121 FERC ¶ 61,059
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

The Goldman Sachs Group, Inc. Docket Nos. EC07-39-000
EC07-39-001
EC07-39-002

ORDER GRANTING BLANKET AUTHORIZATION TO ACQUIRE SECURITIES UNDER SECTION 203(a)(2) OF THE FEDERAL POWER ACT

(Issued October 18, 2007)

1. On December 20, 2006, as amended on May 14, May 25, and September 11, 2007, the Goldman Sachs Group, Inc. (Goldman) filed an application[1] on behalf of itself and its "Non-Utility Subsidiaries"[2] (collectively, Applicants). Applicants seek blanket authorization under Federal Power Act (FPA) section 203(a)(2), [3] for a period of three years, to acquire any amount of voting securities of one or more utilities or holding companies in connection with Applicants' investment advisory services, management of mutual funds and private funds, specialist functions, and lending activities, as passive investors. In this order, we grant Applicants' request for authorization, subject to certain conditions, as discussed below.

[1] Goldman Application (filed Dec. 20, 2006) (Initial Application); Goldman Response to Deficiency Letter (filed May 14, 2007) (Response to Deficiency Letter); Goldman Supplemental Letter (filed May 25, 2007) (Supplemental Letter); Goldman Supplemental Filing (filed Sept. 11, 2007) (Supplemental Filing) (collectively, Application).

[2] The Non-Utility Subsidiaries provide a range of financial services, as discussed further herein.

[3] 16 U.S.C. § 824b(a)(2) (2000), *amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-83 (2005) (EPAct 2005).

2. After section 203(a)(2) was enacted as part of EPAct 2005, Goldman applied under that provision for blanket authorization to acquire utility securities in the ordinary course of its financial businesses, subject to certain limitations. On February 7, 2006, the Commission granted that blanket authorization in Docket No. EC06-38-000 (Current Authorization).[4] In that order, Goldman was granted blanket authorization under section 203(a)(2) to acquire and hold an unlimited amount of voting securities in connection with its dealer/trader activities, fiduciary holdings, underwriting activities (subject to certain limitations), and hedging activities (subject to a commitment not to vote in excess of 10 percent of such shares). The Current Authorization was specifically limited to one year because the Commission was just beginning to implement the statute.[5]

3. On February 6, 2007, the Commission issued an order granting an interim extension of Applicants' Current Authorization pending Commission review of the Application and additional information, and a further order of the Commission. In response to a Commission staff deficiency letter, Applicants filed a response and additional information.

I. Background

A. Description of the Applicants

1. Goldman

4. As described below, Goldman has extensive interests in energy-related activities. For purposes of the Application, however, Goldman is seeking authorization only in connection with its investment banking, securities, and investment management lines of business that provide a range of financial services to corporations, financial institutions, governments and high-net-worth individuals. Within that context, its three core businesses are: (1) Investment Banking, which includes financial advisory services with respect to mergers and acquisitions, divestitures, corporate defense activities, restructurings and spin-offs, and underwritings of public offerings and private placements of equity, equity-related and debt securities; (2) Trading and Principal Investments, which includes market-making in, and trading of, fixed income and equity securities and related products, currencies, commodities (including electric energy) and derivatives on those products; providing execution and clearing services in relation to a range of securities and derivative products; providing various financing arrangements and products and taking proprietary positions in public and private companies, either through

[4] *The Goldman Sachs Group, Inc.*, 114 FERC ¶ 61,118 (2006), *reh'g denied*, 115 FERC ¶ 61,303 (2006).

[5] *Id.* at 61,398.

subsidiaries or through funds that Goldman subsidiaries manage; and (3) Asset Management and Securities Services, which include providing investment advisory, management and financial services to institutions and individuals, and prime brokerage, financing planning services and securities-lending services to mutual funds, pension funds, hedge funds, foundations and high-net-worth individuals. Goldman indirectly owns several subsidiaries that engage in the generation and sale of electricity. Accordingly, for purposes of FPA section 203(a)(2), Goldman is a holding company. It also owns certain Non-Utility Subsidiaries, discussed below, that regularly acquire securities in their capacities as broker-dealers and underwriters, as fiduciaries in connection with asset management operations, and for hedging purposes.

2. Non-Utility Subsidiaries

5. Goldman is the parent company of various Non-Utility Subsidiaries that are Applicants in this proceeding and that provide a range of financial services.[6] The current Non-Utility Subsidiaries listed in the Application include the following:

> (1) Goldman, Sachs & Co. (GS&Co.) is a broker-dealer registered with the Securities and Exchange Commission (SEC) under the Securities Exchange Act of 1934 (1934 Act)[7] and an investment adviser under the Investment Advisers Act of 1940 (Advisers Act).[8] GS&Co. conducts a variety of business functions including underwriting, proprietary trading and investment activity, and advisory services.[9] Two business units within GS&Co. were specifically addressed in the Application:

[6] Goldman filed this Application on behalf of itself and certain current and future Non-Utility Subsidiaries. Goldman is also the indirect parent of "Utility Subsidiaries" that are not applicants in this proceeding. The Utility Subsidiaries are "public utilities" under the FPA, engaged in activities in the electric power industry, which are subject to regulation by the Commission. Cogentrix Energy, Inc. (Cogentrix), and Horizon Wind Energy LLC (Horizon), participate in ownership or operation of qualifying facilities (QFs), exempt wholesale generators (EWGs), and one foreign utility company (FUCO). In addition, Goldman owns J. Aron & Company (J. Aron) and Power Receivable Finance, LLC (PRF), which have been authorized by the Commission to sell power at market-based rates. Initial Application at 3-4.

[7] Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq*. (2000) (1934 Act).

[8] Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 *et seq*. (2000) (Advisers Act).

[9] Response to Deficiency Letter at 17.

a) The Quantitative Volatility Desk, a segregated business unit, but not a separate legal entity, operates as a market-maker on the International Securities Exchange;[10] and

b) Global Securities Services, another segregated business unit,[11] makes loans to customers that are secured by securities owned by the customers and GS&Co., and makes commercial loans on both a secured and unsecured basis.[12]

(2) Goldman Sachs Asset Management, L.P. and Goldman Sachs Asset Management International (GSAM), serve as investment advisers to various mutual funds, private investment funds, and to institutional and individual clients.

(3) GS Investment Strategies, LLC (GSIS) is a newly created investment adviser to certain new private investment funds.

(4) Specialist Entities are registered broker-dealers under the 1934 Act, and are required to be the "dealer of last resort" in relation to the securities for which they are designated specialists. Goldman has four Specialist Entities for which it is seeking authorization under 203(a)(2):

(a) SLK Specialists L.L.C., a specialist in relation to certain New York Stock Exchange (NYSE) listed securities;

(b) Goldman Sachs Execution & Clearing, L.P., a specialist in relation to exchange-traded funds, which are baskets of securities listed on the American Stock Exchange;

(c) SLK Index Specialists L.L.C., a specialist in relation to NYSE indices; and

(d) The Quantitative Volatility Desk, discussed above.

(5) Goldman Sachs Credit Partners LP, Goldman Sachs Bank USA, and Goldman Sachs International are indirect subsidiaries of Goldman engaged in arranging loans and making loans to a range of borrowers.

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[10] *Id.* at 9.

[11] *Id.* at 17.

[12] *Id.* at 8.

6. Goldman also requests authorization on behalf of other unnamed current or future Non-Utility Subsidiaries that are engaged in the same or similar business or businesses as the named applicants and which, from time to time, may acquire utility securities in the ordinary course of business in transactions like those described in the Application.

B. Request for Blanket Authorization

7. Applicants request blanket authority for certain transactions based on their Current Authorization, to the extent it is not superseded by Order No. 669.[13] Specifically, Applicants request authorization under section 203(a)(2) for a three-year blanket authorization to acquire, directly or indirectly, in the ordinary course of business, any amount of utility securities having a value in excess of $10 million:

a. In connection with providing investment advisory services to institutional clients and high net worth individuals under separate account arrangements;

b. Through mutual funds and private investment funds that are managed by certain Non-Utility Subsidiaries;

c. In connection with the "specialist" functions performed by the Specialist Entities; and

d. To the extent authorization is necessary, as collateral for a loan or for purposes of liquidation in connection with a loan previously contracted.[14]

8. Applicants request that any securities acquired and held under the blanket authorization requested in the Application be excluded from the amount of voting securities that they acquire and hold under the blanket authorization set out in Commission regulations for voting securities up to ten percent.[15] Applicants state that, as

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[13] *Transactions Subject to FPA section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006) (collectively, Order No. 669).

[14] Response to Deficiency Letter at 4-5. In Order No. 669-A, the Commission stated that blanket authorization is provided under 18 C.F.R. § 33.1(c)(2)(i) "to hold debt instruments, which normally do not convey a right to control the public utility." Order No. 669-A, FERC Stats. & Regs. ¶ 31,214 at P 126. However, Applicants acknowledge that the Commission has previously exercised jurisdiction over transfers of utility securities upon foreclosure of security interest and pursuant to bankruptcy reorganization plans. *See* Response to Deficiency Letter at 5, n.13.

[15] 18 C.F.R. § 33.1(c)(2)(ii) (2007).

a condition of this authorization, any acquisition under this blanket authorization is "subject to the commitment and principle stated in the December 20, 2006 Application that the utility securities acquired under the blanket authorization must confer no control over the issuer on Goldman Sachs."[16]

9. Applicants assert that they will be making acquisitions of public utility securities for investment purposes only and not for purposes of obtaining or exercising control of the utilities, and they point to legal prohibitions barring their assertion of control. We summarize these prohibitions, first by the function for which Applicants seek to acquire the securities, and second by the overarching limitations that apply to all functions.

1. Investment Advisory Services

10. GS&Co. engages in several activities, including providing advisory services to its private clients and exercising investment discretion to purchase and sell securities on behalf and for client accounts in accordance with pre-established investment guidelines. GSAM also advises institutional and individual clients.

11. GS&Co., GSAM, and GSIS,[17] are registered investment advisers under the Advisers Act.[18] Applicants state that the Advisers Act prohibits investment advisers from acting in any way that would defraud a client or engage in any practice that is fraudulent, deceptive, or manipulative.[19] In addition, under the terms of GS&Co.'s standard investment advisory agreement, GS&Co. does not vote shares held in customer accounts unless the customer or an independent third party service appointed by the customer, such as Institutional Shareholder Services (ISS), gives voting instructions.[20] Further, GSAM votes securities in accordance with Goldman's Proxy Voting Policy, discussed below.[21] Applicants assert that the restrictions on voting ensure that GS&Co. and GSAM will not assert control.

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[16] Supplemental Filing at 2; *see also* Initial Application at 7. We interpret "Goldman Sachs" to include all Applicants, current and future, granted blanket authorization by this order.

[17] GSIS is discussed below, as an investment adviser to private investment funds.

[18] 15 U.S.C. §§ 80b-1 *et seq*. (2000).

[19] 15 U.S.C. § 80b-6 (2000).

[20] Response to Deficiency Letter at 11.

[21] *Id.* at 12.

2. Mutual Funds and Private Investment Funds

12. GSAM and GSIS are investment advisers to private investment funds. Generally, GSAM and GSIS vote securities in accordance with recommendations by ISS. If GSAM and GSIS decide to vote contrary to that recommendation, the decision is subject to review, including a determination that the decision is not influenced by a conflict of interest.[22] As noted above, restrictions on voting limit Applicants' ability to assert control.

13. In addition, GSAM also serves as an investment manager to mutual funds and private investment funds.[23] The mutual funds are registered with the SEC, either as part of an umbrella trust or individually, under the 1940 Act.[24] Each fund is governed by its own board of directors or trustees, the majority of whom are independent, and who are elected by fund shareholders. The board of directors or trustees is ultimately responsible for the operations of the fund.[25] GSAM serves as an investment manager, subject to review by the board.

14. Applicants state that the prospectus and Statement of Additional Information for each mutual fund managed by GSAM expressly states that the fund is prohibited from investing in companies for the purpose of exercising control or management.[26] GSAM is required to adhere to the objectives and policies of each fund, and its management contract with each fund is required to be renewed annually.[27] Applicants state that compliance with these restrictions on investing for control is subject to verification and enforcement through periodic books and records examinations by the SEC.[28]

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[22] More specific guidelines, regarding subjects such as auditors, board of directors, shareholder rights, and more, is attached to Applicants' response. Response to Deficiency Letter, Appendix D, Goldman Sachs Funds Description of Proxy Voting Policy.

[23] Response to Deficiency letter at 9.

[24] Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 *et seq*. (2000) (1940 Act).

[25] Response to Deficiency Letter at 12.

[26] *Id. See also* Response to Deficiency Letter, Appendix E at 2 ("A Fund may not: Invest in companies for the purpose of exercising control or management.").

[27] 15 U.S.C. § 80a-15 (2000).

[28] Response to Deficiency Letter at 12.

3. Specialist Functions

15. SLK Specialists L.L.C., Goldman Sachs Execution & Clearing, L.P., SLK Index Specialists L.L.C., and The Quantitative Volatility Desk (Specialist Entities) are subject to the requirement to be the "dealer of last resort" in relation to the securities for which they are designated specialists. The principal function of a designated specialist is to ensure that all bids and asks in a particular security are reported in an accurate and timely manner, that all marketable trades are executed, and that order is maintained on the floor of the exchange. When there is a demand-supply imbalance in a particular security, the specialist must make adjustments by purchasing and selling from its own inventory to equalize the market.[29]

16. As designated specialists, the Specialist Entities are, according to the Application, subject to various limitations and restrictions imposed by the SEC and the exchanges in which they operate. Under SEC regulations, a specialist is required, as far as practicable, to engage in dealings that will permit it to maintain a fair and orderly market in the securities for which it is responsible.[30] If a specialist does not act in accord with this responsibility, the specialist's registration may be revoked by the granting authority.[31] Therefore, Applicants assert that an authorization to hold unlimited amounts of public utility securities is necessary under 203(a)(2) in order for the Specialist Entities to carry out the designated specialist functions that they have undertaken pursuant to the 1934 Act and the rules of the relevant exchanges.

4. Collateral for Loans

17. Applicants request authorization under 203(a)(2) to hold an unlimited amount of securities issued by public utilities as collateral for a loan or for purposes of liquidation in connection with a loan previously contracted.[32] Although no specific regulations address these activities, they are subject to the overarching principle that the holdings pursuant to this authorization must confer no control over the issuer on Applicants, as well as the general limitations discussed below.

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[29] *Id.* at 9-10.

[30] 15 U.S.C. § 78k(b); 17 C.F.R. § 240.11b-1.

[31] 17 C.F.R. § 240.11b-1(b).

[32] The Applicants identify certain entities that make loans, specifically Goldman Sachs Credit Partners LP, Goldman Sachs Bank USA, Goldman Sachs International, and Global Securities Services. Response to Deficiency Letter at 8, 10.

5. Schedule 13G

18. Applicants also note that they are required to file reports regarding the acquisition and securities and intent to control with the SEC. When any person acquires, directly or indirectly, beneficial ownership of five percent or more of any class of securities of a publicly-traded company, the person must file a disclosure report with the SEC on either a Schedule 13D or 13G.[33] The submission of Schedule 13D or 13G filings applies to all proposed transactions involving publicly-traded securities registered under section 12(b) of the 1934 Act. In order to qualify to file a Schedule 13G, the filer must be able to certify that it "has acquired such securities in the ordinary course of business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect."[34] Applicants state that most of the transactions for which authorization is requested involve the acquisition of equity securities registered under section 12, for which Applicants expect that they will be able to file Schedule 13G reports.[35] Applicants state: "With respect to holdings in utility securities that are registered under Section 12(b) of the 1934 Act, it is the intention of the Applicants to remain qualified to file beneficial ownership reports with the SEC on Schedule 13G."[36] Applicants acknowledge that, if they attempt to exercise control over a public utility whose securities they had acquired and if they improperly submitted a Schedule 13G filing, they could be subject to civil, and

[33] Section 13(d) of the 1934 Act and 17 C.F.R. § 240.13d-1 *et seq*. "Beneficial owner" of a security is one who has voting or investment power. Under section 16, beneficial owners of ten percent or more of any class of security are required to disgorge any profits on "short-swing" trades, that is, purchases and sales made within a six-month period. In that provision, the definition of "beneficial owner" excludes broker-dealers, investment companies, investment advisers, and others who hold the securities for the benefit of third parties or in fiduciary accounts, as long as such securities are acquired without the purpose or effect of changing or influencing control of the issuer." 17 C.F.R. § 240.16a-1(a)(1).

[34] 17 C.F.R. § 240.13d-1(b)(1)(i). "Control," as defined in the SEC's regulations, means "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise." 17 C.F.R. § 240.12b-2 (2006).

[35] Response to Deficiency Letter at 12.

[36] *Id.* at 23.

potentially criminal, liability.[37] These limitations apply to all public securities held by the Applicants, whether in an investment fund, mutual fund, or other capacity.

6. Segregated Units and Related Policies

19. Applicants state that there are separated business units (Segregated Units),[38] and policies and procedures which effectively prevent any coordination of investment activities among the Segregated Units. These protocols include prohibitions on information sharing and coordinated decision making, plus requirements for physical separation, technological separation (e.g. computer files access), separate compensatory systems, and separate responsibilities (e.g. decision to invest in a security).

20. Applicants state that these policies and procedures are monitored and reviewed by Goldman Sachs Management Controls Department, an internal audit function, and by periodic audits by the staff of the SEC.[39] Additionally, Applicants state that the rules barring trading based on insider information are enforced by the SEC and the Department of Justice. Also, the National Association of Securities Dealers, Inc. (NASD) expressly requires its members have internal information barriers, and the NYSE requires its members to certify annually that they enforce policies in compliance with federal securities law, including insider trading prohibitions. The SEC, NASD, and NYSE conduct regular examinations of registered broker-dealers.[40]

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[37] *Id.* at 14; *see also* 15 U.S.C. § 78r (2000) (civil penalties); 15 U.S.C. § 78ff (2000) (criminal penalties).

[38] GS&Co. is a separate Segregated Unit with respect to the activities of underwriting, proprietary trading, investment (including securities acquired in connection with market-making) and advisory (including private wealth management and merchant banking). In addition, two business units of GS&Co., Global Securities Service and Quantitative Volatility Desk, are each separate Segregated Units. GSAM, together with all funds that it manages and accounts that it advises; GSIS, together with the funds it manages; SLK Specialists L.L.C.; Goldman Sachs Execution & Clearing, L.P.; and SLK Index Specialists L.L.C., are each separate Segregated Units. Response to Deficiency Letter at 16-17.

[39] Response to Deficiency Letter at 15.

[40] *Id.* at 17-18. We note that in July 2007, the NASD and the member regulation, enforcement and arbitration functions of the New York Stock Exchange were consolidated in a new organization, the Financial Industry Regulatory Authority (FINRA).

21. Applicants state that these information barriers are in place to comply with the rules for publicly-traded securities. The barriers are also observed by GSAM, GSIS and the other Non-Utility Subsidiaries for their investments in privately-traded securities.[41]

7. Reporting Requirements

22. Applicants commit to filing reports by electric utility company, transmitting utility or holding company, that will cover any: (1) holdings of voting securities acquired and held as a principal for its own account; and (2) total holdings of voting securities, irrespective of the capacity in which such securities are held, within 45 days after the close of each calendar quarter.[42]

II. Notice of Filings

23. Notice of the Initial Application was published in the *Federal Register*, 72 Fed. Reg. 774 (2007), with interventions and protests due on or before January 10, 2007. None was filed.

24. Notice of the Response to the Deficiency Letter was published in the *Federal Register*, 72 Fed. Reg. 33,478 (2007), with interventions and protests due on or before June 25, 2007. None was filed.

25. Notice of the Supplemental Filing was published in the *Federal Register*, 72 Fed. Reg. 54,253 (2007), with interventions and protests due on or before October 2, 2007. None was filed.

III. Discussion

A. Standard of Review under Section 203

26. Section 203(a)(2) requires prior Commission authorization for holding companies to acquire certain securities with values in excess of $10 million of transmitting utilities, electric utility companies or holding company systems containing such entities.

27. Section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. Under the Commission's regulations, its analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on

[41] *Id.* at 21.

[42] Initial Application at 9.

competition; (2) the effect on rates; and (3) the effect on regulation.[43] Section 203 also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."[44] The Commission's regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.

B. Effect on Competition

1. Applicants' Analysis

28. Applicants argue that acquisition of securities under this authorization will not result in the acquisition of ownership or control, directly or indirectly, over generation or transmission facilities of any previously unaffiliated entity, and therefore will not have an adverse effect on competition.[45] Applicants emphasize that they will only acquire securities in the regular course of business, such as security for a loan, in connection with their asset management business, or as part of their routine activities as a broker, dealer, and trader.

29. Applicants further contend that they are subject to affirmative regulation by the SEC and certain self-regulating organizations, have fiduciary duties to clients and funds that are managed under advisory agreements, and have adopted policies and procedures that establish information barriers among and within various business units, backstopped by annual compliance assessments. The cumulative effect of such regulations, policies, and procedures prevents the Applicants from acquiring control over any utility through coordinated investment and voting strategies by providing substantial financial and other legal disincentives to engage in such coordinated activity. Applicants further contend that this cumulative effect also ensures that utility securities acquired pursuant to the

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[43] *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). *See also FPA Section 203 Supplemental Policy Statement*, 72 Fed. Reg. 42,277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007). *See also* Order No. 669.

[44] 16 U.S.C. § 824b(a)(4) (2000), *amended by* EPAct 2005.

[45] Initial Application at 11.

authorization requested will be held for passive investment purposes and not for the purpose of effecting a change in control over any utility or holding company.[46]

2. Commission Determination

30. In evaluating the Application, we consider Applicants' "commitment and principle that the utility securities acquired under the blanket authorization must confer no control over the issuer on Goldman Sachs."[47] In addition, in determining that activities conducted pursuant to the requested authorization do not result in the transfer of control over a public utility or jurisdictional facility, we rely upon Applicants' representations and commitments with respect to each activity for which they seek blanket authorization.

a. Investment Advisory Services

31. Our determination regarding securities acquired in connection with investment advisory services relies upon Applicants' representations and commitments, specifically, (a) Applicants are subject to the requirements of the Advisers Act; (b) GS&Co. does not vote shares in customers' accounts unless given voting instructions; (c) GSAM votes in accordance with Goldman's Proxy Voting Policy; (d) Applicants commit to file Schedule 13G with respect to the securities acquired in connection with its investment advisory services; and (e) Applicants comply with the separations between its Segregated Units and other related policies.

32. First, the Advisers Act proscribes practices that could result in an Applicant acquiring control of a public utility or jurisdictional facility. As registered investment advisers, Applicants are subject to the prohibitions on engaging in fraudulent, deceptive, manipulative behavior. Applicants have further shown that they are constrained from exercising control through restrictions on voting. GS&Co.'s voting practices do not give it discretion to vote the shares in order to gain control over the issuer. Similarly, GSAM's voting of securities in accordance with Goldman's Proxy Voting Policy will ensure that GSAM will not assert control. Further, in the event GSAM decides not to follow Goldman's Proxy Voting Policy, e.g., GSAM does not follow the recommendation made by ISS on how to vote, the internal review and approval process that takes place prior to the vote being cast provides additional assurance that control over the public utility will not be exercised.[48] Moreover, the Schedule 13G process further limits Applicants' ability to exercise control. Schedule 13G requires an

[46] Response to Deficiency Letter at 5.

[47] Supplemental Filing at 2.

[48] Response to Deficiency Letter at Appendix D.

affirmative statement that the acquirer of the securities has no intent to control, and the filings are monitored by Goldman Sachs Management Controls Department, an internal audit function, and by the SEC for purposes of compliance with Schedule 13G and 13D reporting requirements. Further, the Commission will be able to monitor the levels of public utility security acquisitions and holdings through the Schedule 13G and quarterly reporting requirements, discussed below, as well as monitor the investment intent through the Schedule 13G and Schedule 13D filings. Finally, SEC's oversight of, and enforcement of violations associated with, the Segregated Units of GS&Co., GSAM, and GSIS will deter information-sharing and coordinated decision-making, not only between the various Segregated Units, but also with other segments of Goldman, specifically the public utilities, such as Cogentrix, J. Aron, or PRF.

33. Our order is premised, in part, on our understanding that investment advisers subject to the Advisers Act must maintain detailed books and records of securities and trades and holdings on behalf of their clients for a period of not less than five years.[49] In addition, registered investment companies subject to regulation under the 1940 Act are required by SEC regulations to maintain detailed records of securities transactions and portfolio holdings permanently.[50] Our approval is based on the condition that the Applicants will continue to follow the SEC recordkeeping requirements as they currently exist or may change from time to time, and that failure to follow those requirements will constitute a violation of this Commission's order.

34. Accordingly, we condition our authorization upon these representations and commitments, and on the continued adherence to the regulations and safeguards that underlie them. To the extent these safeguards materially change, Applicants must notify us within 30 days of the change. In addition, we will require Applicants to submit Schedule 13G filings with the Commission, for informational purposes, contemporaneously with filing with the SEC. We will also require Applicants to file with the Commission, no later the 45 days after the end of each quarter, a separate report showing the total amount of public utility securities held in connection with investment advisory services and acquired through mutual funds and private investment funds (see below) as of the end of each quarter and as a percentage of the outstanding shares.

b. Management of Mutual Funds and Private Investment Funds

35. Similarly, our determination regarding securities acquired through mutual funds and private investment funds relies upon the representations that GSAM and GSIS vote

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[49] *See* 17 C.F.R. § 275.204-2 (2007).

[50] *See* 17 C.F.R. §§ 270.31a-1, 270.31a-2.

in accordance with Goldman's Proxy Voting Policy and the rigorous review process for exceptions, Applicants' commitment to file Schedule 13G filings with the Commission, and the existence of the Segregated Units and related policies, as discussed above.

36. We further rely on the additional requirements that apply to managers of mutual funds. Each mutual fund has a prospectus which states that the fund is prohibited from investing for purposes of exercising control or management.[51] The terms of the prospectus are enforceable against the funds through investor civil actions. Further, GSAM, as the investment manager, is subject to review by each mutual fund's board of independent directors or trustees. Finally, compliance by GSAM and the mutual funds with these restrictions on investing for control is subject to verification and enforcement by the SEC.

37. Accordingly, we condition our authorization based on these representations and commitments and on the continued adherence to these regulations and safeguards that underlie them. We also require Applicants to submit Schedule 13G filings with the Commission contemporaneously with filing with the SEC. In addition, as stated above, Applicants are required to file with the Commission, no later the 45 days after the end of each quarter, a separate report showing the total amount of public utility securities held in connection with investment advisory services and acquired through mutual funds and private investment funds, as of the end of each quarter and as a percentage of the outstanding shares. The reports are subject to a *de minimis* threshold of one percent.

c. Activities Related to Specialist Functions

38. Each Specialist Entity is its own Segregated Unit. As described above, each Specialist Entity therefore is effectively prevented from coordinating investment activities with other entities in the Goldman family, including other Segregated Units, such as GSAM, and Goldman entities directly engaged in energy-related activities, such as Cogentrix, J. Aron, or PRF. This is achieved through restrictions on information sharing, requirements for physical separation, technological separation, separate compensation systems, and separate responsibilities for investment and voting decisions. Moreover, each Specialist Entity is required to maintain its eligibility to file Schedule 13G, which evidences intent to not exercise control over the issuer of the securities acquired. These restrictions are monitored by Goldman Sachs Management Controls Department, an internal audit function, and by the SEC for purposes of compliance with Schedule 13G and 13D reporting requirements.

[51] This policy can only be changed by a vote of each fund's trustee. Response to Deficiency Letter at 12.

39. As a designated specialist, each Specialist Entity is also subject to oversight and audit of its trading activities pursuant to its "dealer of last resort" responsibilities by the SEC and various exchanges. Further, the Commission will be able to monitor the levels of public utility security acquisitions and holdings by the individual Specialist Entities through the Schedule 13G and quarterly reporting requirements.

40. Applicants have shown that the Specialist Entities have a particular responsibility for dealings in securities, and that this responsibility may be unnecessarily impeded by restrictions imposed by this Commission on the amount of public utility securities they can acquire and hold. Applicants have also shown that the Specialist Entities are subject to overlapping controls and monitoring entities, both internal and external to Goldman, which the Commission concludes are sufficient to prevent a Specialist Entity from exercising control. Therefore, authorization under section 203(a)(2) to acquire and hold an unlimited amount of public utility securities is granted, subject to the following conditions: each Specialist Entity must adhere to the applicable regulations and safeguards, each Specialist Entity is required to file Schedule 13G and 13D filings with the Commission at the same time such filings are submitted to the SEC, and each Specialist Entity must file with the Commission, no later the 45 days after the end of each quarter, a separate report showing the amount of public utility securities held as of the end of each quarter and as a percentage of the outstanding shares.

d. Accepting Collateral and Liquidating Previous Loans

41. Applicants do not specify the regulatory protections that apply to Global Securities Services, Goldman Sachs Credit Partners LP, Goldman Sachs Bank USA, and Goldman Sachs International, the entities that accept securities as collateral for loans and liquidate previous loans. We note that we have, by regulation, granted blanket authority to hold an unlimited amount of securities as collateral for a loan or for purposes of liquidation to banks regulated by the Board of Governors of the Federal Reserve Bank or by the Office of the Comptroller of the Currency, subject to certain conditions.[52] We will impose similar conditions on the authorization granted here, for the four entities named above.[53] Therefore, securities held by Applicants as a result of such a liquidation are subject to the following conditions: (1) the securities may not be held for a period of more than two

[52] 18 C.F.R. § 33.1(c)(9) (2007).

[53] These requirements are similar to those applied to entities regulated by the Board of Governors of the Federal Reserve Bank or by the Office of the Comptroller of the Currency under the Bank Holding Company Act of 1956 as amended by the Gramm-Leach-Bliley Act of 1999. 18 C.F.R. § 33.1(c)(9)(iii) and (iv) (2007).

years; (2) the holding of the securities may not confer a right to control,[54] positively or negatively, the operations through debt covenants or any other means, the operation or management of the public utility or public utility holding company, except as to customary creditor's rights or as provided under the United States Bankruptcy Code; and (3) the holder must file with the Commission on a public basis and within 45 days of the close of each calendar quarter, as a separate filing regarding utility securities obtained through liquidation in connection with a loan, both its total holdings and its holdings as a percentage of those issued, each by class, unless the holdings within a class are less than one percent of outstanding shares, irrespective of the capacity in which they were held. Finally, Applicants must submit any Schedule 13G filings with the Commission contemporaneously with filing with the SEC.

e. Additional Considerations

42. The Application states that the term "Applicant" is intended to cover "any successor entity that is engaged in the same business as any of the above-named Applicants, as well as any new mutual or private investment funds that may be created from time to time after the date of the Commission's order."[55] Further, the Application states that Goldman is an Applicant only to the extent it requests authorization on behalf of unnamed or new Non-Utility Subsidiaries engaged in the same or similar business as any named Applicant and that may acquire utility securities in the ordinary course of business in transactions described in the Application.

43. With respect to the blanket authorization's coverage of as yet unidentified Non-Utility Subsidiaries, we conclude that, if the subsidiaries are substantially identical to entities authorized in this order and, therefore, are subject to the same restrictions on exercising control described above as are applicable to that kind of entity or to that activity, the as-yet unidentified subsidiaries are authorized to engage in the proposed transactions authorized herein. For instance, an entity holding mutual funds must be registered with the SEC under the 1940 Act, and subject to Goldman's express commitment "that the utility securities acquired under the blanket authorization must confer no control over the issuer on Goldman Sachs." If the new or unnamed subsidiary is not subject to the restrictions on control discussed in this order, then a new application under section 203(a)(2) must be filed.

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[54] In keeping with the Commission's decision in *Baltimore Refuse Energy Systems Company*, 40 FERC ¶ 61,366 at 62,118, n.11 (1987), if a bankruptcy or foreclosure proceeding could cause the Applicants to acquire control, such acquisition requires prior Commission authorization under section 203(a)(1).

[55] Response to Deficiency Letter at 19.

44. Applicant must file, for informational purposes, a notice providing the name of the entity proposed to be covered by this blanket authorization, the new entity's activities and functions, and regulatory safeguards as discussed in this order that are applicable to that entity, as well as a reiteration of Goldman's commitment to not acquire securities that will confer control to Goldman over a public utility. The notice should be filed along with the reports due within 45 days of the close of the quarter, as discussed in this order.

f. Conclusion

45. We find that Applicants' representation concerning the purpose of their investments, as supported by their compliance with the regulations described above, in conjunction with the proposed conditions, provide assurance that the proposed transactions will not result in a change in control over a public utility or jurisdictional facility. However, as stated in the FPA section 203 Supplemental Policy Statement, we will not rely solely on Applicants' statements pursuant to SEC regulation.[56] Significantly, Applicants state that "the utility securities acquired under the blanket authorization must confer no control over the issuer on Goldman Sachs."[57]

46. Based on this representation and the restrictions on control cited herein, the Commission finds that the proposed transactions will have no adverse effect on competition because the transactions will not result in the consolidation of generation assets that would increase concentration in any relevant market, and they will not result in any combination of upstream or downstream assets that could create or enhance vertical market power. The authorizations granted in this order are subject to the condition that Applicants must not acquire control over a public utility whose securities they acquire.

C. Effect on Rates

1. Applicants' Analysis

47. Applicants assert that the proposed transactions will have no effect on the rates of wholesale or retail electric service customers.[58] Acquisition of securities under this authorization will not result in transfer of control of any entity, so Applicants will have no role in setting rates or participating in activities that could result in higher rates. Applicants also note that their acquisition of securities will take place in public markets,

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[56] FPA section 203 Supplemental Policy Statement at P 41 (*citing CRMC*, 116 FERC ¶ 61,267 (2006)).

[57] Supplemental Filing at 2.

[58] Initial Application at 12.

so there will be no impact on the cost structures of the issuer that could affect development of cost-based rates.

2. Commission Determination

48. Nothing in the Application indicates that rates to customers will increase as a result of the proposed transactions. Because Applicants represent that they will not obtain control over any entity for which they acquire securities under this blanket authorization, they will not be able to control markets and impact rates. For these reasons, we find that the proposed transactions conducted pursuant to this blanket authorization will have no adverse effect on rates.

D. Effect on Regulation

1. Applicants' Analysis

49. Applicants claim that acquisitions under this blanket authorization will not have an impact on regulation over the issuers of the securities, either by the Commission or state regulatory authorities.[59] Because they will have no control over the public utilities, Applicants argue, they will not be able to cause a change in activities or corporate structure that would affect regulatory jurisdiction. Further, due to the conditions and limitations on the acquisition of securities as set forth in this order, acquisitions under this blanket authorization will not change state or federal regulatory authority.

2. Commission Determination

50. The Commission finds that neither state nor federal regulation will be impaired by the proposed transactions. As discussed above, the requested blanket authorization for the acquisition and disposition of securities will not result in a change of control of a public utility or jurisdictional facility. Nor will it result in a change in regulatory authority over a public utility or jurisdictional facility whose securities might be acquired. Thus, it will not affect the Commission's or any state commission ability to regulate the affected companies. While no state commission has intervened in this case, our review indicates that the proposed investments are in the ordinary course of an investment management business and not for the purpose of obtaining control of a public utility and therefore should not affect any state commission's authority to regulate a public utility.

[59] *Id.* at 13.

E. Cross-Subsidization

1. Applicants' Analysis

51. Applicants assert that their acquisition of securities in the ordinary course of their business in connection with its asset management, lending activities, and broker, dealer, and trading businesses will not "result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company."[60] Applicants reiterate that because they will not acquire control over the companies for which they acquire securities, they will not engage in cross-subsidization or pledge or encumber their assets.[61] In addition, Applicants contend that, based on the facts and circumstances known to them or that are reasonably foreseeable, the proposed transactions will not result in: (1) any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to Commission review under sections 205 and 206 of the FPA.[62]

2. Commission Determination

52. We find that Applicants have demonstrated that they will not obtain control over any entity for which they acquire securities under the proposed transactions. Further, Applicants have provided adequate assurance that the proposed transactions under the blanket authorization will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company. The transactions under the blanket authorization do not involve transactions between public utilities with captive customers and their market-regulated or non-utility

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[60] Initial Application at 13 (*quoting* 18 C.F.R. § 2.26(f) (2007)).

[61] Initial Application at 13-14; *see also* Response to Deficiency Letter, Appendix F (Exhibit M analysis).

[62] Response to Deficiency Letter, Appendix F (Exhibit M analysis).

affiliates, and do not permit any control over utility rates or practices that may affect rates. Applicants do not, and will not as a result of the proposed transactions, control any franchised public utility assets.

The Commission orders:

(A) Applicants' current authorization, extended by the interim authorization, 118 FERC ¶ 61,085 (2007), is terminated as of the date of this order.

(B) Applicants' request for blanket authorization under FPA section 203(a)(2) is authorized for a period of three years from the date of this order, as discussed in the body of this order.

(C) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates, or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

(D) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of costs or any valuation of property claimed or asserted.

(E) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(F) Applicants shall file with the Commission contemporaneous with filing at the SEC the Schedule 13D and 13G filings that are relevant to the authorizations granted in this order. Any changes in the information provided on the initial Schedule 13G must be reflected in an annual amended filing due within 45 days of the end of each calendar year. Applicants shall file with the Commission any comment or deficiency letters received from the SEC that concern Schedule 13G-related compliance audits conducted by the SEC. Such filings shall be made in this docket or in appropriate sub-dockets of this docket.

(G) Applicants are subject to audit to determine whether they are in compliance with the representations, conditions and requirements upon which the authorizations are herein granted and with applicable Commission rules, regulations and policies. In the event of a violation, the Commission may take action within the scope of its oversight and enforcement authority.

(H) Applicants shall file with the Commission on a quarterly basis, three separate reports as follows: (1) a report of holdings arising from investment advisory services and management of mutual funds and private investment funds; (2) a report of holdings by Specialist Entity; and (3) a report of holdings arising from securities held as

collateral or from liquidation of previous loans. Each report should list the holdings of the utility voting securities, stated in terms of the number of shares held and as a percentage of the outstanding shares. The reports are due within 45 days of the close of the quarter. The reports for holdings arising from investment advisory services and management of mutual funds and private investment funds are subject to a *de minimis* threshold of one percent.

(I) If a new entity is to be covered by this blanket authorization, the entity must file notice providing the name of the entity, the new entity's activities and functions, and the regulatory safeguards applicable to that entity, as well as a reiteration of Goldman's commitment to not acquire securities that will confer control to Goldman. The notice should be filed along with the reports due within 45 days of the close of the quarter. The reports for holdings arising from investment advisory services and management of mutual funds and private investment funds are subject to a *de minimis* threshold of one percent.

(J) Applicants must inform the Commission, within 30 days, of any material change in circumstances that would reflect a departure from the facts, policies, and procedures the Commission relied upon in granting the request and specifying the terms and conditions under which the blanket authorization is set forth in section 33.1(c)(5) of the Commission's regulations will be available to them.

(K) Applicants shall retain the records of their transactions concerning public utility securities as required under the Advisors Act and 1940 Act for five years.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.