hank & Florian Hause, *On the effects of stock spam emails*, 11 J. Fin. Mkts 57, 60 (2008).

[408] Letter form Dan Kanter, President, and Craig Carlino, Chief Compliance Officer, Monroe Financial Partners, Inc. (Dec. 30, 2019) ("Monroe Letter").

price.[409] As a result, the Commission believes that the thresholds of the amended Rule[410] confine the exception to OTC securities that are not prone to fraudulent or manipulative activity.[411]

Three commenters supported an exemption that would allow broker-dealers to publish quotations for the securities of exempt foreign private issuers that satisfy the ADTV test, are traded on an "offshore securities market" that meets the requirements in Securities Act Rule 902(b)(2), and are not suspended to trade by a foreign financial regulatory authority.[412] The Commission recognizes that the expansion of the exception to securities of foreign private issuers that are traded on a "designated offshore securities market" within the meaning of Securities Act Rule 902(b)(2) could reduce burdens on broker-dealers in publishing quotations for securities of certain types of issuers, though the Commission believes that such a test would cover many of the same securities that would qualify for the ADTV and asset test exception, which already is designed to accommodate foreign private issuers. In addition, the Commission is concerned that securities that might not satisfy the asset test prong of the ADTV and asset test may meet the requirements of this suggested "offshore securities market" exception, and the Commission believes that the thresholds included by both prongs of the ADTV and asset test under the amended Rule appropriately capture issuers and their securities that are less susceptible to fraud and manipulation based on the liquidity of the securities and size of the issuer.[413]

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[409] *See infra* Part VI.C.1.c.

[410] In addition to the exception's ADTV value threshold, as discussed above, the exception also provides a threshold requiring that the issuer have at least $50 million in total assets and $10 million in shareholders' equity as reflected in the issuer's publicly available audited balance sheet issued within six months after the end of its most recent fiscal year. *See* Amended Rule 15c2-11(f)(5)(ii).

[411] As stated in the Economic Analysis, the Commission has found that zero issuers in 2019 that simultaneously met the $50 million total assets, $10 million shareholders' equity, and $100,000 ADTV value thresholds were subject to trading suspensions or caveat emptor status. *See infra* Part VI.C.1.c.

[412] Canaccord Letter; MCAP Letter; Virtu Letter.

[413] *See infra* Part VI.C.1.c; Proposing Release at 58226.

Further, the Commission believes that compliance with such an alternative would raise practical and implementation issues with respect to, for example, whether a particular offshore market or jurisdiction has comparable securities regulations and market practices and standards.

One commenter suggested that the exception be expanded to include other categories of issuers, such as banks and insurance companies that provide information to their regulators, companies that undergo bankruptcy proceedings and provide information to a bankruptcy court, and other issuers that have a verifiable operating history and revenues and that pay dividends.[414] The Commission believes that the proposed exception appropriately identifies those well-capitalized issuers of securities that are highly liquid and thus are less likely to be susceptible to the type of fraudulent and manipulative conduct that Rule 15c2-11 is designed to prevent. The Commission does not believe that it would be appropriate to except from the requirement for current and publicly available information securities of banks and insurance companies that provide certain information to their regulators, which generally is not the same as the information specified in paragraph (b) of the amended Rule.[415] Further, the regulation of banks' and insurance companies' capital and reserves is not designed to provide the same investor protections that the amended Rule provides. In particular, the information review requirement is designed to help ensure that a quoted market for a security is less susceptible to fraudulent or manipulative schemes.[416] Similarly, an exception for securities based on an issuer's status of undergoing a bankruptcy proceeding and providing information to a bankruptcy court would not provide the same investor protections that the amended Rule provides. Finally, the Commission

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[414] Virtu Letter.

[415] *See also supra* note 249.

[416] *See* Proposing Release at 58208.

does not believe it would be appropriate to except all securities of issuers that pay dividends in light of its concerns that the payment of dividends alone does not prevent the securities of such issuers from being used as part of a fraudulent or manipulative scheme or indicate that an issuer is any less likely to be part of a fraudulent or manipulative scheme. The Commission, however, will continue to monitor trading in this market to consider whether any further expansion of this exception is warranted.

G. Underwritten Offering Exception—Rule 15c2-11(f)(6)

To help expedite the availability of securities to retail investors in the OTC market following an underwritten offering, and to facilitate capital formation, the Commission is adopting the underwritten offering exception, as proposed. The Commission sought comment about an exception from the information review requirement that permits a broker-dealer to publish or submit quotations for a security issued in an underwritten offering if: (1) the broker-dealer is named as an underwriter in the registration statement or offering statement for the underwritten offering, and (2) the broker-dealer that is the named underwriter publishes or submits the quotation.[417] All commenters on the proposed underwritten offering exception supported the proposal, except for one.[418] One of the comments also stated that the liability

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[417] Proposed Rule 15c2-11(f)(6). Although the proposed Rule used the term "circular," the amended Rule uses the term "statement" to be consistent with Regulation A. *See* Amended Rule 15c2-11(f)(6). The Commission is also making a technical edit to the proposed Rule to replace the word "identified" with the word "specified" so that the underwritten offering exception is consistent with the amended Rule's other provisions.

[418] Better Markets Letter. This commenter stated generally that the proposed new exception further "fragments markets and introduces unnecessary complexity." *Id.* The Commission does not believe that the underwritten offering exception would fragment the OTC market because this exception does not change any existing market structure. Rather, this exception provides an alternative means for broker-dealers to initiate a quoted market. In addition, the Commission disagrees with the comment that the underwritten offering exception would introduce unnecessary complexity because the requirements of the exception are provided in a bright-line fashion: (1) the broker-dealer must be named as an underwriter in the registration statement or offering statement for the underwritten offering, and (2) the broker-dealer that is the named underwriter publishes or submits the quotation. The Commission does not believe that compliance with the requirements is operationally difficult or complex because any broker-dealer seeking to rely on the exception will know if it is named as an underwriter in the exception's specified documents. Further, the Commission believes that the underwritten offering exception

standards and professional obligations of underwriters in registered and Regulation A offerings are a sufficient basis for the exception.[419]

The Commission agrees and has determined to adopt the underwritten offering exception, as proposed, with a technical edit.[420] To avoid requiring a redundant review where the objectives of the information review requirement have already been achieved, the amended Rule allows a broker-dealer, without complying with the information review requirement, to publish or submit a quotation for a security of the same class issued in an underwritten offering if the broker-dealer served as the underwriter, so long as the broker-dealer's quotation is published or submitted within a certain time frame.[421] Specifically, paragraph (f)(6) of the amended Rule excepts the publication or submission of a quotation for a security by a broker-dealer that is named as an underwriter either in: (1) a registration statement that became effective fewer than 90 calendar days before the day on which such broker-dealer publishes or submits the quotation to the quotation medium, for an offering for that class of security, as is referenced in paragraph (b)(1), or (2) an offering statement that was qualified fewer than 40 calendar days before the day on which such broker-dealer publishes or submits the quotation to the quotation medium for an offering of that class of security, as referenced in paragraph (b)(2). Like the proposed Rule, the

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appropriately eases broker-dealer burdens in publishing quotations based on the performance of an activity (i.e., a review of the issuer) that such broker-dealers are likely to have already performed, as discussed below, while at the same time helping to ensure that a quoted market for a security is less susceptible to fraudulent or manipulative schemes.

[419] Coral Capital Letter.

[420] Amended Rule 15c2-11(f)(6). The technical edit in the amended Rule replaces the term "circular" with "statement" to be consistent with Regulation A.

[421] As the Commission explained in the Proposing Release, "[b]ecause of a broker-dealer's involvement in the registered or Regulation A offering, including their assumption of liability for misstatements or omissions in the prospectus or offering [statement] and public availability of the proposed paragraph (b) information on EDGAR, the Commission believes that a subsequent review requirement would be redundant and, thus, unnecessary." Proposing Release at 58230.

amended Rule includes a provision that the exception shall apply only for a limited period following the effectiveness of the registration statement or the qualification of the Regulation A offering statement.

A comment suggested that the Commission broaden the exception to apply to: (1) subscription rights, warrants, and units consisting of common stock and warrants, and (2) broker-dealers other than the underwriter.[422] This aspect of paragraph (f)(6) of the amended Rule, which has not been changed from the proposed amendment, refers to a quotation for a *security* by a broker-dealer that is named as an underwriter in a registration statement or in an offering statement. Accordingly, the exception is available for the quotation of any security, including subscription rights, warrants, and units consisting of common stock and warrants, so long as the conditions of the exception are met.

Another commenter suggested that the exception be expanded to cover "any" broker-dealer (including the underwriter), assuming the requirements in paragraphs (a) and (b) of the Rule are met.[423] The Commission believes that extending the exception to include broker-dealers that were not named as an underwriter would risk important investor protections and undermine the goals of the amended Rule, so it is not adopting this suggestion. As discussed in the Proposing Release, broker-dealers that act as underwriters in registered offerings or offerings conducted pursuant to Regulation A are subject to potential liability for misstatements and omissions in the related prospectus or offering statement.[424] As a result, unlike broker-dealers acting as market makers, underwriters are highly incentivized to confirm that information

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[422] Coral Capital Letter.

[423] OTC Markets Group Letter 3.

[424] Proposing Release at 58229–30.

provided to investors in the prospectus for a registered offering or in an offering statement for a Regulation A offering is materially accurate and from a reliable source.

Accordingly, an underwriter typically conducts a due diligence review to mitigate potential liability for misstatements and omissions in the related prospectus or offering statement (and, therefore, is likely to have already conducted a review of the issuer).[425] Thus, the Commission believes that the underwritten offering exception should be unavailable for the publication or submission of a quotation by a broker-dealer that is not named as an underwriter.

H. Publicly Available Determination That an Exception Applies—Rule 15c2-11(f)(7)

The Commission has determined to adopt, with minor modifications, the proposal to permit a broker-dealer to rely on a publicly available determination by a qualified IDQS or a registered national securities association that certain exceptions are available. The proposed exception would have permitted broker-dealers to rely on the publicly available determination of a qualified IDQS or a registered national securities association that: (1) paragraph (b) information is current and publicly available, or (2) a broker-dealer may rely on the proposed Rule's exchange-traded security exception, the piggyback exception, the municipal security exception, the ADTV and asset test exception, or the proposed qualified IDQS review exception. The Commission sought comment about this proposed exception to allow broker-dealers' reliance on publicly available determinations.

Commenters supported this aspect of the proposal,[426] stating that it would greatly enhance marketplace efficiency[427] and improve liquidity.[428] Commenters stated their confidence

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[425] *See id.*

[426] Canaccord Letter; MCAP Letter; Robert E. Schermer, Jr.; Virtu Letter (stating that it could not estimate the potential financial burden, given that it was uncertain of the fees that a qualified IDQS would charge for providing such a service); Zuber Lawler Letter.

in certain market participants to make such determinations.[429] The Commission is adopting the exception substantively as proposed, with certain technical, streamlining, and clarifying amendments in light of other amendments that the Commission is adopting.[430] The Commission believes that this exception will make it easier for broker-dealers to maintain a market in OTC securities and promote the potential for liquidity in providing retail investors with greater opportunity to buy and sell such securities while at the same time achieving the amendments' investor protection goals, including through facilitating Commission oversight of the policies and procedures for making such determinations.[431] The amended Rule also clarifies that the exception allows broker-dealers to rely on publicly available determinations by a regulated third party (i.e., a qualified IDQS or registered national securities association) that the following four

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[427] OTC Markets Group Letter 1.

[428] Coral Capital Letter.

[429] Global OTC Letter; Keating Letter; *see* Coral Capital Letter (advocating for broker-dealers to be able to rely on the publicly available determinations of both qualified IDQSs and registered national securities associations).

[430] First, the paragraph that describes this exception in the amended Rule has been renumbered to paragraph (f)(7) in light of the fact that the Commission is adopting the proposed qualified IDQS review exception as part of paragraph (a) of the amended Rule rather than, as proposed, paragraph (f)(7). *See supra* Part II.A.3. Second, paragraph (f)(7) of the amended Rule has been streamlined and no longer contains the provision in proposed Rule 15c2-11(f)(8)(i) that described a publicly available determination that paragraph (b) information is current and publicly available because the requirement for paragraph (b) information to be current and publicly available has been incorporated into the amended Rule's individual exceptions. Third, while the Commission is adopting this amendment substantially as proposed, it includes a modification to explicitly incorporate into the unsolicited quotation exception the ability of broker-dealers to rely on publicly available determinations that paragraph (b) information is current and publicly available. *See* Amended Rule 15c2-11(f)(2)(iii)(B). Fourth, paragraph (f)(8)(ii) of the proposed Rule would have permitted broker-dealers to rely on the publicly available determination of a qualified IDQS or a registered national securities association that the exceptions in proposed paragraphs (f)(3)(i)(B) (i.e., one of the provisions of the piggyback exception that the amended Rule no longer contains) and (f)(7) (i.e., the proposed qualified IDQS review exception) are available. However, as discussed above, the piggyback exception in paragraph (f)(3)(i)(B) of the proposed Rule is not incorporated into the amended Rule and thus is not enumerated in paragraph (f)(7) of the amended Rule. Finally, paragraph (f)(8)(iii) of the proposed Rule, which would have provided a requirement regarding policies and procedures for making publicly available determinations, is also not incorporated into paragraph (f)(7) of the amended Rule because new paragraph (a)(3) of the amended Rule imposes a similar written policies and procedures requirement.

exceptions are available: the exchange-traded security exception,[432] the piggyback exception,[433] the municipal security exception,[434] and the ADTV and asset test exception.[435]

One commenter stated that a broker-dealer should be permitted to publish a quotation pursuant to this exception in *any* IDQS based on the publicly available determination of a qualified IDQS or registered national securities association to create competition and avoid a monopoly based on issuers providing information necessary to make a publicly available determination to only one qualified IDQS.[436] The Commission agrees, and this exception under the amended Rule does not include any such limitation. Another commenter requested that the Commission clarify: (1) whether a broker-dealer that relies on a publicly available determination that an exception applies must independently verify the availability of the applicable exception, and (2) how often a qualified IDQS or registered national securities association must confirm the accuracy of its publicly available determination that an exception applies (e.g., whether the ADTV and asset test exception must be confirmed each day).[437] The amended Rule does not require a broker-dealer that relies on a publicly available determination that an exception applies to independently verify the availability of that exception. As discussed above in Part II.A.4, qualified IDQSs and registered national securities associations that make publicly available determinations must establish, maintain, and enforce reasonably designed written policies and

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[431] *See supra* Part II.A.4.

[432] *See* Amended Rule 15c2-11(f)(1).

[433] *See* Amended Rule 15c2-11(f)(3)(i).

[434] *See* Amended Rule 15c2-11(f)(4).

[435] *See* Amended Rule15c2-11(f)(5).

[436] Global OTC Letter.

[437] *See* FINRA Letter; *see also* Global OTC Letter.

procedures to determine whether: (1) paragraph (b) information is (or is not) current and publicly available and (2) the requirements of the applicable paragraph (f) exceptions for which it has made a publicly available determination under paragraph (f)(7) are (or are not) met.[438] The Commission believes that the qualified IDQS or registered national securities association that makes a publicly available determination that an exception applies must establish, maintain, and enforce reasonably designed written policies and procedures to determine when the requirements of an exception for which it made such publicly available determination are no longer met. For example, depending on the exception, the frequency with which a qualified IDQS or registered national securities association must make a subsequent determination may depend on the frequency with which an issuer's reports are required to be filed with the Commission, according to the issuer's Exchange Act or Securities Act reporting obligation, or be as of a certain date and publicly available (in the case of a catch-all issuer).[439] In other cases, the frequency with which a qualified IDQS or registered national securities association must make such determination may be every trading day (e.g., with respect to a security's reported worldwide ADTV value).[440]

Finally, in light of the adoption of the piggyback exception's grace period,[441] and because the loss of current and publicly available issuer information may impact individual investment decisions and the market for these securities, the Commission is requiring any qualified IDQS or registered national securities association that makes a publicly available determination that a

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[438] *See* Amended Rule 15c2-11(a)(3).

[439] *See, e.g.*, Amended Rule 15c2-11(f)(3)(i)(C). For example, as discussed above in Part II.D.1, a qualified IDQS or registered national securities association may determine that an issuer's paragraph (b) information, such as a required annual or semi-annual report, is timely filed twice a year based on the prescribed due date for such issuer's report in compliance with its Regulation A reporting obligation. *See* Form 1-SA, General Instructions, A.(2).

[440] *See* Amended Rule 15c2-11(f)(5)(i).

[441] *See* Amended Rule 15c2-11(f)(3)(ii); *supra* Part II.D.6.

broker-dealer may rely on the piggyback exception to subsequently make a publicly available determination if the issuer's paragraph (b) information is no longer current and publicly available, timely filed, or filed within 180 calendar days from the specified period, as applicable. The qualified IDQS or registered national securities association must make such subsequent publicly available determination within the first four business days that such documents and information are no longer current and publicly available, timely filed, or filed within 180 calendar days, respectively.[442]

I. Recordkeeping Requirement—Rule 15c2-11(d)

The Commission is adopting the recordkeeping requirement substantially as proposed, with slight modifications from the proposal. The Commission sought comment about the recordkeeping requirement for: (1) broker-dealers and qualified IDQSs that comply with the information review requirement, and (2) broker-dealers, qualified IDQSs, and registered national securities associations to demonstrate that the requirements of an exception to the information review requirement are met. One commenter stated that it is reasonable for market participants to keep records that support their information review or reliance on an exception.[443] This commenter stated that it was difficult to follow the proposed recordkeeping requirement and that electronic copies of records should suffice, and that records should always be readily accessible.[444] Similarly, another commenter suggested that paragraph (b) information that already is publicly available (e.g., in addition to on EDGAR, on the website of a broker-dealer,

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[442] *See* Amended Rule 15c2-11(f)(7); *see also supra* note 366.

[443] Hamilton & Associates Letter.

[444] *Id.*

qualified IDQS, registered national securities association, or an issuer) should not be required to be preserved as part of the recordkeeping requirement.[445]

The Commission has determined to adopt the recordkeeping requirement substantially as proposed, with modifications to: (1) make clarifying edits to align the provisions regarding publicly available determinations with the corresponding recordkeeping requirement, and (2) eliminate the provisions stipulating that a broker-dealer or qualified IDQS document the paragraph (b) information that it reviewed that is available on EDGAR.[446]

The amendments to the recordkeeping requirement are designed to help facilitate the Commission's oversight of broker-dealers that rely on certain exceptions under the amended Rule. Paragraph (d)(1) of the amended Rule outlines the recordkeeping requirement associated with compliance by a broker-dealer or qualified IDQS with the information review requirement.[447] This requirement applies to both a broker-dealer that publishes or submits a quotation pursuant to paragraph (a)(1) and a qualified IDQS that makes known to others the quotation of a broker-dealer pursuant to paragraph (a)(2).

Paragraph (d)(1)(i) provides that the records to be preserved are the documents and information required to be obtained and reviewed under paragraphs (a), (b), and (c) of the amended Rule with respect to compliance with the information review requirement, while paragraph (d)(1)(ii) provides that a broker-dealer that publishes a quotation in reliance on a

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[445] OTC Markets Group Letter 3 (suggesting streamlining changes to the proposed Rule).

[446] Such documents and information already would be "publicly available" on EDGAR and, therefore, the Commission believes that a requirement for broker-dealers and qualified IDQSs to document such paragraph (b) information would result in unnecessary burdens for such broker-dealers and qualified IDQSs that would not facilitate the Commission's oversight because such paragraph (b) information is otherwise accessible. The Commission is making a technical edit from the proposal to define the term "EDGAR" in paragraph (d)(1)(i) of the amended Rule's recordkeeping requirement while removing the words "Electronic Data Gathering, Analysis and Retrieval System" in subsequent paragraphs of the rule text for streamlining purposes.

[447] Amended Rule 15c2-11(d)(1).

broker-dealer's compliance with the information review requirement need only preserve a record of the name of the qualified IDQS that made the publicly available determination. The retention period for such records is not less than three years, the first two years in an easily accessible place. Further, unlike in the proposed Rule, paragraph (d)(1) of the amended Rule does not require that a broker-dealer or qualified IDQS document the paragraph (b) information that it reviewed on EDGAR. The Commission believes that such documentation is unnecessary and could create regulatory redundancies. Lastly, for purposes of complying with the amended Rule, broker-dealers, qualified IDQSs, or registered national securities associations may comply with the amended Rule's recordkeeping requirement in the same manner as that described in Exchange Act Rule 17a-4(f).[448]

Paragraph (d)(2) of the amended Rule applies to: (1) any qualified IDQS or registered national securities association that makes a publicly available determination described in the unsolicited quotation exception, the piggyback exception, and the exception for a publicly available determination by a qualified IDQS or a registered national securities association that an exception applies, and (2) any broker-dealer that publishes or submits a quotation pursuant to any exception provided in paragraph (f). Paragraph (d)(2) provides that the records to be preserved are the documents and information that demonstrate that the requirements of the following exceptions are met: the unsolicited quotation exception, the piggyback exception, the ADTV and asset test exception, the underwritten offering exception, or the exception for a

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[448] *See, e.g.*, Exchange Act Rule 17a-4. Because the amended Rule requires the preservation of "the documents and information required under paragraphs (a), (b), and (c)" (e.g., that demonstrate that the requirements of a particular exception under the amended Rule are met), a broker-dealer, qualified IDQS, or registered national securities association may not satisfy the relevant recordkeeping requirement by relying on a link or similar reference to a record maintained by another entity, such as a link to an issuer's or qualified IDQS's website and must, instead, preserve its own copy of the relevant contents of such website dated from the period for which the entity is relying on such information for purposes of complying with the amended Rule. *See* Amended Rule 15c2-11(d).

publicly available determination by a qualified IDQS or a registered national securities association that an exception applies. The retention period for such records is not less than three years, the first two years in an easily accessible place. Consistent with the proposal, paragraph (d)(2) of the amended Rule does not require the preservation of records for the exchange-traded security exception or the municipal security exception because whether a security is exchange-traded or is a municipal security is widely known without the need for a broker-dealer, qualified IDQS, or a registered national securities association to preserve a separate record.[449] Paragraph (d)(2) of the amended Rule also excepts from the recordkeeping requirement any paragraph (b) information that is available on EDGAR because such documents and information are readily and easily accessible on an electronic platform provided by the Commission.

Consistent with the proposal, the amended Rule limits the recordkeeping requirement for a broker-dealer that relies on a publicly available determination by a qualified IDQS or a registered national securities association that an exception is available or that an issuer's paragraph (b) information is current and publicly available.[450] Specifically, if a broker-dealer relies on a publicly available determination described in paragraph (f)(2)(iii)(B) of the unsolicited quotation exception or (f)(3)(ii)(A) of the piggyback exception under the amended Rule, the broker-dealer must preserve: (1) the name of the qualified IDQS or registered national securities association that made such determination and (2) the documents and information that demonstrate that the other requirements of the exception provided in paragraph (f)(2) or (f)(3), respectively, are met. A broker-dealer that relies on a publicly available determination of a

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[449] Proposing Release at 58234 (stating that whether a security is traded on an exchange or is a municipal security is widely known such that demonstrating that the requirements of those exceptions are met does not require independent preservation of records to support such reliance or to make a publicly available determination).

[450] *See* Amended Rule 15c2-11(d)(2)(ii).

qualified IDQS or a registered national securities association that an exception applies (i.e., paragraph (f)(7) of the amended Rule) must preserve only a record of the exception for which the publicly available determination is made—whether the exchange-traded security exception, the piggyback exception, the municipal security exception, or the ADTV and asset test exception—and the name of the qualified IDQS or registered national securities association that made the publicly available determinations that the requirements of that exception are met. While the proposed recordkeeping requirement would have required such broker-dealer to document, among other things, the exception upon which the broker-dealer is relying,[451] the Commission is clarifying in the amended Rule's recordkeeping requirement that the word "exception" refers to the exception for which the publicly available determination is made, not the exception provided in paragraph (f)(7).

J. Definitions

In light of the amendments that the Commission is adopting, as discussed above, the Commission is also adopting definitions of certain terms that are used throughout these amendments.

1. Current—Rule 15c2-11(e)(2)

The Commission is adopting a definition of "current" only for purposes of the amended Rule to mean that the paragraph (b) information of a prospectus issuer, a Reg. A issuer, an exempt foreign private issuer, or a catch-all issuer is current if it is filed, is published, or is as of a date in accordance with the time frames specified in the applicable subparagraph for such

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[451] *See* Proposed Rule 15c2-11(d)(2)(i)(B); Proposing Release at 58223 (stating that "[a] broker-dealer that relies on a determination pursuant to proposed paragraph (f)(7) by a qualified IDQS or proposed paragraph (f)(8) by a qualified IDQS or a registered national securities association, however, is required only to document the exception upon which the broker-dealer is relying and the name of the qualified IDQS or registered national securities association that determined that the requirements of that exception are met").

information (i.e., paragraph (b)(1), (b)(2), (b)(4), or (b)(5), respectively). In addition, under the amended Rule's definition of "current," the paragraph (b) information of a reporting issuer is current only for the purposes of Rule 15c2-11 if it is the issuer's most recently required annual report or statement filed pursuant to Section 13 or 15(d) of the Exchange Act and any rule(s) thereunder, Regulation A, Regulation Crowdfunding, or Section 12(G)(2)(g) of the Exchange Act, together with any subsequently required periodic reports or statements filed pursuant to Section 13 or 15(d) of the Exchange Act and any rule(s) thereunder, Regulation A, Regulation Crowdfunding, or Section 12(G)(2)(g) of the Exchange Act.[452] The Commission sought, but did not receive any, comment on the proposal to define "current" to mean filed, published, or disclosed, in accordance with the time frames specified in each of the paragraphs (b)(1) through (b)(5).[453]

The definition sets forth the time frames within which issuer information must be filed, be published, or be as of a certain date for the issuer's information to be current for purposes of the amended Rule. Paragraphs (b)(1) through (b)(5) of the amended Rule provide a comprehensive delineation of the documents and information that must be "current" for purposes of the amended Rule, depending on the regulatory status of the issuer, including with respect to a

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[452] The Commission is making a clarifying change from the proposed definition of "current" to specify the application of the definition of the term "current" in light of the fact that some issuers have an Exchange Act reporting obligation while others do not. In addition, the Commission is also making technical edits from the proposed definition of current. First, the Commission is replacing the word "disclosed" (in the proposed definition) with the words "are as of a date" to align the amended Rule's definition of "current" with paragraph (b)(5)(i) of the amended Rule, which provides that a catch-all issuer's information must "be . . . as of" a certain date. Second, the amended Rule provides the definition of "current" in paragraph (e)(2) in light of the addition of the definition for the term "company insider" in paragraph (e)(1) of the amended Rule. The addition of the definition of "company insider" has changed the subparagraph numbers for other definitions under the amended Rule, and the Commission is also making technical amendments to include the term "interdealer quotation system" in paragraph (e)(3), "issuer" in paragraph (e)(4), "quotation" in (e)(7), and "quotation medium" in (e)(8) of the amended Rule.

[453] Proposed Rule 15c2-11(e)(1).

crowdfunding issuer.[454] Summarized below are examples of paragraph (b) information that would be current for purposes of the amended Rule:

- A prospectus specified by section 10(a) of the Securities Act for an issuer that filed a registration statement under the Securities Act, other than a registration statement on Form F-6, that became effective fewer than 90 calendar days before the day on which such broker-dealer publishes or submits the quotation to the quotation medium;[455]
- An offering statement provided for under Regulation A for an issuer that has filed an offering statement under Regulation A that was qualified fewer than 40 calendar days before the day on which such broker-dealer publishes or submits the quotation to the quotation medium;[456]
- An issuer's most recent annual report filed pursuant to Section 13 or 15(d) of the Exchange Act, together with any periodic or current reports that have been filed thereafter under the Exchange Act by the issuer, except for current reports filed during the three business days before the publication or submission of the quotation, provided that the issuer has filed all required annual and periodic reports within the time frames specified;[457]
- An issuer's most recent annual report filed pursuant to Regulation A, together with any periodic and current reports filed thereafter under Regulation A by the

[454] *See* Amended Rule 15c2-11(b)(1) through (5).

[455] *See* Amended Rule 15c2-11(b)(1).

[456] *See* Amended Rule 15c2-11(b)(2).

[457] *See* Amended Rule 15c2-11(b)(3)(i).

issuer, except for any current reports filed during the three business days before the publication or submission of the quotation, provided that the issuer has filed all required annual and periodic reports within the time frames specified;[458]

- An issuer's most recent annual report filed pursuant to Regulation Crowdfunding, provided that the issuer has filed the required annual report within the time frame specified;[459]
- An issuer's most recent annual statement referred to in Section 12(g)(2)(G)(i) of the Exchange Act, together with any periodic and current reports filed thereafter under the Exchange Act, except for current reports filed during the three business days before the publication or submission of the quotation, provided that the issuer has filed all required annual and statements within the time frame specified;[460]
- The information that, since the first day of its most recently completed fiscal year, the issuer has published as required to establish the exemption from registration under Section 12(g) of the Exchange Act pursuant to Exchange Act Rule 12g3-2(b);[461] and

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[458] *See* Amended Rule 15c2-11(b)(3)(ii).

[459] *See* Amended Rule 15c2-11(b)(3)(iii).

[460] *See* Amended Rule 15c2-11(b)(3)(iv).

[461] *See* Amended Rule 15c2-11(b)(4). The Commission is including technical edits to paragraph (b)(4) of the amended Rule to align the amended Rule with Exchange Act Rule 12g3-2(b), which refers to information required to be published for the foreign private issuer to avail itself of an exemption from registration under Section 12(g) of the Exchange Act. Accordingly, the amended Rule replaces the text "beginning of its last fiscal year" with "first day of its most recently completed fiscal year" and added the text "as required to establish the exemption from registration under section 12(g) of the Act."

- The information specified in paragraph (b)(5)(i)(A) though (P) (excluding paragraph (b)(5)(i)(L)) of the amended Rule that is as of a date within 12 months before the publication or submission of the quotation in addition to: (1) the issuer's most recent balance sheet that is as of a date less than 16 months before the publication or submission of the quotation for the issuer's security, and (2) the profit and loss and retained earnings statements for the 12 months preceding the date of the most recent balance sheet.[462]

2. Shell Company—Rule 15c2-11(e)(9)

The Commission has determined to adopt the definition of a "shell company" as proposed, with a technical edit from the proposal.[463] The Commission sought comment regarding the proposal to define "shell company" to mean any issuer other than a business combination related shell company, as defined in Rule 405 of Regulation C, or an asset-backed issuer, as defined in Item 1101(b) of Regulation AB, that has: (1) no or nominal operations; and (2) either: (a) no or nominal assets, (b) assets consisting solely of cash and cash equivalents, or (c) assets consisting of any amount of cash and cash equivalents and nominal other assets.[464] As the Commission explained in the Proposing Release, this definition of shell company closely tracks the definition of shell company in Rule 405 of Regulation C and in Exchange Act Rule 12b-2, the provisions of which apply to registrants, and comports with the provisions of Rule

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[462] *See* Amended Rule 15c2-11(b)(5)(i).

[463] The term "shell company" is defined in paragraph (e)(9) of the amended Rule in light of the addition of the definition for the term "company insider" in paragraph (e)(1) of the amended Rule.

[464] *See* Proposed Rule 15c2-11(e)(8).

144(i)(1)(i) regarding the availability of that safe harbor for the resale of securities initially issued by certain issuers.[465]

Commenters who opposed the proposed definition stated that, although there is a need to curtail abusive reverse mergers that can be facilitated by shell companies, the proposed definition would be ambiguous and difficult to apply.[466] The Commission believes the definition of shell company is a well-established and broadly used definition in other areas of the federal securities laws. The definition of shell company that the Commission is adopting does not preclude a broker-dealer, qualified IDQS, or registered national securities association from determining that an entity is a shell company based on an observation that a company has identified itself as a shell company (or as not a shell company) or, alternatively, review of a company's financial information, including asset composition, operational expenditures, and income-related metrics. The definition of shell company under the amended Rule is consistent with the requirements of other established and broadly used Commission rules to provide market participants flexibility in analyzing the particular facts and circumstances involving an issuer, such as the issuer's financial information and information related to its operations.[467]

Some commenters advocated for more of a bright-line definition of "shell company"[468] or examples of the types of attributes of companies that would meet the Rule's definition of shell company to reduce the likelihood of inconsistent determinations.[469] One commenter stated that

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[465] *See* Proposing Release at 58236.

[466] Anthony Letter; Coral Capital Letter; Leonard Burningham Letters; OTC Markets Group Letter 1; Sosnow & Associates Letter; STA Letter. *But see* Lowy Letter.

[467] *See, e.g.*, Proposing Release at 58236 n.157.

[468] *E.g.*, STA Letter; *see* Lucosky Brookman Letter. *But see* Peregrine Comment.

[469] FINRA Letter.

the definition should also include self-identified shell companies and companies that are "shell risk" companies based on a review of a company's financial information, including asset composition, operational expenditures, and income-related metrics.[470] The Commission continues to believe that defining the term "nominal" with reference to quantitative thresholds would be unworkable in this context.[471] However, in determining whether the requirements of the piggyback exception are met,[472] a market participant may rely on an issuer's self-identification as a shell company (or as not a shell company), unless it has a reasonable basis to believe otherwise.[473] Further, a broker-dealer may rely on a catch-all issuer's self-identification as a shell company in its review of the issuer's documents and information in paragraph (b)(5)(i)(H) of the amended Rule regarding a description of the issuer's business or any other statement from the issuer regarding its status as a shell company. Consistent with the definition of shell company in the proposal, the definition of a shell company under the amended Rule applies to all issuers of securities, and is not limited to companies that have filed a registration statement or have an obligation to file reports under Section 13 or Section 15(d) of the Exchange Act, because Rule 15c2-11 applies to the publication and submission of quotations for the

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[470] OTC Markets Group Letter 2; OTC Markets Group Letter 3; *see* Coulson Comment; Sosnow & Associates Letter.

[471] *See* Proposing Release at 58236.

[472] *See* Amended Rule 15c2-11(f)(3)(i)(B)(*2*).

[473] In the absence of any information that, under the circumstances, reasonably indicates that the source is unreliable, a broker-dealer, qualified IDQS, or registered national securities association could satisfy the amended Rule's requirement regarding the reliability of the information source if that information were provided by the issuer of the security or its agents, including its officers and directors, attorneys, or accountants. *See infra* Part II.O.2. The Commission understands that some instances exist in which an issuer may not identify as a shell company, such as in the context of a reverse merger screening, but that other factors may suggest that the issuer is a shell company. *See, e.g.*, *Use of Form S-8, Form 8-K, and Form 20-F by Shell Companies*, Securities Act Release No. 8587 (July 15, 2005), 70 FR 42234, 42236 nn.31, 32 (July 21, 2005).

securities of all types of issuers, including reporting issuers and catch-all issuers.[474] In response to comment,[475] the Commission reiterates that startup companies, or, in other words, companies with a limited operating history, are not captured in the definition of "shell company" because such companies do not meet the condition of having "no or nominal operations."[476]

3. Publicly Available—Rule 15c2-11(e)(5)

The Commission has determined to adopt the definition of "publicly available" substantially as proposed, with a modification to expand the proposed definition's list of locations to include: (1) the website of a state or federal agency, and (2) an electronic information delivery system that is generally available to the public in the primary trading market of a foreign private issuer, as defined in Rule 3b-4 of the Exchange Act.[477] In addition, the Commission is requiring that access to any specified location under the amended Rule's definition of "publicly available" must not be restricted by user name, password, fees, or other restraints.[478] The Commission sought comment about the proposal to define "publicly available"

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[474] *See* Proposing Release at 58236.

[475] *See* OTC Markets Group Letter 1.

[476] The Commission has stated that startup companies that have limited operating history do not meet the condition of having "no or nominal operations" for the purposes of Securities Act Rule 144(i)(1)(i). *See also* Rules 144 and 145 Release at 71557 n.172. The Commission also believes that this is appropriate in the context of broker-dealers determining whether a company fits within the meaning of "shell company" as defined in the amended Rule when deciding whether they may rely on the piggyback exception because it is consistent with other Commission statements. *See, e.g.*, *id.*

[477] *See* Amended Rule 15c2-11(e)(5). The Commission is also adopting a technical edit from the proposal to define the term "publicly available" in paragraph (e)(5) of the amended Rule in light of the addition of the definition for the term "company insider" in paragraph (e)(1) of the amended Rule.

[478] As proposed, only access to paragraph (b) information was required to be unencumbered. *See* Proposed Rule 15c2-11(e)(4); Proposing Release at 58236. In addition, the Commission is also making a technical edit from the proposed definition of "publicly available." Whereas the provision in the proposed Rule's definition of "publicly available" specified that the term "*publicly available* shall *not* mean where access to documents and information . . . is restricted," *see* Proposed Rule 15c2-11(e)(4) (emphasis added), the provision in the amended Rule's definition of "publicly available" specifies that "*publicly available* shall mean where access is *not* restricted," *see* Amended Rule 15c2-11(e)(5) (emphasis added).

to mean available on EDGAR, or on the website of a qualified IDQS, a registered national securities association, the issuer, or a registered broker-dealer, provided that access is not restricted by user name, password, fees, or other restraints.[479] Commenters supported this aspect of the proposal,[480] acknowledging that, today, issuer information is available to the public on a wide variety of platforms—from EDGAR[481] to issuers' own websites.[482] Commenters generally agreed that the term "publicly available" should not apply if money is charged for access.[483] One commenter did not foresee any privacy concerns associated with making paragraph (b) information publicly available on the Internet.[484]

Commenters suggested that the list of websites in the definition of "publicly available" be expanded to include Canada's System for Electronic Document Analysis and Retrieval ("SEDAR") or other similar foreign regulatory or exchange websites (so long as information is available in English and access is not restricted by user name, password, fees, or other restraints)[485] and the websites of other financial regulators (e.g., the Federal Deposit Insurance Corporation's website).[486] One commenter suggested that the Commission clarify that "publication" by an exempt foreign private issuer of information required by Rule 12g3-2(b)

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[479] *See* Proposed Rule 15c2-11(e)(4).

[480] *E.g.*, Global OTC Letter; NASAA Letter.

[481] Hamilton & Associates Letter.

[482] *E.g.*, Leonard Marx, Jr., Retired Chairman & President, Merchants National Properties (Oct. 8, 2019); Mitchell Partners Letter 1; Braxton Gann.

[483] Canaccord Letter; Coral Capital Letter; NASAA Letter; *see* Global OTC Letter.

[484] NASAA Letter.

[485] FINRA Letter.

[486] Monroe Letter.

means that the information must be "publicly available" consistent with the definition of that term in proposed Rule 15c2-11(e)(4).[487]

The expansion of the list of specified locations under the amended Rule to include the websites of state and federal agencies accommodates state and federal agency websites that routinely make paragraph (b) information available to the public (e.g., the Federal Deposit Insurance Corporation's website, which makes information about certain insured depositary institutions, including community banks, available for viewing by the public).[488] In addition, the expansion of the list to include an electronic information delivery system that is generally available to the public in the primary trading market of a foreign private issuer,[489] as defined in Rule 3b-4 of the Exchange Act, aligns the definition of publicly available in the amended Rule with Exchange Act Rule 12g3-2(b) and is appropriate because paragraph (b) information regarding an exempt foreign private issuer must, among other things, be publicly available for purposes of compliance with the information review requirement, reliance on an exception, or making a publicly available determination before a broker-dealer can publish a quotation for an exempt foreign private issuer's security.

While one commenter stated that the term "publicly available" correctly excludes websites that have barriers to access information,[490] another commenter suggested that the term's

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[487] Murphy & McGonigle Letter.

[488] *E.g.*, Securities Exchange Act Filings, Federal Deposit Insurance Corporation, https://efr.fdic.gov/fcxweb/efr/index.html (last visited June 1, 2020).

[489] *See Exemption From Registration Under Section 12(G) of the Securities Exchange Act of 1934 for Foreign Private Issuers*, Exchange Act Release No. 58465 (Sept. 5, 2008), 73 FR 52752, 52759 (Sept. 10, 2008) (stating that Rule 12g3-2(b) permits issuers to meet the rule's electronic publication requirement concurrently with the publishing in English of a non-U.S. disclosure document through an electronic information delivery system generally available to the public in its primary trading market).

[490] Global OTC Letter.

definition be expanded to include receipt, free of charge, via the Internet or upon request by email.[491] The definition of "publicly available" for purposes of the amended Rule does not include delivery or receipt, free of charge, via the Internet or upon request by email.[492] The requirement for publicly available information is designed to give *all* investors free, unfettered access to certain information about an issuer to reduce information asymmetries that all investors could use to better understand and evaluate the issuer and the issuer's security before making an investment decision. The Commission believes, therefore, that the definition of publicly available should not include transmissions of information that are made upon request or are not freely available to all market participants at once.

Further, the definition of "publicly available" does not require that an issuer itself make its information available. Instead, the amended Rule defines the term "publicly available" as "available on . . . or through" a specified list of locations so that an investor could work with a broker-dealer or a qualified IDQS to make an issuer's information publicly available on the website of a broker-dealer or a qualified IDQS.[493]

Some commenters suggested that companies make their information publicly available in an immediately downloadable form, from a centralized website or on their own website.[494] While such a measure could facilitate access to such information, the Commission does not believe that it is necessary for such a measure to be required in the amended Rule, given that widespread use of the Internet has made it easier and less burdensome to facilitate access to

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[491] Coral Capital Letter; *see* Mitchell Partners Letter 1 (commenting that some issuers have a policy of sending financial information to non-shareholders who inquire, which might not be captured in the definition of "publicly available").

[492] Nor does the definition under the amended Rule require availability in a centralized location.

[493] *See* Amended Rule 15c2-11(e)(5).

[494] Brett Dorendorf; Lake Highlands Comment; Ariel Ozick.

information in many different ways and that the definition of "publicly available" requires that access to information be unencumbered by user name, password, fees, or other constraints. Therefore, the Commission is not requiring under the amended Rule that information be in an immediately downloadable form, from a centralized website or from an issuer's own website, for such information to meet the definition of "publicly available." Such publications would meet the amended Rule's definition of "publicly available" so long as: (1) the website is one of the enumerated locations in the definition (i.e., EDGAR; the website of a state or federal agency, a qualified IDQS, a registered national securities association, an issuer, or a registered broker-dealer; or an electronic information delivery system that is generally available to the public in the primary trading market of a foreign private issuer, as defined in Exchange Act Rule 3b-4); and (2) access to such centralized website is not restricted by user name, password, fees, or other restraints.

Finally, to ensure the free and wide availability to market participants and investors, including retail investors, of publicly available determinations by any qualified IDQSs or registered national securities association regarding the public availability of current paragraph (b) information and the applicability of certain of the amended Rule's exceptions,[495] the Commission is expanding the proposed requirement that access to paragraph (b) information must not be restricted by user name, password, fees, or other restraints.[496] Rather, access to any specified location under the amended Rule's definition of "publicly available" must not be restricted by user name, password, fees, or other restraints. In this regard, access to a publicly available determination of a qualified IDQS or a registered national securities association, such

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[495] *See, e.g.*, *supra* Part II.D.6.

[496] *See* Proposed Rule 15c2-11(e)(4).

as, for example, that the piggyback exception applies or a subsequent determination that an issuer's information is no longer current and publicly available, also must not be restricted by user name, password, fees, or other restraints.

4. Qualified Interdealer Quotation System—Rule 15c2-11(e)(6)

The Commission has determined to adopt the definition of a qualified IDQS as proposed, with technical revisions.[497] Specifically, paragraph (e)(6) of the amended Rule defines a "qualified interdealer quotation system" to mean any interdealer quotation system that meets the definition of an ATS under Rule 300(a) of Regulation ATS and operates pursuant to the exemption from the definition of an "exchange" under Rule 3a1-1(a)(2) of the Exchange Act.

The Commission sought comment regarding the proposal to define a "qualified interdealer quotation system" as any IDQS that meets the definition of an ATS, as defined under Rule 300(a) of Regulation ATS, and operates pursuant to the exemption from the definition of an "exchange" under Rule 3a1-1(a)(2) of the Exchange Act.[498] Although the Commission received comment on other aspects of the proposed Rule regarding certain activities of qualified IDQSs,[499] the Commission received no comment on the proposed definition of a qualified IDQS. The Commission continues to believe that the regulatory requirements for an IDQS that operates as an ATS under the Exchange Act—and the concomitant SRO and Commission oversight of

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[497] The Commission is making a non-substantive change to replace references to Regulation ATS and Exchange Act Rule 3a1-1(a)(2) in the proposed Rule with their Code of Federal Regulations cites. This technical edit does not change the meaning or operation of the term "qualified interdealer quotation system" in the amended Rule. Finally, the Commission is adopting a technical amendment to define the term "qualified interdealer quotation system" in paragraph (e)(6) of the amended Rule in light of the addition of the definition for the term "company insider" in paragraph (e)(1) of the amended Rule.

[498] *See* Proposed Rule 15c2-11(e)(5).

[499] *See, e.g.*, *supra* Part II.A.2 (discussing the requirements for a qualified IDQS to comply with the information review requirement).

this type of entity—would help to ensure investor protection and to prevent fraud and manipulation for the reasons discussed in the Proposing Release.[500]

5. Company Insider—Rule 15c2-11(e)(1)

The Commission has determined to add a definition of the term "company insider." Specifically, paragraph (e)(1) of the amended Rule defines the term "company insider" to mean any officer or director of the issuer, or person that performs a similar function, or any person who is, directly or indirectly, the beneficial owner of more than 10 percent of the outstanding units or shares of any class of any equity security of the issuer.[501] As discussed below, this definition is consistent with the list of persons in the proposed rule text and with how the term "company insider" was used in the Proposing Release.[502]

The Commission sought comment regarding whether the Rule should include the defined term "company insiders" to describe the list of persons specified in paragraphs describing the requirements for certain catch-all issuer information (i.e., paragraph (b)(5)(i)(K)), supplemental information (i.e., paragraph (c)(1)), and the unsolicited quotation exception (i.e., paragraph (f)(2)(ii)) and whether such a definition should include any other additional persons.[503] Although the Commission received no comment specifically on the proposed definition of "company insider," commenters suggested generally that the Rule's investor protections could be enhanced by increasing the amount of current and publicly available information regarding insiders and

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[500] *See* Proposing Release at 58236–37. For example, the requirements of Regulation ATS would provide the Commission with relevant information about the IDQS function of the qualified ATS and quoting and trading activity in the ATS, and therefore contribute to Commission oversight of an ATS that may choose to operate as a qualified IDQS. The amendments do not change the definition of an alternative trading system under Rule 300(a) for Regulation ATS or the conditions to the ATS exemption provided under Exchange Act Rule 3a1-1(a)(2).

[501] Amended Rule 15c2-11(e)(1).

[502] *See* Proposing Release at 58208 n.9.

[503] *See* Proposing Release at 58237.

affiliates of issuers.[504] In addition, one commenter suggested that the Commission recognize that the financial decisions of lower level officers who do not manage the company are largely based on personal financial considerations, not on material non-public information.[505]

Under the amended Rule, this definition applies to the same list of persons that were individually described in paragraphs (b)(5)(i)(K), (c)(1), and (f)(2) of the proposed Rule while also applying to any person that performs a similar function to that of an officer or director. Though this definition does not explicitly include the terms "chief executive officer" and "member of the board of directors," the definition nevertheless applies to such person so long as he or she is an officer, director, or person that performs a similar function.[506] The Commission believes the definition of the term "company insider" in the amended Rule appropriately captures persons who manage a company or have a greater degree of access to issuer information and who may have a heightened incentive to engage in fraudulent or manipulative conduct.

K. Removal of Outdated Provisions

The Commission is rescinding the Nasdaq security exception, as proposed, because the Nasdaq security exception is obsolete in light of Nasdaq's registration as a national securities exchange.[507] The publication or submission of quotations by a broker-dealer of securities that are traded on a national securities exchange is already excepted from a broker-dealer's compliance with the information review requirement by paragraph (f)(1) of the amended Rule.

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[504] *See, e.g.*, OTC Markets Group Letter 2.

[505] *See* Computer Services Letter.

[506] *See* Amended Rule 15c2-11(e)(1).

[507] The Commission received one comment in support of removing obsolete provisions from the Rule. Virtu Letter.

The Commission is also rescinding the requirement in former Rule 15c2-11(d)(1) that a broker-dealer that submits a quotation for the security of a catch-all issuer furnish to the IDQS, at least three business days before the quotation is published or submitted, the documents and information that the broker-dealer is required to maintain pursuant to paragraph (a)(5) of the former Rule. This requirement is unnecessary in light of the amendments to the recordkeeping requirement, which require that the applicable documents and information be preserved for a period of not less than three years, the first two years in an easily accessible place,[508] that help to facilitate the Commission's oversight of broker-dealers that publish quotations after complying with the information review requirement themselves, by relying on a qualified IDQS's publicly available determination that it complied with the information review requirement, or by relying on certain of the amended Rule's exceptions.[509] Accordingly, it is redundant to require broker-dealers both to submit information to an IDQS and to comply with the amended Rule's recordkeeping requirement. The Commission received no comment on this aspect of the proposal.

In addition, the Commission is rescinding the provision in the Rule that allowed a broker-dealer to comply with the requirement to obtain annual, quarterly, and current reports filed by the issuer where the broker-dealer has made arrangements to receive such reports when they are filed by the issuer and has regularly received reports from the issuer on a timely basis. As the Commission explained above and in the Proposing Release, this requirement is outdated because

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[508] *See* Amended Rule 15c2-11(d)(1), (2).

[509] *See supra* Part II.I.

such reports can be obtained by broker-dealers through EDGAR.[510] No commenters opposed the rescission of this requirement.

Finally, the Commission is removing the "Preliminary Note" from the Rule and including new guidance to accompany the Rule. The Commission solicited comment on whether the Preliminary Note should be retained in its current form, in the form of guidance as proposed, or in a different form. The Commission received one comment in support of removing obsolete provisions from the Rule[511] and, for the reasons discussed in the Proposing Release, is removing the Preliminary Note from the Rule and, instead, is including new guidance to accompany the amended Rule.[512] This guidance is discussed in Part II.O below.

L. Exemptive Authority—Rule 15c2-11(g)

The Commission is amending paragraph (g) to conform the standard for the amended Rule's exemptive authority to the provision for exemptive authority in Section 36 of the Exchange Act because the Commission believes that the appropriate standard for granting an exemption from Rule 15c2-11 should mirror the statutory standard. Specifically, paragraph (g) of the amended Rule provides that the Commission may grant, conditionally or unconditionally, an exemption from the Rule to the extent such exemption "is necessary or appropriate in the public interest, and is consistent with the protection of investors." As discussed in the Proposing Release, Section 36 was enacted after the most recent substantive amendments to this Rule were

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[510] *See supra* Part II.B.1; Proposing Release at 58237.

[511] Virtu Letter.

[512] As the Commission explained in the Proposing Release, if the Commission were to include new guidance to accompany the Rule, the guidance provided in the 1991 Adopting Release and referenced in the Preliminary Note to the Rule would be superseded. Proposing Release at 58239.

adopted.[513] The Commission sought comment on this aspect of the proposal and received no comment.

M. Technical Amendments

As discussed above in Parts II.A through II.K, and for the reasons discussed in the Proposing Release, the Commission is adopting non-substantive technical amendments to the Rule's text. The Commission solicited comment on the proposed technical amendments, including whether any additional technical amendments would be appropriate and whether any of the Rule's text should be revised to improve the Rule's effectiveness and clarity. The Commission received one comment in support of streamlining the Rule and making technical, non-substantive changes[514] and is adopting the technical amendments as proposed in light of other amendments to the Rule.

Specifically, because the Commission is separating the review requirement from the Rule's specified information provisions, the Commission is re-lettering the Rule's provisions and making conforming edits to all cross-references within the Rule to reflect the re-lettering. The Commission is also alphabetizing defined terms under the Rule's definitional section and re-lettering the Rule's definitional provisions.

In addition, the Commission is adopting grammatical edits to the Rule. For example, the Commission is (1) amending the Rule's definition of "quotation" in paragraph (e)(7) by replacing the word "he" with "its," (2) replacing the word "which" with the word "that" where appropriate, (3) adding and deleting commas in paragraph (b)(5)(i)(P) to provide clarity, (4) fixing typographical errors, (5) replacing the phrase "required by" with the phrase "specified in"

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[513] *See* Proposing Release at 58238.

[514] Virtu Letter.

with respect to paragraph (b) information, and (6) replacing the word "specific" with the word "specified" in the Rule's title. In addition, the Commission is spelling out all numbers that are less than 10.

Further, the Commission is adopting amendments to aid in the Rule's readability. For example, the Commission is amending the Rule by adding headings before certain of the Rule's provisions and by addressing instances of inconsistent letter capitalization (e.g., by ensuring that all phrases such as "Provided, however, that" are written consistently throughout the Rule). In addition, the Commission is adding the term "that is" in paragraph (f)(1) when referring to a security that is admitted to trading on a national securities exchange. The Commission also is adopting amendments to replace the word "shall" with "must" where appropriate (e.g., paragraph (b)(5), addressing catch-all issuer information), and is replacing the word "respecting" with the word "for" (e.g., paragraph (f)(3), in the provisions of the piggyback exception).[515] To be consistent with other rules under the Exchange Act, the Commission is replacing (1) any references to the Financial Industry Regulatory Authority, Inc. with a reference to a registered national securities association and (2) adding CFR citations where appropriate (e.g., replacing the words "under the Securities Act" in the paragraph pertaining to Reg. A issuers with "(§§ 230.251 through 230.263 of this chapter)" to reflect a reference to the CFR cite to Regulation A). In this regard, to align the amended Rule with Regulation A, the Commission is also adopting amendments in paragraph (b)(2) to replace the phrases (1) "authorized to commence the offering" with the word "qualified," and (2) "offering circular provided for under"

[515] While the proposed Rule would have used the word "concerning," the amended Rule uses the word "for" when describing publications or submissions of quotations to be consistent with the rule text in paragraph (a). In addition, the amended Rule uses the word "regarding" instead of the word "concerning," as proposed, when describing an issuer or its documents and information.

with the phrase "exemption, with respect to such issuer," after the reference to Regulation A that existed in the former Rule. Similarly, to align the amended Rule with Exchange Act Rule 12g3-2(b), the Commission is adopting technical amendments to (1) replace the word "beginning" with the words "first day" and the word "last" with the phrase "most recently completed fiscal year," (2) add the phrase "as required to establish the exemption from registration under section 12(g) of the [Exchange] Act," and (3) delete the word "reasonably" before the phrase "available at the request." In addition, the Commission is adding the phrase "of the broker or dealer" in paragraph (b)(5)(i)(N) to clarify that the specified information refers to any associated person of the broker-dealer. Also, the Commission is adopting conforming changes to begin each paragraph of paragraph (b) in the same manner to be consistent in listing the issuer information that the Rule requires. Further, the Commission is also adding the words "under the circumstances" to paragraph (b)(5)(ii) so that the standard for source reliability of catch-all issuer information is the same standard that is stated for the accuracy of catch-all issuer information. The Commission is also making a technical amendment to the definition of "quotation" so that it is provided in the same style as the amended Rule's other definitions.

The Commission also is adopting amendments to streamline and clarify the Rule's text. For example, the Commission is replacing the phrase "a record of the circumstance involved in" with the phrase "records related to" in paragraph (c)(1). The Commission also is replacing "customer's indication of interest and does not involve the solicitation of the customer's interest" in paragraph (f)(2) with "customer's unsolicited indication of interest" in paragraph (f)(2). The Commission is also replacing the list of "any director, officer or any person, directly or indirectly the beneficial owner of more than 10 percent of the outstanding units or shares of any equity security of the issuer" with the newly defined term "company insider." Finally, the Commission

is deleting the word "exact" from paragraphs (a)(5)(i) and (iv) of the former Rule and replacing the phrase "the nature" with the phrase "a description" in paragraphs (a)(5)(viii), (ix), and (x).

The Commission also is adopting amendments to avoid redundancy in the Rule's text. For example, the Commission is removing from the Rule all instances of the phrase "as defined in this section" because the text of the Rule's definitional section, paragraph (f), makes it sufficiently clear that all instances where a particular defined term is mentioned are for the purposes of the Rule, unless as otherwise specified. In addition, the Commission is deleting the word "said" from the former Rule's paragraph (d)(1) because the words "of this section" also appear in the text of the Rule. The Commission is also deleting the phrase "the issuer's most recent" from the phrase "a copy of the issuer's most recent" in paragraph (b)(3) and also replacing "[i]ssuer's most recent" with the word "[a]n" in the beginning of paragraphs (b)(3)(i) through (iv) to avoid a redundancy.

Finally, the Commission is adopting amendments to paragraph (b)(2) of the amended Rule to align with Regulation A, which requires that all issuers who conduct offerings pursuant to Regulation A electronically file an offering statement on Form 1-A, on EDGAR.[516] The amended Rule references the offering circular for the issuer's security, the description of an issuer's filing under Regulation A is updated to more closely reflect Regulation A's requirement for an issuer that conducts an offering pursuant to Regulation A to electronically file an offering

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[516] Technical edits from the proposal include the deleting words "under the Securities Act" and adding Code of Federal Regulations (the "CFR") citations. In addition, the amended Rule includes technical edits from the proposed Rule to be consistent with Regulation A. For example, technical edits in this regard include changing the phrase "a notification" to "an offering statement;" changing text regarding commencing to "qualified;" and replacing the words "offering circular provided for under" with a reference to the Regulation A exemption with respect to the issuer. Lastly, technical edits have been made to delete the word "the" before the word "subject;" and replacing the word "of" with the word "to." *See* Amended Rule 15c2-11(b)(2). The Commission did not receive comment on the proposed amendments to paragraph (b)(2).

statement (as opposed to an offering notification) on EDGAR.[517] Further, paragraph (b)(2) of the amended Rule also reflects, consistent with Regulation A, that issuers are only permitted to begin selling securities pursuant to Regulation A once the offering statement has been qualified by the Commission.[518]

N. Conforming Rule Change—Rule 144(c)(2)

The Commission proposed to make conforming amendments to Rule 144(c)(2)[519] in light of the proposal to re-letter the provision addressing catch-all issuer information in paragraph (b)(5) of the proposed Rule. The Commission did not receive any comment on this aspect of the proposal. In light of the amendments adopted, the Commission is making conforming amendments to cross-references in the provisions of Rule 144(c)(2) that cite to Rule 15c2-11(a)(5). Specifically, the Commission is amending Rule 144(c)(2) to cross-reference Rule 15c2-11(b)(5)(i)(A) to (N) and Rule 15c2-11(b)(5)(i)(P), and the Commission is removing the cross-references to Rule 15c2-11(a)(5)(i) to (xiv) and Rule 15c2-11(a)(5)(xvi).

O. Guidance

As discussed above, the Commission is removing the Preliminary Note from the former Rule and adopting as proposed the guidance that appears below. This guidance is based on the 1991 Adopting Release (the "1991 Guidance") and the Appendix in the 1999 Reproposing Release (the "1999 Appendix").[520] The guidance includes targeted updates to: (1) the discussions related to source reliability and the information review requirement that were

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[517] Rule 251(f) of Regulation A.

[518] Rule 251(d)(2) of Regulation A.

[519] Securities Act Rule 144(c)(2).

[520] The Commission took no further action on the guidance included in the 1999 Appendix in the 1999 Reproposing Release.

included in the 1991 Guidance,[521] and (2) the examples of red flags that were included in the 1999 Appendix.[522] In addition, the guidance below discusses the obligations of broker-dealers and qualified IDQSs in considering supplemental information as part of complying with the information review requirement. The guidance below supersedes the 1991 Guidance that was referenced in the Preliminary Note.

The Commission solicited comment on the guidance, including whether the 1999 Appendix should be incorporated into the new guidance. The 1999 Appendix provided guidance to broker-dealers on the scope of the review required by the Rule and offered examples of red flags that broker-dealers should look for when reviewing issuer information. Commenters suggested that the Commission provide updated guidance to the industry on the process involved in complying with the Rule's information review requirement, particularly with respect to any "red flags" regarding an issuer or its securities.[523] One commenter stated that broker-dealers' compliance with the provisions of the amended Rule involves the exploration of any red flags that may arise with respect to an issuer or security.[524] For example, one commenter stated that pump-and-dump schemes occur where companies in "hot" sectors use constant streams of press

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[521] Proposing Release at 58239.

[522] 1999 Reproposing Release at 11145. The 1999 Appendix supplemented the guidance from the 1991 Adopting Release, which was incorporated into the Rule through the Preliminary Note, by providing additional guidance on, among other things, "red flags" regarding the issuer that broker-dealers should consider as part of complying with the information review requirement. *See id.* at 11145. The Commission had proposed in the Proposing Release to update the 1991 Guidance. *See* Proposing Release at 58239.

[523] *See* Coral Capital Letter; FINRA Letter; OTC Markets Group Letter 1.

[524] FINRA Letter. FINRA stated that both it and the industry rely on the 28 examples of red flags that the Commission provided in the 1999 Appendix. Further, FINRA stated that broker-dealers being alert to possible red flags during the review process is an important component to achieving the investor protection and market integrity benefits for which the Rule is designed. In particular, FINRA stated its view about the continued importance of several of the red flags examples to firms' reviews, including regarding concentration of ownership, the presence of unusual auditing issues, suspicious documents, and large reverse stock splits. FINRA stated that, while some of the red flag examples may be less prevalent today than others, it believes that the Commission should incorporate all of the red flag examples into the adopted guidance. *Id.*

releases and promotional announcements, implying large quick profits to create a fear of missing out in order to appeal to unsophisticated investors.[525] Another commenter suggested that "additional regulatory guidance is necessary to give effect to the proposed Rule."[526]

The Commission has determined to include the guidance, substantially as proposed, with a modification to include and update the red flags examples that were included in the 1999 Appendix. With one exception, the Commission continues to believe that all of the red flag examples from the 1999 Appendix, as updated, remain valid. The exception appeared in the section entitled, "Offerings under Rule 504 of Regulation D where [certain] factors are present."[527] There have been amendments to Rule 504 of Regulation D and changes in the OTC market regarding use of that exemption since the list was last updated.[528] As a result, the Commission no longer believes that including an example to highlight certain fact patterns only in the context of Rule 504 of Regulation D would be useful for broker-dealers or qualified IDQSs in identifying the particular types of circumstances that require additional scrutiny in complying with the information review requirement.

1. Introduction

Broker-dealers and qualified IDQSs complying with the information review requirement under the amended Rule must have a reasonable basis under the circumstances for believing, based on a review of paragraph (b) information, together with any supplemental information

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[525] Caldwell Sutter Capital Comment.

[526] Anthony Letter.

[527] *See* 1999 Reproposing Release at 11150 (describing the example of a Rule 504 offering that is preceded by an unregistered offering to insiders or others for services rendered at prices well below the price in the subsequent offering).

[528] *See, e.g.*, *Exemptions to Facilitate Intrastate and Regional Securities Offerings*, Securities Act Release No. 10238 (Oct. 26, 2016), 81 FR 83494 (Nov. 21, 2016).

required by paragraph (c), that: (1) the paragraph (b) information is accurate in all material respects, and (2) the sources of the paragraph (b) information are reliable.[529] Accordingly, the Commission is providing the following basic principles to guide broker-dealers and qualified IDQSs in complying with the information review requirement.

2. Source Reliability

The amended Rule requires that the broker-dealer or qualified IDQS must have a reasonable basis for believing that any source of the paragraph (b) information is reliable. In the absence of any red flag (e.g., information that, under the circumstances, reasonably indicates that the source is unreliable), a broker-dealer or qualified IDQS could satisfy the amended Rule's requirement regarding the reliability of the information source if that information were provided by the issuer of the security or its agents, including its officers and directors, attorneys, or accountants, or was obtained from an independent information service, a document retrieval service, or standard research sources, such as reputable and commonly used Internet websites used to research information related to securities issuers.

Occasionally, a broker-dealer or qualified IDQS may receive information specified in paragraph (b) and required by paragraph (c) of the amended Rule about an issuer from someone other than another broker-dealer, the issuer or its agents, or an independent information service. In such situations, while the broker-dealer or qualified IDQS might be aware of the identity of the immediate source of the specified information, it might not have any knowledge about the person that compiled such information. However, to comply with the amended Rule's requirement regarding source reliability, the broker-dealer or qualified IDQS is required to ascertain the reliability of the sources of the information. In this regard, when the immediate

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[529] Amended Rule 15c2-11(a)(1)(i)(C), (a)(2)(iii).

source represents that the information was compiled by the issuer, the broker-dealer generally should verify that representation by contacting the issuer directly.

If, however, the broker-dealer or qualified IDQS receives the information from an independent and objective source representing that it received the information directly from the issuer, the broker-dealer or qualified IDQS could rely on that representation absent countervailing information. When a red flag regarding the source's reliability exists, the broker-dealer or qualified IDQS should conduct the inquiry called for under the circumstances to reasonably assess whether the source of the information is reliable.

3. Information Review Requirement

Once the broker-dealer or qualified IDQS has a reasonable belief as to the source's reliability, it should examine the materials in its records to make certain that all of the specified information has been obtained. Next, the broker-dealer or qualified IDQS should review the paragraph (b) information in the context of all other information, including supplemental information under paragraph (c), about the issuer that has come to its knowledge or is in its possession. Ordinarily, the broker-dealer or qualified IDQS need not take any further steps (e.g., look behind the financial statements or affirmatively seek out information about the issuer beyond that specifically required by the amended Rule). However, the broker-dealer, consistent with paragraphs (a)(1)(i)(C)(1) and (2), or qualified IDQS, consistent with paragraphs (a)(2)(iii)(A) and (B), should be alert to any red flags (i.e., information under the circumstances that reasonably indicates that one or more of the required items of information may be materially inaccurate or from an unreliable source). Red flags would be indicated, for example, by material inconsistencies in the paragraph (b) information or material inconsistencies between that information and other information that comes to the knowledge or possession of the broker-

dealer or qualified IDQS. In the absence of red flags during the review of such information, a broker-dealer or qualified IDQS does not have an obligation to make further inquiries to determine whether it has a reasonable basis to believe that the issuer information is accurate.

Where no red flags appear during this review process, the broker-dealer or qualified IDQS could have a reasonable basis for believing that the information is accurate. If red flags appear, the broker-dealer or qualified IDQS could attempt to reasonably address any red flags or decide not to publish or submit a quotation for the issuer's security. In such case, the specific efforts by the broker-dealer or qualified IDQS to satisfy the reasonable basis standard with respect to the accuracy of the information and the reliability of sources can vary with the circumstances and may require the broker-dealer or qualified IDQS to obtain additional information or seek to verify the accuracy of existing information. For example, the broker-dealer or qualified IDQS may have a reasonable basis to believe that the information is accurate in all material respects after questioning the issuer directly. When red flags are present such that they bring into question the reliability of an issuer or its officers and directors, attorneys, or accountants, as a source of information, the broker-dealer or qualified IDQS may need to consult independent sources, such as an attorney or accountant.

As discussed above, the amended Rule requires that a broker-dealer or qualified IDQS have a reasonable basis under the circumstances for believing that paragraph (b) information, in light of any other documents and information required by the amended Rule, such as paragraph (c) information, is accurate in all material respects. However, the amended Rule does not require that, before submitting or publishing quotations for a security, a broker-dealer or qualified IDQS conduct an independent "due diligence" investigation regarding the issuer or its business operations and financial condition such as the investigation expected to be conducted by an

underwriter. A broker-dealer or qualified IDQS publishing quotations may have no relationship with or access to the issuer of the security. The amended Rule does not require that the broker-dealer or qualified IDQS develop such a relationship to obtain information about the issuer. Rather, as described above, the amended Rule specifies the information that must be gathered, and the information review requirement would be satisfied if the broker-dealer or qualified IDQS had a reasonable basis for believing that the information is accurate in all material respects and obtained from a reliable source, after reviewing that information.

In short, a reasonable basis for belief in the accuracy of the paragraph (b) information can be founded solely on a careful review of the paragraph (b) information together with paragraph (c) information, provided that the paragraph (b) information was obtained from sources reasonably believed to be reliable and there are no red flags. When red flags are initially present, the broker-dealer or qualified IDQS may, upon inquiry, obtain additional information that provides a reasonable basis for believing that the information is accurate in all material respects and that the sources are reliable.

4. Examples of Red Flags

The Commission is providing examples of red flags where the broker-dealer or qualified IDQS may want to apply additional scrutiny. These examples, however, are not exhaustive. Conversely, the presence of these or other red flags is not necessarily an indication of fraud or inaccurate information; it simply means that the broker-dealer or qualified IDQS should consider questioning whether the issuer information is accurate, and in certain cases, from a reliable source. The more red flags that are present, the more a broker-dealer or qualified IDQS may want to scrutinize the issuer information.

a. *Commission and Foreign Trading Suspensions.* Trading suspensions, including foreign trading suspensions, generally raise significant red flags as to whether the issuer's information is accurate and whether the sources of such information are reliable. Once a trading suspension terminates, and before a broker-dealer can publish a quote, a broker-dealer or qualified IDQS must comply with the information review requirement if it cannot rely on an exception to the Rule. While conducting its information review under the amended Rule following a trading suspension, a broker-dealer or qualified IDQS may want to attempt to determine the basis for the suspension order and assess whether the issuer information that is current and publicly available following the trading suspension is accurate and whether its source is reliable. Such review may include seeking verification from the issuer or soliciting the views of an independent professional.

b. *Concentration of ownership of the majority of outstanding, freely tradeable stock.* Concentration of ownership of freely tradeable securities is a prominent feature of microcap fraud cases. When one person or group controls the flow of freely tradeable securities, this person or persons can have a much greater ability to manipulate the stock's price than when the securities are widely held.

c. *Large reverse stock splits.* Fraudulent and manipulative activity in OTC securities can involve the substantial concentration of the publicly traded float through a reverse stock split. The subsequent issuance of large amounts of stock to insiders increases their control over both the issuer and trading of the stock.

d. *Companies in which assets are large and revenue is minimal without any explanation.* A red flag exists when the issuer assigns a high value on its financial

statements to certain assets, often assets that are unrelated to the company's business and were recently acquired in a non-cash transaction. While assets that are unrelated to the business of the issuer are not always an indication of potential fraud, some unscrupulous issuers have overvalued these types of assets in an effort to inflate their balance sheet. In such situations, the company's revenues often are minimal and there appears to be no valid explanation for such large assets and minimal revenues. Also, a red flag is present when the financial statements of a development stage issuer list as the principal component of the issuer's net worth an asset wholly unrelated to the issuer's line of business.

e. *Shell company's acquisition of private company or other material business development.* Shell companies have been used as vehicles for fraud in a number of different fact patterns and schemes.[530] The piggyback exception under the amended Rule prohibits broker-dealers from relying on the piggyback exception for shell companies after a certain period.[531] The Commission remains concerned about the potential that a continuously quoted market could be used to entice investors to make an investment decision based on what appears to be an active and independent market when, in fact, the investor may be considering the security price of the shell company that increased due to inaccurate and misleading promotional information.[532] A broker-dealer should be mindful of the potential for abuse when reviewing issuer information where a shell company is involved, in particular if the shell company has

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[530] *See, e.g.*, Proposing Release at 58222–23 (discussing fact patterns in which shell companies have been used to defraud investors). See Amended Rule 15c2-11(e)(9) for a definition of the term "shell company."

[531] *See* Amended Rule 15c2-11(f)(3)(i)(B).

[532] *See* Proposing Release at 58222–23.

acquired a privately held company or has undergone other material business developments (including, but not limited to, declarations of bankruptcy, re-organizations and mergers).

f. *A registered or unregistered offering raises proceeds that are used to repay a bridge loan made or arranged by the underwriter where:* (1) the bridge loan was made at a high interest rate for a short period; (2) the underwriter received securities at below-market rates prior to the offering; and (3) the issuer has no apparent business purpose for the bridge loan.

g. *Significant write-up of assets upon a company obtaining a patent or trademark for a product.* The significant write-up of assets once an issuer obtains a patent or trademark for a product may be a technique used by issuers engaged in fraud to inflate their balance sheets.

h. *Significant assets consist of substantial amounts of shares in other OTC companies.* Some fraudulent activity may involve issuers whose major assets are substantial amounts of shares in other OTC companies.

i. *Assets acquired for shares of stock when the stock has no market value.* The issuer's financial statements often can indicate that the issuer acquired assets to which it assigned substantial value in exchange for its essentially worthless stock.

j. *Unusual auditing issues.* Examples of this include auditors who refuse to certify financial statements or who issue audited reports containing a qualified opinion, where there has been an unexplained change of accountants, or an accountant has resigned or been dismissed. Rule 15c2-11 does not contemplate that a broker-dealer or qualified IDQS will scrutinize the issuer's financial statements with the expertise

of an accountant. If, however, a broker-dealer or qualified IDQS sees any of these examples of red flags, it may wish to confirm the auditor's credentials with the appropriate state licensing authority, question the circumstances of the change in accountants, and carefully scrutinize the Rule's specified information.

k. *Significant write-up of assets in a business combination of entities under common control or extraordinary items in notes to the financial statements.* Unusual related party transactions are sometimes found in fraud schemes and may be used to write up the value of an issuer's assets after a merger between the related parties.

l. *Suspicious documents.* Examples can include inconsistent financial statements, altered financial statements, and altered certificates of incorporation. Issuer information that is altered on its face raises red flags that, at a minimum, could lead a broker-dealer or qualified IDQS to determine it does not have a reasonable basis to believe the issuer's information is accurate.

m. *A broker-dealer or qualified IDQS receives substantially similar offering documents from different issuers with certain characteristics.* Such characteristics include: the same attorney is involved; the same officers and directors are listed; or the same shareholders are listed. If a broker-dealer or qualified IDQS realizes, after reviewing the information for several issuers, that the same individuals are involved with these entities, the broker-dealer or qualified IDQS should consider inquiring further to determine whether it has a reasonable basis to believe that the issuer information is accurate.

n. *Extraordinary gains in year-to-year operations.* Such gains may be achieved through assigning an artificially high value to certain assets or through other manipulative

devices that are red flags, such as the significant write-up of assets upon merger or acquisition.

o. *Reporting company fails to file an annual report.* A reporting company's failure to file an annual report suggests that there is a potential problem with the company.

p. *Disciplinary actions against an issuer's officers, directors, general partners, promoters, auditors, or control persons.* The following types of disciplinary actions raise red flags: an indictment or conviction in a criminal proceeding; an order permanently or temporarily enjoining, barring, suspending or otherwise limiting an officer, director, general partner, promoter, auditor, or control person's involvement in any type of business, securities, commodities, or banking activities; an adjudication by civil court of competent jurisdiction, the Commission, the Commodity Futures Trading Commission or a state securities regulator of a violation of federal or state securities or commodities law; or an order by a SRO permanently or temporarily barring, suspending or otherwise limiting involvement in any type of business or securities activities.

q. *Significant events involving an issuer or its predecessor, or any of its majority owned subsidiaries.* The following types of significant events raise red flags: change in control of the issuer; substantial increase in equity securities; merger, acquisition, or business combination; acquisition or disposition of significant assets; bankruptcy proceedings; or delisting from any securities exchange. These are all examples of significant events involving the issuer, though they are not per se examples that reflect fraud and manipulation. However, certain events—a change in control of the issuer; merger, acquisition, or business combination; or acquisition or disposition of

significant assets—can provide unscrupulous issuers an opportunity to artificially overvalue the issuer's assets to support an upward manipulation of the issuer's stock. An increase in the number of an issuer's equity securities provides the securities necessary for such manipulation. Bankruptcy proceedings or delisting from an exchange may also indicate facts surrounding an issuer that could lead a broker-dealer or qualified IDQS to conclude that it does not have a reasonable basis to believe that the issuer's financial information is accurate.

r. *Request to publish both bid and offer quotes on behalf of a customer for the same stock.* The highly unusual request from a customer for the broker-dealer to publish both bid and offer quotes is a red flag that may indicate manipulative trading (e.g., wash trades) and may call for appropriate inquiry on the part of a broker-dealer or qualified IDQS.

s. *Issuer or promoter offers to pay a fee.* If a broker-dealer receives an offer from an issuer, any affiliate or promoter thereof, to pay a fee in connection with making a market in the issuer's security, this is both a red flag and a potential FINRA rule violation. Specifically, it is a violation of FINRA Rule 5250 for a broker-dealer or any person associated with a broker-dealer to accept any payment or other consideration, directly or indirectly, from an issuer of a security, or any affiliate or promoter thereof, for publishing a quotation, acting as market maker in a security, or submitting an application in connection therewith.[533]

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[533] *See* FINRA Rule 5250, *available at* https://www.finra.org/rules-guidance/rulebooks/finra-rules/5250. FINRA Rule 5250, however, does not preclude: (1) payment for bona fide services, including, but not limited to, investment banking services (including underwriting compensation and fees); (2) reimbursement of any payment for registration imposed by the Commission or state regulatory authorities and for listing of an issue of securities imposed by a SRO; and (3) any payment expressly provided for under the rules of a national securities exchange that are effective after being filed with, or filed with and approved by, the Commission pursuant to the Exchange Act.

t. *Regulation S transactions of domestic issuers.* Regulation S provides a safe harbor from the registration requirements of the Securities Act for offers and sales of securities by both foreign and domestic issuers that are made outside the United States. In 1998, the Commission adopted amendments to Regulation S designed to prevent the abuses that relate to offshore offerings of equity securities of domestic issuers, in particular transactions involving large amounts of the securities of U.S. issuers for which little information was available. Broker-dealers and qualified IDQSs should be alert to any questionable activities involving Regulation S offerings.

u. *Form S-8 stock.* Form S-8 is the short-form registration statement for offers and sales of a company's securities to its employees, including its consultants and advisors.

v. *"Hot industry" OTC stocks.* Another characteristic of misconduct in the OTC market is that it often can involve stocks that are in vogue.

w. *Unusual activity in brokerage accounts of issuer affiliates, especially involving "related" shareholders.* Fraudulent and manipulative activity in the OTC market can begin with the deposit and sale of large blocks of an obscure stock by a new and unfamiliar customer who often is affiliated with an issuer and a simultaneous request by the issuer that the broker-dealer make a market in the stock.

x. *Companies that frequently change their names or lines of business.* The Commission and other regulators have brought enforcement actions in which this type of activity among OTC issuers has been a characteristic of the alleged misconduct.[534]

P. Compliance Date

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[534] *See, e.g.*, Press Release, SEC Charges Eight for Roles in Widespread Pump-and-Dump Scheme Involving California-Based Microcap Company (Sept. 18, 2014), https://www.sec.gov/news/press-release/2014-202.

The Commission is providing a compliance date that is nine months after the effective date of the amended Rule, except for the compliance date for paragraph (b)(5)(i)(M) of the amended Rule. The compliance date for paragraph (b)(5)(i)(M) of the amended Rule is two years after the effective date of the amended Rule.[535]

After considering the comments received regarding the transition period for compliance with the amended Rule's provisions,[536] the Commission believes that these compliance dates will provide sufficient time for broker-dealers to prepare to comply with the amended Rule, including by creating or updating any necessary systems or internal measures, such as training modules, and to develop and update any necessary policies and procedures, as appropriate, to achieve compliance with the amended Rule. The Commission further believes that these compliance dates provide sufficient time for qualified IDQSs and registered national securities associations to implement technological or other changes that they determine to make in light of the amended Rule.

The Commission recognizes that there are market participants who are concerned about the loss of a quoted market for certain securities as a result of the amended Rule and that such market participants may wish to seek relief from the provisions of the amended Rule. The Commission encourages such persons to submit relief requests expeditiously during the nine-month transition period. The Commission notes, however, that it will consider relief requests at any time, including after the nine-month transition period.

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[535] In this regard, the compliance date for the requirement in the piggyback exception that a catch-all issuer's information that is specified in paragraph (b)(5)(i)(M) must be current and publicly available is two years after the effective date of the amended Rule. This compliance date is designed to provide a sufficient window during which such current information can be prepared and made publicly available.

[536] FINRA Letter (requesting nine months for covered entities to comply with the provisions of the amended Rule); Jason Hirschman (Oct. 8, 2019) (stating that there should be an "extended transition period" for the amended Rule).

On and after the nine-month transition period, broker-dealers that publish or submit quotations in a quotation medium, qualified IDQSs that make known to others certain broker-dealer quotations and make certain publicly available determinations, and registered national securities associations that make certain publicly available determinations would be required to comply with the amended Rule when they perform those activities. The Commission staff intends to offer assistance and support to covered entities during the transition period and thereafter, with the aim of helping to ensure that the investor protections and other benefits of the amended Rule are implemented in an efficient and effective manner.

III. Comments on the Concept Release

A. Information Repositories

The Commission is not making any changes in the regulatory structure around information repositories. The Commission solicited comment on the designation of certain entities as information repositories, including whether investors and other market participants would benefit from having access to proposed paragraph (b) information solely through a centralized location, such as an information repository. Two commenters supported the idea of a centralized location for paragraph (b) information,[537] though both commenters stated that some companies may prefer to make current information available only on their websites or upon request.[538] Because the amended Rule's definition of "publicly available" already provides the opportunity for, among other things, free access to issuer information through the Internet, the Commission is not taking further action in this regard. One commenter advocated for the public

[537] Coral Capital Letter; Hamilton & Associates Letter (observing that some market participants might be more useful than others in serving as an information repository).

[538] Coral Capital Letter; Hamilton & Associates Letter.

availability of past issuer information in addition to current issuer information.[539] On balance, the Commission believes that the requirement for the publicly availability of current paragraph (b) information provides appropriate information to facilitate informed investment decisions without adding the potential for an overly burdensome requirement to make older issuer information publicly available in addition to current information.

B. Other Issues

Certain commenters urged the Commission to take additional or different regulatory and non-regulatory actions than the approach adopted, including actions that the Commission did not propose. These suggestions covered a variety of areas, including settlement cycles,[540] short sale regulation,[541] rules governing stock splits,[542] state laws,[543] changes regarding publication of information and "offers" under the federal securities laws,[544] rules governing the sales of

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[539] Coral Capital Letter.

[540] Alan S. Cameron (Nov. 24, 2019).

[541] OTC Markets Group Letter 2; *see also* Canaccord Letter; Christopher, DiIorio; GTS Letter; MCAP Letter; Professor Angel Letter; Securities Law USA Letter; Zuber Lawler Letter. In response to the Proposing Release's Q133, some commenters stated that it would be helpful to extend the close-out period for lower-volume securities. *See, e.g.*, OTC Markets Group Letter 2; *see also* Canaccord Letter; GTS Letter; Securities Law USA Letter; Zuber Lawler Letter. These commenters stated that doing so might, for example, increase short sale volume in the OTC market. *E.g.*, Canaccord Letter. Amending Regulation SHO to extend the close-out period for OTC securities is outside the scope of the proposed rulemaking.

[542] Christian Gabis (suggesting that any company trading below $1.00 for six months be required to perform a reverse split to "remain listed"); John Guerriero (Oct. 4, 2019) (advocating for reform to the grey market).

[543] Braxton Gann; Daniel Raider.

[544] Beacon Redevelopment Letter (changes to allow non-reporting issuers to publish their information, in the spirit of the JOBS Act); Murphy & McGonigle Letter (changes necessary to allow exempt foreign private issuers to publish their Rule 12g3-2(b) information). One commenter also suggested that the Commission, as necessary, provide guidance that publication by an exempt foreign private issuer on its website (or on EDGAR) of the information required by Rule 12g3-2(b), "without more," would not be an "offer" under the Securities Act. Murphy & McGonigle Letter.

securities,[545] shareholder of record rules,[546] transfer agent rules,[547] sales practice issues,[548] paid promotions,[549] and alternative venues.[550] The Commission appreciates the helpful feedback on these issues and will take such views into account as part of its ongoing consideration of the markets and the federal securities rules and regulations. The Commission believes that they are outside the scope of the proposed Rule and that the amended Rule appropriately furthers the Commission's objectives of promoting investor protection, enhancing market efficiency, and facilitating capital formation by promoting greater transparency, efficiency, and capital formation and helping to prevent incidents of fraud and manipulation in OTC securities. Other suggestions covered FINRA rules.[551] As discussed above, the Commission's staff expects to work with FINRA on an ongoing basis regarding the implementation of the amended Rule.[552]

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[545] GUARDD Letter.

[546] *See* Anbec Partners Letter; Franklin Antonio; Caldwell Sutter Capital Comment; Brett Dorendorf; Lucas Elliott; David J. Flood; Jason Hirschman; Letter from James E. Mitchell, General Partner, Mitchell Partners, L.P., to Hon. Hester M. Peirce, Comm'r, SEC (Oct. 11, 2019) ("Mitchell Partners Letter 2"); Ariel Ozick; Anthony Perala; Daniel Raider; Michael E. Reiss; Dan Schum; Michael Tofias; Don C. Whitaker.

[547] GTS Letter; STA Letter.

[548] *See* Raymond Balser (Oct. 27, 2019); Coulson Comment; James Duade; GTS Letter; Michael Tofias; Alex Toppan; Kevin Ward. For example, commenters stated that some issuers issue "toxic notes" that are convertible into shares at a deep discount to the market price that dilute existing shareholders. R. Berkvens; Coral Capital Letter; John Guerriero; Leonard Burningham Letters. Another commenter, however, suggested that warnings like "caveat emptor" and "buyer beware" do nothing to restore what victims of fraudulent and manipulative schemes have lost. Coral Capital Letter; Brett Dorendorf; David J. Flood; Braxton Gann; Jason Hirschman; Lake Highlands Comment; Ron Lefton; Ariel Ozick.

[549] Ariel Ozick; STA Letter.

[550] *See* Todd Blue (Oct. 9, 2019); Andersen Letter; GTS Letter (advocating for a "task force"); *see also supra* Part II.A.1 (discussing the suggestion to exempt quoting in OTC securities in a market for certain types of individuals).

[551] *See* Tyler Black (discussing securities that trade in the grey market for which broker-dealers desire to create a quoted market); Coral Capital Letter; CrowdCheck Letter; HTFL Letter; Mitchell Partners Letter 1; OTC Markets Group Letter 2 (stating that the process, which includes requests for additional information, can take anywhere from weeks to months, with the average amount of time for FINRA to process a Form 211 being 34 days); Sosnow & Associates Letter; *see also* Andersen Letter; Coral Capital Letter (stating that, as a result, only one broker-dealer remains that is willing to file a Form 211 for domestic issuers); FINRA Letter (requesting further guidance as to whether a new Form 211 would need to be filed when a broker-dealer relies on a publicly available determination that the piggyback exception—or any of the other exceptions—is available; whether such a requirement to file a new

Some commenters advocated that persons complying with the information review requirement should have a reasonable basis for believing that the issuer's information is complete and from a reliable source, rather than accurate and from a reliable source.[553] The Commission believes a review for "completeness" rather than for "accuracy" would weaken the important investor protections that the Rule is designed to provide. Broker-dealers are required "to give some measure of attention to financial and other information about the issuer of a security before it commences trading that security."[554] However, as discussed in above in Part II.O, the requirements of the amended Rule do not contemplate that, before submitting or publishing quotations for a security, a broker-dealer or qualified IDQS must conduct an independent "due diligence" investigation regarding the issuer or its business operations and financial condition such as the investigation expected to be conducted by an underwriter. The Commission is not aware of any developments in the OTC market since the initial adoption of the Rule that warrant changing this standard from "accuracy" to "completeness." Moreover, the

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Form 211 for quotations that are published or submitted pursuant to the piggyback exception would apply only for securities of catch-all issuers; whether any transition period would be prolonged for the securities of catch-all issuers if a Form 211 were processed during the 12 months before the adoption of the amendments; and whether any grace period would apply if an issuer's shell company status becomes unclear); Leonard Burningham Letters; Lucosky Brookman Letter; OTC Markets Group Letter 2; Securities Law USA Letter; STA Letter (advocating for qualified IDQSs to be permitted to file a Form 211 with FINRA, or to allow broker-dealers to rely on a qualified IDQS's compliance with the information review requirement without filing a Form 211 at all); Zuber Lawler Letter. As explained in the Proposing Release, FINRA Rule 6432 requires broker-dealers to file a Form 211 when the Rule requires them to comply with the information review requirement. Proposing Release at 58242. The amended Rule does not impose obligations with respect to FINRA Rule 6432, as discussed above in Part II.A.3, and does not require broker-dealers that rely on a publicly available determination that the piggyback exception—or any of the other exceptions—is available to file Forms 211 with FINRA. The Commission will continue to monitor the operation of this market and expects FINRA to do the same, including through examinations of qualified IDQSs. *See supra* Part II.A.3.

[552] As discussed above in Part II.P, the Commission staff intends to offer assistance and support to covered entities during the transition period and thereafter, with the aim of helping to ensure that the investor protections and other benefits of the amended Rule are implemented in an efficient and effective manner.

[553] OTC Markets Group Letter 2; OTC Markets Group Letter 3; *see also* Canaccord Letter; Lucosky Brookman Letter; Robert E. Schermer, Jr.; Securities Law USA Letter; Sosnow & Associates Letter; Zuber Lawler Letter.

[554] 1991 Adopting Release at 19149.

"accuracy" standard of review, specified in paragraphs (a)(1)(iii)(C) and (a)(2)(iii) of the amended Rule, is the same for a catch-all issuer as it is for all other categories of issuers (i.e., a prospectus issuer, a Reg. A issuer, a reporting issuer, and an exempt foreign private issuer),[555] so the standard for compliance with the information review requirement is the same notwithstanding whether a broker-dealer or qualified IDQS is reviewing the documents and information of an issuer that has an Exchange Act or Securities Act reporting obligation or has no such reporting obligation whatsoever.

In addition, some commenters stated their views regarding alternatives to the requirement that paragraph (b) information be current and publicly available[556] and exceptions to Rule 15c2-11 that were not proposed.[557] The Commission believes that the amendments that require paragraph (b) information to be current and publicly available, provide certain new exceptions, and modify exceptions that existed before the amendments were adopted are narrowly tailored to appropriately further the Commission's objectives of promoting investor protection while facilitating market efficiency. The Commission, however, will continue to monitor trading in this market to consider whether any further amendments to the Rule in this regard are warranted.

IV. Other Matters

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[555] *See* Proposing Release at 58216.

[556] Anbec Partners Letter; Tim Bergin; Brett Dorendorf; David J. Flood; Christian Gabis; Braxton Gann; Paul Lucot; Ariel Ozick (stating that companies should still be able to de-register but provide annual reporting at a lower standard); Dave Peirce; Michael E. Reiss; Mark Schepers; Dan Schum; John Sheehy; Symphony Financial Comment; Michael Tofias.

[557] *E.g.*, Alluvial Letter; Anbec Partners Letter; Caldwell Sutter Capital Comment; Brandon Cline; Coral Capital Letter; FINRA Letter; GTS Letter; Coral Capital Letter; Jason Hirschman; Aharon Levy; Mitchell Partners Letter 2; Mitchell Partners Letter 3; Doug Mohn; Monroe Letter; OTC Markets Group Letter 2; OTC Markets Group Letter 3; Ariel Ozick; Professor Angel Letter; Peter Quagliano; Securities Law USA Letter; Zuber Lawler Letter; Michael Tofias; Total Clarity Comment; Joep vd Berg (Dec. 15, 2019); David W. Wright; Samuel J. Yake.

Pursuant to the Congressional Review Act,[558] the Office of Information and Regulatory Affairs has designated these rules as a "major rule," as defined by 5 U.S.C. § 804(2).

If any of the provisions of these final rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

V. Paperwork Reduction Act Analysis

A. Background

Certain provisions of the amended Rule impose "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[559]

The title for this collection of information is "Publication or submission of quotations without specified information." In accordance with the PRA, the Commission submitted the collection of information for the proposed amendments to the Rule to the Office of Management and Budget ("OMB") for review.[560] An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a current valid control number. OMB has assigned control number 3235-0202 to this collection of information.

The Commission published notice and solicited comments on the collection of information requirements for the proposed amendments in the Proposing Release.[561] The Commission received one comment regarding the collection of information requirements, which

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[558] 5 U.S.C. 801 *et seq*.

[559] 44 U.S.C. 3501 *et seq.*

[560] *See* 44 U.S.C. 3507; 5 CFR 1320.11.

[561] *See* Proposing Release at 58249.

focused on the Commission's estimates of burdens and costs associated with determining an issuer's status as a shell company.[562] The Commission did not receive any other comments regarding its other estimates of burdens and costs that were included in the Proposing Release's PRA. In addition, the Commission's estimates of the collection of information for the amendments, as adopted, have been updated from the estimates included in the Proposing Release, as appropriate, with the updated estimates based on more recent data.

The Rule is designed to prevent broker-dealers from publishing or submitting quotations for OTC securities that may facilitate a fraudulent or manipulative scheme. Subject to certain exceptions, the Rule prohibits broker-dealers from publishing or submitting a quotation for a security, or submitting a quotation for publication, in a quotation medium, unless they have reviewed specified information regarding the issuer. The Commission is adopting amendments designed to modernize the Rule, promote investor protection, and help prevent incidents of fraud and manipulation by, among other things, requiring information about the issuers of securities that are quoted in the OTC market to be current and publicly available; narrowing certain exceptions from the Rule's requirements, including the piggyback exception and unsolicited quotation exception; adding new exceptions for the quotations of securities that may be less susceptible to fraud and manipulation; removing obsolete provisions; adding new definitions; and making technical amendments.

B. Respondents Subject to the Rule

Generally, the Rule applies to broker-dealers that participate in the quoted market for OTC securities. The amendments modify some of the existing information collection burdens on broker-dealers and create new record retention obligations on broker-dealers that rely on

[562] Leonard Burningham Letters.

exceptions to the Rule. The Commission believes that approximately 34 broker-dealers will be subject to the burdens associated with publishing or submitting a quotation without an exception,[563] and approximately 80 broker-dealers will be subject to the burdens associated with documenting reliance on an exception in paragraph (f) of the amended Rule.[564] Additionally, the Commission estimates that, at this time, one qualified IDQS[565] and one registered national securities association[566] will be subject to burdens associated with making publicly available determinations pursuant to paragraph (a)(3) of the amended Rule.[567]

The amendments permit a qualified IDQS to comply with the information review requirement in certain circumstances.[568] A qualified IDQS must meet the definition of an alternative trading system under Rule 300(a) of Regulation ATS and operate pursuant to the exemption from the definition of an "exchange" under Rule 3a1-1(a)(2) of the Exchange Act. As such, a qualified IDQS must be registered as a broker-dealer.[569] The amendments modify only

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[563] Thirty-four broker-dealers submitted Forms 211 to FINRA in 2019. The Commission uses this number as a proxy for broker-dealers that comply with the information review requirement under paragraphs (a), (b), and (c) of the amended Rule.

[564] As of April 24, 2020, there are 80 broker-dealers that publish quotations on OTC Markets Group's systems. The Commission believes that this number reasonably estimates the number of broker-dealers that would engage in activities that would subject them to the requirements discussed in the section "Other Burden Hours" below because they are the only broker-dealers that are publishing or submitting quotations for OTC securities.

[565] Based on the current structure of the market for quoted OTC securities, the Commission believes that only one qualified IDQS would engage in a review pursuant to paragraph (a)(2) or make publicly available determinations pursuant to paragraph (a)(3).

[566] As of May 14, 2020, one registered national securities association exists.

[567] In making this estimate, the Commission is mindful that a qualified IDQS or a registered national securities association may elect not to make publicly available determinations pursuant to paragraph (a)(3), or may elect to do so at a later date. The Commission also recognizes that, in the future, other market participants may become qualified IDQSs, or new national securities associations may be established, that make publicly available determinations pursuant to paragraph (a)(3).

[568] More specifically, under the amended Rule, a qualified IDQS that makes known to others the quotation of a broker-dealer that is published or submitted pursuant to paragraph (a)(1)(ii) of the amended Rule must first have complied with paragraphs (a), (b), and (c) of the amended Rule.

[569] *See* Rule 301(a) of Regulation ATS.

the allocation of burden from existing paragraphs (a), (b), and (c) between qualified IDQSs and broker-dealers that are not qualified IDQSs, rather than create new and distinct burdens.[570] Therefore, burdens of the amended Rule on qualified IDQSs have not been analyzed below in a manner that is distinct from those of broker-dealers. The analysis of burdens for qualified IDQSs and registered national securities associations are separated from those of broker-dealers in the section discussing the requirement in paragraph (a)(3) of the amended Rule that such entities must establish, maintain, and enforce reasonably designed written policies and procedures to make certain publicly available determinations.

For the purposes of the analysis below, the Commission has made assumptions regarding how respondents would comply with the amended Rule.

C. Summary of Collections of Information

The collections of information associated with the initial publication or submission of a quotation are intended to prevent broker-dealers from publishing or submitting quotations for OTC securities that may facilitate a fraudulent or manipulative scheme. In addition, information collections associated with recordkeeping and establishing, maintaining, and enforcing reasonably designed written policies and procedures under the amended Rule are intended to help ensure compliance with the Rule's exceptions.[571]

1. Burden Associated with the Initial Publication or Submission of a Quotation in a Quotation Medium

Absent an exception, broker-dealers must comply with the information review requirement of the Rule before initiating the publication or submission of a quotation for an OTC

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[570] *See* Amended Rule 15c2-11(a)(2).

[571] The recordkeeping obligations under the amended Rule, including those relating to the creation of reasonable policies and procedures under paragraph (a)(3) of the amended Rule, are discussed in Part V.C.2.g below.

security. The Commission believes that, as was the case with the former Rule, the information collections associated with the information review requirement and recordkeeping requirement under the amended Rule involve conducting a review of and maintaining the specified information.[572]

A broker-dealer that initiates or resumes a quotation in an OTC equity security is subject to FINRA Rule 6432, which requires the broker-dealer to demonstrate compliance with, among other things, Rule 15c2-11 by filing a Form 211. Given the alignment of this FINRA requirement and the Rule, the Commission believes that the number of Forms 211 filed with FINRA in 2019 provides a reasonable baseline from which to estimate the burdens associated with the information review requirement under both the former Rule and the amended Rule. Based on information provided by FINRA, broker-dealers submitted a total of 384 Forms 211 to initiate the publication or submission of quotations of OTC securities in 2019: 87 of these Forms 211 concerned securities of prospectus issuers, Reg. A issuers, and reporting issuers; 253 concerned securities of exempt foreign private issuers; and 44 concerned securities of catch-all issuers. The Commission estimates that it takes approximately three hours to review, record, and retain the information pertaining to prospectus issuers, Reg. A issuers, and reporting issuers, and seven hours to review, record, and retain the information pertaining to exempt foreign private issuers and catch-all issuers.[573] Before taking into account any potential changes to burdens that

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[572] As discussed in Part II.K above, the Commission is removing the disclosure requirement in paragraph (d)(1) of the former Rule. This disclosure requirement previously has been discussed as a component of the estimated burden associated with all types of issuers (regardless of their reporting obligations), and, as a result, is included in the existing burden estimates for the Rule.

[573] The Commission believes that these burden hour estimates reasonably measure the time required to comply with the information review requirement and recordkeeping requirement utilizing available technology. In addition, because the specified information regarding exempt foreign private issuers and catch-all issuers may not be as readily available as the specified information regarding prospectus, Reg. A, and reporting issuers, these burden hour estimates include four additional hours to review information about such issuers.

could be imposed by the amendments, the estimated total annual burden of the information collection by the 34 broker-dealers that complied with the information review requirement for the 384 OTC securities referred to above would be 2,340 hours.[574]

The information review requirement is set forth in paragraphs (a), (b), and (c) of the amended Rule. The amendments change the information review requirement by adding, among other things, the requirement that paragraph (b) information be current and publicly available before the initial publication or submission of a quotation for an OTC security.[575] The Commission believes that these changes would not modify the burden hours for completion of the information review requirement that are estimated above. Additionally, it is not expected that these changes to the information review requirement would create any initial one-time burden as it is unlikely that a broker-dealer or qualified IDQS would need to modify its systems

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[574] (87 prospectus, Reg. A, and reporting issuers x 3 hours) + (253 exempt foreign private issuers x 7 hours) + (44 catch-all issuers x 7 hours review and recordkeeping) = (261 hours) + (1,771 hours) + (308 hours) = 2,340 hours. The burden hours for compliance with the information review requirement does not include securities that are piggyback eligible on the compliance date. A broker-dealer or qualified IDQS would not be required to comply with the information review requirement because broker-dealers would be able to publish quotations based on the piggyback exception. Burden hours associated with documenting that information is current and publicly available for purposes of relying on an exception are discussed below in Part V.C.2.

[575] The Commission does not believe that the expansion of the types of market participants that comply with the information review requirement—to include not only broker-dealers publishing or submitting a quotation for an OTC security in a quotation medium but also a qualified IDQS that makes known to others that the qualified IDQS conducted the information review (paragraph (a)(2))—will impact the hourly burden attributable to completion of the information review requirement. The adopted modification to the Rule does not affect the information review burden itself, but rather spreads that burden among more entities. Similarly, the Commission does not believe that the modifications to the information specified in paragraph (b) or the supplemental information in paragraph (c) affects the information review requirement itself because such information is already gathered and maintained, or the modifications to the previously existing information required by former Rule 15c2-11 are so minor that these changes are not expected to have an impact on the overall time burden related to the information review requirement.

Modifications to the Rule, as well as several of the proposed changes to exceptions from the requirements of the Rule, do, however, affect the recordkeeping obligations of broker-dealers and qualified IDQSs. The impact of paragraph (a)(1)(ii) on the recordkeeping requirement in paragraph (d)(1)(i), as well as the recordkeeping requirements in paragraph (d)(2) for revised and new exceptions, is discussed in Part V.C.2 below.

or training practices to comply with the information review requirement under the amended Rule.

a) Amendments to the Piggyback Exception

As discussed above, the amendments would modify the piggyback exception in various ways, and these amendments would, in turn, impact the burdens associated with the information review requirement.[576] Paragraph (f)(3)(i)(A) of the amended Rule limits broker-dealers' reliance on the piggyback exception to securities with a one-sided priced quotation in an IDQS.[577] Broker-dealers would have to comply with the information review requirement before initially publishing or submitting quotations on securities that currently are quoted and that would lose piggyback eligibility as a result of this provision. According to estimates based on data from OTC Markets Group for 2019, 264 out of 9,864 piggyback eligible quoted OTC securities, would lose piggyback eligibility under this amendment because there was no publication of either a bid or an offer quotation for five or more business days in succession on one or more occasions during that year.[578]

Based on the lack of quotes by broker-dealers for these securities in 2019, it is unclear whether broker-dealers would conduct the required review for most of these securities that would no longer be eligible for the piggyback exception provided under paragraph (f)(3)(i)(A). Taking a conservative approach in assessing the burden that may arise under this amendment, the

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[576] *See supra* Part II.D.

[577] As discussed in Part II.D.2 above, after considering the comments, and in conjunction with the other requirements to the piggyback exception and SRO rules that apply to the quotations of a broker-dealer as a regulated entity, the Commission determined to narrowly tailor this part of the piggyback exception to require a one-sided priced quotation rather than a two-sided priced quotation, as proposed.

[578] The amended Rule, unlike the proposed Rule, permits broker-dealers to rely on the piggyback exception based on at least a one-way (rather than a two-way) priced quotation, as long as there are no more than four business days in succession without a quotation. *See, e.g.*, *supra* Part II.D.2; *infra* Part VI.C.1.b. This modification increases the size of the subset of piggyback eligible quoted OTC securities, as reflected in these estimates.

Commission estimates that broker-dealers would comply with the information review requirement once annually for each security that would lose piggyback eligibility.[579] Therefore, it is estimated that broker-dealers would comply with the information review requirement 264 additional times annually. The Commission estimates that 88 (approximately 33%) would be securities of prospectus, Reg. A, or reporting issuers, 143 (approximately 54%) would be securities of exempt foreign private issuers, and 33 (approximately 13%) would be securities of catch-all issuers, leading to an increase in the total annual burden of 1,496 hours.[580]

The Commission is increasing the estimated overall burdens related to the information review requirement based on the provision in paragraph (f)(3)(i)(C) of the amended Rule, which would allow broker-dealers to rely on the piggyback exception to publish quotations for the securities of (1) issuers for which documents and information are specified in paragraphs (b)(4) or (b)(5) if paragraph (b) information is current and publicly available, (2) issuers for which documents and information are specified in paragraphs (b)(3)(i), (b)(3)(iv), or (b)(3)(v) if paragraph (b) information is filed within 180 calendar days from a specified time frame, *or* (3) issuers for which documents and information are specified in paragraphs (b)(3)(ii) or (b)(3)(iii) if paragraph (b) information is timely filed. Paragraphs (a)(1)(i)(B) and (a)(2)(ii) of the amended Rule require that paragraph (b) information be current and publicly available as a component of the review requirement, and thus a broker-dealer or qualified IDQS would not be able to comply

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[579] The Commission believes that this conservative approach is reasonable because it accounts for all securities that may lose piggyback eligibility under this amendment. While broker-dealers may not comply with the information review requirement for every security that loses piggyback eligibility, broker-dealers may comply with the requirement multiple times regarding the same issuer. Therefore, the Commission believes that this reasonably approximates the impact of the amendments industry-wide.

[580] The total annual burden is computed as follows: (88 prospectus, Reg. A, or reporting issuers x 3 hours) + (143 exempt foreign private issuers x 7 hours) + (33 catch-all issuers x 7 hours review and recordkeeping) = (264 hours) + (1,001 hours) + (231 hours) = 1,496 hours.

with the information review requirement under the amended Rule for securities that lose piggyback eligibility as a result of their issuers' paragraph (b) information not being current and publicly available.

To the extent that paragraph (b) information becomes current and publicly available after the loss of the piggyback exception, a broker-dealer or qualified IDQS would need to comply with the information review requirement in order to be able to publish or submit a quotation for such OTC security.

There were 3,095 securities of issuers of quoted OTC securities in 2019 without current and publicly available information.[581] 946 of these issuers were issuers referenced in paragraph (f)(3)(i)(C)(1) that are delinquent in their filing obligations with the Commission.[582] As is the case in the context of one-way priced quotations, it is unclear whether broker-dealers would conduct the required review for securities of issuers subject to the provision in paragraph (f)(3)(i)(C) that lose piggyback eligibility. Taking a conservative approach in assessing the burden that may arise under this amendment to the piggyback exception, the Commission estimates that broker-dealers would comply with the information review requirement once annually for each such security that would lose piggyback eligibility. Accordingly, this amendment would increase burdens by 17,789 hours.[583]

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[581] This total consists of 969 securities of SEC reporting companies (including issuers that make filings pursuant to Regulation Crowdfunding) / Reg. A issuers / other reporting issuers, 85 foreign private issuers, and 2,041 catch-all issuers.

[582] For purposes of the PRA analysis, the Commission assumes that each delinquent filer has not timely filed a quarterly, semi-annual, or annual report, or filed a required report, within 180 calendar days from the end of a reporting period.

[583] (969 securities of SEC reporting companies/ Reg. A issuers/ other reporting issuers x 3 hours review and recordkeeping) + (85 foreign private issuers x 7 hours review and recordkeeping) + (2,041 catch-all issuers x 7 hours review and recordkeeping) = (2,907) + (595) + (14,287) = 17,789 hours.

The Commission is revising the estimates of current burdens of the information review requirement based on the provision in paragraph (f)(3)(i)(B) of the amended Rule, which eliminates piggyback eligibility for quotations for securities of shell companies that are published or submitted 18 months following the publication or submission of the initial priced quotation for such issuer's security in an IDQS and for securities within 60 calendar days following a trading suspension under Section 12(k) of the Exchange Act. With respect to shell companies, as stated in the Economic Analysis, the Commission believes that approximately 460 securities of shell companies that are quoted in the OTC market would lose piggyback eligibility. The Commission also believes that there are approximately 219 securities that were piggyback eligible within 60 calendar days following a trading suspension under Section 12(k) of the Exchange Act. As is the case in the context of one-way priced quotations, it is unclear whether broker-dealers would conduct the required review for securities of issuers subject to the provision in paragraph (f)(3)(i)(B) that lose piggyback eligibility. Taking a conservative approach in assessing the burden that may arise under this amendment to the piggyback exception, the Commission estimates that broker-dealers would comply with the information review requirement once annually for each such security that would lose piggyback eligibility. Accordingly, this amendment would increase burdens by 2,829 hours.[584]

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[584] There were no securities of foreign issuers in either category below.

For securities of shell companies: (306 securities of SEC reporting companies/ Reg. A issuers/ other reporting issuers x 3 hours review and recordkeeping) + (154 catch-all issuers x 7 hours review and recordkeeping) = (918) + (1,078) = 1,996 hours

For securities subject to trading suspensions: (175 securities of SEC reporting companies/ Reg. A issuers/ other reporting issuers x 3 hours review and recordkeeping) + (44 catch-all issuers x 7 hours review and recordkeeping) = (525) + (308) = 833 hours.

Grand total: (1,996) + (833) = 2,829 hours.

In summary, the amendments to the piggyback exception would impact the burdens associated with the information review requirement in various ways. Paragraph (f)(3)(i)(A) of the amended Rule permits broker-dealers to piggyback on one-way priced quotations. The Commission estimates that this amendment would increase the annual burden by 1,496 hours. The provision in paragraph (f)(3)(i)(C) of the amended Rule permits broker-dealers to piggyback quotations of the securities of certain issuers only if paragraph (b) information is, depending on the regulatory status of the issuer, (1) current and publicly available, (2) timely filed, or (3) filed within 180 calendar days from a specified period. The Commission estimates that this amendment would increase the annual burden by 17,789 hours. The provision in paragraph (f)(3)(i)(B) of the amended Rule eliminates piggyback eligibility for quotations for securities of shell companies that are published or submitted 18 months following the publication or submission of the initial priced quotation for such issuer's security in an IDQS and for securities within 60 calendar days following a trading suspension under Section 12(k) of the Exchange Act. The Commission estimates that this amendment would increase the annual burden by 2,829 hours.

b) Other Amendments

Amendments to the Rule create a new exception that is intended to reduce burdens related to publishing or submitting quotations for OTC securities that are highly liquid and of an issuer that is well-capitalized. Specifically, paragraph (f)(5) of the amended Rule provides an exception for securities with a worldwide ADTV value of at least $100,000 during the 60 calendar days immediately before the date of the publication of a quotation for such security, and of an issuer with $50 million in total assets and $10 million in shareholder's equity as reflected in the issuer's publicly available audited balance sheet issued within six months after the end of

its most recent fiscal year. The amendment is estimated to reduce the burden of information collection by creating an exception from the information review requirement under the Rule for broker-dealers publishing or submitting quotations for OTC securities that are less susceptible to fraud or manipulation.

The Commission estimates that approximately 180 of quoted OTC securities on an average day during calendar year 2019 would be eligible for the ADTV and asset test exception set forth in paragraph (f)(5) of the amended Rule.[585] Approximately 35 percent (63) of these are securities of reporting issuers, approximately 63 percent (113) are securities of exempt foreign issuers, and approximately two percent (4) are securities of catch-all issuers.[586] From this number of excepted securities (180) and the total number of quoted OTC securities (11,542), it can be estimated that the amendments would reduce the number of times broker-dealers conduct the required review by approximately 1.6 percent annually. Therefore, after rounding, the Commission estimates that the exceptions would reduce the number of times broker-dealers conduct the required review by six per year,[587] twice with respect to securities of reporting issuers and four times with respect to securities of exempt foreign issuers and catch-all issuers,[588] resulting in a total reduction of 34 burden hours per year.[589]

The Commission also believes, however, that amendments to other Rule exceptions—namely, those set forth in paragraphs (f)(2)(ii) and (f)(6) of the amended Rule—do not impact

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[585] *See infra* Part VI.C.1.c.

[586] *See infra* Part VI.C.1.c.

[587] 384 completions of the information review requirement x 1.6% = 6.

[588] 6 x 35% for reporting issuers and 6 x 65% for exempt foreign issuers and catch-all issuers.

[589] [2 (regarding securities of reporting issuer) x 3 hours] + [4 (regarding securities of exempt foreign issuers and catch-all issuer) x 7 hours] = (6 hours) + (28 hours) = 34 hours.

the burden of the information review requirement. More specifically, paragraph (f)(2)(ii) of the amended Rule, which provides an exception for a broker-dealer to publish or submit a quotation by or on behalf of certain company insiders and affiliates of the issuer in reliance on the unsolicited quotation exception only if paragraph (b) information is current and publicly available,[590] limits the availability of the unsolicited quotation exception in certain circumstances. This amendment would not decrease the burden of the information review requirement, however, because under paragraph (f)(2) of the former Rule, broker-dealers were not required to conduct an information review before publishing or submitting a quotation that represented a customer's unsolicited indication of interest. Nor would this amendment increase the burden of the information review requirement: if the unsolicited quotation exception becomes unavailable due to this amendment, broker-dealers would not be able to comply with the information review requirement as an alternative to utilizing this exception because current and publicly available information is a condition of the information review requirement in paragraphs (a)(1)(ii) and (a)(2)(ii) of the amended Rule.[591]

Further, paragraph (f)(6) of the amended Rule provides an exception from the information review requirement for certain quotations of broker-dealers named as underwriters in the registration statement or offering statement of a security within the time frames specified in paragraphs (b)(1) or (b)(2) of the amended Rule, as applicable. The Commission believes that no broker-dealer would be required to comply with the information review requirement for

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[590] The burden related to a broker-dealer's determination of whether paragraph (b) is current and publicly available is discussed below.

[591] The unsolicited quotation exception, as adopted, adds the term "affiliate" to enhance the investor protections under the proposed amendments by capturing more fully the types of persons with the potential for a heightened incentive to manipulate the price of a security. The addition of the word "affiliate" has no impact on the burden of the information review requirement, for the reasons described above.

quoted OTC securities that meet the requirements of the underwriter exception. While it is estimated that this amendment would result in a slight reduction in the number of times broker-dealers comply with the information review requirement annually, out of an abundance of caution given the lack of granular data, the Commission has not decreased the overall burden estimates associated with the information review requirement as a result of the underwritten offering exception provided in paragraph (f)(6) of the amended Rule.

PRA Table 1:
Summary of Estimated Burdens Associated with Initial Publication or Submission of a Quotation in a Quotation Medium

	Type of Issuer	Type of Burden	Initial Burden[a]	Number of Times the Specified Information Is Reviewed	Annual Burden per Response (Hours)	Total Industry Burden (Hours)
Baseline Information Review Requirement Burdens	Information review requirement absent changes[b]					
	Prospectus, Reg. A, or reporting issuers	Recordkeeping and Review	0	87	3	261
	Exempt foreign private issuers	Recordkeeping and Review	0	253	7	1,771
	Catch-all issuers	Recordkeeping and Review	0	44	7	308
Changes to Exceptions	Limiting piggyback exception to at least a bid or offer quotation at a specified price					
	Prospectus, Reg. A, or reporting issuers	Recordkeeping and Review	0	88	3	264
	Exempt foreign private issuers	Recordkeeping and Review	0	143	7	1,001
	Catch-all issuers	Recordkeeping and Review	0	33	7	231
	Requiring publicly available paragraph (b) information within specified time frames for issuers' securities to remain piggyback eligible					
	Prospectus, Reg. A, or reporting issuers	Recordkeeping and Review	0	969	3	2907
	Exempt foreign private issuers	Recordkeeping and Review	0	85	7	595
	Catch-all issuers	Recordkeeping and Review	0	2041	7	14,287
	Eliminating piggyback eligibility for securities of shell companies					
	Prospectus, Reg. A, or reporting issuers	Recordkeeping and Review	0	306	3	918
	Catch-all issuers	Recordkeeping and Review	0	154	7	1,078
	Eliminating piggyback eligibility for securities subject to a trading suspension order					
	Prospectus, Reg. A, or reporting issuers	Recordkeeping and Review	0	175	3	525
	Catch-all issuers	Recordkeeping and Review	0	44	7	308
	Exception for securities that meet ADTV and asset test (decreases annual burden)					
	Prospectus, Reg. A, or reporting issuers	Recordkeeping and Review	0	2	3	6
	Exempt foreign private issuers and catch-all issuers	Recordkeeping and Review	0	4	7	28

a. As mentioned above, it is not expected that the changes to the information review requirement effected by the amendments would create any initial one-time burden as it is unlikely that broker-dealers would need to modify their systems or conduct training to comply with the information review requirement under the amended Rule.

b. Because the exception for securities that meet the ADTV and asset tests would decrease the annual burden from the 2019 baseline, the numbers in this section of the chart reflect the number of times the specified information was reviewed in 2019, multiplied by the hourly burden estimates for compliance with the information review requirement.

2. Other Burden Hours

The amendments also create burdens relating to recordkeeping obligations under the amended Rule. The amendments update the recordkeeping requirements under the Rule to require broker-dealers, qualified IDQSs, and registered national securities associations to keep records that demonstrate that the requirements of a Rule exception are met.[592] The types of documentation that a broker-dealer, qualified IDQS, or registered national securities association would need to maintain would vary based upon the exception. Certain exceptions, such as the unsolicited quotation exception,[593] require that paragraph (b) information be current and publicly available. Additionally, the piggyback exception[594] requires that paragraph (b) information be (1) filed within 180 calendar days from the end of a reporting period for issuers referenced in paragraph (f)(3)(i)(C)(1) of the amended Rule, (2) timely filed for issuers referenced in paragraph (f)(3)(i)(C)(2), or (3) current and publicly available for issuers referenced in paragraph (f)(3)(i)(C)(3). Notably, however, the amendments except from these recordkeeping requirements any paragraph (b) information that is available on EDGAR. The Commission believes that the requirement in these exceptions to have paragraph (b) information current and publicly available, timely filed, or filed within 180 calendar days from a specified period would create ongoing recordkeeping burdens for broker-dealers under paragraph (d)(2) of the amended Rule.

As shown in the Table 3 of the Economic Analysis, there are 9,895 unique issuers of quoted OTC securities for which broker-dealers would be required to maintain records to establish that paragraph (b) information is, depending on the regulatory status of the issuer,

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[592] Amended Rule 15c2-11(d)(2).

[593] Amended Rule 15c2-11(f)(2).

[594] Amended Rule 15c2-11(f)(3).

current and publicly available, timely filed, or filed within 180 calendar days from the specified period. Of these 9,895 issuers, 3,081 are SEC / Reg. A / Bank Reporting Obligation issuers, 4,413 are exempt foreign private issuers, and 2,401 are catch-all issuers.[595] It is estimated that it would take one minute to create documentation regarding the determination that paragraph (b) information is current and publicly available, timely filed, or filed within 180 calendar days from the specified period, as applicable; and that broker-dealers, qualified IDQSs, and registered national securities associations would create such documentation no more frequently than quarterly for SEC / Reg. A / bank reporting obligation issuers and foreign private issuers,[596] and annually for catch-all issuers.[597] Accordingly, each broker-dealer would spend approximately 540 hours on this task annually, leading to a total annual burden of 44,280 hours dispersed between 80 broker-dealers, one qualified IDQS, and one registered national securities association.[598] The Commission believes that broker-dealers, qualified IDQSs, and a registered

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[595] *See infra* Part VI.B, Table 3.

[596] The amended Rule defines "current" to mean, for the documents and information specified in paragraph (b)(3) of the amended Rule, the most recently required annual report or statement filed pursuant to Section 13 or 15(d) of the Exchange Act and any rule(s) thereunder, Regulation A, Regulation Crowdfunding, or section 12(g)(2)(g) of the Exchange Act, together with any subsequently required periodic reports or statements, filed pursuant to section 13 or 15(d) of the Act and any rule(s) thereunder, Regulation A, Regulation Crowdfunding, or Section 12(G)(2)(g) of the Exchange Act. Accordingly, the definition of "current" includes quarterly reports, as well as semi-annual reports, depending on the issuer's reporting obligations. Paragraph (b)(4) of the amended Rule provides a similar standard for exempt foreign private issuer information, and calls for the information the issuer has published pursuant to 12g3-2(b) since the first day of the issuer's most recently completed fiscal year. The Commission expects that respondents will preserve records to document compliance with this requirement on a quarterly basis to capture quarterly reporting for these issuers. For purposes of this PRA analysis, the Commission has adopted a more conservative approach of grouping Reg. A issuers, which have a semi-annual obligation, with issuers with quarterly reporting obligations.

[597] Paragraph (b)(5)(i) of the amended Rule requires that the catch-all issuer information be as of a date within twelve months before the publication or submission of the quotation, except for certain financial information: a balance sheet (as of a date less than 16 months before the publication or submission of a broker-dealer's quotation) and profit and loss and retained earnings statements (for the 12 months preceding the date of the most recent balance sheet). *See supra* Part II.B.3.

[598] [(3081 SEC/Reg. A/Bank Reporting Obligation issuers x 1 minute x 4 responses per year) + (4,413 exempt foreign private issuers x 1 minute x 4 responses per year) + (2,401 catch-all issuers x 1 minute x 1 response per year)] / 60 = (12,324 + 17,652 + 2,401) / 60 = 540 hours.

national securities association would already have systems and personnel in place to create these records, so the initial burden of putting procedures in place to ensure compliance with the amendments would be one hour of internal cost per broker-dealer, qualified IDQS, and registered national securities association to reprogram systems and capture records pursuant to the recordkeeping requirement, leading to an initial burden of 82 hours for the industry. Adding these values together, it is estimated that the total industry-wide burden for this documentation requirement would be 44,362 hours for the first year, and 44,280 hours annually going forward.

The amendments would also create ongoing recordkeeping burdens for broker-dealers relying on exceptions under paragraphs (f)(2), (f)(3), (f)(5), (f)(6), or relying on a qualified IDQS's publicly available determination that it has complied with the information review requirement of the amended Rule (pursuant to paragraph (a)(1)(ii)).[599]

a) Unsolicited Quotation Exception—Rule 15c2-11(f)(2)

Although there is current and publicly available information for many issuers of securities involving unsolicited customer order quotations, out of an abundance of caution, the Commission is basing its estimate of recordkeeping obligations under this exception on data regarding all unsolicited customer quotations, and assuming that the number would remain consistent on an annual basis. According to OTC Markets Group data, there were 5,782,286 quotations published in reliance on the unsolicited quotation exception in 2019. Therefore, it is estimated that there would be 5,782,286 quotations published in reliance on the unsolicited quotation exception annually that would require documentation and information to demonstrate that the quotation is not by or on behalf of a company insider or an affiliate of the issuer.

[599] As discussed in Part II.A.3 above, the amendments collapse the exception in proposed paragraph (f)(7) into an unlawful activity provision of the amended Rule, paragraph (a)(1)(ii).

Further, it is estimated that it would take a broker-dealer approximately one minute to create a record regarding such unsolicited customer quotation or, pursuant to paragraph (f)(2)(iii) of the amended Rule, to review and document the written representation of a customer's broker that the quotation is not on behalf of a company insider or an affiliate of the issuer. Accordingly, it is estimated that annually, broker-dealers would spend approximately 96,371 hours[600] in the aggregate (after rounding) complying with this recordkeeping requirement. These 96,371 hours would be dispersed between 80 broker-dealers, leading to an annual burden of approximately 1,205 hours per broker-dealer.[601]

The Commission believes that broker-dealers would already have administrative systems and procedures, as well as personnel, in place to document and record the circumstances involved in unsolicited customer quotations, and that the initial burden of putting procedures in place to ensure compliance with this amendment would be three hours of internal burden per broker-dealer to reprogram systems and capture the requisite records relating to unsolicited quotations,[602] leading to an initial burden of 240 hours for the industry.[603] Adding these values

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[600] (5,782,286 quotations x 1 minute) / 60 minutes = 96,371 hours.

[601] 96,371 hours / 80 broker-dealers = 1,205 hours.

[602] This three-hour burden estimate to reprogram systems and capture records regarding the unsolicited quotation exception is separate from the information review requirement discussed in Part V.C.1, and is analogous to the time burden estimates in the 2010 amendments to Regulation SHO. *See Amendments to Regulation SHO*, Exchange Act Release No. 61595, at 183, 193 (Feb. 26, 2010), 75 F.R. 11232, 11283, 11286 (May 10, 2010) ("Regulation SHO Release") (describing ongoing internal compliance time for SROs and "non-SRO trading centers" to ensure that their existing written policies and procedures are up-to-date and remain in compliance with 2010 amendments to Rule 201 of Regulation SHO).

[603] Supplemental Material .01 to FINRA Rule 6432 requires that broker-dealers initiating or resuming quotations in reliance on the exception provided by Rule 15c2-11(f)(2) (i.e., the unsolicited quotation exception) must be able to demonstrate eligibility for the exception by making a contemporaneous record of (1) the identification of each associated person who receives the unsolicited customer order or indication of interest directly from the customer, if applicable; (2) the identity of the customer; (3) the date and time the unsolicited customer order or indication of interest was received; and (4) the terms of the unsolicited customer order or indication of interest that is the subject of the quotation (*e.g.*, security name and symbol, size, side of the market, duration (if specified) and, if priced, the price). Given this FINRA recordkeeping requirement, the Commission believes that broker-dealers will already have systems in place to document information related to the unsolicited quotation exception.

together, it is estimated that the total industry-wide burden for this documentation requirement would be 96,611 hours for the first year, and 96,371 hours annually going forward.

b) Piggyback Exception—Rule 15c2-11(f)(3)

The piggyback exception requires that there be no more than four business days in succession without a bid or offer priced quotation. To comply with the recordkeeping requirement in paragraph (d)(2) of the amended Rule, broker-dealers relying on the piggyback exception, and each qualified IDQS or registered national securities association that makes publicly available determinations regarding the availability of the piggyback exception, must preserve documents and information regarding this frequency of priced bid or offer quotation requirement. The Commission estimates that broker-dealers, qualified IDQSs, and registered national securities associations would make determinations regarding the frequency of quotation requirement once per trading day.

Further, it is estimated that it would take a broker-dealer, a qualified IDQS, or a registered national securities association approximately one second to create a record regarding the frequency of a priced bid or offer quotation, pursuant to paragraph (f)(3)(i) of the amended Rule. The Commission believes that one second is an appropriate estimate regarding the time it will take to create such a record because the Commission believes that such a record will be created through an automated process that will require minimal direct human intervention, if any. Accordingly, it is estimated that, annually, broker-dealers, qualified IDQSs, and a registered national securities association would spend approximately 66,251 hours[604] in the aggregate (after rounding) complying with this recordkeeping requirement. These 66,251 hours would be

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[604] (80 broker-dealers + 1 qualified IDQS + 1 registered national securities association) x (1/3600 (one second)) x (252 trading days per year) x (11,542 securities) = 66,251 hours.

dispersed between 80 broker-dealers, one qualified IDQS, and one registered national securities association leading to an annual burden of approximately 808 hours per entity.[605] The Commission believes that broker-dealers, qualified IDQSs, and a registered national securities association already have administrative systems and procedures, as well as personnel, in place to create these records, so the initial burden of putting procedures in place to ensure compliance with the amendments would be three hours of internal burden per broker-dealer, qualified IDQS, and registered national securities association leading to an initial burden of 246 hours for these market participants to reprogram systems and capture the record relating the frequency of a priced bid or offer quotation.[606] Adding these values together, it is estimated that the total industry-wide burden for this documentation requirement would be 66,497 hours for the first year, and 66,251 hours annually going forward.

A provision in paragraph (f)(3)(i)(B) of the amended Rule eliminates piggyback eligibility for quotations for securities of shell companies that are published or submitted 18 months following the publication or submission of the initial priced quotation for such issuer's security in an IDQS. To comply with the recordkeeping requirement in paragraph (d)(2) of the amended Rule, each broker-dealer relying on the piggyback exception, and each qualified IDQS or registered national securities association that makes publicly available determinations regarding the availability of the piggyback exception, must preserve documents and information regarding its determination that the issuer of a security is not a shell company. The Commission

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[605] 66,251 hours / (80 broker-dealers + 1 qualified IDQS + 1 registered national securities association) = 808 hours.

[606] This three-hour burden estimate to reprogram systems and capture records regarding the frequency of priced bid or offer quotations is separate from the information review requirement discussed in Part V.C.1, and is analogous to the time burden estimates in the 2010 amendments to Regulation SHO. *See* Regulation SHO Release at 11283, 11286 (describing ongoing internal compliance time for self-regulatory organizations and "non-SRO trading centers" to ensure that their existing written policies and procedures are up-to-date and remain in compliance with 2010 amendments to Rule 201 of Regulation SHO).

estimates that broker-dealers, qualified IDQSs, and registered national securities associations would make determinations regarding shell companies based on how frequently information for that issuer is filed or made current and publicly available. For example, a broker-dealer, qualified IDQS, or registered national securities association may determine that a reporting issuer is a shell company when its annual or periodic reports are filed. Similarly, a broker-dealer, qualified IDQS, or registered national securities association may determine that a catch-all issuer is a shell company on an annual basis.[607]

The Commission estimates that broker-dealers, qualified IDQSs, and registered national securities associations would each spend, on average, one minute making a determination and preserving documents and information that demonstrate that an issuer of the OTC security is not a shell company. As stated above, one commenter stated that the Commission significantly underestimated the amount of time it would take a broker-dealer to determine whether an issuer is a shell company.[608] Recognizing that there may be wide disparities in the time it may take to determine whether an issuer is a shell company, the Commission continues to believe that this one minute average estimate is correct for the PRA analysis.

Broker-dealers currently rely on the piggyback exception to publish quotations for 9,895 individual issuers. The time it takes to determine whether an individual issuer is a shell company varies, however, depending on whether the issuer discloses its shell company status. In some instances, it may take less than one minute to assess whether a company is a shell company,

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[607] As discussed in Part II.I above, paragraph (d)(2) of the amended Rule requires broker-dealers, qualified IDQSs, and registered national securities associations to preserve only documents and information "that demonstrate that the requirements for an exception under paragraph (f)(2), (f)(3), (f)(5), (f)(6), or (f)(7)" are met. Accordingly, the Commission believes that while it may be likely that broker-dealers document the availability of this exception quarterly, they may do so more or less often in practice.

[608] *See* Leonard Burningham Letters.

while in other instances, it may take longer than one minute.[609] As discussed above, a broker-dealer, qualified IDQS, or registered national securities association may rely on an issuer's self-identification as a shell company in its review of the issuer's documents and information, for example, as specified in paragraph (b)(5)(i)(H) of the amended Rule regarding a description of the issuer's business.[610] In such instances, broker-dealers, qualified IDQSs, and registered national securities associations will not need to conduct a detailed analysis regarding whether an issuer is a shell company for purposes of the piggyback exception based on the issuer's representation that it is (or is not) a shell company. The Commission believes that broker-dealers will have access to such statements made by issuers regarding shell company status in circumstances in which the issuer has an obligation to disclose its shell company status under the Federal securities laws,[611] or when the issuer opts to reduce burdens on broker-dealers by disclosing shell company status to facilitate broker-dealers maintaining a quoted market in the securities of the issuer. For the foregoing reasons the Commission believes that one minute is an appropriate average estimated length of time to review and create a record of whether an issuer is a shell company.

As stated in the Economic Analysis, there are 9,895 issuers of quoted OTC securities.[612] Accordingly, each broker-dealer would spend approximately 540 hours[613] on this task annually,

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[609] This estimate is analogous to the estimate of de minimis amounts of time necessary to collect identifying information about customers in circumstances in which broker-dealers already obtain the specified information about their customers. *See Joint Final Rule: Customer Identification Programs for Broker-Dealers,* Exchange Act Release No. 47752 (Apr. 29, 2003), 68 FR 25113, 25127 n.160 (noting that requiring identifying information about customers "should not impose a significant additional burden").

[610] *See* Part II.J.2.

[611] *See, e.g.*, Forms 10-K, 10-Q, 1-A, and C.

[612] Some broker-dealers may not provide quotations for all OTC securities. Taking a conservative approach, however, the Commission estimates that each broker-dealer would determine the shell status of each issuer of a quoted OTC security on a quarterly basis.

leading to a total annual burden of 44,280 hours dispersed between 80 broker-dealers, one qualified IDQS, and one registered national securities association. The Commission believes that broker-dealers already have administrative systems and procedures, as well as personnel, in place to create these records, and that the initial burden of putting procedures in place to ensure compliance with the amendments would be three hours of internal burden per broker-dealer, qualified IDQS, and registered national securities association leading to an initial burden of 246 hours for the industry to reprogram systems and capture the record relating to the determination an issuer's shell company status.[614] Adding these values together, it is estimated that the total industry-wide burden for this documentation requirement would be 44,526 hours for the first year, and 44,280 hours annually going forward.

The amended Rule also limits the ability of a broker-dealer to rely on the piggyback exception with respect to a security that is the subject of a trading suspension order issued by the Commission pursuant to section 12(k) of the Exchange Act until 60 calendar days after the expiration of such order. The Commission believes that a broker-dealer, qualified IDQS, or registered national securities association would only create records for securities that have been the subject of a trading suspension issued by the Commission pursuant to section 12(k). In 2019, the Commission issued a trading suspension for 213 securities. Further, it is estimated that it would take a broker-dealer, qualified IDQS, or registered national securities association

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[613] [(3081 SEC /Reg. A/ Bank Reporting Obligation issuers x 1 minute x 4 responses per year) + (4,413 exempt foreign private issuers x 1 minute x 4 responses per year) + (2,401 catch-all issuers x 1 minute x 1 response per year)] / 60 = (12,324 + 17,652 + 2,401) / 60 = 540 hours.

[614] This three-hour burden estimate to reprogram systems and capture records regarding the determination of shell company status is separate from the information review requirement discussed in Part V.C.1, and is analogous to the time burden estimates in the 2010 amendments to Regulation SHO. *See* Regulation SHO Release at 11283, 11286 (describing ongoing internal compliance time for self-regulatory organizations and "non-SRO trading centers" to ensure that their existing written policies and procedures are up-to-date and remain in compliance with 2010 amendments to Rule 201 of Regulation SHO).

approximately one minute to create a record regarding whether a security has been subject to a trading suspension. Accordingly, it is estimated that, annually, broker-dealers, qualified IDQSs, and registered national securities associations would spend approximately 291 hours[615] in the aggregate (after rounding) complying with this recordkeeping requirement. These 291 hours would be dispersed among 80 broker-dealers, one qualified IDQS, and one registered national securities association leading to an annual burden of approximately 4 hours (after rounding) per entity.[616]

The Commission believes that broker-dealers, qualified IDQSs, and registered national securities associations already have administrative systems and procedures as well as personnel in place to create records regarding whether a security has been subject to a trading suspension, and that the initial burden of putting procedures in place to ensure compliance with the amendments would be three hours of internal burden per broker-dealer, qualified IDQS, and registered national securities association, leading to an initial burden of 246 hours for these market participants to reprogram systems and capture the record relating to the prohibition for reliance on the piggyback exception until 60 calendar days after the expiration of a Commission trading suspension order issued pursuant to section 12(k) of the Exchange Act.[617] Adding these values together, it is estimated that the total industry-wide burden for this documentation requirement would be 537 hours for the first year, and 291 hours annually going forward.

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[615] (80 broker-dealers + 1 qualified IDQS + 1 registered national securities association) x (1/60 hour) x (213 securities) = 291 hours.

[616] 291 hours / (80 broker-dealers + 1 qualified IDQS + 1 registered national securities association) = 4 hours.

[617] This three-hour burden estimate to reprogram systems and capture records regarding trading suspensions is separate from the information review requirement discussed in Part V.C.1, and is analogous to the time burden estimates in the 2010 amendments to Regulation SHO. *See* Regulation SHO Release (describing ongoing internal compliance time for self-regulatory organizations and "non-SRO trading centers" to ensure that their existing written policies and procedures are up-to-date and remain in compliance with 2010 amendments to Rule 201 of Regulation SHO).

c) ADTV and Asset Test Exception—Rule 15c2-11(f)(5)

As stated in the Economic Analysis, it is estimated that there would be approximately 180 securities that would meet the amended Rule paragraph (f)(5) ADTV and asset tests. In addition to preserving documents and information that demonstrate paragraph (b) information is current and publicly available, as discussed above, the broker-dealer, qualified IDQS, or registered national securities association would need to preserve documents and information that demonstrate that the various requirements of the ADTV test and asset test have been met. It is estimated that it would take one minute to create documentation supporting the broker-dealer's reliance on the asset test prong of the exception and that broker-dealers would do this once annually per issuer.[618] Accordingly, broker-dealers, qualified IDQSs, and registered national securities associations would spend approximately 3 hours[619] on this information collection annually, leading to an ongoing burden of approximately 246 hours dispersed between 80 broker-dealers, one qualified IDQS, and one registered national securities association.

Additionally, the Commission estimates that it would take one minute for a broker-dealer, qualified IDQS, or registered national securities association to preserve documents and information that demonstrate that the requirements of the ADTV test have been met and that each respondent would do this 252 times a year (i.e., each trading day). Accordingly, each respondent would spend approximately 756 hours[620] on this information collection annually,

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[618] As discussed in Part II.I above, paragraph (d)(2) of the amended Rule requires broker-dealers, qualified IDQSs, and registered national securities associations to preserve only documents and information "that demonstrate that the requirements for an exception under paragraph (f)(2), (f)(3), (f)(5), (f)(6), or (f)(7) are met." Accordingly, the Commission believes that broker-dealers would likely document the availability of this exception annually because the test is based on audited balance sheets issues within six months of the end of the most recent fiscal year.

[619] (180 securities x 1 minute) / 60 minutes = 3 hours.

[620] (252 trading days per year x 180 securities x 1 minute) / 60 minutes = 756 hours.

leading to an ongoing burden of approximately 61,992 hours dispersed between 80 broker-dealers, one qualified IDQS, and one registered national securities association. The Commission believes that broker-dealers, the qualified IDQS, and the registered national securities association would already have administrative systems and procedures, as well as personnel, in place to create these records, and that the initial burden of putting procedures in place to ensure compliance would be three hours of internal burden per broker-dealer, qualified IDQS, and registered national securities association, leading to an initial burden of 246 hours for the industry to reprogram systems and capture the record regarding whether the requirements of the ADTV and asset tests have been met.[621] Adding these values together, it is estimated that, after rounding, the total industry-wide requirement would be 62,238 hours for the first year, and 61,992 hours annually going forward.

d) Underwritten Offering Exception—Rule 15c2-11(f)(6)

Paragraph (f)(6) of the amended Rule excepts from the information review requirement quotations for a security by a broker-dealer that is named as underwriter in a security's registration statement referenced in paragraph (b)(1) or in an offering statement referenced in paragraph (b)(2) of the amended Rule, subject to the time limitations contained in those sections of the amended Rule. Registration statements and offering statements are filed in EDGAR. Because the provision in paragraph (d)(2)(ii) of the amended Rule does not require broker-dealers to preserve paragraph (b) information that is available on EDGAR, the Commission is not estimating any initial or ongoing recordkeeping burden to be associated with this exception.

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[621] This three-hour burden estimate to reprogram systems and capture records regarding ADTV and asset tests is separate from the information review requirement discussed in Part V.C.1, and is analogous to the time burden estimates in the 2010 amendments to Regulation SHO. *See* Regulation SHO Release at 11283, 11286 (describing ongoing internal compliance time for self-regulatory organizations and "non-SRO trading centers" to ensure that their existing written policies and procedures are up-to-date and remain in compliance with 2010 amendments to Rule 201 of Regulation SHO).

e) Exchange-Traded Security Exception and Municipal Security Exception—Rule 15c2-11(f)(1), (f)(4)

Amendments to the amended Rule provide exceptions for quotations for: (1) a security admitted to trading on a national securities exchange and which is traded on such an exchange on the same day as, or on the business day immediately preceding, the day of the quote (paragraph (f)(1)), and (2) a municipal security (paragraph (f)(4)). The Commission is not estimating any initial or ongoing burden with respect to these exceptions because the provision in paragraph (d)(2) of the amended Rule does not require broker-dealers, qualified IDQSs, or registered national securities association to preserve records under paragraph (d)(2) for the paragraph (f)(1) or paragraph (f)(4) exceptions.

f) Broker-Dealer That Publishes a Qualified IDQS Review Quotation—Rule 15c2-11(a)(1)(ii)

Paragraph (a)(1)(ii) of the amended Rule allows broker-dealers to rely on a qualified IDQS's publicly available determination that it complied with the information review requirement. Paragraph (d)(1)(ii) of the amended Rule requires that broker-dealers maintain a record of the name of the qualified IDQS that made such publicly available determination. It is unclear for how many OTC securities qualified IDQSs might choose to comply with the information review requirement under the amended Rule.

This provision, which collapses the proposed qualified IDQS review exception into an unlawful activity provision of the amended Rule, pertains to the application of the information review requirement with respect to certain securities that are less likely to be targeted for fraudulent activity (e.g., securities of large cap foreign issuers). The Commission conservatively estimates that qualified IDQSs would conduct the required review for five percent of this subset

of quoted OTC securities[622] and that each broker-dealer would document its reliance on a qualified IDQS's compliance with the information review requirement once per year per issuer.[623] Assuming that the information required to document compliance with the information review requirement for this subset of OTC securities would be publicly available, the Commission estimates that each broker-dealer would spend approximately one minute creating each record. Accordingly, broker-dealers would spend approximately 0.22 hours[624] on this information collection annually leading to an ongoing burden of approximately 18 hours (after rounding)[625] dispersed between 80 broker-dealers. The Commission believes that broker-dealers would already have administrative systems and procedures, as well as personnel, in place to create these records, and that the initial burden of putting procedures in place to ensure compliance with the amendments would be three hours of internal burden per broker-dealer leading to an initial burden of 240 hours for the industry to reprogram systems and capture the record documenting its reliance the publicly available determination by a qualified IDQS that such qualified IDQS complied with the information review requirement.[626] Adding these values

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[622] According to FINRA Form 211 data, broker-dealers complied with the information review requirement 384 times, five percent of which, after rounding, is 19 issuers. The Commission believes that, given the relatively large number of foreign issuers of quoted OTC securities, five percent is a reasonable estimate for the proportion of securities that would be reviewed by qualified IDQSs.

[623] As discussed in Part II.A.3 above, under the amended Rule, broker-dealers can only rely on this provision for a limited period of time. The Commission, therefore, estimates that the securities that are quoted under this provision would either become eligible for the piggyback exception or would not be eligible for quotations for the remainder of the year given the lack of interest in the market.

[624] 13 issuers x 1 minute = 13 minutes or 0.22 hours.

[625] 0.22 hours x 80 broker-dealers = 18 hours.

[626] This three-hour burden estimate to reprogram systems and capture records regarding publicly available determinations that a qualified IDQS complied with the information review requirement is separate from the information review requirement discussed in Part V.C.1, and is analogous to the time burden estimates in the 2010 amendments to Regulation SHO. *See* Regulation SHO Release at 11283, 11286 (describing ongoing internal compliance time for self-regulatory organizations and "non-SRO trading centers" to ensure that their existing written policies and procedures are up-to-date and remain in compliance with 2010 amendments to Rule 201 of Regulation SHO).

together, it is estimated that the total industry-wide burden for this documentation requirement would be 258 hours for the first year, and 18 hours annually going forward.

g) Policies and Procedures for a Qualified IDQS or Registered National Securities Association to Make a Publicly Available Determination—Rule 15c2-11(a)(3)

Under the amended Rule, a qualified IDQS or registered national securities association must establish, maintain, and enforce reasonably designed written policies and procedures to make certain publicly available determinations.[627] The Commission estimates that it would take one qualified IDQS and one registered national securities association subject to the amended Rule approximately 18 hours of initial burden each to initially prepare these written policies and procedures, and an ongoing annual burden of 10 hours each to review and update policies and procedures. Given the sophistication of the qualified IDQS and the registered national securities association, the Commission estimates that this burden would be borne internally. Accordingly, the total industry-wide burden for this documentation requirement would be 36 hours for the first year, and 20 hours annually going forward.

h) Broker-Dealer Recordkeeping in Reliance on Publicly Available Determinations by a Qualified IDQS or Registered National Securities Association—Rule 15c2-11(d)(2)(ii)

Paragraph (d)(2)(ii) of the amended Rule requires broker-dealers that rely on publicly available determinations described in paragraph (f)(2)(iii)(B) or (f)(3)(ii)(A) to preserve the name of the qualified IDQS or registered national securities association that made such a

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[627] Amended Rule 15c2-11(a)(3). The amended Rule replaces the proposed requirement that a qualified IDQS or registered national securities association make a publicly available determination that it has reasonably designed written policies and procedures, with a requirement that such an entity establish, maintain, and enforce reasonably designed policies and procedures to make certain publicly available determinations—namely, whether issuer information is current and publicly available, and, in some instances, whether the requirements of an exception under the Rule are met. *See supra* Part II.A.4. The time burden under both the proposed requirement and the requirement under the amended Rule is the same—the time to initially prepare such written policies and procedures, and any ongoing annual burden to review and update such policies and procedures.

determination. Paragraph (d)(2)(ii) of the amended Rule also requires that broker-dealers that rely on publicly available determinations described in paragraph (f)(7) of the amended Rule preserve a record of the exception upon which the broker-dealer is relying and the name of the qualified IDQS or registered national securities association that determined that the requirements of that exception are met. The Commission estimates that broker-dealers would create documents as required by paragraph (d)(2)(ii) each trading day. The Commission estimates that each broker-dealer would spend approximately one second creating such a record. The Commission believes that one second is an appropriate estimate regarding the time it will take to create such a record because the Commission believes that such a record will be created through an automated process that will require minimal direct human intervention, if any. Accordingly, broker-dealers would spend approximately 808 hours[628] on this information collection annually leading to an ongoing burden of approximately 64,635 hours[629] dispersed between 80 broker-dealers. The Commission believes that broker-dealers would already have administrative systems and procedures, as well as personnel, in place to create these records, and that the initial burden of putting procedures in place to ensure compliance with the recordkeeping requirement under paragraph (d)(2)(ii) would be three hours of internal cost per broker-dealer leading to an initial burden of 240 hours for the industry to reprogram systems and capture the record documenting its reliance the publicly available determination by a qualified IDQS or registered national securities association.[630] Adding these values together, it is estimated that the total

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[628] 64,635 hours/80 broker-dealers = 808 hours.

[629] (80 broker-dealers) x (1/3600 (one second)) x (252 trading days per year) x (11,542 securities) = 64,635 hours.

[630] This three-hour burden estimate to reprogram systems and capture records regarding publicly available determinations by a qualified IDQS or registered national securities association is separate from the information review requirement discussed in Part V.C.1, and is analogous to the time burden estimates in the 2010 amendments to Regulation SHO. *See* Regulation SHO Release at 11283, 11286 (describing ongoing internal compliance time for

industry-wide burden for this documentation requirement would be 64,875 hours for the first year, and 64,635 hours annually going forward.

PRA Table 2: Summary of Estimated Other Burdens				
Requirement	**Type of Burden**	**Number of Entities Impacted**	**Total Initial Industry Burden**	**Total Annual Industry Burden**
Recordkeeping when relying on an exception under paragraph (f), that paragraph (b) information is current and publicly available	Recordkeeping	82	82	44,280
Recordkeeping obligations under unsolicited quotation exception under paragraph (f)(2)	Recordkeeping	80	240	96,371
Recordkeeping obligations regarding frequency of a priced bid or offer quotation under paragraph (f)(3)(i)(A)	Recordkeeping	82	246	66,251
Recordkeeping obligations regarding determining shell status under the provision in paragraph (f)(3)(i)(B)	Recordkeeping	82	246	44,280
Recordkeeping obligations regarding trading suspensions under the provision in paragraph (f)(3)(i)(B)	Recordkeeping	82	246	291
Recordkeeping obligations for the exceptions under paragraph (f)(5)—Asset Test	Recordkeeping	82	246	246
Recordkeeping obligations for the exceptions under paragraph (f)(5)—ADTV Test	Recordkeeping	82	0	61,992
Recordkeeping obligations of qualified IDQS complying with information review requirement pursuant to paragraph (a)(2)	Recordkeeping	80	240	18
Recordkeeping obligations related to the creation of reasonable written policies and procedures under paragraph (a)(3)	Recordkeeping	2	36	20
Recordkeeping obligations of broker-dealers relying on publicly available determinations by qualified IDQSs or registered national securities associations pursuant to paragraph (d)(2)(ii)	Recordkeeping	80	240	64,635

3. Collection of Information Is Mandatory

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self-regulatory organizations and "non-SRO trading centers" to ensure that their existing written policies and procedures are up-to-date and remain in compliance with 2010 amendments to Rule 201 of Regulation SHO).

The information collections for the information review requirement and recordkeeping requirement are mandatory under the amendments to the Rule if a broker-dealer wishes to provide the initial publication or submission of a quotation for an OTC security. Additionally, the information collections involving documentation and information that demonstrate that the requirements for an exception have been met are mandatory under the amendments if a broker-dealer submits or publishes quotations that rely on an exception in paragraph (f) of the amended Rule.

4. Confidentiality

The Commission would not typically receive confidential information as a result of this collection of information. To the extent that the Commission receives—through its examination and oversight program, through an investigation, or by some other means—records or disclosures from a qualified IDQS or registered broker-dealer that concern the information review requirement and that are not publicly available, such information would be kept confidential, subject to the provisions of applicable law. Likewise, to the extent that the Commission receives—through its examination and oversight program, or through an investigation, or by some other means—records from a qualified IDQS, registered national securities association, or registered broker-dealer that are related to reliance on an exception contained in paragraph (f) of the amended Rule and that are not publicly available, such information would be kept confidential, subject to the provisions of applicable law.

5. Retention Period of Recordkeeping Requirement

Under paragraph (d)(1) of the amended Rule, a broker-dealer publishing or submitting a quotation, or a qualified IDQS that makes known to others the quotation of a broker-dealer pursuant to paragraph (a)(2) of the amended Rule, must preserve the documents and information

for a period of not less than three years, the first two years in an easily accessible place. Under paragraph (d)(2) of the amended Rule, a broker-dealer publishing or submitting a quotation, or a qualified IDQS, or a registered national securities association that makes a publicly available determination pursuant to paragraphs (f)(2)(iii)(B), (f)(3)(ii)(A), or (f)(7) of the amended Rule must preserve the documents and information for a period of not less than three years, the first two years in an easily accessible place.

VI. Economic Analysis

A. Background

The amended Rule updates investor protection requirements in light of the substantial reductions in costs for information acquisition and dissemination due to modern technology. These changes are expected to better protect retail investors from incidents of fraud and manipulation in OTC securities, particularly the securities of issuers for which there is no or limited publicly available information. These amendments are also intended to reduce regulatory burdens on broker-dealers for publication of quotations of certain OTC securities that may be less susceptible to potential fraud and manipulation, such as highly liquid securities of certain well-capitalized issuers and securities that were issued in offerings underwritten by the broker-dealer publishing the quote.

The Commission is mindful of the costs imposed by and the benefits obtained from the Commission's rules. Exchange Act Section 3(f) requires the Commission, when engaging in rulemaking that requires consideration or determination of whether an action is necessary or appropriate in the public interest, also to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Additionally, Exchange Act Section 23(a)(2) requires the Commission, when adopting rules under the

Exchange Act, to consider the impact that any new rule will have on competition and not to adopt any rule that will impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The discussion below addresses the expected economic effects of these amendments, including the likely benefits and costs, as well as the likely effects of the amendments on efficiency, competition, and capital formation. The Commission has, where possible, quantified the economic effects that are expected to result from these amendments in the analysis below. However, the Commission is unable to quantify some of the potential effects discussed below.

First, it is unclear to what extent current and publicly available paragraph (b) information would influence OTC investors' investment decisions and how these decisions might affect the welfare of these investors.[631] In addition, the Commission is unable to estimate certain costs with precision because it lacks data on the degree of activity by and concentration in this market of individual broker-dealers with respect to publishing quotes for OTC securities.[632] Wherever possible, if more precise estimates were not feasible, the Commission has estimated a range or bound associated with the costs of the amendments. Lastly, the Commission is unable to quantify the extent to which the amendments to the Rule would impact entry of issuers into the quoted OTC market or the migration between securities in the quoted OTC market and the grey market, in which trades in OTC securities occur without broker-dealers publishing quotations in

[631] For example, the effect of investment decisions on the welfare of the investor depends on the individual's preference for risk and return. The Commission lacks data not only on the effect of disclosure on investment decisions, but also the preferences of OTC investors.

[632] For example, the Commission lacks data on the number and identities of broker-dealers that are publishing quotes for OTC securities in reliance on the piggyback exception or other exceptions to the Rule; much of the analysis in this release is done at the security- or issuer-level.

a quotation medium. Therefore, much of the discussion below is qualitative in nature, although the Commission describes, where possible, the direction of these effects.

B. Baseline and Affected Parties

1. Affected Parties

The final amendments to the Rule would affect broker-dealers that publish or submit quotations for OTC securities. Besides broker-dealers and qualified IDQSs, affected parties include issuers of quoted OTC securities and investors in these securities (either investors already holding a position in OTC securities or those seeking to acquire such a position).[633] The Commission assesses the economic effects of the amendments relative to the baseline of existing requirements and practices in the OTC market. Registered broker-dealers participate in the market for quoted OTC securities by publishing priced and unpriced quotations representing customer interest in trading, executing customer orders, and acting as market makers.[634] OTC Markets Group identifies 80 broker-dealers that are active on the OTC Link ATS in OTC securities.[635] Thirty-four broker-dealers filed at least one FINRA Form 211 in order to initiate the publication or submission of quotations for an OTC security during the calendar year 2019.[636]

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[633] The Commission does not have data to estimate the number of investors currently participating in the OTC securities market.

[634] In addition to the Rule, the regulatory baseline includes SRO rules governing the process of broker-dealers' publication of quotations for OTC securities. In particular, FINRA Rule 6432 requires broker-dealers to file Form 211 when initiating or resuming quotations in OTC securities to ensure compliance with the information requirements of the Rule. *See supra* Part II.J.1.

[635] *See Broker-Dealer Directory*, OTC Mkts. Grp. Inc., https://www.otcmarkets.com/otc-link/broker-dealer-directory (last visited Apr. 24, 2020, 2:35PM). The Commission expects that not all of the broker-dealers included in the directory are actively engaged in quoting OTC securities.

[636] The Commission received information on FINRA Form 211 filings from FINRA. The total number of FINRA Form 211 filings for calendar year 2019 was 384 and each broker-dealer filed this form for approximately 11 OTC securities on average. The total number of FINRA Form 211 filings has been declining since 2013, the earliest year of data available to the Commission, when the total number of FINRA Form 211 filings was 830.

2. Baseline

a) OTC Securities

Securities that are quoted on the OTC market differ from those listed on national securities exchanges. In particular, the average OTC security issuer is smaller, and its securities trade less, on average. Table 1 below compares quoted OTC securities to those listed on the New York Stock Exchange ("NYSE") or Nasdaq.[637] On average, issuers of quoted OTC securities have a lower market capitalization than those with securities that are listed on a national securities exchange.[638] Panel B of Table 1 shows that this difference is more pronounced when companies with securities listed on foreign exchanges, such as the Tokyo Stock Exchange or the TSX Venture Exchange, are excluded from the sample of quoted OTC

One commenter stated that the count of unique broker-dealers filing FINRA Form 211 does not accurately represent the concentration of broker-dealers conducting the initial information review because the vast majority of securities that were approved for trading were foreign securities that were already listed on a foreign exchange. In addition, the commenter stated that only four broker-dealers conducted the initial information review for the remaining domestic issuers and since 2018, three of these broker-dealers have ceased this activity. *See* Coral Capital Letter. Based on information provided by FINRA, 66 percent of FINRA FORM 211 filings were for securities of foreign issuers, and that fraction has been relatively stable since 2013. Further, the commenter's analysis may not fully capture all FINRA Form 211 filing activity because according to data available to the Commission, 28 unique broker-dealers filed these forms for domestic issuers in 2018 and 13 broker-dealers filed forms for catch-all issuers.

Filing of FINRA Form 211 is associated with initiating or resuming quotations only. The Commission lacks data that would allow it to estimate the number of quotes that broker-dealers published pursuant to paragraph (a) or in reliance on the piggyback exception, national securities exchange, or municipal security exceptions to the Rule. Based on data from OTC Markets Group, broker-dealers published a total of approximately 3.8 billion quotations during calendar year 2019, of which 5,782,286 were published in reliance on the unsolicited quotation exception. See *supra* note 632 for a discussion of data limitations. Because broker-dealers could rely on the piggyback exception for the vast majority (90 percent) of quoted OTC securities on an average day during 2019, the Commission believes that it is reasonable to assume that the majority of quotes that broker-dealers published during 2019 relied on the piggyback exception. See Table 2 below, which describes average daily activity for securities that are quoted in the OTC market.

[637] See *infra* note 640 for a description of OTC securities data sources. All information for stocks listed on NYSE and Nasdaq comes from The Center for Research in Security Prices (CRSP). Statistics are computed by averaging market capitalization and trading volume for each security across all trading days during the calendar year 2019. The conclusions drawn from this analysis regarding how OTC securities compare to exchange-listed securities with respect to size and volume traded remain qualitatively unchanged if the Commission extends the analysis to include securities listed on additional smaller national exchanges.

[638] The Commission estimates that securities listed on NYSE and Nasdaq were valued at approximately $35.7 trillion in total during calendar year 2019, while quoted OTC securities were valued at approximately $32.3 trillion

securities. Further, Table 1 demonstrates that quoted OTC securities are characterized by significantly lower dollar trading volumes than listed stocks, even when comparing securities of similar size as measured by market capitalization.[639]

Table 1—Comparison of Quoted OTC Securities and Listed Securities, CY 2019

	Quoted OTC			Exchange Listed	
	(A) All	(B) Unlisted	(C) $50M-$5B Market Cap	(D) All	(E) $50M-$5B Market Cap
Market Cap - median ($M)	20.99	3.92	472.74	517.90	485.74
Market Cap - mean ($M)	3,601.17	393.19	1158.18	5,890.43	993.98
Volume - median ($M)	0.29	0.15	0.84	760.02	693.19
Volume - mean ($M)	107.76	51.02	29.05	10,375.73	2,549.60
Number of Securities	**11,542**	**6,253**	**2,626**	**6,166**	**4,277**

Table 2 provides more detail on the characteristics of quoted OTC securities and their issuers for the 2019 calendar year.[640] The Commission estimates that, on average, 9,998 quoted

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with 94.7 percent of the total market capitalization coming from companies that also have securities listed on public foreign exchanges.

[639] Total dollar volume is annualized by taking the average daily trading volume and multiplying it by the number of trading days in 2019. Panels C and E of Table 1 provide statistics for comparable samples of quoted OTC and exchange listed securities with a market capitalization between $50 million and $5 billion. Several academic studies document the differences in liquidity between OTC and listed stocks using older data. *See* Bjorn Eraker & Mark Ready, *Do Investors Overpay for Stocks with Lottery-Like Payoffs? An Examination of the Returns of OTC Stocks*, 115 J. Fin. Econ. 486–504 (2015); Ang *et al., supra* note 3.

Commenters generally agreed that the key difference between quoted OTC securities and those listed on national exchanges were size and trading volume. *See, e.g.*, Mitchell Partners Letter 1.

[640] The Commission uses three sources of data on OTC securities. OTC Markets Group's "End-of-Day Pricing Service" and "OTC Security Data File" provide closing trade and quote data for the U.S. OTC equity market and include identifying information for securities and issuers, as well as securities' piggyback eligibility. The Commission also uses information from the weekly OTC Markets Group's "OTC Company Data File." Company Data Files include information about issuer reporting, shell, and bankruptcy status, as well as the SEC Central Index Key (CIK) identifier and whether an issuer's financial statements are audited.

All statistics in Table 1 represent characteristics of OTC securities and OTC issuers on a typical trading day and are computed by averaging across all trading days for the 2019 calendar year. The Commission identified 19,141 unique OTC securities for 16,059 unique companies from aggregated OTC Markets Group data for the calendar year 2019. Of these, 11,542 unique OTC securities had at least one published quotation and 9,895 unique companies had a security that was quoted at least once during the calendar year 2019. The Commission believes that OTC Markets Group data are reasonably representative of all OTC quoting and trading activity in the U.S.

OTC securities had published quotations per day during the calendar year 2019.[641] A majority of these had published either bid or offer quotations (93 percent).[642] The Commission identified that broker-dealers could rely on the piggyback exception to publish or submit quotations for 90 percent of these quoted OTC securities.[643] Many quoted OTC securities are illiquid. For example, the Commission estimates that, on average, only 44 percent of these quoted securities reported a positive daily trading volume, with two percent of quoted securities being "inactive," which the Commission defines as not having reported any trading volume within the last year.[644] Conversely, only eight percent of quoted securities had an ADTV value greater than $100,000.[645]

Table 2—Market for Quoted OTC Securities, CY 2019

Average Daily Activity

Number of Securities	**9,998**
Priced Quotes with Either Bid or Offer	93%
Piggyback Eligible	90%
Traded	44%

[641] The number of securities quoted includes those with published priced and unpriced quotations. The Commission estimates that approximately seven percent of quoted OTC securities did not have priced quotations. The number of OTC securities quoted on an average day is lower than the total number of OTC securities with published quotations in 2019 because some securities did not have published quotations for every trading day in 2019.

[642] The Commission estimates the number of securities with quotations with either bid or offer prices from close of trading day data. This estimate is a lower bound as the Commission is not able to identify cases in which a security had a published priced quotation during the day but was no longer published at day close.

[643] *See supra* Part II.D. A security would qualify for the piggyback exception if it satisfies the frequency of quotation requirements pursuant to paragraph (f)(3) of the Rule. For such securities, a broker-dealer would not need to comply with the Rule's information review requirement before publishing a quotation on an IDQS.

[644] Broker-dealers trading in quoted OTC securities are required to report their trades to FINRA, which then disseminates this information to the market. OTC Markets Group receives trading data from FINRA's Trade Data Dissemination Service (TDDS) feed and incudes aggregated daily trading volume data for OTC securities in the "End-of-Day Pricing Data File."

[645] The Commission computes the ADTV on a given day by taking the average of reported dollar trading volume over the previous 60 calendar days. The computed ADTV for each security is a lower bound estimate of its worldwide ADTV if some of the trading activity was not reported to FINRA. As such, it is possible that there were more securities than the Commission identifies that would satisfy the volume threshold. The Commission estimates that approximately eight percent of quoted securities had an ADTV value greater than $100,000 and current and publicly available information.

Inactive	2%
ADTV value > $100,000	8%

Some OTC securities are traded without having published quotation.[646] Broker-dealers might not publicly quote these securities due to a lack of available issuer information necessary to satisfy the information review requirement or due to insufficient investor interest. The Commission estimates that 5,915 OTC securities were traded at some point during 2018 without having published quotations, with 553 securities of 538 issuers traded on average per day during 2018. Despite not having published quotations, some of these OTC securities were actively traded, with three percent having an ADTV value greater than $100,000.[647]

b) Issuers of OTC Securities

Table 3 below provides detail on issuers of quoted OTC securities.[648] The Commission estimates that brokers participating in the OTC market published quotations for the securities of 9,895 issuers during the calendar year 2019.[649] These issuers differed in regulatory status, which determines the information that needs to be provided to comply with securities regulations and the type of paragraph (b) information that would be required to be current and publicly available

[646] On the OTC Markets Group platform, OTC securities trade without published quotations on the grey market and on the "Expert Market." According to OTC Markets Group, the Expert Market is a "private market to serve broker-dealer pricing and best execution needs in securities that are restricted from public quoting or trading." OTC Markets Group notes that the restrictions on quoting or trading can be based on issuer requirements, security attributes, investor accreditation and/or suitability risks.

[647] Conditional on having been traded, the average (median) dollar trading volume on a given day during 2019 for a security trading on the grey market was $33,913 ($830) as compared to $293,608 ($4,000) for quoted OTC securities.

[648] See *supra* note 640 for information on data sources. Numbers in parenthesis represent percentages of the row totals.

[649] During the 2019 calendar year, 14 percent of issuers of quoted OTC securities had multiple (two or more) quoted OTC securities with published quotations.

by the amendments. Thirty-one percent of issuers followed the Exchange Act, Regulation A, or the U.S. Bank reporting standards; 45 percent followed international reporting standards; and the remaining 24 percent followed an alternative reporting standard.[650] Given that issuers of quoted OTC securities follow different reporting standards, current financials are available for some issuers but not others. The Commission estimates that current financials were publicly available for approximately 70 percent of issuers of quoted OTC securities.[651] In particular, the Commission estimates that broker-dealers published quotations for a total of 3,008 issuers of OTC securities with no current and publicly available information, although, as commenters stated, the Commission recognizes that some of these issuers may have published current

[650] The Exchange Act reporting standard requires that issuers are in compliance with their SEC reporting requirements. The Regulation A reporting standard applies to companies subject to reporting obligations under Tier 2 of Regulation A under the Securities Act. These companies must file annual, semi-annual, and other interim reports on EDGAR. The U.S. Bank reporting standard applies to companies in the OTCQX U.S. Bank Tier on OTC Markets Group's system and may be satisfied by following the SEC reporting standards, Regulation A reporting standards, or reporting standards outlined in OTCQX Rules for U.S. Banks (https://www.otcmarkets.com/files/OTCQX_Rules_for_US_Banks.pdf). Foreign issuers that are exempt from registering a class of equity securities under Section 12(g) of the Exchange Act pursuant to Rule 12g3-2(b) follow international disclosure requirements. Lastly, the alternative reporting standard, which could apply to all remaining OTC security issuers and is based on the information required by former Rule 15c2-11(a)(5), has varying requirements for disclosure depending on the OTC Markets Group Tier in which quotations for the security are published.

The Commission observed several instances in the data in which issuers of quoted OTC securities changed their reporting standard during 2019, for example, by switching from following an alternative reporting standard to the Exchange Act reporting standard. In these instances, for the computation of statistics in Table 3, the Commission attributed a reporting standard that the issuer followed for the majority of the days that its securities had published quotations during 2019.

[651] See *supra* note 640 for information on data sources. The Commission uses information on the IDQS and the OTC Markets Group tier classification to estimate the number of issuers with current and publicly available information. In particular, the Commission counts all issuers with securities quoted on OTC Bulletin Board ("OTCBB") and specific tiers on OTC Markets Group's system: OTCQX, OTXQB, and OTC Pink: Current

financial information somewhere other than on the OTC Markets Group platform.[652] Of these, 946 issuers had an obligation to disclose information under the Exchange Act, Regulation A, or the U.S. Bank reporting standards; 82 issuers had an obligation under an international reporting standard; and the remaining 1,980 issuers did not have a reporting or disclosure obligation. Although the majority of issuers of quoted OTC securities provided current financial information publicly, financial statements of these issuers are not always audited. The Commission estimates that 48 percent of issuers with publicly available financial statements with quoted OTC securities in 2019 provided audited financial statements.[653] Several commenters stated that certain issuers of quoted OTC securities provide current financial information to their shareholders, including in connection with disclosure requirements under the laws of the state in which the company is

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Information. This includes all quoted securities other than in the OTC Market OTC Pink: Limited Information and OTC Pink: No Information tiers. OTC Bulletin Board requires that quoted securities are current in their required filings with the SEC or other federal regulatory authority with proper jurisdiction. All OTC Markets Group tiers other than OTC Pink: Limited Information and OTC Pink: No Information require financial information to be at most six months old and available on www.otcmarkets.com or on the Commission's EDGAR system.

The number the Commission computes here is a rough estimate as it is possible that some issuers of securities in the OTC Pink: Limited Information or OTC Pink: No Information tiers voluntarily release current and public information somewhere other than on the OTC Markets Group platform. In particular, some commenters stated that certain issuers of quoted OTC securities publish current financial information on their websites. *See, e.g.*, Beacon Redevelopment Letter; Braxton Gann; Hamilton & Associates Letter; Dave Peirce; Peter Quagliano; Dan Schum.

Of all the quoted securities that qualified for the piggyback exception in calendar year 2019, the Commission estimates that 69 percent of them had publicly available current disclosures based on data from OTC Markets Group.

[652] *See, e.g.*, Beacon Redevelopment Letter; Braxton Gann; Hamilton & Associates Letter; Dave Peirce; Peter Quagliano; Dan Schum.

[653] OTC Markets Group classifies issuers that provide audited financial statements. In the analysis, the Commission assumes that all issuers that have been identified as providing audited financial statements provide audited balance sheets.

incorporated.[654] Other commenters stated difficulties that investors may face when trying to access financial information for companies in which they hold shares, such as having to provide proof of ownership or having to sign a non-disclosure agreement.[655] Commenters also argued that while certain issuers provide information to their shareholders, they are hesitant to do so more widely because they do not want to reveal information to their competitors.[656] In summary, current information is either not readily available, especially for persons not holding these securities, or not available at all for a subset of OTC securities.

Three percent of issuers with quoted OTC securities were shell companies, and broker-dealers were able to rely on the piggyback exception to publish or submit quotations for nearly all securities of shell companies (99 percent).[657] Lastly, the Commission estimates that 1,030 (10 percent) of issuers with quoted OTC securities and current and publicly available information

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Although current FINRA and Commission rules do not require the financial statements of non-SEC reporting OTC securities issuers to be audited, OTC Markets Group requires audited financials from OTC issuers with securities quoted in the OTCQX U.S.® and OTCQB® tiers. Issuers with securities quoted in the OTC Pink: Current Information tier must provide an Attorney Letter with Respect to Current Information if they do not file with the SEC and do not publish audited financial information.

[654] *See, e.g.*, James Duade; Caldwell Sutter Capital Comment; Drinker Letter; Christian Gabis; Mitchell Partners Letter 1; Dan Schum; Michael Tofias.

[655] *See, e.g.*, Tim Bergin; Richard Kogut; Jim Rivest.

[656] *See, e.g.*, Drinker Letter; Peter Quagliano.

[657] See *supra* Part II.D.4 for a detailed discussion of shell companies. Even though broker-dealers had the ability to publish quotes for these securities relying on the piggyback exception, some quotes broker-dealers published for these securities may have relied on other exceptions to the Rule.

In its comment letter, OTC Markets Group stated that, as of December, 2019, 339 issuers of OTC securities have self-reported in their public filings as shell companies, as defined by Rule 405 of Regulation C. OTC Markets Group has flagged an additional 534 issuers as "shell risk," based on the following annual financial metrics: (i) revenue less than $100,000; (ii) total assets (less cash and cash equivalents) less than $100,000; (iii) gross profit or loss less than $100,000; and (iv) research and development costs under $50,000. See OTC Markets Group Letter 2.

had total assets greater than $50 million and shareholder equity greater than $10 million on their most recent audited balance sheets.[658]

Table 3—Issuers of Quoted OTC Securities, CY 2019[a]

	SEC/ Reg. A/ Bank Reporting Obligation[b]	International Reporting Obligation	No Reporting/ Disclosure Obligation	**Total**
	Public Information Available			
	(A)	(B)	(C)	
Issuers	2,134 (30.99)	4,331 (62.90)	421 (6.11)	**6,886**
Securities	2,531 (29.97)	5,470 (64.76)	445 (5.27)	**8,446**
Shell Company	136 (80.95)	0 (0)	32 (19.05)	**168**
Audited Financials	1,908 (58.17)	1,254 (38.23)	118 (3.60)	**3,280**
Assets > $50 mil & SE > $10mil	571 (55.44)	448 (43.50)	11 (1.07)	**1,030**
	No Public Information Available			
	(D)	(E)	(F)	
Issuers	946 (31.45)	82 (2.73)	1,980 (65.82)	**3,008**
Securities	969 (31.31)	85 (2.75)	2,041 (65.95)	**3,095**
Shell Company	96 (55.81)	0(0)	76 (44.19)	**172**
	Total (by Reporting Status)			
Issuers	3,081 (31.14)	4,413 (44.60)	2,401 (24.26)	**9,895**
Securities	3,501 (30.33)	5,555 (48.13)	2,486 (21.54)	**11,542**

a. See *supra* note 640 for information on data sources. The Commission observes that issuers of OTC securities that trade on the grey or expert markets differ from issuers of quoted OTC securities. The majority of these issuers followed the alternative reporting standard (63 percent) and a few (one percent) were identified as shell companies. In addition, three percent of these issuers had total assets greater than $50 million and shareholder equity greater than $10 million on their most recent audited balance sheets.

b. Estimates of issuers in this column include issuers that make filings pursuant to Regulation Crowdfunding. The Commission estimates that there were five such issuers that had quoted OTC securities, of which four

[658] The Commission reviewed information on assets and shareholder equity of OTC issuers from a combination of three data sources: (1) S&P Global Market Intelligence Compustat North America and Compustat Global databases, (2) the OTC Markets Group website (https://www.otcmarkets.com), and (3) Bloomberg. For the analysis in the Proposing Release, the Commission also reviewed information from quarterly and annual filings in EDGAR. However, there is significant overlap in these datasets and data from annual and quarterly filings did not provide any additional information to what was already contained in the three datasets described above. The Commission used data on the most recent financial information available, as the Commission does not have access to historical financial data for many issuers. In some cases, the most recent financial data available is outdated. Specifically, for approximately 30 percent of OTC issuers, for which the Commission has data, the financial data are from calendar year 2018 or earlier. Of the 16,059 unique OTC issuers that appear in the data for calendar year 2019, the Commission is able to draw financial data for 2,791 (17 percent) of them from Compustat, 7,461 (46 percent) from Bloomberg, and 3,300 (21 percent) from the OTC Markets Group website. The Commission is unable to collect financial information for 2,507 (16 percent) of OTC issuers because financial statement information for these issuers was absent in the three data sources the Commission reviewed.

(80 percent) had publicly available financial information. These issuers were included in the economic analysis of the Proposing Release, but not discussed separately as they are in this note.

c) Risk of Fraud and Manipulation

The OTC market may be attractive to those seeking to engage in fraudulent practices, such as pump-and-dump schemes, due to a lack of publicly available current information about certain issuers of quoted OTC securities.[659] Two academic studies have found that market manipulation and pump-and-dump cases are concentrated among issuers of OTC securities relative to exchange-listed securities.[660] Another study has highlighted a higher incidence of cases involving delinquent filings and pump-and-dump schemes brought against issuers of OTC securities relative to cases brought against issuers of exchange-listed securities.[661] A Commission staff analysis of 4,000 SEC litigation releases between 2003 and 2012 found that the majority of alleged violations involving issuers of OTC securities were primarily classified as reverse mergers of shell companies or as market manipulation.[662] One commenter stated that the

[659] The Commission lacks data on the costs associated with fraudulent schemes involving OTC securities. One study found that pump-and-dump schemes result in sizable losses for market participants. *See* Hackethal *et al.*, *supra* note 407 (finding an average loss of 30 percent per investor and a loss of at least €1.2 million per tout aggregated across investors in a sample of 421 pump-and-dump schemes from 2002 to 2015 involving 6,569 German investors).

[660] One study analyzed 142 stock manipulation cases, including pump-and-dump cases, in SEC litigation releases from 1990 to 2001 and found that that 48 percent involved OTC securities, while 17 percent involved securities listed on national exchanges. *See* Aggarwal & Wu, *supra* note 6. A more recent study looked at 150 pump-and-dump manipulation cases between 2002 and 2015 and found that 86 percent of those cases involved OTC securities. *See* Renault, *supra* note 6.

[661] This study looked at a broader sample of securities cases filed between January 2005 and June 2011 and identified 1,880 cases involving OTC securities and 1,157 cases involving securities listed on exchanges in the United States. The majority of OTC securities cases, 1,148 (61 percent), were related to delinquent filings, while 151 (eight percent) were related to a pump-and-dump scheme, 159 (eight percent) were related to financial fraud, 12 (one percent) were related to insider trading, and 212 (11 percent) were related to other fraudulent misrepresentation or disclosure. In contrast, only 26 (two percent) of listed securities cases involved delinquent filings, 43 (four percent) involved pump-and-dumps, 278 (24 percent) involved financial fraud, 399 (34 percent) involved insider trading, and 173 (15 percent) involved other fraudulent misrepresentation or disclosure. *See* Cumming & Johan, *supra* note 7.

[662] *See* Spotlight on Microcap Fraud (Feb. 22, 2019), https://www.sec.gov/spotlight/microcap-fraud.shtml.

majority of the pump-and-dump schemes that he has observed involved shell companies.[663] In addition, the Commission estimates, from a sample of 323 Commission enforcement actions filed in fiscal years 2017 to 2019 involving 689 OTC securities, that 250 enforcement actions (77 percent) were classified as involving delinquent filings and 11 enforcement actions (three percent) were classified as involving market manipulation.[664] In contrast, the Commission estimates, from a sample of 109 Commission enforcement actions filed in fiscal years 2017 to 2019 involving listed securities, that four enforcement actions (four percent) was classified as involving delinquent filings and three enforcement actions (three percent) were classified as involving market manipulation.

To highlight characteristics of securities and issuers in the OTC market that tend to involve risk of fraud and manipulation, the Commission examined quoted OTC securities that had been the subject of Commission-ordered trading suspensions and those that have been assigned a "caveat emptor" designation by OTC Markets Group during the 2019 calendar year.[665] The Commission summarizes the findings below, in Table 4.[666]

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[663] Morning Light Mountain Comment. It is difficult to draw conclusions about shell companies' involvement in fraudulent schemes from the commenter's statement without information on the sample of pump-and-dump schemes that the commenter has observed.

[664] One commenter stated that it is difficult to infer a causal relationship between delinquent or unavailable financial information about the OTC security issuer and fraud because the OTC market is complex. *See* GTS Letter.

[665] *See* Trading Suspensions (2019), https://www.sec.gov/litigation/suspensions.shtml; Annual Report, SEC, Div. Enforcement, 5 (2018), https://www.sec.gov/files/enforcement-annual-report-2018.pdf; Addendum to Annual Report, SEC, Div. Enforcement, 2 (2017), https://www.sec.gov/files/enforcement-annual-report-2017-addendum-061918.pdf; Select SEC and Market Data Fiscal 2016, 2 (2016), https://www.sec.gov/files/2017-03/secstats2016.pdf. OTC Markets Group explains that a "caveat emptor" designation may be assigned to a security if OTC Markets Group becomes aware of a misleading or a manipulative promotion; a company is under investigation for fraudulent activity; there is a regulatory suspension on the security; the company fails to disclose a corporate action, such as a reverse merger; or there is another public interest concern associated with the security. *See Caveat Emptor Policy*, OTC Mkts. Grp. Inc., https://www.otcmarkets.com/learn/caveat-emptor (last visited Apr. 28, 2020).

[666] All statistics in Table 4 were estimated by analyzing security and issuer characteristics on the trading day before the start of a Commission-ordered trading suspension or an assignment of a "caveat emptor" designation by OTC Markets Group.

Table 4—Quoted OTC Securities, Suspensions and OTC Markets Group "Caveat Emptor" Status, CY 2018

	SEC Suspensions		OTC Markets Group "Caveat Emptor" Status	
Issue Characteristics				
Number of Securities	**213**		**241**	
Quotes with Either Bid or Offer	209	(98%)	230	(95%)
Piggyback Eligible	212	(100%)	238	(98%)
Issuer Characteristics				
Number of Issuers	**213**		**236**	
SEC/Reg. A/ Bank Reporting Standard	169	(79%)	176	(75%)
International Reporting Standard	0	(0%)	1	(0%)
Alternative Reporting Standard (ARS)	44	(21%)	62	(26%)
Public Information Available	13	(6%)	33	(14%)
Audited Financials	162	(76%)	173	(73%)
Shell Company	20	(9%)	23	(10%)

Overall, 213 quoted OTC securities were the subject of Commission-ordered trading suspensions over the calendar year 2019.[667] Relative to the characteristics of the overall quoted OTC security market, broker-dealers were more likely to be able to rely on the piggyback exception to publish or submit quotations for quoted OTC securities subject to trading suspensions on the trading day immediately prior to the commencement of the trading suspension. Although issuers of suspended quoted OTC securities tended to be mostly reporting companies, they were less likely to have current public information available relative to the full sample of quoted OTC securities because many failed to file required reports.[668] Several of these companies were identified as shell companies (nine percent).

[667] The results are qualitatively similar for the set of 1,369 Commission-ordered trading suspensions in the past five calendar years, 2015-2019. In particular, the Commission estimates that almost all quoted OTC securities subject to Commission-ordered trading suspensions (1,364) were piggyback eligible, approximately seven percent had publicly available current financial information, and 10 percent were shell companies.

[668] Issuers typically become subject to Commission-ordered trading suspensions under circumstances where there is a lack of publicly available current, accurate, or adequate information about the company. This may happen, for

In addition, the Commission examined 241 instances in which quoted OTC securities were flagged with the "caveat emptor" designation by OTC Markets Group to inform investors to exercise additional care when considering whether to transact in these securities. Most of these companies had Commission-ordered trading suspensions.[669] Similar to the sample of OTC issuers with suspended securities, issuers of these securities were less likely to have publicly available information.

Increasing the availability of information about OTC issuers has the potential to counteract misinformation, which can proliferate through promotions and other channels. Several recent studies have examined the effects of stock promotions on investor trading in the OTC market.[670] For example, one study has found large price and trading volume movements following spam email campaigns that conveyed optimism about a particular OTC security's price and were viewed by investors as containing credible information about the security.[671] Others have documented that cases in which issuers have secretly hired stock promoters for campaigns to increase their stock price and liquidity often are accompanied by trading by company

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example, when a company is not current in its filings of periodic reports. As a result, it is not surprising that many of these issuers were not quoted in OTCBB or OTC market tiers that require current and publicly available financial information.

[669] For 187 of the 241 "caveat emptor" securities, this designation was assigned at the start of the suspension. In the remaining 26 suspensions over the calendar year 2019, the security had already been designated with a "caveat emptor" status prior to 2019. The remaining 54 instances of "caveat emptor" assignment were associated with fraud or public interest concerns other than trading suspensions.

[670] *See* White, *supra* note 5.

[671] *See* Nelson *et al.*, *supra* note 252 ("[T]rading volume more than doubles in the days immediately following the spam campaign, and the mean return is positive and significant. However, the median return is zero, with nearly as many firms experiencing negative returns as positive on the spam date . . . . [C]ombining optimistic target price projections with credible, but stale, information from old press releases increase the return and volume reaction to spam. Moreover, the larger the return implied by the target price, the larger the market reaction.").

insiders.[672] Based on publicly available website information reviewed by the Commission on OTC securities that were subjects of promotion campaigns, the Commission identified 288 OTC securities (two percent of all quoted OTC securities) that were featured in at least one promotion campaign during 2019.[673] The vast majority of these OTC securities, 240 (83 percent), were issued by companies that did not otherwise provide current and publicly available financial information.[674]

d) Investors

One academic study has found that OTC stocks are owned primarily by retail investors rather than institutional investors.[675] However, retail investors' access to OTC securities is not frictionless in all cases. For instance, several commenters stated that broker-dealers put up "gates" that restrict retail investors' access to OTC securities, such as signing agreements and disclaimers before allowing these investors to purchase OTC stocks. Studies have also found that, on average, quoted OTC securities earn lower returns than exchange-listed stocks.[676] These investment decisions by individuals may be due to investors misestimating payoff probabilities for OTC stocks by overweighting extreme positive outcomes, particularly in cases where there is

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[672] *See* Nadia Massoud *et al.*, *Does It Help Firms to Secretly Pay for Stock Promoters?*, 26 J. Fin. Stability 45–61 (2016) (sampling both OTC securities and exchange-listed securities).

[673] One commenter stated that sometimes it is not the absence of current information, but rather the abundance of false information that facilitates fraudulent behavior in the OTC market. *See* Caldwell Sutter Capital Comment. However, current financial information can serve to limit the effectiveness of misinformation in the OTC market.

[674] The Proposing Release included additional information from OTC Markets Group data that identified 241 OTC securities (two percent of all quoted OTC securities) that were involved in at least one promotion campaign during 2018 with 58 of these securities (24 percent) issued by companies that did not provide current and publicly available information. The Commission did not receive updated promotion data from OTC markets for calendar year 2019.

[675] *See* Ang *et al.*, *supra* note 3 (stating that retail investors are "the primary owners of most OTC stocks, whereas institutional investors hold significant stakes in nearly all stocks on listed exchanges, including small stocks").

[676] *See* White, *supra* note 5; *see also* Ang *et al.*, *supra* note 3; Eraker & Ready, *supra* note 639.

a lack of available information about the issuer.[677] Some investors in OTC securities may be driven by a speculative motive.[678] Demographic analysis of OTC investors suggests that they tend toward higher wealth and education.[679] However, OTC security holding period returns are worse for investors residing in locations with populations that may be more vulnerable in that they are older, lower-income, and less educated.[680] Overall, findings in these studies suggest that investors in the OTC market might benefit from additional information regarding company fundamentals.[681] For example, some retail investors could more readily find, through online searches, information that refutes misinformation disseminated through promotions with publicly available paragraph (b) information. One commenter argued that OTC investors lose money in OTC securities because they are not educated on how to interpret the information that issuers provide and are thus susceptible to misinformation campaigns.[682] Nevertheless, these investors could benefit from more efficient prices that are less susceptible to manipulation as a result of the

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[677] *See* White, *supra* note 670.

[678] *See* Hackethal *et al.*, *supra* note 407 (finding an average loss of 30 percent in a sample of 421 pump-and-dump schemes from 2002 to 2015 involving 6,569 German investors). The study finds that "35% of the tout investors have been day-trading in penny stocks or are frequent traders with short investment horizons. These investors appear to be willing to take substantial risks and trade aggressively also in other stocks. These investor types are more likely to invest in touts, place larger bets and have better returns. Their participation in touts looks quite differently from more conservative traders, who trade infrequently and do not invest in penny stocks. This group could be the ones that were tricked into the schemes." *Id.*

[679] *See* White, *supra* note 5; *see also* John R. Nofsinger & Abhishek Varma, *Pound Wise and Penny Foolish? OTC Stock Investor Behavior*, 6 Rev. Behav. Fin. 2–25 (2014).

[680] *See* White, *supra* note 5 ("[M]edian holding period returns deteriorate for zip codes with greater percentages of elderly, less education and residence stability, and lower income and wealth. All of the return differences are economically and statistically significant.").

[681] Some commenters stated that investors are aware of the risks associated with trading in OTC securities. *See, e.g.*, David Aldridge; R. Berkvens; Dana Blanc; Caldwell Sutter Capital Comment; Frank Danna III; Ralf Erz; Philippe Goodwill; Richard Kogut; Aharon Levy; Tracy Michaels; Michael E. Reiss; Robert Ringelberg; Jim Rivest; David Sanders; Thomas Schiessling; Lucas H. Selvidge; Terravoir Venture Letter; Kevin Ward.

[682] Alexandra Elliott.

trading activity of better-informed investors who acquire and are better equipped at interpreting this information.

C. Discussion of Economic Effects

1. Effects of Rule 15c2-11 Amendments

In this section, the Commission discusses the expected costs and benefits of the amendments to Rule 15c2-11. These amendments modify rule requirements to account for the reduction in information acquisition costs, and generally seek to increase the availability of current company financial information within the quoted OTC market.

The amendments would affect OTC investors, issuers, and intermediaries such as broker-dealers. The Commission anticipates the principal economic effects of the amendments to be as follows. First, the transparency requirements could enable investors to learn more about the fundamental value of certain companies in the OTC market, which may direct their funds toward higher-return investments. These benefits are directly linked to modern technology that enables relatively low cost access to and dissemination of company filings. In addition, other investors could benefit from more efficient prices that are less susceptible to manipulation as a result of the trading activity of better-informed investors who acquire this information. Second, the amendments may reduce the incidence of fraudulent schemes, such as pump-and-dump activity, as a result of heightened information requirements and restrictions on the piggyback exception being applied to securities without current and publicly available information. Finally, broker-dealers could bear additional costs from the information review requirement as well as filing FINRA Forms 211 more frequently (e.g., if paragraph (b) information is not publicly available) as a result of, among other things, limitations on relying on the piggyback exception.[683] Costs

[683] Several of these amendments would provide additional exceptions to the Rule (e.g., eliminating the requirement for 12 business days of quotes within the previous 30 calendar days to establish piggyback eligibility). However,

borne by broker-dealers may be heterogeneous and depend on whether the broker-dealer specializes in retail or institutional orders, market making, or some combination of these services. To the extent that broker-dealers currently incur costs associated with disseminating paragraph (b)(5) information, such costs on broker-dealers may be mitigated to some extent. The requirement for paragraph (b)(5) information to be publicly available would reduce the broker-dealer's obligation to make paragraph (b) information available upon request to interested investors electronically.

In specific circumstances, other provisions of the amended Rule seek to relieve broker-dealers of costs related to the information review requirement and filing FINRA Form 211. For example, the exception for issuers with ADTV value greater than $100,000, total assets greater than $50 million, and shareholder equity greater than $10 million will relieve broker-dealers of the information review requirement for larger, more liquid issuers which are potentially less susceptible to fraud.[684]

Broker-dealers and investors could also incur costs and benefits associated with possible migration in trading activity from certain issuers and markets to others (e.g., between quoted and grey markets). For example, commenters highlighted difficulties that broker-dealers and issuers of such OTC securities may face in resuming a quoted market once the securities have migrated to the grey market.[685] On the other hand, to the extent that the Rule amendments lead to a net

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the Commission does not expect these amendments to have a significant impact on the costs and benefits of the Rule, as discussed below.

[684] The Commission estimates that approximately 180 (two percent) of quoted OTC securities on an average day during calendar year 2019 would be eligible for the ADTV and assets exception.

[685] In particular, commenters have highlighted the costs to issuers associated with providing current disclosures and to broker-dealers associated with complying with the information review requirement to resume quoting. *See, e.g.*, Coral Capital Letter; Tyler Black; Woessner & Associates Letter.

increase in the demand for OTC securities that continue to be quoted, broker-dealers and issuers of these securities may accrue benefits. Some of these costs and benefits to broker-dealers may be passed on to investors in the form of higher or lower transaction costs and account fees. Further, as discussed in more detail below, OTC investors may incur costs associated with a decrease in liquidity and share value as a result of losing piggyback eligibility for OTC securities without current and publicly available information.

The costs and benefits associated with the specific amended Rule provisions are discussed below.

a) Making Paragraph (b) Information Current and Publicly Available

The costs and benefits discussed below pertain to the general requirements for paragraph (b) information to be current and publicly available to publish or submit quotations for, or to maintain a quoted market in, quoted OTC securities. They also pertain to the new public information requirements for the unsolicited quotation exception. The Commission expects that investors would benefit from easier access to paragraph (b) information through public media, such as EDGAR or the website of a qualified IDQS, a registered national securities association, the issuer, or a registered broker-dealer that publishes paragraph (b) information related to quoted OTC securities.

Presently, not all issuers of quoted OTC securities provide current and publicly available financial information.[686] Some of these OTC issuers may choose to provide such information under the amended Rule in order to maintain the liquidity of their securities in the quoted market.

[686] Notably, there are no requirements to make financial disclosures publicly available for OTC securities quoted on the OTC Market OTC Pink: No Information tier. An analysis of quoted OTC securities during the calendar year 2019 has revealed that approximately 30 percent of issuers do not provide current and publicly available financial information. *See supra* Part VI.B.

The Commission further believes that the rule amendments should incentivize issuers to make information current and publicly available to allow broker-dealers to continuously quote their securities. This information could allow investors to better assess the quality of the issuer and help them to avoid lower-return investments, such as those involved in a fraudulent scheme. By enabling investors to compare information contained in promotion campaigns to that in current company information, the new requirement for paragraph (b) information to be publicly available may help investors avoid trading on false information. In general, the ease of accessing information on the Internet should allow investors to migrate toward forming inferences about the value of OTC securities based upon paragraph (b) information and away from inferences based principally upon quoted prices. Investors could also use this information to make better-informed corporate voting decisions to the extent that OTC issuers put matters to a shareholder vote in annual or special meetings.[687] Investors could also benefit from more efficient prices that are less susceptible to manipulation as a result of the trading activity of better-informed investors who acquire this information. The amended Rule provides flexibility with respect to the format of the paragraph (b) information issuers may opt to provide. Certain formats such as machine-readable content might facilitate processing of information by sophisticated or institutional investors and thereby promote arbitrage activity as well as price efficiency in OTC securities. However, issuers may opt to not submit information in this format as the final Rule maintains flexibility with respect to information format.[688] In addition, broker-dealers will be restricted

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[687] The Commission lacks data on the quantity and nature of matters put to a vote at annual or special meetings of issuers of quoted OTC securities not subject to Commission reporting obligations.

[688] In the Proposing Release, recognizing the value that machine-readable information can have to market participants, the Commission solicited commenters' views on whether at a later date the Commission might propose that paragraph (b) information should be published in this format. The Commission did not receive any comments directly supporting or opposing whether paragraph (b) information should be published in this format. One commenter supported requiring issuers to have their latest filings and investor information immediately

from publishing quotations for securities without publicly available paragraph (b) information, which would likely push trading activity in these dark issuers' (i.e., issuers that do not make their information publicly available) securities into the grey market.[689] The lack of a quoted market could curtail the trading activity of retail investors, making such securities less attractive to perpetrators of fraud. Therefore, these new requirements could deter fraudulent activity related to quoted OTC securities. Investors could benefit from decreased exposure to investment losses as a result of diminished frequency of fraudulent activity in the OTC market.

Higher quality issuers (i.e., issuers more likely to have productive investment opportunities) could benefit from increased access to capital to the extent that the change leads to a net increase in demand for higher quality issuers' OTC stocks.[690] Previous academic studies have highlighted the relationship between the breadth and quality of firm disclosures and liquidity in the OTC market.[691] Therefore, investors in these higher quality issuers could benefit

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downloadable from a centralized site or from issuer websites, and noted that the information could be provided in XML or XBRL format. *See* Lake Highlands Comment.

[689] Using data on daily dollar trading volume for quoted OTC securities during the 2019 calendar year, the Commission finds that quoting activity and trading activity are correlated. In particular, the Commission finds that OTC securities with published quotations were 4.9 times more likely to have reported a positive dollar trading volume on a given day in 2019 relative to securities trading on the grey or Expert markets. In addition, if they were traded, OTC securities with published quotations had, on average, 1.98 times greater daily dollar trading volume than securities trading on the grey market. See *supra* note 640 for a description of OTC securities data sources.

[690] The potential increase in access to capital for issuers is based on the likelihood that market changes as a result of the amendments could result in the divestiture of OTC securities more susceptible to fraud and manipulation and increased investment in OTC securities less susceptible to fraud and manipulation. However, to the extent that investment decisions are driven by other factors, such as a personal interest in specific companies, there might be no increase in access to capital for issuers.

[691] *See* John (Xuefeng) Jiang *et al.*, *Private Intermediary Innovation and Market Liquidity: Evidence from the Pink Sheets Market*, 33 Contemp. Acct. Res. 920–48 (2016) (finding that, following the introduction of Pink tiers in OTC Markets Group, each associated with different self-established eligibility requirements pertaining to disclosure, firms with higher levels of disclosure experienced an increase in liquidity, while firms that did not disclose information experienced a decrease in liquidity); *see also* Brüggemann *et al.*, *supra* note 72 (finding that market liquidity and the propensity of a security to experience a crash in returns, both used as proxies for the quality of a security in the analysis, decrease monotonically when moving across OTC tiers from those with high regulatory strictness and disclosure requirements to those with lower requirements); Ryan Davis *et al.*, *Information and*

from greater liquidity and an associated reduction in trading costs. According to studies, these more liquid securities should trade at higher prices based on lower costs associated with their resale.[692]

Conversely, issuers may also incur costs associated with making paragraph (b) information publicly available before broker-dealers can publish or submit quotations for their securities. We focus our discussion below on the costs of providing current and publicly available information for non-transparent catch-all issuers as any issuers that make disclosures pursuant to reporting obligations other than those contained within the amended Rule would incur costs attributable to those obligations and not to Rule 15c2-11. These costs could include preparing and producing paragraph (b) information in document form and ensuring that the paragraph (b) information is publicly available.[693] Some commenters stated that certain OTC security issuers that do not make financial information widely available make the information available to their current shareholders either on a periodic basis or upon request.[694] In addition, certain issuers may prepare financial information to meet state-level public reporting requirements. These issuers would likely face minimal costs associated with the preparation of paragraph (b) information. One commenter stated that because issuers of OTC securities have to

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Liquidity in the Modern Marketplace (Working Paper, Nov. 21, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2873853.

[692] *See* Ang *et al.*, *supra* note 3.

[693] Issuers that presently make disclosures publicly available, either voluntarily or because of a reporting obligation, and have systems in place for the preparation of these disclosures, would not face additional costs as a result of this amendment. An analysis of quoted OTC securities during the calendar year 2019 has revealed that approximately 18 percent of all catch-all issuers provide current and publicly available financial information. This estimate represents a lower bound as it is possible that some catch-all issuers provide current and publicly available information somewhere other than on the OTC Markets Group platform, such as the issuer's website. *See supra* Part VI.B.

[694] *See supra* notes 257 and 258.

prepare financial reports for reasons such as tax reporting, there would not be a burden associated with publishing unaudited financial statements on their websites.[695] Other commenters stated that a qualified IDQS may charge a fee for publication of an OTC issuer's financial information on its website.[696] However, the costs associated with making current information publicly available are mitigated by the fact that these amendments would offer several possible alternatives for releasing paragraph (b) materials, including making this information available on an issuer's website.[697] The availability of multiple acceptable locations will provide issuers or other publishers of paragraph (b) information with flexibility in meeting the public availability requirement. To facilitate investor access to information, the amended Rule requires broker-dealers to make catch-all issuer information available upon the request of a person expressing an interest in a proposed transaction in the issuer's security, such as by providing the requesting person with appropriate instructions regarding how to obtain publicly available information electronically. In this regard, if such information is located on different websites, broker-dealers may provide the website addresses at which investors can find the information that is required to be publicly available. The amended Rule also provides flexibility with respect to the format of the paragraph (b) information issuers may opt to post on these websites. Certain formats such as standard text might reduce direct costs of information production for issuers.

Finally, there may also be indirect costs to OTC issuers of disclosing paragraph (b) information, such as costs of revealing sensitive financial information that might be exploited by

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[695] Michael Hess.

[696] *See, e.g.*, Beacon Redevelopment Letter; Virtu Letter.

[697] Presumably, issuers, investors, qualified IDQSs, the registered national securities association, or broker-dealers would choose the most cost-effective method to disseminate paragraph (b) information.

competitor firms, as discussed by commenters.[698] The Commission recognizes that compliance with this requirement, including with respect to the financial information for an issuer that does not have a statute- or rule-based reporting obligation, such as a catch-all issuer, may reveal confidential financial or business information to competitors. The Commission nevertheless believes that, on balance, requiring current and publicly available information can help to better facilitate informed investment decisions by both existing investors and potential investors in addition to better protecting retail investors from incidents of fraud and manipulation in OTC securities.

Alternatively, OTC issuers, including dark catch-all issuers and delinquent reporting issuers, may elect not to provide paragraph (b) information to the public. The securities of these dark OTC issuers may exit from the quoted market as a result. A number of commenters stated that the absence of published quotes may limit liquidity in OTC securities without current and publicly available information and lead to losses for existing investors in these securities.[699] One commenter argued that this effect may be more pronounced among retail investors because institutional investors may be able to sell stakes in dark companies through block trades.[700] On the other hand, one commenter observed that published quotes for OTC securities without current and publicly available information may not be representative of the underlying value of the security.[701]

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[698] *See, e.g.*, Drinker Letter; Peter Quagliano.

[699] *See supra* notes 207 and 209.

[700] Richard Krejcarek.

[701] *See* Jim Rivest (describing purchasing OTC securities of dark issuers at bargain prices relative to the value).

The Commission acknowledges that OTC investors may incur costs associated with a loss of liquidity and possible associated decrease in share value if OTC issuers elect not to provide current and publicly available paragraph (b) information. While these costs to investors may be significant, the Commission believes that deterring fraud and manipulation in OTC securities justifies the requirement for paragraph (b) information to be current and publicly available to maintain a quoted market in these securities. This loss in share value, if it occurred, could arise from an increase in the costs of resale associated with the OTC stock when migrating to the grey market. The Commission does not believe that the securities of issuers with operations and profitability (or the prospect of future profitability) will become "worthless" as a result of the amendments, as suggested by one commenter.[702] Issuers with operations and profits, even without a quotation for their securities by a broker-dealer, would presumably continue to operate and generate profits for their shareholders; thus, OTC shares will continue to represent a claim on these profits and assets. For newer issuers with prospective future profits, OTC shares would similarly represent a claim on these prospective profits. Therefore, they should continue to have some positive value. The Commission recognizes, however, that the share value may be lower than it would have been for the same financials due to a perceived loss of liquidity when losing the quoted market.

The Commission is unable to reasonably predict the extent to which OTC securities issuers that do not presently provide current and publicly available information will choose to do so, or continue not to, as a result of final amendments.[703] Further, to the extent that certain OTC

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[702] Andersen Letter.

[703] For example, the Commission is unable to quantify the benefits of disclosure to an issuer in terms of enhanced liquidity and access to capital. This benefit net of the costs of disclosure should, in principle, inform whether an issuer elects to provide current and publicly available paragraph (b) information or not.

security issuers may choose to remain dark, the Commission is unable to quantify the potential impact on liquidity and value.[704] Prior academic research and the Commission's own analysis suggests that there is presently limited liquidity and price discovery in the market for OTC securities of dark issuers, even when broker-dealers are frequently publishing quotations for such securities.[705] In addition, the potential costs associated with a loss in liquidity may be partially mitigated by the ability of broker-dealers to publish quotations on behalf of existing shareholders relying on other exceptions (e.g., the unsolicited quotation exception), provided the requirements of the exception are met, as all investors, other than company insiders and issuer affiliates, will continue to have access to the quoted market. Any potential loss of liquidity for certain dark

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[704] Using data available to the Commission, it is impossible to reliably isolate the effect of the presence and characteristics of published quotations from other factors that may affect liquidity and value of a particular OTC security. While the Commission does observe instances in which cessation of published quotations and migration to the grey market for some OTC securities is followed by subsequent drops in price and share volume, a causal relationship is difficult to establish because of other confounding factors contributing to the migration to the grey market (i.e., Commission-ordered trading suspensions, financial distress, negative news releases, etc.).

[705] See *supra* note 64 for a discussion of academic studies examining the relationship between transparency and liquidity in the OTC market.

The Commission estimates that an average (median) quoted OTC security of a dark issuer reported a positive dollar trading volume for 70 (51) days during calendar year 2019, while an average (median) quoted OTC security of an issuer with current and publicly available information reported trading for 100 (71) days during the same period. Further, on an average trading day during 2019, trading in quoted OTC security of dark issuers accounted for approximately one percent of aggregate daily trading volume across all OTC securities. Among OTC securities of catch-all issuers only, trading in dark OTC securities accounted for 12 percent of aggregate daily trading.

In addition, the Commission finds that bid-offer spreads for dark OTC securities are significantly higher than those of OTC securities with current and publicly available information. In particular, during the average trading day during 2019, the average (median) bid-offer spread for a dark OTC security was 63 (50) percent, which was approximately 3 (8) times higher than the bid-offer spread for OTC security with current and publicly available information. Bid-offer spreads are computed as the absolute difference between best closing bid and closing offer prices, divided by the midpoint of the bid and offer prices. See *supra* note 640 for a description of OTC securities data sources.

Lastly, based on data provided to the Commission by OTC Markets Group on the total counts of quote updates for each OTC security for calendar year 2019, the Commission finds that the mean (median) OTC security of a dark issuer saw 70 (6) times fewer quotation updates as compared to an OTC security of an issuer with current and publicly available information. Among OTC securities of catch-all issuers only, the mean (median) number of quotation updates during 2019 was 4 (3) times lower for OTC securities of dark issuers.

companies also may be mitigated to the extent the Commission issues exemptions to permit broker-dealers, subject to certain conditions and in limited circumstances, to continue to publish or submit quotations for dark issuers in reliance on the piggyback exception. Lastly, the amendments do not restrict investors from trading OTC securities without quotations on the grey market, and so investors will continue to be able to trade OTC securities of dark issuers.[706]

Some commenters were concerned that the amendments would encourage issuers to remain dark[707] and make minority shareholders vulnerable to management buyouts at unfair discount prices.[708] The Commission acknowledges that existing shareholders, including minority shareholders, of companies that do not have current and publicly available paragraph (b) information could incur costs if broker-dealers cease publishing quotations for the securities of such companies and, for example, OTC company insiders are able to repurchase shares from outside investors at lower stock prices. However, the Commission believes that such impact would affect a limited number of existing shareholders in the overall market, since the Commission expects a majority of issuers may not engage in such activity. In addition, broker-dealers would not be able to publish a quotation relying on the unsolicited quotation exception on behalf of insiders of dark OTC issuers, possibly limiting insiders' ability to engage in these transactions. Furthermore, the Commission believes this impact is justified by the benefits of

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[706] See *supra* note 647 for a comparison of daily trading volumes between quoted and grey OTC securities. The Commission also finds that while a lower number of grey securities traded on an average trading day during the calendar year 2019 as compared to the number of quoted OTC securities of dark issuers (553 grey securities vs. 965 dark quoted OTC securities), the total daily dollar volume in the grey market was approximately 43 percent higher than the total dollar trading volume of dark OTC securities. Among OTC securities of catch-all issuers only, the total daily dollar volume in the grey market was approximately 47 percent higher than the total dollar trading volume of dark OTC securities.

[707] *See, e.g.*, Anbec Partners Letter; Tim Bergin; Lucas Elliott; Ralf Erz; Braxton Gann; James Gibson; Han Han; William E. Mitchell; Daniel Raider; Michael E. Reiss; Mark Schepers; Dan Schum; Michael Tofias; Raymond Webb.

[708] Caldwell Sutter Capital Comment; Professor Angel Letter.

deterring fraud and manipulation and incentivizing greater issuer transparency, and contributing to more efficient price formation. The requirement for current and publicly available issuer information for a broker-dealer to rely on the piggyback exception to maintain a quoted market could also benefit existing shareholders, including minority shareholders or non-company insiders, due to more efficient pricing of securities that are less susceptible to manipulation.

Lastly, one commenter stated that a lack of quotations may make certain OTC securities more susceptible to manipulation.[709] However, the Commission believes that the lack of a quoted market will be more likely to curtail trading by retail investors, making such securities less attractive to perpetrators of fraud.

The Commission estimates that the cost to a catch-all issuer in connection with preparing and publishing the information required by the amended Rule may be comparable to the cost of completing and filing a Form C-AR under Regulation Crowdfunding.[710] The staff report on Regulation Crowdfunding cites survey data and estimates related costs to issuers to be, at most $12,804.[711] The Commission estimates that 3,008 issuers of quoted OTC securities in 2019 did not provide current and publicly available information subject to the requirements of paragraph

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[709] *See* Brad Christensen.

[710] Costs associated with preparing and publishing the information required by the amended Rule may depend on issuer characteristics (e.g., age, size, state of incorporation, etc.) and catch-all issuers of quoted OTC securities may differ from those subject to Regulation Crowdfunding. The Commission recognizes that the methodology above may underestimate or overestimate the costs of preparing and publishing the information for certain catch-all issuers.

[711] *See* SEC Staff, *Report to the Commission: Regulation Crowdfunding* (June 18, 2019), *available at* https://www.sec.gov/files/regulation-crowdfunding-2019_0.pdf. This report cites survey data and estimates costs to issuers undertaking a crowdfunding offering, including accounting costs of $3289, legal costs of $3297, and certain disclosure costs of $6218. Some of these costs may include costs unrelated to Form C-AR (such as legal review of promotional materials). Therefore, the cost cited above serves as an upper bound for the cost of completing and filing Form C-AR.

(b)(5).[712] These non-transparent OTC issuers could make the specified information current and publicly available pursuant to the amended Rule's requirements for catch-all issuers and become eligible for a quoted market.[713] Therefore, the Commission estimates that the maximum annual monetized cost of producing and updating paragraph (b) information and making it publicly available annually to be $38,514,432 across OTC issuers.[714] This cost may be mitigated by a number of factors, including whether some of the cost associated with ensuring that the paragraph (b) information is publicly available may be borne by broker-dealers intending to quote the security of this issuer.[715] In addition, this estimate likely overstates the costs of preparing information as certain dark OTC issuers currently make financial information available

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[712] See *supra* Part VI.B for an analysis of quoted OTC securities issuers for which there was no public information in 2019.

The number of issuer estimates here represents an upper bound on the number of issuers impacted by this amendment to the Rule for two reasons. First, certain issuers may be making current information publicly available (e.g., via the issuer's website or the website of a state of federal agency), but the issuer's security may still be quoted on the Pink Limited Information or Pink No Information tiers on the OTC Markets Platform. *See supra* note 651. Second, because OTC Markets Group's alternative reporting standard for catch-all issuers requires more frequent updating of financial information than this amendment to the Rule, some of the 1,980 catch-all issuers with OTC securities that are quoted on the Pink Limited Information or Pink No Information tiers may actually meet the amended Rule's requirement for current and publicly available information. In particular, using data from financial statements of quoted OTC securities, the Commission estimates that 222 dark catch-all issuers of quoted OTC securities (approximately seven percent of 3,008 dark issuers) had publicly available financial information dated within 12 months of their OTC securities being quoted. See *supra* note 658 for information on the data used.

[713] Any delinquent issuers that provide information pursuant to reporting obligations other than those contained within the amended Rule would incur costs attributable to those obligations and not to Rule 15c2-11.

[714] $12,804 x 3,008 issuers = $38,514,432. In the Commission's estimate of the maximum total cost to issuers of providing paragraph (b) information publicly, the Commission has assumed that all issuers of quoted OTC securities that do not currently provide information publicly will choose to do so consistent with the rule provisions. In addition, the Commission has assumed that these issuers will update this information annually to maintain eligibility for quotes in their securities to be initiated or submitted within an IDQS. It may be the case that some of these issuers will choose not to provide current and publicly available paragraph (b) information and quoting in their securities will cease. In these cases, costs associated with providing paragraph (b) information for these issuers will be null.

[715] For example, it is unclear the extent to which specific OTC issuers without current and publicly available paragraph (b) information may already be producing financial information internally or even have operations producing income and other accounting items. In these cases, the Commission expects the cost for these issuers would be less than the Commission's estimate.

to their current shareholders either on a periodic basis or upon request. Other OTC issuers on OTC Market's Pink Limited Information and Pink No Information tiers prepare financial information to meet state-level public reporting requirements. Both sets of issuers would likely face minimal costs associated with the preparation of paragraph (b) information.

Broker-dealers will also incur costs related to determining and documenting whether or not OTC issuers have current and publicly available paragraph (b) information. The Commission believes that broker-dealers could set up information systems to assess whether these conditions apply to OTC securities such that there would be a one-time cost plus an ongoing cost for each security. The Commission believes that the hours in all of the following compliance cost estimates will be borne by internal staff at a rate of $70 per hour.[716] Consistent with the PRA section,[717] the Commission estimates that it would take a broker-dealer, IDQS, or national securities association one hour to establish a system to determine whether issuers have current and publicly available paragraph (b) information as well as to create associated documentation, for an aggregate cost of $5,740.[718] Consistent with the PRA section,[719] the Commission also estimates that it would take a broker-dealer, IDQS, or national securities association at most one minute per each OTC issuer to determine and document whether the issuer has current and publicly available paragraph (b) information; and that broker-dealers,

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[716] The $70 per hour figure for a compliance clerk is based on SIFMA's "Office Salaries in the Securities Industry 2013," and has been modified by Commission staff to account for an 1800-hour work year and inflation, and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

[717] *See supra* Part V.C.2. The one hour burden in the PRA section includes the establishment of systems to both determine and document that paragraph (b) information is current and publicly available.

[718] (80 broker-dealers + 1 IDQS + 1 national securities association) x 1 hour x $70 = $5,740. These costs are an upper bound of the total costs on broker-dealers because the actual number of broker-dealers quoting OTC securities may be a subset of the 80 broker-dealers identified by OTC Markets Group.

[719] *See supra* Part V.C.2. The one minute burden in the PRA section includes the time required to both determine and document that paragraph (b) information is current and publicly available.

qualified IDQSs, and registered national securities associations would create such documentation no more frequently than quarterly for issuers with reporting obligations under the federal securities laws, Regulation A or bank reporting obligations, foreign private issuers,[720] and annually for catch-all issuers.[721] Therefore, the total cost per year of this determination and documentation would be $37,773 per year.[722] However, the costs on individual broker-dealers may be substantially mitigated by permitting broker-dealers to rely on publicly available determinations by qualified IDQSs and national securities associations that an issuer has current and publicly available paragraph (b) information.

Broker-dealers may also incur costs or accrue benefits from changes in the liquidity of quoted OTC securities as a result of changes in demand associated with new current and publicly available information within quoted markets. For example, there may be changes in trading volume which alter the number of transactions from which broker-dealers earn fees. As discussed below, there may be migration from the quoted market to the grey market for OTC issuers avoiding these requirements. Therefore, the proportion of rents earned by broker-dealers from the grey market for OTC securities may increase relative to the quoted market. The net

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[720] For purposes of paragraph (b)(3) of the amended Rule, the reporting issuer information considered timely filed and made publicly available would be the issuer's most recent annual report, together with any periodic or current reports filed thereafter by the issuer. Paragraph (b)(4) of the amended Rule provides a similar standard for foreign private issuer information, and calls for the information the issuer has published pursuant to 12g3-2(b) since the first day of the issuer's most recently completed fiscal year. The Commission expects that respondents will preserve records to document compliance with this requirement on a quarterly basis to capture quarterly reporting for these issuers. For purposes of this Economic Analysis, the Commission has adopted a more conservative approach of grouping Reg. A issuers, which have a semi-annual obligation, with issuers with quarterly reporting obligations.

[721] Paragraph (b)(5) of the amended Rule requires that the catch-all issuer information be "current" and publicly available annually, except for certain financial information: a balance sheet (as of a date less than 16 months before the publication or submission of a broker-dealer's quotation) and profit and loss and retained earnings statements (for the 12 months preceding the date of the most recent balance sheet). *See supra* Part II.B.3.

[722] (3081 SEC/Reg. A/Bank Reporting Obligation issuers x 1 minute x 4 responses per year) + (4413 exempt foreign private issuers x 1 minute x 4 responses per year) + (2401 catch-all issuers x 1 minute x 1 response per year)] / 60 x $70 = $37,773.

effect of these changes on the profits of trading intermediaries is unclear. Some of these costs and benefits to broker-dealers may be passed on to investors in the form of higher or lower transaction costs and account fees. The Commission anticipates that costs and benefits would be passed on more readily as competition increases among broker-dealers for OTC transactions.

b) Amendments to Rule 15c2-11 Exceptions

The following amendments to the piggyback exception would serve to limit the circumstances under which the exception would apply relative to the baseline: the requirement for paragraph (b) information to be, depending on the regulatory status of the issuer, filed within 180 calendar days from a specified period, timely filed, or current and publicly available for broker-dealers to continue to rely on the piggyback exception; the requirement that reliance on the piggyback exception be based upon priced quotations with either bid or offer prices; and the elimination of piggyback eligibility for quotations for securities of shell companies that are published or submitted 18 months following the publication or submission of the initial priced quotation for such issuer's security in an IDQS or for securities within 60 calendar days of a trading suspension. Such amendments generally would serve to draw quotation and trading activity away from less liquid and less transparent quoted OTC securities. Hence, these amendments to the piggyback exception are designed to provide narrowly tailored updates to prevent fraud and manipulation, while otherwise maintaining liquidity in OTC market.

Currently, broker-dealers may rely on the piggyback exception to publish or submit quotations for the vast majority of quoted OTC securities, but many issuers of these securities do not provide current and publicly available financial information.[723] The requirement that an

[723] *See supra* note 686. The Commission estimates that during the calendar year 2019, issuers of 3,014 quoted OTC securities for which broker-dealers could rely on the piggyback exception when publishing quotations, did not have current and publicly available information.

issuer's paragraph (b) information be, depending on the regulatory status of the issuer, filed within 180 calendar days from a specified period, timely filed, or current and publicly available, would encourage the production and publication of such information so that broker-dealers could continue to publish quotations in reliance on the piggyback exception. The Commission discusses in detail the expected benefits and costs associated with providing current information publicly for investors, issuers of quoted OTC securities, and broker-dealers.[724] In general, the ease of accessing information on the Internet should allow investors to migrate toward forming inferences about the value of OTC securities based upon paragraph (b) information and away from inferences based principally upon the prices of piggybacked quotes.

Generally, these amendments could benefit investors by drawing their trading activity away from less liquid and less transparent quoted OTC securities that could attract fraudulent activity, thereby potentially deterring fraudulent activity. For example, the inability of broker-dealers to rely on the piggyback exception where there is no current and publicly available information about the issuer could draw trading activity away from these securities. Currently, many publications of quotations for quoted OTC securities associated with completely dark issuers are eligible for broker-dealers to rely on the piggyback exception. Potential fraudsters could incur costs in providing paragraph (b) information to perpetrate fraud in these dark issuers. Alternatively, quotations for OTC securities would not be easily accessible to retail investors if the issuer does not provide current and publicly available information, which could cause fraudsters to have more difficulty in driving up the price for an OTC security. In addition, higher quality issuers in the OTC market could benefit from greater access to capital to the extent that the change leads to a net increase in demand for higher quality OTC stocks and a net decrease in

[724] *See supra* Part V.C.1.a.

demand for less liquid quoted OTC securities that could attract fraudulent activity.[725] However, to the extent that investment decisions are driven by other factors, such as a personal interest in specific companies, there might be no increase in access to capital for certain issuers.

These amendments could also cause broker-dealers to incur additional costs. In particular, broker-dealers may need to comply with the information review requirement as well as file FINRA Forms 211 to resume a quoted market in securities that lose piggyback eligibility as a result of the amendments. The Commission estimates that it will take broker-dealers four hours to complete the information review and file Form 211 for prospectus issuers, Reg. A issuers, and reporting issuers and eight hours to do so for exempt foreign private issuers or catch-all issuers whenever a broker-dealer initiates the publication or submission of a quotation for an OTC security.[726] These costs are mitigated by the fact that information can be readily accessed through the Internet. Therefore, broker-dealers will bear a monetized cost of $280 for prospectus issuers, Reg. A issuers, crowdfunding issuers, and reporting issuers, $560 for exempt foreign private issuers and catch-all issuers whenever a broker-dealer initiates the publication or submission of a quotation in an OTC security.[727] The Commission estimates that 3,489 securities would lose piggyback eligibility as a result of the changes to the piggyback exception.[728] Therefore, the aggregate monetized cost on broker-dealers would be $1,612,240

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[725] *See supra* note 690.

[726] The Commission estimates that it would take one hour for a broker-dealer to complete and file FINRA Form 211. The estimate above represents an average number of hours per security across the set of all securities for which broker-dealers comply with the information review requirement and file a Form 211 to resume a quoted market. The Commission recognizes that broker-dealers may spend more time than the average to comply with the information review requirement for certain securities, such as those that raise multiple red flags.

[727] 4 hours x $70 per hour = $280 for prospectus, Reg. A, and reporting issuers; 8 hours x $70 per hour = $560 for exempt foreign private issuers and for catch-all issuers.

[728] The Commission estimates that during 2019, broker-dealers could publish quotations relying on the piggyback exception for 9,864 quoted OTC securities. The Commission estimates the total number of securities that would lose piggyback eligibility under these amendments by considering the number of securities that were piggyback

assuming that 1,220 securities were from prospectus, Reg. A, crowdfunding, or reporting issuers, 216 were from exempt foreign private issuers, and 2,053 were from catch-all issuers.[729] However, these costs of individual broker-dealers may be mitigated by allowing a qualified IDQS to satisfy the information review requirement under the Rule, as these amendments permit.[730]

Broker-dealers will also incur costs related to determining and documenting whether or not these conditions apply to the issuer (i.e., whether the issuer is a shell company within the Rule definition). The Commission believes that broker-dealers could set up information systems to assess whether these conditions apply to OTC securities such that there would be a one-time cost plus an ongoing cost for each security. Several comments stated that it may be difficult for broker-dealers to determine whether an OTC securities issuer is a shell company.[731] However,

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eligible, but also would meet at least one of the following conditions: (1) the issuer of the quoted OTC security did not provide public information (3,059 securities); (2) the issuer of the quoted OTC security was a shell company and the initial priced quotation for its security was more than 18 months ago (460 securities); (3) the security did not have either a priced bid or offer quotations for four or more consecutive days (264 securities); and (4) the security was piggyback eligible after having been suspended (219 securities).

Of the 3,489 securities that would lose piggyback eligibility under these amendments, 1,220 were securities of prospectus issuers, Reg. A issuers, and reporting issuers, 216 were securities of exempt foreign private issuers, and 2,053 were securities of catch-all issuers.

The estimated number securities that would lose piggyback eligibility (as a result of their issuers' paragraph (b) information not being current and publicly available) represents an upper bound. *See supra* note 651.

[729] 1,220 x $280 + 216 x $560 + 2,053 x $560 = $1,612,240. To the extent that broker-dealers may maintain the ability to rely on the piggyback exception by starting to publish either bid or offer quotations for securities that are presently piggyback eligible with only unpriced quotations, fewer securities may lose piggyback eligibility under these amendments than the estimates the Commission presents. As noted in the PRA section, broker-dealers may also withdraw from quoting in securities such as shell companies and suspended securities. Therefore, the Commission expects the costs for broker-dealers computed here to be an upper bound.

[730] One commenter stated that there is uncertainty around the costs that broker-dealers may incur for the services provided by a qualified IDQS and the extent to which the costs for such services may be passed down to issuers and investors. *See* Virtu Letter. The Commission acknowledges that there may be uncertainty in the costs broker-dealers incur for the services provided by a qualified IDQS as a result of these amendments. These costs are included in the upper bound estimates above, which aggregates the cost of information review for OTC securities losing piggyback eligibility irrespective of whether this review is conducted by a broker-dealer or qualified IDQS.

[731] *See, e.g.*, Coral Capital Letter; OTC Markets Letter 1; STA Letter; Virtu Letter. *See supra* Part II.D.4.

costs associated with determinations of whether conditions of the Rule apply to OTC securities may be mitigated by permitting broker-dealers to rely on publicly available determinations by qualified IDQSs and national securities associations that an exception to the Rule applies. Consistent with the PRA section,[732] the Commission estimates that it would take a broker-dealer, IDQS, or national securities association a total of nine hours to establish a system to determine whether or not the piggyback exception applies to a particular security as well as to create associated documentation, for an aggregate cost of $51,660.[733] Consistent with the PRA section,[734] the Commission estimates that it would take a broker-dealer, IDQS, or national securities association at most one minute per each OTC security per quarter to determine and document whether the issuer is a shell company in order to rely upon the piggyback exception. Therefore, the maximum aggregate ongoing cost of this determination and documentation would be $3,097,400 per year.[735] In addition, the Commission estimates that it would take one second for a broker-dealer, qualified IDQS, or registered national securities association to create a record regarding the frequency of a priced bid or offer quotation when the piggyback exception applies and that each respondent would do this 252 times a year (i.e., each trading day). Therefore, the maximum aggregate ongoing cost of this determination and documentation would

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[732] *See supra* Part V.C.2.b. The nine hour burden in the PRA section includes the establishment of systems to both determine and document that the piggyback exception applies to a particular OTC security. In the PRA section, the documentation of trading suspensions, determination and documentation of shell company status, as well as documentation of the frequency of bid and offer prices are each attributed three hours of this systems cost.

[733] (80 broker-dealers + 1 IDQS + 1 national securities association) x 3 hours x $70 = $17,220. These costs are an upper bound of the total costs on broker-dealers because the actual number of broker-dealers quoting OTC securities may be a subset of the 80 broker-dealers identified by OTC Markets Group.

[734] *See supra* Part V.C.2.b. The one minute burden in the PRA section includes the time required to both determine and document that an OTC issuer is a shell company.

[735] (80 broker-dealers + 1 IDQS + 1 national securities association) x [(3081 SEC/Reg. A/Bank Reporting Obligation issuers x 1 minute x 4 responses per year) + (4413 exempt foreign private issuers x 1 minute x 4 responses per year) + (2401 catch-all issuers x 1 minute x 1 response per year)] x 1/60 hours x $70 = $3,097,400.

be $4,637,576 per year.[736] The Commission believes that a broker-dealer, qualified IDQS, or registered national securities association needs to create records for securities that have been the subject of a trading suspension in order to fulfill the amended requirements of the piggyback exception. In 2019, the Commission issued a trading suspension for 213 securities. Consistent with the PRA section,[737] it is estimated that it would take a broker-dealer, qualified IDQS, or registered national securities association approximately one minute to create a record regarding whether a security has been subject to a trading suspension.[738] Therefore, the maximum aggregate ongoing cost of this determination and documentation would be $20,377 per year.[739]

Alternatively, broker-dealers could withdraw from publishing or submitting quotations for certain OTC securities as a result of the requirements related to paragraph (b) information, including the requirements to review and retain this information, as suggested by commenters.[740] This withdrawal may impose costs on investors by reducing liquidity for OTC securities they might want to purchase or already owned before the withdrawal of liquidity. In addition, such withdrawal might impose costs of raising capital for OTC issuers. Broker-dealers, again, could incur costs and benefits associated with possible migration in trading activity from certain issuers

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[736] (80 broker-dealers + 1 IDQS + 1 national securities association) x (11,542 OTC issuers) x 1/3600 hours x 252 trading days per year x $70 = $4,637,576.

[737] *See supra* Part V.C.2.b.

[738] *See supra* Part V.C.2.b.

[739] (80 broker-dealers + 1 IDQS + 1 registered national securities association) x (213 trading suspensions) x 1/60 hours x $70 = $20,377.

[740] *See, e.g.*, Coral Capital Letter. The Commission is unable to quantify the extent of any such withdrawal by broker-dealers as a result of information review requirements. For example, the Commission lacks data on profits earned from market making activity in OTC stocks which would inform this decision. Furthermore, the Commission is unable to quantify the effect of any such withdrawal on liquidity in the OTC market. For example, the Commission lacks data on the number and identities of broker-dealers are that are publishing quotes for OTC securities in reliance on the piggyback or other exceptions to the Rule. As such, it cannot estimate the degree of activity and concentration in this market by individual broker-dealers with respect to piggybacking quotes. *See supra* Part VI.A.

to others as well as from the quoted to non-quoted market. Some of these costs and benefits to broker-dealers, again, may be passed on to investors.

The amended requirement that reliance on the piggyback exception be conditioned on quotations with at least a bid or offer quotation at a specified price also could impose costs on broker-dealers and issuers of quoted OTC securities by possibly limiting the formation of an active quoted market for OTC securities for which broker-dealers initially publish unpriced quotes. The Commission estimates that, out of 345 quoted OTC securities for which broker-dealers could start relying on the piggyback exception to publish or submit quotations during the calendar year 2019, 34 (10 percent) had unpriced quotes only for the entire first 30-days of being quoted.[741] At the same time, however, if the requirement were to encourage broker-dealers to shift away from publishing unpriced quotations to publishing priced quotations for some quoted OTC securities, the amended requirement may expedite the development of a priced market and facilitate price discovery and liquidity in these securities.

In contrast, eliminating from the piggyback exception the requirement for 12 days of quotations within the previous 30 calendar days has the potential to widen the circumstances under which broker-dealers may rely on the piggyback exception relative to the baseline. This amendment could make publishing quotations and trading easier in less liquid securities. Therefore, this amendment could, in principle, mitigate both the benefits and costs of the amendments described above. However, the Commission expects that eliminating the 12-day publication-of-quotations requirement would have an insignificant effect on the OTC market as it should only impact a small fraction of quoting activity. In particular, of all quoted OTC

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[741] Of the 34 quoted OTC securities that became piggyback eligible based on unpriced quotations, 22 (65 percent) had a published priced quote within the first 60 days after becoming piggyback eligible.

securities in the calendar year 2019, the Commission estimates that only 16 of more than 10,000 securities had fewer than 12 days of published quotations within the 30 previous calendar days, with no more than four business days in succession without a priced quotation.

Eliminating the 30-day requirement before OTC securities become eligible for the piggyback exception can increase price competition between broker-dealers. In particular, all broker-dealers would be able to rely on the piggyback exception to begin quoting an OTC security during the 30-day period after the initial quote under the amended Rule. This increased competition could decrease the cost of bid-offer spreads for OTC investors during this 30-day period. However, this increased competition may deter broker-dealers from conducting the initial information review and filing of FINRA Form 211. Therefore, the net effect on the liquidity of OTC securities and the trading costs of OTC investors is unclear.

These amendments also include changes to the exception for unsolicited customer quotations. In particular, the amendments limit reliance on the unsolicited quotation exception on behalf of company insiders and affiliates of the issuer when paragraph (b) information is not current and publicly available. These amendments could increase costs for broker-dealers because they may need to verify whether paragraph (b) information is current and publicly available. Broker-dealers could also be required to document and record the circumstances involved in an unsolicited customer quotation. Two commenters stated that it may be difficult for broker-dealers to determine whether quotations are submitted on behalf of company insiders or affiliates, especially in cases when market makers receive order flow from retail broker-dealers.[742] However, this cost may be mitigated by the possibility under these amendments that

[742] *See, e.g.*, Canaccord Letter; OTC Markets Letter 3.

the quoting broker-dealer may rely upon a written representation from a customer's broker that such customer is not a company insider.

Consistent with the PRA section,[743] the Commission estimates that it would take a broker-dealer, IDQS, or national securities association at most three hours to establish a system to document and record the circumstances of an unsolicited customer quotation, for an aggregate cost of $17,220.[744] Consistent with the PRA section,[745] the Commission also estimates that it would take a broker-dealer one minute to document and record these circumstances for each customer order arising from a distinct customer and circumstance. There were 5,782,286 quotations published in reliance on the unsolicited quotation exception in 2019 based on OTC Markets Group data. Therefore, it is estimated that annually, broker-dealers would spend at most $6,746,000[746] in the aggregate complying with this requirement. Broker-dealers could withdraw from quoting for unsolicited customer orders as result of these costs, which could impose costs on OTC investors and issuers as discussed previously.

The costs incurred by broker-dealers related to the unsolicited quotation exception could be passed on to OTC investors. For example, OTC investors may be required to provide documentation supporting the fact that they are not a prohibited person within this exception. The magnitude of this potential cost to OTC investors could vary significantly depending on the manner in which the supporting documentation is or is not acquired by broker-dealers. However,

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[743] *See supra* Part V.C.2.a.

[744] (80 broker-dealers + 1 IDQS + 1 national securities association) x 3 hours x $70 = $17,220. These costs are an upper bound of the total costs on broker-dealers because the actual number of broker-dealers quoting OTC securities may be a subset of the 80 broker-dealers identified by OTC Markets Group.

[745] *See supra* Part V.C.2.a.

[746] (5,782,286 quotations x 1 minute) / 60 minutes x $70 = $6,746,000. This estimate reflects an upper bound as not all of these quotations necessarily represent distinct customers under distinct circumstances, such that not all of these quotations would require a separate document and record.

the Commission believes that this cost could be minimal because there are means to provide documentation such as through attestations which would require minimal resources on the part of the investor. In addition, OTC investors seeking to transact using unsolicited orders may incur costs related to reduced liquidity if broker-dealers withdraw from quoting unsolicited customer orders as a result of costs. This reduced liquidity would pertain to certain OTC securities for which the issuer elects not to make paragraph (b) information current and publicly available.

There could also be benefits to OTC investors from the requirement for broker-dealers to obtain and review paragraph (b) information when the unsolicited quotation exception does not apply. For example, the review of paragraph (b) information in order to provide a quotation for an unsolicited customer quotation of a company insider or issuer affiliate could deter fraud by alerting broker-dealers to potential sales by company insiders or issuer affiliates related to fraud. In addition, as discussed above in relation to the new limitations on the piggyback exception, the costs and benefits to investors, issuers and broker-dealers would be qualitatively similar. OTC investors could benefit if quotations and trading activity migrate away from fraudulent investments. Higher quality issuers in the OTC market could also benefit from greater access to capital. Broker-dealers could also incur costs and benefits associated with possible migration in trading activity if unsolicited customer orders move from quoted to non-quoted markets. These costs and benefits could be passed on to OTC investors. Finally, there would be benefits and costs associated with the requirements pertaining to current and publicly available paragraph (b) information, as the unsolicited quotation exception for a company insider or issuer affiliate would be contingent on this information being current and publicly available.

c) New Exceptions to Rule 15c2-11 to Reduce Burdens

The amended Rule introduces three new exceptions to except publications of quotations for certain OTC securities from the provisions of Rule 15c2-11, primarily the requirement for broker-dealers to obtain and review paragraph (b) information. The first of the three new exceptions would apply to securities with (1) a $100,000 ADTV value and where (2) the issuer of such security has $50 million total assets value and $10 million shareholders' equity on the issuer's publicly available audited balance sheet issued within six months after the end of the most recent fiscal year. This exception would apply only to securities for which paragraph (b) information is current and publicly available. This exception is meant to target more visible quoted OTC securities for which current and reliable information about the issuer is publicly available to investors, specifically for larger issuers, and for more liquid securities. Larger companies with greater trading activity may be less vulnerable to fraud for a number of reasons. For example, there may be a greater likelihood of arbitrage or information-based trading with higher trading activity, which can drive prices toward fundamental values. Larger issuers may also attract this type of trading activity through their visibility. In addition, companies with higher shareholder equity may be more expensive to acquire, making them less vulnerable to being purchased for the purposes of perpetrating a fraudulent scheme. The analysis in the baseline revealed no issuers that had financial information publicly available to investors and that had been the subject of Commission-ordered trading suspensions or assigned a "caveat emptor" designation by OTC Markets Group in calendar year 2019 would have met both the ADTV and assets test prongs of the ADTV and asset test exception.[747] Therefore, the

[747] The Commission finds that in 2019, seven suspended securities and nine "caveat emptor" securities had an ADTV value in excess of $100,000. However, issuers of these securities would not have satisfied the thresholds for assets and shareholder equity required to qualify for the exemption under these amendments. Similarly, three issuers of suspended securities and three issuers of securities with the "caveat emptor" designation that would have met the assets and the shareholder thresholds but would not have had sufficient trading volume to meet the liquidity threshold.

Commission expects that many other quoted OTC securities that would qualify for these exceptions would be less susceptible to misinformation campaigns and share price run-ups as a result of buying pressure.

The main economic effect of the ADTV and assets test exception should be to relieve broker-dealers from the information review requirement and filing a FINRA Form 211 to publish quotations in a quotation medium. As before, the Commission estimates that broker-dealers will incur relief from a monetized cost of $280 for prospectus issuers, Reg. A issuers, crowdfunding, and reporting issuers, $560 for exempt foreign private and catch-all issuers whenever a broker-dealer publishes or submits a quotation for issuers satisfying these requirements. Consistent with the PRA section,[748] the Commission estimates that two reporting issuers and four exempt foreign private or catch-all issuers per year would satisfy these requirement so that the total cost savings would be $2,800.[749] Broker-dealers would also need to incur the costs of determining and creating documentation supporting the broker-dealer's reliance on the ADTV and asset test.

Because delinquent filings may be the reason for the trading suspension, the Commission is aware that the Commission's analysis using data on total assets and shareholder equity of issuers with suspended OTC securities may rely on information which is outdated and no longer representative of issuer fundamentals.

[748] *See supra* Part V.C.2.c.

[749] (2 reporting issuers x $280) + (4 foreign private or catch-all issuers x $560) = $2,800.

The Commission estimates that approximately 180 (two percent) of quoted OTC securities on an average day during calendar year 2019 would be eligible for the ADTV and assets exception. Of these securities, approximately 35 percent were of reporting issuers, 63 percent were of exempt foreign private issuers and the remaining two percent were of catch-all issuers. Applying these proportions to the 384 OTC securities for which broker-dealers were required to conduct an information review for the initiation or the resumption of quotations, yields securities of two reporting issuers and four exempt foreign private or catch-all issuers.

There could be additional relief as a result of the ADTV and assets exception for broker-dealers quoting securities that end up losing piggyback eligibility under the paragraph (f)(3) exception. The Commission estimates that out of the 3,489 securities that would lose piggyback eligibility under these amendments five securities of prospectus issuers, Reg. A issuers, crowdfunding, and reporting issuers and one security of an exempt foreign private issuer would have satisfied the ADTV value and assets thresholds. The ability of broker-dealers to rely on the paragraph (f)(5) exception for securities for which they could no longer rely on the paragraph (f)(3) exception could lead to an additional relief of five x $240 + 1 x $480 = $1,680.

Consistent with the PRA section,[750] the Commission estimates that it would take one minute to create documentation supporting the broker-dealer's reliance on the asset test prong of the exception and that broker-dealers would do this at most once annually per issuer.[751] In addition, the Commission estimates that it would take one minute for a broker-dealer, qualified IDQS, or registered national securities association to preserve documents and information that demonstrate that the requirements of the ADTV test have been met and that each respondent would do this 252 times a year (i.e., each trading day).[752] Therefore, the total cost of determination and documentation related to the ADTV and asset test would be $4,356,660 each year.[753] Broker-dealers would also need to incur costs to establish systems to verify and document that OTC issuers satisfy these ADTV and size thresholds. Consistent with the PRA section,[754] the Commission estimates that it would take a broker-dealer, IDQS, or national securities association three hours to establish a system to determine whether or not the ADTV and assets test exception applies to a particular security as well as to create associated documentation, for an aggregate cost of $17,220.[755]

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[750] *See supra* Part V.C.2.c.

[751] The one minute burden in the PRA section for the ADTV prong of the exception includes the time required to both determine and document that the threshold applies to a particular OTC issuer.

[752] *See supra* Part V.C.2.c. The one minute burden in the PRA section for the asset prong of the exception includes the time required to both determine and document that the threshold applies to a particular OTC issuer.

[753] (252 days x 180 securities x 1 minute) / 60 minutes x $70 + (180 securities x 1 minute) / 60 minutes x $70 = $53,130. (80 broker-dealers + 1 IDQS + 1 national securities association) x $53,130 = $4,356,660. The Commission estimates that approximately 180 (two percent) of quoted OTC securities on an average day during calendar year 2019 would be eligible for the ADTV and assets exception.

[754] *See supra* Part V.C.2.c. The three hour burden in the PRA section includes the establishment of systems to both determine and document that the ADTV and assets test applies to a particular OTC security.

[755] (80 broker-dealers + 1 IDQS + 1 national securities association) x 3 hours x $70 = $17,220. These costs are an upper bound of the total costs on broker-dealers because the actual number of broker-dealers quoting OTC securities may be a subset of the 80 broker-dealers identified by OTC Markets Group.

Some of these benefits and costs may be passed on to OTC investors. Certain issuers or securities that would meet the Rule's ADTV and asset test exception but that currently trade in the grey market may benefit from a broker-dealer establishing a quoted market without incurring costs associated with complying with the Rule's provisions. This migration may result in a benefit to investors to the extent that it may establish a new quoted market that facilitates price discovery and liquidity for higher quality securities previously traded in the grey market.

The second of the three new exceptions would apply to quotations following a registered or Regulation A offering, where the broker-dealer was named as an underwriter in the registration statement or offering circular and publishes or submits quotations for the same class of security in an IDQS within certain specified time frames. This exception is targeted towards those OTC securities that were recently offered in a transaction in which a regulated entity may have conducted a due diligence review. Because of the liability attached to underwriting activity, an underwriter typically conducts a due diligence review to mitigate potential liability associated with underwriting an offering of securities. Depending on its breadth and quality, this review may permit an underwriter to assert a defense to liability under Section 11 or Section 12(a)(2) of the Securities Act. As a result, underwriters of registered and Regulation A offerings are incentivized to confirm that the information provided to investors in the prospectus for a registered offering and offering circular for a Regulation A offering is materially accurate and obtained from a reliable source. Thus, excepting publications or submissions of quotations by underwriters from the Rule's provisions is expected to reduce the burden of complying with the Rule for such broker-dealers without sacrificing investor protection. The Commission does not currently have data that allow it to estimate the propensity with which broker-dealers are

underwriting offerings for the same securities for which they are publishing quotations and thus quantify the effect of this exception on broker-dealers.

In addition, the Commission is adopting an exception for publications or submissions of quotations respecting securities where a qualified IDQS complies with the Rule's provisions. Broker-dealers could rely on a publicly available determination by a qualified IDQS that paragraph (b) information is current and publicly available for a given security, as well as whether a broker-dealer may rely on certain exceptions to the Rule. This exception is expected to reduce the burden on some broker-dealers with respect to publishing or submitting quotations for certain OTC securities. In particular, the Commission expects the main economic effect of this exception to be mitigating costs broker-dealers are expected to incur associated with determining certain characteristics about an issuer (e.g., whether the security satisfies the criteria for the ADTV and asset test exception).

Lastly, the Commission is also adopting an exception for publications or submissions of quotations by broker-dealers that rely on publicly available determinations by a qualified IDQS or a registered national securities association that paragraph (b) information is current and publicly available, as well as whether a broker-dealer may rely on certain exceptions to the Rule. The Commission expects the main economic effect of this exception to be mitigating costs broker-dealers are expected to incur associated with determining certain characteristics about an issuer (e.g., whether the issuer is a shell company within the definition, or whether the security jointly satisfies the ADTV and assets tests). The quantified costs above for these determinations provide an upper bound for aggregate costs irrespective of whether they are made by a broker-dealer, qualified IDQS, or registered National Securities Association.

Under the amended Rule, a qualified IDQS or registered national securities association must also establish, maintain, and enforce reasonably designed written policies and procedures to make certain publicly available determinations.[756] Consistent with the PRA section,[757] the Commission estimates that it would take one qualified IDQS and one registered national securities association subject to the amended Rule approximately 9 hours each to initially prepare these written policies and procedures, and 5 hours each on an ongoing annual basis to review and update policies and procedures, resulting in an aggregate cost of $1260 initially[758] and $700 annually[759] thereafter.

2. Efficiency, Competition, and Capital Formation

In this section, the Commission discusses the impact that these amendments to Rule 15c2-11 may have on efficiency, competition, and capital formation. As discussed above, these amendments generally would increase transparency by requiring public availability of paragraph (b) information that is current to enable broker-dealers to publish or submit quotations for OTC securities. As a result, these amendments may cause capital to migrate from opaque to more transparent companies. A transfer of capital could occur as a result of OTC issuers without current and publicly available information either exiting the OTC market altogether because broker-dealers could no longer publish quotations for the securities of such issuer or migrating from the quoted OTC market to the grey market. Less liquid OTC securities could also migrate away from the quoted OTC market as a result of these restrictions on the piggyback exception

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[756] Amended Rule 15c2-11(a)(3).

[757] *See supra* Part V.C.2.f.

[758] (1 IDQS + 1 national securities association) x 9 hours x $70 = $1260.

[759] (1 IDQS + 1 national securities association) x 5 hours x $70 = $700.

pertaining to (1) shell companies, (2) recently suspended securities, and (3) securities without a sufficient prior history of either bid or offer prices. One academic study finds that valuations decrease when firms migrate from more liquid markets to less liquid markets, possibly as a result of decreased access to capital.[760] Therefore, investors may reallocate capital away from OTC issuers of these less liquid securities as these issuers exit the quoted OTC market. The loss of a quoted market and the information embedded in prices may affect an issuer's ability to raise capital through stock issuances or through other channels of finance, such as debt. These amendments could decrease investors' exposure to fraudulent activity involving non-transparent securities. Capital formation could improve as investors' funds are diverted away from fraudulent OTC securities, which would migrate away from the quoted OTC market, and investors move toward the investments that remain.

In addition, the transparency of the market for quoted OTC securities should generally improve, particularly for previously dark issuers where paragraph (b) information is made current and publicly available for broker-dealers to continue to publish quotations. Capital formation could improve as investors allocate funds toward more productive investments based on enhanced availability of paragraph (b) information in the quoted market for OTC securities. In particular, investors may be able to better discern the value of an OTC security from the financial and qualitative data contained in paragraph (b) information. As a result of these effects, these amendments could generally enhance the efficiency of capital allocation, i.e., the degree to which funds are diverted away from low value investments and toward high value investments. Previous academic studies have documented a relationship between greater quality of a firm's

[760] *See* Angel *et al.*, *supra* note 243.

disclosures and a decreased cost of capital for the firm.[761] Other studies find a relationship between increased quality and frequency of accounting disclosures and the productivity of corporate investment.[762] As discussed previously, certain OTC issuers may withdraw from quoted markets as a result of the amended requirements pertaining to current and publicly available paragraph (b) information and, as a result, lose access to capital. Indeed, some commenters were concerned that these information requirements would encourage issuers to remain dark and that access to capital would diminish for these firms as a result.[763] The Commission acknowledges that issuers could opt to remain dark for various reasons including the cost of providing current and publicly available information or the strategic value of withholding information from competitor firms. The resulting migration to the grey market could, in principle, adversely impact capital formation for these firms. However, issuers with productive investment opportunities should be more likely to elect to provide current and publicly available paragraph (b) information as they would realize more value from access to capital by providing this information. Therefore, remaining non-transparent issuers may be less likely to have productive investment opportunities than those that opt to provide current and publicly available information.

The efficiency of prices (i.e., the degree to which prices reflect the fundamental value of the security) could also improve in the OTC market as a result of greater transparency. In

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[761] *See supra* note 693; Luzi Hail & Christian Leuz, *International Differences in the Cost of Equity Capital: Do Legal Institutions and Securities Regulation Matter?*, 44 J. Acct. Res. 485–531 (2006) (finding that stock markets with greater disclosure requirements have lower costs of capital in cross-country comparisons).

[762] *See, e.g.*, Sugata Roychowdhury *et al.*, *The Effects of Financial Reporting and Disclosure on Corporate Investment: A Review*, 68 J. Acct. & Econ. 1–27 (2019), *available at* https://www.sciencedirect.com/science/article/pii/S0165410119300412.

[763] Paul Lucot Letter; Michael Tofias; Anbec Partners; Michael A. Zgayb; Laura Coffman; Caldwell Sutter Capital; Coral Capital Comment.

particular, prices could become less susceptible to manipulation as a result of the trading activity of informed investors who would have access to paragraph (b) information. These investors could buy underpriced securities and sell overpriced securities, pushing mispriced securities toward fundamental values.

The heightened transparency that would arise from these amendments could increase competition among both broker-dealers and issuers of quoted OTC securities. For example, broker-dealers could access paragraph (b) information at a low cost and establish more competitive prices. Before these amendments, broker-dealers could have had differential access to paragraph (b) information in the quoted OTC market and potentially benefited from non-competitive pricing as a result. As mentioned previously, some broker-dealers may withdraw from quoting certain OTC securities (e.g., those of shell companies that are published or submitted 18 months following the publication or submission of the initial priced quotation for such issuer's security in an IDQS) as a result of the costs of initiating and resuming quotations associated with these amendments. As a result, there may be diminished price competition in these types of securities.

Eliminating the 30-day requirement before OTC securities become eligible for the piggyback exception can increase price competition between broker-dealers. In particular, all broker-dealers can begin quoting an OTC security during the 30-day period after the initial quote based upon the piggyback exception under the amended Rule. However, this increased competition may deter broker-dealers from conducting the initial information review and filing of FINRA Form 211. Fewer OTC securities may remain in the grey market where there may be diminished price competition relative to the quoted market.

Issuers of quoted OTC securities may also need to price seasoned equity offerings more competitively because investors would have improved access to information and might be able to more easily compare the financials of OTC issuers when allocating their investment dollars. This information could again enable OTC investors to divert funds more easily from higher to lower cost issues. As a result, OTC issuers would have less ability to price their issues high relative to the fundamental value of the securities being offered.

D. Reasonable Alternatives

In this section, reasonable alternatives to these amendments to Rule 15c2-11 are discussed.

1. Eliminating the Piggyback Exception

The 1999 Reproposing Release proposed to eliminate the piggyback exception from Rule 15c2-11. This amendment would have required all broker-dealers to complete the information review requirement and file FINRA Form 211 before publishing or submitting a quotation in a quotation medium. One commenter also suggested this alternative.[764] Relative to the baseline (i.e., the existing provisions of Rule 15c2-11), this alternative would have increased the costs of broker-dealers that complied with the Rule's review, document collection, and recordkeeping provisions before publishing or submitting a quotation for an OTC security. These costs could be passed on to OTC investors. Alternatively, some broker-dealers could withdraw from publishing quotations in the OTC market as a result of the information review requirement, which could lead to the disappearance of a quoted market for some OTC securities and a migration of these securities to the grey market. Both possible effects could benefit investors by imposing costs on potential fraudsters in the OTC market.

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[764] Better Markets Letter.

First, review of paragraph (b) information could help broker-dealers increase price efficiency, while deterring fraudsters. Second, broker-dealers' withdrawal from publishing quotations for OTC securities could benefit investors by inhibiting fraudulent and manipulative schemes. Higher quality OTC issuers could also benefit from increased access to capital.

However, broker-dealers might also withdraw from publishing quotations for securities of higher quality issuers at the same time. Therefore, eliminating the piggyback exception could increase capital raising costs for OTC issuers. This withdrawal may also impose costs on investors by reducing the liquidity of OTC securities. The net effect of this alternative on OTC investors and issuers is unclear.

The Commission believes that the amended Rule more appropriately meets the Commission's policy goals because the alternative places the additional burdens upon broker-dealers and OTC issuers relative to these amendments. In particular, broker-dealers would incur additional costs associated with review of paragraph (b) information and filing FINRA Form 211 for all OTC securities they wish to quote. In addition, this alternative could raise the costs for OTC issuers and investors relative to these amendments.

2. Maintaining the Piggyback Exception for the Securities of Non-Transparent Issuers

A number of commenters suggested that the amended Rule include a greater set of OTC securities within the piggyback exception than the amended Rule permits. For example, commenters raised concerns about potential negative impacts on persons who are invested in OTC securities of well-established, non-reporting issuers that do not make their information current and publicly available.[765] Therefore, one alternative to the amended Rule would be to

[765] *See, e.g.*, Don C. Whitaker; Jim Rivest; Lawrence Goldstein.

maintain piggyback eligibility for well-established non-disclosing issuers, which could include non-penny stocks or existing OTC securities vis-à-vis a grandfather exception. Some commenters supported grandfathering presently quoted OTC securities without current and publicly available information.[766]

Eliminating transparency requirements related to the piggyback exception for certain OTC securities may cause more OTC issuers to remain non-transparent relative to the amended Rule. These additional issuers would incur lower costs of providing current and publicly available paragraph (b) information as a result. In addition, OTC investors may incur costs from less informed investment and voting decisions as well as less efficient pricing.

Such an alternative would increase the number of OTC securities included within the piggyback exception relative to the amended Rule. Consequently, this alternative would be anticipated to decrease broker-dealer costs related to information review and filing FINRA Form 211 relative to the amended Rule. Some of these costs savings could be passed on to OTC investors. Fewer broker-dealers may withdraw from quoting OTC securities, which could increase liquidity for OTC investors and access to capital for OTC issuers. This alternative may also increase investors' exposure to fraud and manipulation in non-transparent securities or that may be the targeted for these activities. Indeed, risk of fraud and manipulation may be more pronounced in OTC securities without current and publicly available information, as discussed previously.[767]

This alternative could also diminish possible costs associated with the ability of OTC firm insiders to manipulate the stock's price downward when seeking to repurchase shares by

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[766] *See, e.g.*, Alluvial Letter; Anbec Partners Letter; Ariel Ozick; Michael Tofias; Mitchell Partners Letter 3.

[767] *See supra* Part VI.B.2.c.

keeping their firm dark and causing migration to the grey market. However, the amended Rule provides a grace period of up to 15 calendar days for the piggyback exception to continue once a qualified IDQS or registered national securities association makes a publicly available determination that the requisite information is no longer current and/or publicly available. This grace period should allow existing investors in an OTC issuer to exit positions before such a potential manipulation could occur.

3. Eliminating or Maintaining the Piggyback Exception for Shell Companies

The proposed Rule presented an alternative to these amendments whereby the piggyback exception would be eliminated entirely for shell companies. Therefore, one possible alternative to the amended Rule would be to eliminate the piggyback exception for shell companies or maintain it under a stricter set of conditions (e.g., permitting its use for less than 18 months from the initial priced quotation in an IDQS). Alternatively, some commenters suggested that the piggyback exception should include shell companies since they can be used for non-fraudulent purposes.[768] Therefore, an additional alternative to the amended Rule would be to maintain the piggyback exception under a looser set of conditions (e.g., permitting its use for more than 18 months from the initial priced quotation in an IDQS).

Relative to these amendments, the first alternative of maintaining the piggyback exception for shell companies under a stricter set of conditions could increase the costs of broker-dealers that comply with the Rule's review, document collection, and recordkeeping provisions before publishing or submitting a quotation for an OTC security. These costs could be passed on to OTC investors. Alternatively, some broker-dealers could withdraw from publishing quotations for shell companies under these conditions in the OTC market as a result

[768] Philippe Goodwill Letter; Tom Amenda; Coral Capital Letter.

of the information review requirement, which could lead to the disappearance of a quoted market for their securities and their migration to the grey market. Both possible effects could benefit investors by imposing costs on potential fraudsters in the OTC market.

First, review of paragraph (b) information could help broker-dealers increase price efficiency, while deterring fraudsters. Second, broker-dealers' withdrawal from publishing quotations for OTC securities could benefit investors by inhibiting fraudulent and manipulative schemes. As discussed previously, pump-and-dump schemes are often targeted toward shell companies.[769] Higher quality OTC issuers could also benefit from increased access to capital.

However, broker-dealers might withdraw from publishing quotations for securities of shell companies seeking to execute a reverse merger with an operating company seeking capital on the public markets. Therefore, eliminating the piggyback exception could increase capital raising costs for issuers, although it may benefit investors by limiting the potential for fraud arising from shell companies in the context of reverse mergers.[770] This withdrawal may also impose costs on investors by reducing the liquidity of OTC securities of shell companies. The net effect of this alternative on OTC investors and issuers is unclear.

The second alternative of maintaining the piggyback exception for shell companies under a looser set of conditions could have the opposite effects listed above relative to the amended Rule. In particular, broker-dealers could benefit from diminished costs associated with information review and filing FINRA Form 211. Fewer broker-dealers may withdraw from quoting the OTC securities of shell companies and maintain liquidity in these securities as a result. Investors and issuers may benefit as result relative to these amendments. However,

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[769] *See supra* Part VI.B.2.c.

[770] *See supra* note 345 and accompanying text.

investors may incur costs from additional fraud utilizing shell companies as a result of looser restrictions on the piggyback exception.

As discussed previously, the Commission believes that the amended Rule appropriately balances the promotion of investor protection and the facilitation of capital formation by allowing broker-dealers to maintain a quoted market for the securities of shell company issuers, which could become public companies as a result of engaging in a reverse merger, but providing this piggyback exception for a limited period of 18 months.

4. Alternative Thresholds for Exceptions

The 1999 Reproposing Release proposed to except publications of quotations from the provisions of Rule 15c2-11 for OTC securities with at least: (1) $100,000 ADTV value, (2) $50 million total assets value and $10 million shareholders' equity on the issuer's audited balance sheet or (3) $50 bid price. These exceptions were less restrictive than the ones in the current amendments as the exception would apply if an OTC security could conform to only one of these three conditions. Therefore, one possible alternative would be to establish thresholds which conform to these conditions from the 1999 Reproposing Release.

Relative to the baseline, the main economic effect of this alternative would be to relieve broker-dealers from complying with the Rule's provisions and filing FINRA Form 211 to publish quotations in a quotation medium. Some of these benefits may be passed on to OTC investors. Certain issuers or securities that would qualify for these exceptions but currently trade in the grey market may benefit from a broker-dealer establishing a quoted market without incurring costs associated with complying with the Rule's provisions. This migration may result in a benefit to investors to the extent that it may establish a new quoted market that facilitates price discovery and liquidity for quality securities previously trading in the grey market.

Relative to these amendments, however, this alternative may be more likely to except securities that may be targeted for fraudulent activity from the Rule's review and document collection provisions. For example, there were seven suspended OTC securities in 2019 with ADTV value in excess of $100,000 and three issuers of suspended OTC securities that exceeded the thresholds for $50 million in total assets and $10 million in shareholders' equity. Therefore, though trading suspensions are not necessarily indicative of fraud, investors may face greater exposure to fraud and manipulation under this alternative. In addition, companies may be able to circumvent thresholds based on stock price. For example, an OTC issuer could, in principle, conduct reverse share splits in order to achieve a share price that exceeds a given threshold. As a result, the Commission believes the amended Rule is better than the alternative. However, investors in higher quality OTC issuers could benefit in that a greater number would qualify for the quoted market relative to these amendments. In addition, broker-dealers would benefit from even greater relief from the Rule's provisions and from filing FINRA Form 211.

The proposed Rule provided an exception from the information review requirement for OTC securities with at least: (1) $100,000 ADTV value and (2) $50 million total assets value and $10 million unaffiliated shareholders' equity on the issuer's audited balance sheet. These previously proposed thresholds would potentially compel broker-dealers to conduct the specified information review for more OTC securities relative to the amended Rule as issuers with more than $10 million shareholders' equity (but less than $10 million unaffiliated equity) could be included in the requirement. As a result, the previous proposal would potentially increase broker-dealers' costs associated with information review, filing of FINRA Form 211, and their possible withdrawal from quoting activity relative to the amended Rule. These additional costs could be passed on to OTC investors. In addition, OTC issuers could incur additional costs

associated with raising capital, and OTC investors could incur costs associated with diminished liquidity.

However, OTC investors may benefit from decreased exposure to fraud and manipulation relative to the amended Rule. In particular, the amended Rule may exempt OTC securities with small public float but total shareholder equity exceeding $10 million. Such securities may be prone to manipulation if they are controlled by insiders complicit with a fraudulent scheme. Nonetheless, the Commission believes that the thresholds of the amended Rule will still confine the exception to OTC securities not prone to fraudulent or manipulative activity. In particular, the Commission has found that zero issuers in 2019 that simultaneously met the $50 million total assets, $10 million shareholders' equity, and $100,000 ADTV value thresholds were subject to trading suspensions or caveat emptor status.

As pointed out by commenters, it can be difficult to accurately determine unaffiliated shareholder ownership.[771] As a result, broker-dealers could bear costs associated with this determination relative to the amended Rule. Alternatively, broker-dealers may forgo such a determination, in which case they may instead assess the amount of an issuer's total shareholder equity. In this case, the costs and benefits associated with the thresholds of the proposed Rule would be equivalent to those of the amended Rule.

One commenter also recommended replacing the previously proposed threshold for shareholder equity with a threshold of $150 million market capitalization. Similar to the amended Rule, this alternative would decrease broker-dealers' costs of complying with the Rule's provisions and filing FINRA Form 211 to publish quotations in a quotation medium relative to the baseline. Some of these benefits may be passed on to OTC investors. Certain

[771] OTC Markets Group Letter 2; SIFMA Letter; Professor Angel Letter.

issuers or securities that would qualify for these exceptions but currently trade in the grey market may benefit from a broker-dealer establishing a quoted market without incurring costs associated with complying with the Rule's provisions. This migration may result in a benefit to investors to the extent that it may establish a new quoted market that facilitates price discovery and liquidity for quality securities previously trading in the grey market.

Relative to the amended Rule, this alternative could possibly allow for more issuers that could be vulnerable to pump-and-dump schemes to be admitted within the exception, thus increasing investor exposure to fraud. Unlike shareholders' equity, which is based on book value, market capitalization can fluctuate with market share price and can be susceptible to volatility, especially in a fraudulent or manipulative scheme, such as a pump-and-dump scheme. Indeed, the Commission estimates that that approximately three percent of issuers with OTC securities that were the subject of Commission-ordered trading suspensions over the calendar year 2019 had a market capitalization in excess of $150 million.

5. Quotations with Both Bid and Offer Prices for the Piggyback Exception

The proposed Rule conditioned the piggyback exception on both bid and offer prices for the prior 30 calendar days with no gap in quoting of more than four days. After considering feedback from commenters,[772] the amended Rule instead conditions the piggyback exception on quotations with either bid or offer quotation at a specified price with no more than four consecutive business days in succession without a quotation. One alternative would be to condition the exception on quotations with both a bid and offer price. Relative to the amended Rule, this alternative would allow fewer securities to become eligible for the piggyback exception. As such, broker-dealers would incur higher costs associated with the Rule's review,

[772] *See supra* Part II.D.2.

document collection, and record-keeping provisions (as well as filing with FINRA a Form 211) before publishing or submitting a quotation for an OTC security relative to the amended Rule. The Commission has estimated that 629 OTC securities for which broker-dealers could publish quotations relying on the piggyback exception during 2019 had quotations with either a bid or offer price—but not both—for four days one or more times in a year. Of these securities, 308 were of prospectus, Reg. A, crowdfunding, and reporting issuers, 81 were of exempt foreign private issuers, and 240 were of catch-all issuers. Therefore, the Commission estimates that the additional dollar cost to broker-dealers from this alternative would be $266,000.[773]

OTC investors in higher quality issuers could suffer from lower liquidity if this cost results in fewer securities remaining in the quoted market. However, this alternative may also cause less liquid securities to lose eligibility for piggyback quotations relative to the amended Rule. As a result, OTC investors may benefit from this alternative if these securities are more prone to fraud than securities with both bid and offer prices.

Nonetheless, the Commission believes that the amended Rule more appropriately meets the Commission's policy goals of reducing burdens on broker-dealers while retaining OTC securities in the quoted markets with a legitimate, independent market interest. One commenter stated that a priced bid is a valid price discovery mechanism and that existing self-regulatory organization rules require broker-dealers to trade at their publicly quoted prices (i.e., FINRA Rule 5220).[774] This commenter also stated that the development of liquidity begins with, and frequently depends on, the ability of a broker-dealer to publish a one-sided priced bid.[775]

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[773] (308 x $280) + (81 x $560) + (240 x $560) = $266,000.

[774] OTC Markets Group Letter 2.

[775] *Id.*

Eliminating the 30-day requirement before OTC securities can become eligible for the piggyback exception can increase price competition between broker-dealers. In particular, broker-dealers can begin quoting in these securities during the initial 30-day period based on the piggyback exception under the amended Rule. This increased competition could decrease the cost of bid-offer spreads for OTC investors during this 30-day period. However, this increased competition may deter broker-dealers from conducting the initial information review and filing of FINRA Form 211. Therefore, the net effect on the liquidity of OTC securities and the trading costs of OTC investors is unclear.

6. Alternative Required Frequency of Current and Publicly Available Information

The Commission has sought to align the amended Rule with existing regulatory requirements for publicly available information, as well as with private market solutions that have developed since the Commission last proposed to amend the Rule. Notwithstanding this, an alternative to these amendments would be to define paragraph (b) information as "current" for issuers based on a different lengths of time (e.g., six months instead of twelve months for catch-all issuers) for the purposes of the initiation and resumption of quotes or reliance upon the piggyback exception. For example, the proposed Rule would have conditioned broker-dealer quotations on the paragraph (b) information of catch-all issuers being publicly available and current within six months of the broker-dealer's quotation (unless the unsolicited customer exception applied).

Increasing the frequency of publicly available information required to qualify as "current" relative to the amended Rule could benefit investors by improving the relevance of information used for investment and voting decisions relative to the information available under the existing Rule. Investors could also benefit from decreased exposure to loss from fraud as

additional current and publicly available information that is more frequently provided could push trading activity in less transparent securities out of the OTC market or to the grey market. Higher quality OTC issuers could benefit from increased access to capital to the extent that more frequent information requirements lead to a net increase in demand for higher quality OTC stocks.

Although the amended Rule does not require any issuer to make paragraph (b) information current and publicly available, a broker-dealer could not publish a quotation in the absence of such information. OTC issuers would face increased costs of providing current and publicly available information if the amended Rule required such information to be provided more frequently. In particular, OTC issuers with no reporting obligations or minimal reporting obligations have to make current information publicly available more frequently under such an alternative. In order for a broker-dealer to continue to publish quotations, some OTC issuers might find they have to prepare current information and make it publicly available more frequently than their current annual or semi-annual reporting obligations as an issuer under the federal securities laws, such as reporting requirements under the Securities Act or exchange listing requirements under the Exchange Act. OTC issuers may find that they must prepare current information and make it available more often than they are required to do so under state law, as well. Broker-dealers, qualified IDQSs, and national securities associations may also be required to review paragraph (b) information more frequently under this alternative in order to initially publish or submit, or maintain, quotes in the OTC market. Some OTC issuers may opt not to provide information with a greater required frequency relative to the amended Rule. Similarly, more broker-dealers may withdraw from quoted OTC markets as a result of more frequent information review. Both effects could adversely affect OTC investors' liquidity and

increase their trading costs. The Commission believes the amended Rule is better than the alternative because the additional benefits from more frequently available information are likely to be relatively minor, while the costs for issuers, broker-dealers, and other market participants could increase in proportion to the required frequency of making current information publicly available.

Decreasing the frequency of publishing current and publicly available information to relative to the amended Rule (e.g., requiring current and publicly available information every two years instead of twelve months for catch-all issuers) could have effects opposite to those discussed relating to increased frequency of making current information publicly available. For example, decreasing the frequency of making current information publicly available could provide relief, relative to the requirements of the amended Rule, from the costs to OTC issuers of preparing and disseminating such information. The Commission is not pursuing such an alternative because a significant decrease in the frequency in the availability of current and publicly available paragraph (b) information could make the information less relevant for decision making and investor protection purposes, driving down their potential benefit to investors.

VII. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act ("RFA")[776] requires federal agencies, in promulgating rules, to consider the impact of those rules on "small entities,"[777] a term that includes "small

[776] 5 U.S.C. 601 *et seq.*

[777] 5 U.S.C. 605(b).

businesses."[778] Section 603(a)[779] of the Administrative Procedure Act,[780] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, unless the Commission certifies that the amendments, if adopted, would not have a significant impact on a substantial number of small entities.[781]

A broker-dealer is a small entity if it has total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to § 240.17a-5(d), or, if not required to file such statements, has total capital of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[782] In the Proposing Release, the Commission certified, pursuant to Section 605(b) of the RFA, that the proposed amendments to Rule 15c2-11 would not have a significant economic impact on a substantial number of small entities.[783] The Commission did not receive any comments on the certification as it related to the entities impacted by the Rule.[784]

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[778] Although Section 601(b) of the RFA defines the term "small business," the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term small business for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in Exchange Act Rule 0-10 ("Rule 0-10"). Rule 0-10 also provides that the Commission may, if warranted by the circumstances, use a different definition for particular rulemakings.

[779] 5 U.S.C. 603(a).

[780] 5 U.S.C. 551 *et seq.*

[781] 5 U.S.C. 605(b).

[782] Rule 0-10(c).

[783] *See* Proposing Release at 58262.

[784] The Commission received one comment that mentioned the Regulatory Flexibility Act in relation to other market participants. *See* Virtu Letter, at 8. The costs and benefits of the amended Rule with respect to other market participants are considered in the Economic Analysis section. *See supra* Part VI.

As discussed in the PRA and Economic Analysis sections above, the Commission believes that the proposed amendments will impact the 80 broker-dealers that publish or submit quotations on OTC Markets Group's systems.[785] Based on the Commission's analysis of existing information relating to broker-dealers that would be subject to the amended Rule, the Commission does not believe that any of the 80 broker-dealers impacted by the Rule are small entities under the above definition because they either have at least $500,000 in total capital or are affiliated with a person (other than a natural person) that is not a small business or small organization as defined in Rule 0-10. Based on experience with broker-dealers that participate in the market for OTC securities, the Commission believes that it is unlikely that in the future a small entity may become impacted by the amendments since firms that enter the market are likely to have at least $500,000 in total capital or be affiliated with a person that is not a small business or small organization under Rule 0-10.

For the foregoing reasons, the Commission certifies that the amendments to Exchange Act Rule 15c2-11 will not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

VIII. Statutory Authority

The rule amendments are being adopted pursuant to sections 3, 10(b), 15(c), 15(h), 17(a), 23(a), and 36 of the Securities Exchange Act of 1934, 15 U.S.C. 78c, 78j(b), 78o(c), 78o(g), 78q(a), 78w(a), and 78mm.

List of Subjects in 17 CFR Parts 230 and 240

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

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[785] *See supra* Parts V.B, VI.B.

For the reasons set out in the preamble, the Commission is amending title 17, chapter II of the Code of the Federal Regulations as follows.

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The general authority for part 230 continues to read as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78*l*, 78m, 78n, 78*o*, 78*o*-7 note, 78t, 78w, 78*ll*(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, and Pub. L. 112-106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

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§ 230.144 [Amended]

2. Section 230.144, paragraph (c)(2), is amended by removing the text "(a)(5)(i) to (xiv), inclusive, and paragraph (a)(5)(xvi)" and adding "(b)(5)(i)(A) to (N), inclusive, and paragraph (b)(5)(i)(P)" in its place.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78*l*, 78m, 78n, 78n-1, 78*o*, 78*o*-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78*ll*, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq*., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

Section 240.15c2-11 also issued under 15 U.S.C. 78j(b), 78o(c), 78q(a), and 78w(a).

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4. Section 240.15c2-11 is revised to read as follows:

§ 240.15c2-11 Publication or submission of quotations without specified information.

(a) *Unlawful activity.* As a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts or practices, it shall be unlawful for:

(1) *Brokers or dealers*. A broker or dealer to publish any quotation for a security or, directly or indirectly, to submit any such quotation for publication, in any quotation medium, unless:

(i)(A) Such broker or dealer has in its records the documents and information specified in paragraph (b) of this section;

(B) Such documents and information specified in paragraph (b) of this section (excluding paragraphs (b)(5)(i)(N) through (P) of this section) are current and publicly available; and

(C) Based upon a review of the documents and information specified in paragraph (b) of this section, together with any other documents and information required by paragraph (c) of this section, such broker or dealer has a reasonable basis under the circumstances for believing that:

(*1*) The documents and information specified in paragraph (b) of this section are accurate in all material respects; and

(*2*) The sources of the documents and information specified in paragraph (b) of this section are reliable; or

(ii)(A) The quotation medium is a qualified interdealer quotation system that made a publicly available determination that it has performed the activities described in paragraph (a)(2)(i) through (iii) of this section; and

(B) Such quotation is published or submitted for publication within three business days after such qualified interdealer quotation system makes such publicly available determination.

(2) *Qualified interdealer quotation systems*. A qualified interdealer quotation system to make known to others the quotation of a broker or dealer that is published or submitted for publication pursuant to paragraph (a)(1)(ii) of this section, unless:

(i) Such qualified interdealer quotation system has in its records the documents and information specified in paragraph (b) of this section (excluding paragraphs (b)(5)(i)(N) through (P) of this section except where the qualified interdealer quotation system has knowledge or possession of this information);

(ii) Such documents and information specified in paragraph (b) of this section (excluding paragraphs (b)(5)(i)(N) through (P) of this section) are current and publicly available;

(iii) Based upon a review of the documents and information specified in paragraph (b) of this section (excluding paragraphs (b)(5)(i)(N) through (P) of this section, except where the qualified interdealer quotation system has knowledge or possession of this information), together with any other documents and information required by paragraph (c) of this section, such qualified interdealer quotation system has a reasonable basis under the circumstances for believing that:

(A) The documents and information specified in paragraph (b) of this section are accurate in all material respects; and

(B) The sources of the documents and information specified in paragraph (b) of this section are reliable; and

(iv) The qualified interdealer quotation system makes a publicly available determination that it has performed the activities described in paragraphs (a)(2)(i) through (iii) of this section; or

(3) *Qualified interdealer quotation systems or registered national securities Associations*. A qualified interdealer quotation system or registered national securities association to make a publicly available determination described in paragraph (f)(2)(iii)(B), (f)(3)(ii)(A), or (f)(7) of this section, unless such qualified interdealer quotation system or registered national securities association establishes, maintains, and enforces reasonably designed written policies and procedures to determine whether:

(i) The documents and information specified in paragraph (b) of this section are current and publicly available; and

(ii) The requirements of an exception under paragraph (f) of this section are met, if it makes a publicly available determination described in paragraph (f)(7) of this section.

(b) *Specified information*. (1) A copy of the prospectus specified by section 10(a) of the Securities Act of 1933 for an issuer that has filed a registration statement under the Securities Act of 1933, other than a registration statement on Form F-6, that became effective less than 90 calendar days prior to the day on which such broker or dealer publishes or submits the quotation to the quotation medium; *Provided,* That such registration statement has not thereafter been the subject of a stop order that is still in effect when the quotation is published or submitted; or

(2) A copy of the offering circular provided for under Regulation A (§§ 230.251 through 230.263 of this chapter) for an issuer that has filed an offering statement under Regulation A that was qualified less than 40 calendar days prior to the day on which such broker or dealer publishes or submits the quotation to the quotation medium; *Provided,* That the Regulation A

exemption, with respect to such issuer, has not thereafter become subject to a suspension order that is still in effect when the quotation is published or submitted; or

(3) A current copy of:

(i) An annual report filed pursuant to section 13 or 15(d) of the Act, together with any periodic and current reports that have been filed thereafter under the Act by the issuer, except for current reports filed during the three business days prior to the publication or submission of the quotation; *Provided*, *however*, That, until such issuer has filed its first such annual report, the broker, dealer, or qualified interdealer quotation system has in its records a copy of the registration statement filed by the issuer under the Securities Act of 1933, other than a registration statement on Form F-6, that became effective within the prior 16 months, or a copy of any registration statement filed by the issuer under section 12 of the Act that became effective within the prior 16 months, together with any periodic and current reports filed thereafter under section 13 or 15(d) of the Act;

(ii) An annual report filed pursuant to Regulation A, together with any periodic and current reports filed thereafter under Regulation A by the issuer, except for current reports filed during the three business days prior to the publication or submission of the quotation; *Provided*, *however*, That, until such issuer has filed its first such annual report, the broker, dealer, or qualified interdealer quotation system has in its records a copy of the offering statement filed by the issuer under Regulation A, that was qualified within the prior 16 months, together with any periodic and current reports filed thereafter under Regulation A;

(iii) An annual report filed pursuant to Regulation Crowdfunding (§§ 227.100 through 227.503 of this chapter); *Provided*, *however*, that, until such issuer has filed its first such annual report, the broker, dealer, or qualified interdealer quotation system has in its records a copy of

the Form C filed by the issuer under Regulation Crowdfunding within the prior 16 months, together with any Form C/A and Form C/U filed thereafter under Regulation Crowdfunding;

(iv) An annual statement referred to in section 12(g)(2)(G)(i) of the Act (in the case of an issuer required to file reports pursuant to section 13 or 15(d) of the Act), together with any periodic and current reports filed thereafter under the Act by the issuer, except for current reports filed during the three business days prior to the publication or submission of the quotation; *Provided*, *however*, that, until such issuer has filed its first such annual statement, the broker, dealer, or qualified interdealer quotation system has in its records a copy of the registration statement filed by the issuer under the Securities Act of 1933, other than a registration statement on Form F-6, that became effective within the prior 16 months, or a copy of any registration statement filed by the issuer under section 12 of the Act, that became effective within the prior 16 months, together with any periodic and current reports filed thereafter under section 13 or 15(d) of the Act; or

(v) An annual statement referred to in section 12(g)(2)(G)(i) of the Act (in the case of an issuer of a security that falls within the provisions of section 12(g)(2)(G) of the Act); or

(4) A copy of the information that, since the first day of its most recently completed fiscal year, the issuer has published as required to establish the exemption from registration under section 12(g) of the Act pursuant to § 240.12g3-2(b) of this chapter, which the broker or dealer must make available upon the request of a person expressing an interest in a proposed transaction in the issuer's security with the broker or dealer, such as by providing the requesting person with appropriate instructions regarding how to obtain the information electronically; or

(5)(i) The following information, which must be (excluding paragraphs (b)(5)(i)(N) through (P) of this section) as of a date within 12 months prior to the publication or submission of the quotation, unless otherwise specified:

(A) The name of the issuer and any predecessors during the past five years;

(B) The address(es) of the issuer's principal executive office and of its principal place of business;

(C) The state of incorporation or registration of the issuer and of each of its predecessors (if any) during the past five years;

(D) The title, class, and ticker symbol (if assigned) of the security;

(E) The par or stated value of the security;

(F) The number of shares or total amount of the securities outstanding as of the end of the issuer's most recent fiscal year;

(G) The name and address of the transfer agent;

(H) A description of the issuer's business;

(I) A description of products or services offered by the issuer;

(J) A description and extent of the issuer's facilities;

(K) The name and title of all company insiders;

(L) The issuer's most recent balance sheet (as of a date less than 16 months before the publication or submission of the quotation) and profit and loss and retained earnings statements (for the 12 months preceding the date of the most recent balance sheet);

(M) Similar financial information for such part of the two preceding fiscal years as the issuer or its predecessors has been in existence;

(N) Whether the broker or dealer or any associated person of the broker or dealer is affiliated, directly or indirectly, with the issuer;

(O) Whether the quotation is being published or submitted on behalf of any other broker or dealer and, if so, the name of such broker or dealer; and

(P) Whether the quotation is being submitted or published, directly or indirectly, by or on behalf of the issuer or a company insider and, if so, the name of such person and the basis for any exemption under the federal securities laws for any sales of such securities on behalf of such person.

(ii) The broker or dealer must make the documents and information specified in paragraph (b)(5)(i) of this section available upon the request of a person expressing an interest in a proposed transaction in the issuer's security with the broker or dealer, such as by providing the requesting person with appropriate instructions regarding how to obtain such publicly available documents and information electronically. If such information is made available to others upon request pursuant to this paragraph, such delivery, unless otherwise represented, shall not constitute a representation by such broker or dealer that such information is accurate but shall constitute a representation by such broker or dealer that the information is current in relation to the day the quotation is submitted, the broker or dealer has a reasonable basis under the circumstances for believing the information is accurate in all material respects, and the information was obtained from sources that the broker or dealer has a reasonable basis under the circumstances for believing are reliable. The documents and information specified in paragraph (b)(5) of this section must be reviewed where paragraphs (b)(1) through (4) of this section do not apply to such issuer. For purposes of compliance with paragraph (a)(1)(i)(B) or (a)(2)(ii) of this section, the documents and information specified in paragraph (b)(5) of this section must be

reviewed for an issuer for which the documents and information specified in paragraph (b)(1), (2), (3), or (4) of this section regarding such issuer are not current.

(c) *Supplemental information*. With respect to any security the quotation of which is within the provisions of this section, the broker or dealer submitting or publishing such quotation, or any qualified interdealer quotation system that makes known to others the quotation of a broker or dealer pursuant to paragraph (a)(2) of this section, shall have in its records the following documents and information:

(1) Records related to the submission or publication of such quotation, including the identity of the person or persons for whom the quotation is being published or submitted, whether such person or persons is the issuer or a company insider, and any information regarding the transactions provided to the broker, dealer, or qualified interdealer quotation system by such person or persons;

(2) A copy of any trading suspension order issued by the Commission pursuant to section 12(k) of the Act regarding any securities of the issuer or its predecessor (if any) during the 12 months preceding the date of the publication or submission of the quotation or a copy of the public release issued by the Commission announcing such trading suspension order; and

(3) A copy or a written record of any other material information (including adverse information) regarding the issuer that comes to the knowledge or possession of the broker, dealer, or qualified interdealer quotation system before the publication or submission of the quotation.

(d) *Recordkeeping*. (1)(i) The following persons shall preserve for a period of not less than three years, the first two years in an easily accessible place, the documents and information required under paragraphs (a), (b), and (c) of this section, except for the documents and

information that are available on the Commission's *Electronic Data Gathering, Analysis and Retrieval System* (EDGAR):

(A) Any broker or dealer that publishes or submits a quotation pursuant to paragraph (a)(1) of this section for a security; or

(B) Any qualified interdealer quotation system that makes known to others the quotation of a broker or dealer pursuant to paragraph (a)(2) of this section for a security;

(ii) Any broker or dealer that publishes or submits a quotation pursuant to paragraph (a)(1)(ii) of this section shall preserve for a period of not less than three years, the first two years in an easily accessible place, the name of the qualified interdealer quotation system that made a publicly available determination that it has performed the activities described in paragraph (a)(2)(i) through (iii) of this section.

(2) The following persons shall preserve for a period of not less than three years, the first two years in an easily accessible place, the documents and information that demonstrate that the requirements for an exception under paragraph (f)(2), (3), (5), (6), or (7) of this section are met, except for the documents and information that are available on EDGAR:

(i) Any qualified interdealer quotation system or registered national securities association that makes a publicly available determination described in paragraph (f)(2)(iii)(B), (f)(3)(ii)(A), or (f)(7) of this section; and

(ii) Any broker or dealer that publishes or submits a quotation pursuant to paragraph (f) of this section; *Provided, however*, That any broker or dealer that relies on a publicly available determination described in paragraph (f)(2)(iii)(B) or (f)(3)(ii)(A) of this section shall preserve only a record of the name of the qualified interdealer quotation system or registered national securities association that determined whether the documents and information specified in

paragraph (b) of this section are current and publicly available in addition to the documents and information that demonstrate that the other requirements of the exception provided in paragraph (f)(2) or (3), respectively, are met; and that any broker or dealer that relies on a publicly available determination described in paragraph (f)(7) of this section shall preserve only a record of the exception provided in paragraph (f)(1), (f)(3)(i), or (f)(4) or (5) for which the publicly available determination is made and the name of the qualified interdealer quotation system or registered national securities association that determined that the requirements of that exception are met.

(e) *Definitions*. For purposes of this section:

(1) *Company insider* shall mean any officer or director of the issuer, or person that performs a similar function, or any person who is, directly or indirectly, the beneficial owner of more than 10 percent of the outstanding units or shares of any class of any equity security of the issuer.

(2) *Current* shall mean, for the documents and information specified in:

(i) Paragraph (b)(1), (2), (4), or (5) of this section, filed, published, or are as of a date in accordance with the time frames specified in the applicable paragraph for such documents and information; or

(ii) Paragraph (b)(3) of this section, the most recently required annual report or statement filed pursuant to section 13 or 15(d) of the Act and any rule(s) thereunder, Regulation A, Regulation Crowdfunding, or section 12(G)(2)(g) of the Act, together with any subsequently required periodic reports or statements, filed pursuant to section 13 or 15(d) of the Act and any rule(s) thereunder, Regulation A, Regulation Crowdfunding, or section 12(G)(2)(g) of the Act.

(3) *Interdealer quotation system* shall mean any system of general circulation to brokers or dealers that regularly disseminates quotations of identified brokers or dealers.

(4) *Issuer*, in the case of quotations for American Depositary Receipts, shall mean the issuer of the deposited shares represented by such American Depositary Receipts.

(5) *Publicly available* shall mean available on EDGAR; on the website of a state or federal agency, a qualified interdealer quotation system, a registered national securities association, an issuer, or a registered broker or dealer; or through an electronic information delivery system that is generally available to the public in the primary trading market of a foreign private issuer as defined in § 240.3b-4 of this chapter; *Provided, however*, that *publicly available* shall mean where access is not restricted by user name, password, fees, or other restraints.

(6) *Qualified interdealer quotation system* shall mean any interdealer quotation system that meets the definition of an "alternative trading system" under § 242.300(a) of this chapter and operates pursuant to the exemption from the definition of an "exchange" under § 240.3a1-1(a)(2) of this chapter.

(7) *Quotation*, except as otherwise specified in this section, shall mean any bid or offer at a specified price with respect to a security, or any indication of interest by a broker or dealer in receiving bids or offers from others for a security, or any indication by a broker or dealer that wishes to advertise its general interest in buying or selling a particular security.

(8) *Quotation medium* shall mean any "interdealer quotation system" or any publication or electronic communications network or other device that is used by brokers or dealers to make known to others their interest in transactions in any security, including offers to buy or sell at a stated price or otherwise, or invitations of offers to buy or sell.

(9) *Shell company* shall mean any issuer, other than a business combination related shell company, as defined in § 230.405 of this chapter, or an asset-backed issuer as defined in Item 1101(b) of Regulation AB (§ 229.1101(b) of this chapter), that has:

(i) No or nominal operations; and

(ii) Either:

(A) No or nominal assets;

(B) Assets consisting solely of cash and cash equivalents; or

(C) Assets consisting of any amount of cash and cash equivalents and nominal other assets.

(f) *Exceptions*. Except as provided in paragraph (d)(2) of this section, the provisions of this section shall not apply to:

(1) The publication or submission of a quotation for a security that is admitted to trading on a national securities exchange and that is traded on such an exchange on the same day as, or on the business day next preceding, the day the quotation is published or submitted.

(2)(i) The publication or submission by a broker or dealer, solely on behalf of a customer (other than a person acting as or for a dealer), of a quotation that represents the customer's unsolicited indication of interest;

(ii) Provided, however, that this paragraph (f)(2) shall not apply to a quotation:

(A) Consisting of both a bid and an offer, each of which is at a specified price, unless the quotation medium specifically identifies the quotation as representing such an unsolicited customer interest; or

(B) Published or submitted, directly or indirectly on behalf of a company insider or affiliate as defined in § 230.144(a)(1) of this chapter, unless the documents and information specified in paragraph (b) of this section are current and publicly available.

(iii) For purposes of paragraph (f)(2)(ii)(B) of this section, a broker or dealer that publishes or submits quotations may rely on either a:

(A) Written representation from the customer's broker that such customer is not a company insider or an affiliate if:

(*1*) Such representation is received prior to, and on the same day that, the quotation representing the customer's unsolicited indication of interest is published or submitted; and

(*2*) The broker or dealer has a reasonable basis under the circumstances for believing that the customer's broker is a reliable source; or

(B) Publicly available determination by a qualified interdealer quotation system or registered national securities association that the documents and information specified in paragraph (b) of this section are current and publicly available.

(3)(i)(A) The publication or submission, in an interdealer quotation system that specifically identifies as such unsolicited customer indications of interest of the kind described in paragraph (f)(2) of this section, of a quotation for a security that has been the subject of a bid or offer quotation (exclusive of any identified customer interests) in such a system at a specified price, with no more than four business days in succession without such a quotation;

(B) Provided, however, that this paragraph (f)(3) shall not apply to a quotation that is published or submitted by a broker or dealer for the security of an issuer that:

(*1*) Was the subject of a trading suspension order issued by the Commission pursuant to section 12(k) of the Act until 60 calendar days after the expiration of such order;

(*2*) Such broker or dealer, or any qualified interdealer quotation system or registered national securities association, has a reasonable basis under the circumstances for believing is a shell company, unless such quotation is published or submitted within the 18 months following the initial quotation for such issuer's security that is the subject of a bid or offer quotation in an interdealer quotation system at a specified price;

(C) Provided further, that this paragraph (f)(3) shall apply to the publication or submission of a quotation for a security of an issuer only if the documents and information regarding such issuer that are specified in:

(*1*) Paragraph (b)(3)(i), (iv), or (v) of this section are filed within 180 calendar days from the end of the issuer's most recent fiscal year or any quarterly reporting period that is covered by a report required by section 13 or 15(d) of the Act, as applicable;

(*2*) Paragraph (b)(3)(ii) or (iii) of this section are timely filed;

(*3*) Paragraph (b)(4) or (b)(5)(i) (excluding paragraphs (b)(5)(i)(N) through (P)) are current and publicly available; or

(*4*) Paragraph (b)(3)(i), (ii), (iii), (iv), or (v) are filed within 15 calendar days starting on the date on which a publicly available determination is made pursuant to paragraph (f)(3)(ii)(A) of this section; or

(ii) If the documents and information specified in paragraph (b) of this section (excluding paragraphs (b)(5)(i)(N) through (P)) regarding an issuer are no longer current and publicly available, timely filed, or filed within 180 calendar days, as specified in paragraph (f)(3)(i)(C) of this section, a broker or dealer may continue to publish or submit a quotation for such issuer's security in an interdealer quotation system during the time frame specified in in paragraph (f)(3)(ii)(C) if:

(A) Within the first four business days that such documents and information are no longer current and publicly available, timely filed, or filed within 180 calendar days, as applicable, a qualified interdealer quotation system or registered national securities association makes a publicly available determination that:

(*1*) Such documents and information are no longer current and publicly available, timely filed, or filed within 180 calendar days, as specified in paragraph (f)(3)(i)(C) of this section; and

(*2*) The exception provided in paragraph (f)(3)(ii) of this section is available only during the 15 calendar days starting on the date on which the publicly available determination described in paragraph (f)(3)(ii)(A)(*1*) of this section is made; and

(B) The broker or dealer complies with the requirements of paragraphs (d)(2) and (f)(3)(i) of this section, except for the requirement that the documents and information specified in paragraph (b) (excluding paragraphs (b)(5)(i)(N) through (P)) regarding such issuer be current and publicly available, timely filed, or filed within 180 calendar days, as applicable;

(C) Provided, however, that the provisions of this paragraph (f)(3)(ii) shall apply only during the shorter of the period beginning with the date on which a qualified interdealer quotation system or registered national securities association makes a publicly available determination identified in paragraph (f)(3)(ii)(A) and ending on:

(*1*) The date on which the documents and information specified in paragraph (b) of this section (excluding paragraphs (b)(5)(i)(N) through (P)) regarding such issuer become current and publicly available or filed; or

(*2*) The fourteenth calendar day following the date on which such publicly available determination was made.

(4) The publication or submission of a quotation for a municipal security.

(5) The publication or submission of a quotation for:

(i) A security with a worldwide average daily trading volume value of at least $100,000 reported during the 60 calendar days immediately before the publication of the quotation of such security; and

(ii) The issuer of such security has at least $50 million in total assets and $10 million in shareholders' equity as reflected in the issuer's publicly available audited balance sheet issued within six months after the end of its most recent fiscal year.

(6) The publication or submission of a quotation for a security by a broker or dealer that is named as an underwriter in a registration statement for an offering of that class of security referenced in paragraph (b)(1) of this section or in an offering statement for an offering of that class of security referenced in paragraph (b)(2) of this section; *Provided, however*, that this paragraph (f)(6) shall apply only to the publication or submission of a quotation for such security within the time frames specified in paragraph (b)(1) or (2) of this section.

(7) The publication or submission of a quotation by a broker or dealer that relies on a publicly available determination by a qualified interdealer quotation system or registered national securities association that the requirements of an exception provided in paragraph (f)(1), (f)(3)(i), or (f)(4) or (5) of this section are met; *Provided, however*, that any qualified interdealer quotation system or registered national securities association that makes a publicly available determination that the requirements of the exception provided in paragraph (f)(3)(i) of this section are met must subsequently make a publicly available determination under paragraph (f)(3)(ii)(A) of this section, as applicable.

(g) *Exemptive authority.* Upon written application or upon its own motion, the Commission may, conditionally or unconditionally, exempt by order any person, security, or

transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this section, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

By the Commission.

Dated: September 16, 2020.

Vanessa A. Countryman,
Secretary

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