SUPPORTING STATEMENT
Rule 202(a)(11)-1

A. JUSTIFICATION

1. Necessity for the Information Collection

Section 202(a)(11)(C) of the Investment Advisers Act of 1940 excepts from the definition of "investment adviser" a broker or dealer whose performance of advisory services "is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor." In recent years, some broker-dealers have begun offering their customers full service brokerage (including advice) for an asset-based fee instead of traditional commissions, mark-ups, and mark-downs. On April 12, 2005, the Securities and Exchange Commission (the "Commission") adopted a new rule under the Investment Advisers Act of 1940 ("Advisers Act") that addressed the application of the Act to brokers offering these types of programs.[1] Subsection (a) of rule 202(a)(11)-1 requires that all advertisements for brokerage accounts charging an asset-based fee, and all agreements and contracts governing the operation of those accounts, contain a certain prominent disclosure statement. The disclosure consists of a brief plain English statement that:

> Your account is a brokerage account and not an advisory account. Our interests may not always be the same as yours. Please ask us questions to make sure you understand your rights and our obligations to you, including the extent of our obligations to disclose conflicts of interest and to act in your best interest. We are paid both by you and, sometimes, by people who compensate us based on what

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[1] Certain Broker-Dealers Deemed Not To Be Investment Advisers, Investment Advisers Act Release No. 2376 (Apr. 12, 2005) [70 FR 20424 (Apr. 19, 2005)] ("Adopting Release").

you buy. Therefore, our profits, and our salespersons' compensation, may vary by product and over time.[2]

Some broker-dealers offering these new accounts have marketed them heavily based on the incidental advisory services provided rather than the brokerage services. The collection of information, i.e., the required disclosure to customers, is necessary to prevent customers and prospective customers from mistakenly believing that the account is an advisory account subject to the Advisers Act, and will be used to assist customers in making an informed decision on whether to establish an account.

The collection of information has been previously approved and subsequently extended. This collection of information is mandatory. In general, the information collected pursuant to the rule is held by broker-dealers. The Commission, self-regulatory organizations, and other securities regulatory authorities gain possession of the information only upon request. The information collected pursuant to the rule takes the form of disclosures by brokers and dealers to their customers and potential customers. These disclosures are not kept confidential. The potential respondents to this collection of information are all broker-dealers that are registered with the Commission.

2. Purpose of the Information Collection

Rule 202(a)(11)-1 addresses the application of the Advisers Act to certain brokerage programs that charge fees based on the amount of assets in customers' accounts, instead of traditional transaction-based fees such as commissions and mark-ups. The rule requires that all advertisements for fee-based brokerage accounts, as well as all

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[2] Rule 202(a)(11)-1(a)(1)(ii). An advertisement would include any notice, circular, letter or other written communication addressed to more than one person, or any notice or other announcement in any publication or by radio or television. See Rule 206(4)-1(b) [17 CFR 275.206(4)-1(b)] (defining the term "advertisement").

agreements and contracts for such accounts, contain a certain prominent statement that the accounts are brokerage accounts and not advisory accounts. The purpose of this collection of information is to prevent customer confusion with respect to the services that they are receiving.

3. Role of Improved Information Technology

Broker-dealers currently file Form BD with the NASD which operates an Internet-based system called Web CRD. Broker-dealers make their initial filings in paper with the NASD which enters the data electronically onto the Web CRD system. Broker-dealers access Web CRD directly through NASD's Web site, and submit their subsequent filings electronically. The Web CRD filings are made available to the Commission. This method of collecting information reduces the regulatory burden upon broker-dealers by permitting them to file applications for registration, and amendments thereto, at one central location, rather than filing Form BD separately with the Commission, certain SROs, and the states.

The information collected pursuant to rule 202(a)(11)-1 takes the form of disclosures made by brokers and dealers to their customers and potential customers. Accordingly, the Commission's use of computer technology will have little effect.

4. Efforts to Identify Duplication

The collection of information requirements of the rule are not duplicated elsewhere.

5. Effect on Small Entities

The requirements of the rule are the same for all broker-dealers registered with the Commission, including those that are small entities. The rule, however, affects only those broker-dealers that manage non-discretionary brokerage accounts and charge those

accounts asset-based fees. Broker-dealers offering those accounts are unlikely to be small entities. The rule, therefore, likely affects few or no small entities.

6. Consequences of Less Frequent Collection

The collection of information required by the rule is necessary to protect investors from misleading or confusing advertising regarding the nature of services they are receiving from broker-dealers. The consequences of not collecting this information would be confusion of investors.

7. Inconsistencies with Guidelines in 5 CFR 1320.5(d)(2)

The rule imposes no additional requirements regarding record retention. Broker-dealers taking advantage of the rule need to maintain certain records that establish their eligibility to do so, but rules under the Exchange Act already require the maintenance of those records. Specifically, broker-dealers are currently required to maintain all "evidence of the granting of discretionary authority given in any respect of any account"[3] and all "written agreements . . . with respect to any account."[4] Broker-dealers already are required to maintain records regarding their advertisements under existing self-regulatory organizations' rules. Therefore, the rule does not increase the recordkeeping burden for any broker-dealer. The long-term retention of these records is necessary for the Commission's inspection program to ascertain compliance with the Advisers Act.

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[3] 17 CFR 240.17a-4(b)(6). Rule 202(a)(11)-1(a)(1) limits its application to accounts that a broker-dealer does not exercise investment discretion over.

[4] 17 CFR 240.17a-4(b)(7). Rule 202(a)(11)-1(a)(3) requires a prominent statement be made in agreements governing the accounts to which the rule applies.

8. Consultation Outside the Agency

The Commission and the staff of the Division of Investment Management participate in an ongoing dialogue with representatives of the investment adviser and broker-dealer industries through public conferences, meetings and informal exchanges. These various forums provide the Commission and the staff with a means of ascertaining and acting upon paperwork burdens facing the industries. At the time the Commission proposed rule 202(a)(11)-1 and again when it reproposed the rule, it requested comment on the proposed rule and on the collection of information. No comment was received regarding the Commission's PRA estimates for the burden imposed by the collection, although one commenter did indicate that the proposed rule might require broker-dealers relying on it to make time consuming and costly amendments to existing account documents. The Commission, however, clarified that broker-dealers were not required to amend existing contracts and agreements governing those accounts. The Commission also requested public comment on the collection of information requirements in rule 202(a)(11)-1 before it submitted this request for extension and approval to the Office of Management and Budget. The Commission received only one comment letter in response to its request. This commenter disagreed with the Commission's estimated hourly burden, but did not provide an alternative estimate. The commenter also assumed that the collection of information would require broker-dealers to complete and submit a form to the Commission and to examine raw data underlying responses to the form. The collection of information in the rule, however, is the requirement that all advertisements for brokerage accounts charging an asset-based fee and all agreements and contracts governing the operation of those accounts contain a certain prominent statement that the

accounts are brokerage accounts and not advisory accounts. In the Adopting Release, the Commission specifically considered the modifications to the disclosure requirement and the effect, if any, on the estimated paperwork burden for this collection. After consideration, it concluded that the modifications did not increase the estimated burden. In light of this conclusion and without being presented with any viable alternative estimate, it is believed that the Commission's estimate is reasonable.

9. Payment or Gift to Respondents

None.

10. Assurance of Confidentiality

The information collected pursuant to the rule takes the form of disclosures made by brokers and dealers to their customers and potential customers. These disclosures are not kept confidential.

11. Sensitive Questions

Not applicable.

12. Estimate of Hour Burden

The rule affects only those broker-dealers that offer brokerage accounts charging an asset-based fee. The only incremental burden associated with the rule is the need for broker-dealers offering those accounts to include in their advertising materials and written agreements the required prominent statement. The currently-approved annual aggregate burden of collection under rule 202(a)(11)-1 is 673 hours. This approved annual aggregate burden was based on estimates that all of the 8,100 broker-dealers then registered with the Commission were subject to the rule, and that the rule would impose a total burden of five minutes per broker-dealer offering brokerage accounts charging an

asset-based fee. Updating those prior calculations based on current information about the number of registered broker-dealers, however, we now estimate that only 6,158 broker-dealers are registered with the Commission, and thus, potentially subject to the rule.[5] We continue to estimate that each of these broker-dealers would need to spend an average of five minutes preparing and making disclosures statements in accordance with the rule. These current data would decrease the annual aggregate burden under the rule to 511 hours,[6] which is a reduction of 162 hours. At an assumed $312 per hour,[7] the total cost of the information collection requirements would be approximately $159,432.[8]

These estimates of average burden hours and average costs of those average burden hours are made solely for the purposes of the Paperwork Reduction Act and are not derived from a comprehensive or representative survey or study, or the cost of Commission rules and forms.

13. Estimate of Total Annual Cost Burden

None.

14. Estimate of Cost to the Federal Government

There are no costs to the government directly attributable to rule 202(a)(11)-1.

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5 This estimate is based on information filed with the Commission through the EDGAR system as of May 17, 2006.

6 6,158 brokers x .083 hours = 511 hours.

7 The figure of $312 per hour is based on reported industry wages for a Compliance Attorney taken from the SIA Report on Management & Professional Earnings in the Securities Industry 2005, modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

8 This cost estimate is higher than that previously submitted in connection with this collection. This increase in estimated cost results primarily from use of a new calculation method for employee costs.

15. Explanation of Changes in Burden

As discussed above in Item A.12 of this statement addressing the hourly burden imposed by rule 202(a)(11)-1, there has been a decrease in the number of broker-dealers potentially subject to the rule resulting in a corresponding decrease in the annual aggregate hour burden of 162 hours.

16. Information Collection Planned for Statistical Purposes

Not applicable.

17. Approval to not Display Expiration Date

Not applicable.

18. Exceptions to Certification Statement

Not applicable.

B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS

Not applicable.