SECURITIES AND EXCHANGE COMMISSION

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Unless otherwise noted, each of the following individual Members of the Commission voted affirmatively upon each action of the Commission shown in the file:

MARY L. SCHAPIRO, CHAIRMAN

ELISSE B. WALTER, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

DANIEL L. GALLAGHER, COMMISSIONER

(75 Documents)

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**August 16, 2012**

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| **In the Matter of**<br><br>**Star Entertainment Group, Inc.,**<br><br>**File No. 500-1** | **ORDER OF SUSPENSION OF TRADING** |

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Star Entertainment Group, Inc. ("Star Entertainment") because of questions regarding the accuracy of the company's financial statements published with OTC Markets Group Inc. Star Entertainment's securities are quoted on OTC Link operated by OTC Markets Group Inc. under the ticker symbol "SETY."

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-quoted company.

THEREFORE, IT IS ORDERED, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above-quoted company is suspended for the period from August 16, 2012, 9:30 a.m. EDT, on August 16, 2012 through 11:59 p.m. EDT, on August 29, 2012.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**CHANGE ACT OF 1934**
**/ September 4, 2012**

**VE PROCEEDING**

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| **SKY ONE**<br>**AL, INC.**<br><br>**Res ent.** | **ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934** |

**I.**

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 (Exchange Act") against Respondent China Sky One Medical, Inc. ("Respondent" or "CSKI").

**II.**

After an investigation, the Division of Enforcement alleges that:

A. <u>RESPONDENT</u>

CSKI was a Nevada corporation[1] headquartered in Harbin, Heilongjiang Province, the People's Republic of China. It manufactures and sells medicinal and diagnostic products, and all of its operations are carried out in China. At all relevant times, CSKI's common stock has been registered pursuant to Section 12(g) of the Exchange Act, and the company has filed annual reports on Forms 10-K, quarterly reports on Forms 10-Q, and current reports on Forms 8-K pursuant to Section 13(a) of the Exchange Act and Rules 13a-1, 13a-11, and 13a-13 thereunder. The stock was traded on the NASDAQ Global Market under the symbol "CSKI" from September 14, 2008 to February 15, 2012. NASDAQ halted the trading following the company's announcement of resignation of 26 mid-level managers, including nine from the accounting department and two from internal controls functions.

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[1] CSKI's corporate registration was revoked, and its registered agent resigned on June 27, 2012.

CSKI's external audit firm resigned on March 12, 2012, and NASDAQ filed a Form 25 to delist CSKI's stock on March 14, 2012 after finding that the stock was no longer suitable for continued listing and trading. Currently, CSKI's stock trades in the over-the-counter market under the ticker symbol "CSKI." In the meantime, CSKI's CFO resigned effective December 22, 2011, and its CEO Yan-qing Liu has been on sick leave since December 2011.

B. CSKI'S DELINQUENT FILINGS

1. CSKI has failed to file an annual report on Form 10-K for the year ended December 31, 2011, and Forms 10-Q for the quarters ended March 31, 2012 and June 30, 2012.

2. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports. Exchange Act Rules 13a-1 and 13a-13 require issuers to file annual and quarterly reports.

3. As a result of the foregoing, CSKI failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder.

**III.**

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations;

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or to revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondent identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent.

**IV.**

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondent personally or as permitted by the Commission's Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

September 5, 2012

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| In the Matter of<br><br>eHydrogen Solutions, Inc., and ChromoCure, Inc.<br><br>File No. 500-1 | : | **Order of Suspension of Trading** |

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of eHydrogen Solutions, Inc. (EHYD) because of questions concerning the adequacy of publicly available information about the company.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of ChromoCure, Inc. (KKUR) because of questions concerning the adequacy of publicly available information about the company.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies.

THEREFORE, IT IS ORDERED, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT, on September 5, 2012 through 11:59 p.m. EDT, on September 18, 2012.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

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Commissioner Aguilar not participating

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67781 / September 5, 2012**

**INVESTMENT ADVISERS ACT OF 1940**
**Release No. 3456 / September 5, 2012**

**INVESTMENT COMPANY ACT OF 1940**
**Release No. 30193 / September 5, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15006**

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| **In the Matter of**<br><br>**RAYMOND J. LUCIA COMPANIES, INC. and RAYMOND J. LUCIA, SR.,**<br><br>**Respondents.** | **ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, SECTIONS 203(e), 203(f), AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940, AND NOTICE OF HEARING** |

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act"), against Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr. (collectively, "Respondents").

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## II.

After an investigation, the Division of Enforcement alleges that:

### A. RESPONDENTS

1. Raymond J. Lucia Companies, Inc. ("RJL") is a California corporation located in San Diego, California which did business as "RJL Wealth Management" until it abandoned that business name in May 2010. RJL was registered with the Commission as an investment adviser from September 2002 through December 2011 (CRD No. 115670). RJL had almost 4,700 client accounts with approximately $300 million in client assets under management until May 2010, when it sold its business and transferred its client accounts to RJL Wealth Management, LLC ("RJLWM"), which is registered with the Commission as an investment adviser (CRD No. 152396).

2. Raymond J. Lucia, Sr. ("Lucia") owns Respondent RJL, as well as RJL Enterprises, Inc., an entertainment company through which he produces a daily syndicated radio show, *The Ray Lucia Show*. He currently is a registered investment adviser representative (CRD No. 1073284) associated with RJLWM. He was a registered representative of First Allied Securities, Inc. (CRD No. 32444) and owned Lucia Financial, LLC (CRD No. 37179), both registered broker-dealers. He currently holds a Series 7 license and previously held Series 24, 63 and 66 licenses. Lucia, 61 years old, is a resident of Rancho Santa Fe, California.

### B. FACTUAL BACKGROUND

#### (i) Respondents' Development of the "Buckets of Money" Investment Strategy

1. Since 1991, Lucia has hosted a daily radio show, *The Ray Lucia Show,* which was nationally syndicated in 2000 and is now simultaneously podcast. Lucia also appears frequently as a commentator on a variety of television programs. Lucia is featured on two websites, www.rjlwm.com and www.raylucia.com. In addition, Lucia was the featured speaker at regular seminars hosted by RJL across the country. These seminars were promoted on Lucia's radio show and website. In addition, Lucia has written three books on investing for retirement: *Buckets of Money: How to Retire in Comfort and Safety* (2004), *Ready... Set... Retire!* (2007), and *The Buckets of Money Retirement Solution: The Ultimate Guide to Income for Life* (2010).

2. On his radio show and website, at seminars, and in his books, Lucia discusses his proprietary wealth management strategy, which he calls "Buckets of Money" ("BOM"). Lucia's comments are not limited to discussions of the BOM strategy, but a recurring theme is that the BOM strategy will enhance one's ability to retire in comfort and safety, protect the money one has spent a lifetime accumulating, and generate inflation-adjusted income for life.

3. According to Respondents, the idea for the BOM strategy was a 1998 article in *Financial Planning* by John J. Bowen, Jr., which compared the performance of $100,000 portfolios from which annual deductions of 8% were made over the 25-year period from 1972 to 1997. Respondents also claim to have relied on research conducted by Ibbotson Associates showing that there has never been a 15-year period during which an investment in the stock market lost money, and that over every 20-year period stocks have outperformed the corresponding rate of inflation. The Respondents admittedly did not attempt to recreate or otherwise verify the results of those studies.

4. To support their claims about the BOM strategy, Respondents claimed to have extensively "backtested" it. Backtesting is generally understood as the process of evaluating a strategy, theory, or model by applying it to historical data. Backtesting calculates how a strategy would have performed if it had actually been applied in the past. Thus, a backtest must utilize the actual data from the time in question in order to get an accurate result.

5. Despite the claims they made to the public, the Respondents performed scant, if any, backtesting of the BOM strategy. Respondents have admitted that the only testing they performed involved: (1) some calculations Lucia performed manually in the late 1990s, copies of which no longer exist; (2) a so-called "backtest" for the period from 1966 to 2003, memorialized on a two page Excel spreadsheet, which was performed by an RJL employee in 2003 (the "1966 Spreadsheet"); and (3) a so-called "backtest" for the period from 1973 to 2003, memorialized on a two page Excel spreadsheet, which was performed by the same RJL employee, also in 2003 (the "1973 Spreadsheet"). For the reasons described in Sections II.B(iii) and II.C below, the 1966 and 1973 backtests were deficient.

6. Respondents' various public statements contain many references to their backtesting of the BOM strategy and to the results which Respondents claim validate the BOM strategy.

7. The back cover of Lucia's 2004 book *Buckets of Money: How to Retire in Comfort and Safety*, states: "[T]he Buckets of Money technique is *a proven way* to achieve both income and growth, while guarding against the ravages of inflation." (Emphasis added.)

8. In his 2007 book *Ready ... Set ... Retire!*, Lucia wrote:

> [R]etirees need a strategy that will work in both good times and bad. Buckets of Money is such a strategy. It's not designed to make anyone rich, nor does it come with any guarantees. But *it has stood up to numerous backtests* representing some of the worst eras in past market history.
>
> But I believe – *and have shown empirically* – that this simple yet sophisticated concept reduces risk while taking advantage of growth.

> But you don't have to believe me. Others, perhaps far smarter than I, have come to the same conclusion. One such guy is economist and market guru Ben Stein, who concurred, *after I back-tested the strategy over several decades*, that it works in good times and bad. In fact, *I backtested it over several bear markets, including the dismal period beginning in 1966* [and found that it] would produce this result after 38 years. (Emphasis added.)

9. RJL's website homepage stated: "We individually custom tailor clients' portfolios using *our time-tested investment strategy*, Buckets of Money, a retirement planning strategy that seeks to provide inflation-adjusted income for life and sustained portfolio growth." (Emphasis added.)

10. A recurring theme of RJL's public statements is that Respondents' methods follow "science, not art" and that their recommendations are based on research. For example, broadcast copy for Lucia's radio show reads:

> My strategy follows the science of investing finance professors and economists from around the world have written about . . . .You need a plan that follows academic science and research, not the art of speculation . . . .
>
> I've spent twenty years refining the strategy now used by more than 8,000 people nationwide. Now, I'm inviting you to my free Denver workshop, where I'll show you the science and academic research that supports the strategy.

### (ii) <u>The BOM Investment Strategy</u>

11. Respondents have expounded on the BOM strategy since 2003. Respondents claim the BOM strategy will provide inflation-adjusted income to retirees while protecting, and even increasing, their retirement savings.

12. As explained by Respondents, the BOM strategy would typically have retirees divide their retirement savings into three "buckets." The first bucket holds the safest assets, *i.e.*, liquid assets on which both the risk of capital depreciation and the expected yield are relatively low, such as money market funds and certificates of deposit. The second bucket holds moderately safe assets on which the potential for both risk and gain is somewhat higher than those held in the first bucket – *e.g.*, municipal bonds, balanced funds and fixed annuities. The third bucket holds those assets which hold the most potential for long-term growth, as well as the highest level of risk – *e.g.*, common stocks, mutual funds, ETFs, and REITs.

13. According to the BOM strategy as articulated by Respondents, a retiree following the BOM strategy would draw on the assets in the first bucket, and any income generated by those assets could be used for immediate income needs until that bucket is

depleted – ideally, for a period of seven to eight years. At that point, the assets are reallocated to continue to provide inflation-adjusted income and asset growth.

### (iii) Respondents' Misleading Slideshow Promoting the BOM Investment Strategy and Its Backtesting

14. Respondents held numerous seminars promoting their BOM strategy in an effort to obtain advisory clients who would be charged fees in return for Respondents' advisory services. Respondents promoted the BOM strategy by using a lengthy sideshow at the seminar presentations, after promoting those seminar presentations on Lucia's radio show and the websites www.rjlwm.com and www.raylucia.com.

15. In this slideshow, three different retirement portfolio allocation strategies are contrasted with the BOM strategy. In each instance, it is assumed that (1) the beginning portfolio has $1 million in assets, (2) the portfolio must provide inflation-adjusted income of $60,000 per year, (3) inflation will average 3% per year, and (4) its owners intend to leave the $1 million to their children. The slideshow provides the following outcomes, all of which purport to demonstrate what would have happened had the portfolio been exposed to the bear market for equities that commenced on January 1, 1973:

- The "Conservative Campbells" invest only in cash or other exceedingly safe instruments earning a hypothetical 6% return, so they are not exposed to the decline in the equities market. If they die after 30 years, they will leave their children a $1 million portfolio whose purchasing power will be less than $412,000 after factoring for inflation. And if they index their $60,000 annual income every six years to keep pace with inflation, their assets will be exhausted in 27 years and their children will inherit nothing.

- The "High Rolling Hendersons" invest all of their assets in the stock market. If the market earns their anticipated return of 10% per year, they can take $60,000 per year in income, adjust that amount for inflation, and leave more than $4.2 million to their heirs after 30 years. But if they had retired in 1973, rather than earning 10% every year on their all-equities portfolio, they would have absorbed a 41% decline in the value of their assets in the first two years of retirement and would have gone bankrupt after only 17 years of taking $60,000 of inflation-adjusted income per year.

- The "Balanced Buttafuccos" put 40% of their portfolio into bonds earning 6% per year and 60% of their portfolio into stocks, drawing their income from these two asset classes on a pro rata basis, and adjusting their income needs every six years to account for inflation. If the Buttafuoccos had retired in 1973, they too would have experienced a precipitous decline in the value of their assets in their first two years of retirement, and would have depleted their stock portfolio after 15 years and their bond portfolio after 21 years of taking $60,000 of inflation-adjusted income per year.

- The "Bold Bucketeers" use a BOM approach wherein $238,000 is put into a safe bucket earning 4%, $200,000 is put into a moderate bucket earning 5.5%, $200,000 is put into a REIT investment earning 7.75%, and $362,000 is put into a stock portfolio earning 10%. This allows for six years of $60,000 income and an additional six years of inflation-adjusted income of $71,500, at which point the monies are reallocated for another 12 years. At the end of the initial 12-year period, the core $1 million has grown to $1.4 million. But this outcome, while used for purposes of comparison, is not tied to the same January 1, 1973 starting date used for the "High Rolling Hendersons" and the "Balanced Buttafuoccos", and thus, does not reflect the significant losses experienced by equity portfolios (including those of the Hendersons and the Buttafuoccos) during that era. The slideshow continues to make the point that, even if the Bucketeers had retired in 1973, they would have been able to take $60,000 of inflation-adjusted income each year for 21 years and still had a portfolio worth $1,544,789 in 1994, the year the Buttafuoccos would have exhausted their assets.

16. The Respondents' slideshow then presents information from their alleged backtesting of portfolio strategies for the period from 1966 to 2003. In this backtest, each portfolio begins with $1 million and has to produce $50,000 of annual inflation-adjusted income. The historical returns for U.S. Treasury Bonds and the S&P 500 are used as proxies for the annual returns on the bond and stock portions of the portfolios. The 1966 Spreadsheet uses as a 7% annual return on REITs, and a 3% annual inflation rate. The results, as presented in the slideshow, are as follows:

- The "60-40 Portfolio -- Income from Stocks & Bonds (Pro Rata)" -- a portfolio divided 60/40 between stocks and bonds, wherein income is taken from each on a pro rata basis -- would have dwindled to about $30,000 by 2003.

- The "60-40 Portfolio -- Buckets of Money Portfolio (Without REIT)" -- a second portfolio using the same 60/40 split, but from which income is taken from the bond portion first -- would have provided income of $150,000 per year and would have increased in value to $1.2 million by 2003.

- The "Buckets of Money Portfolio (40-20-40) (With Real Estate Investment Trusts)" -- a third portfolio placing 40% in stocks, 20% in REITs and 40% in bonds, from which income is taken from the bonds and REITs first –also would have provided income of $150,000 per year and would have increased in value to $4.7 million by 2003.

- Respondents summarize the results of the contrasted strategies "after 38 years" of purported backtesting:

| | |
|---|---|
| 60-40 Portfolio: | $30,000 |
| 60-40 (bonds first): | $1.2 million |

"Buckets" Portfolio: $4.7 million

17. The 1966 and 1973 Spreadsheets purportedly validate the slideshow's central premise – that the BOM investment strategy would have provided superior outcomes across historical time periods than other investment strategies, and thus, is a superior investment strategy going forward.

18. For several reasons, it was materially misleading for Respondents to claim that their alleged backtesting validated the BOM strategy. Among other reasons, Respondents do not appear to have engaged in the "numerous" backtests and do not appear to have "proven" that the BOM investment strategy works.

## C. RESPONDENTS' TOUTING OF THE RESULTS OF THEIR BACKTESTING IN THEIR SEMINARS WAS MATERIALLY MISLEADING

### (i) Respondents Failed to Disclose that Using Hypothetical Inflation Rate and REIT Returns Materially Impacted their Results

19. In presenting the results of the purported 1966 and 1973 backtests, Respondents disclosed that they used a hypothetical 3% inflation rate, although they used actual historical data for returns on stocks and bonds. Lucia admittedly knew that using a lower inflation rate for the backtests would make the results look more favorable for the BOM strategy. Moreover, actual figures for the inflation rate during the time period 1966 through 2003 were readily available from the Department of Labor when Respondents performed the calculations in 2003.

20. When historically accurate inflation rates are used in the alleged 1966 and 1973 backtests, an investor using the BOM strategy would have exhausted his or her assets by 1986 (if retiring in 1966) or by 1989 (if retiring in 1973), which are far worse outcomes than are presented by Respondents' slideshow, which bases those outcomes on backtesting purportedly evidenced by the 1966 and 1973 Spreadsheets.

21. Respondents also used hypothetical rates of return for REITs. In explaining the results of the backtest from 1966, Respondents included a slide titled "Notes & Assumptions," which states that Respondents based their examples "on actual market returns for the period(s) listed," and that "bond returns are based on US Treasury returns, stock returns are based on S&P 500 returns, REIT returns are based on a 7% annual return," and "inflation is based at 3% annual." A slide shown earlier in the presentation, titled "Notes and Disclaimers (REITs)," disclosed the risks of investing in REITs, including that they are long-term investments, not publicly traded, and involve significant risks including limited liquidity and fluctuating real estate values. However, in presenting the results of the 1966 backtest, Respondents failed to disclose that the REIT rates of return were entirely hypothetical, and failed to disclose that using an assumed REIT return materially inflated the results of the purported backtesting.

22. Respondents' claim that the 1966 and 1973 Spreadsheets validate the BOM strategy and show that it would prevent retirees from exhausting their assets is therefore materially misleading because Respondents were only able to reach such a result by using hypothetical data – rather than the historical data normally used in backtesting. Moreover, Respondents knew, or were reckless in not knowing, that their use of a lower-than-actual hypothetical inflation rate and assumed REIT rates of return skewed the results of the 1966 and 1973 Spreadsheets in favor of the BOM strategy.

**(ii) <u>Respondents' Failure to Deduct Advisory Fees, or to Disclose Their Impact, Was Materially Misleading</u>**

23. Respondents did not make any provision in the 1966 and 1973 Spreadsheets for advisory fees. While acknowledging the importance of fees, Respondents did not disclose to investors that their backtesting, which is purportedly validated by the 1966 and 1973 Spreadsheets, did not include advisory fees.

24. Over long periods of time such as those covered by the 1966 and 1973 Spreadsheets, advisory fees can have a substantial impact on returns. Respondents' failure to disclose that advisory fees can materially lower the returns that investors would receive, and their failure to deduct or otherwise provide for fees in the 1966 and 1973 Spreadsheets, artificially inflated the returns produced by the BOM strategy.

25. Respondents' claim that the 1966 and 1973 Spreadsheets validate the BOM strategy and show that it would prevent retirees from exhausting their assets is therefore materially misleading because the 1966 and 1973 Spreadsheets failed to take into account advisory fees. Moreover, Respondents knew, or were reckless in not knowing, that their failure to deduct advisory fees in their alleged backtests, or to even disclose the potential impact that advisory fees and other costs could have, was materially misleading.

**(iii) <u>Respondents' Failure to Reallocate Produced Materially Misleading Results</u>**

26. In the calculations for the 1966 and 1973 Spreadsheets, Respondents failed to reallocate assets after the bond and REIT buckets were exhausted. As a result, a substantial portion of the hypothetical portfolio was fully invested in the stock market from 1981 to 2003 (in the 1966 Spreadsheet) and from 1986 to 2003 (in the 1973 Spreadsheet). This resulted in overstating the performance of the BOM strategy, and materially misrepresented the results that could be expected from the BOM strategy.

27. Respondents' claim that the 1966 and 1973 Spreadsheets validate the BOM strategy and show that it would prevent retirees from exhausting their assets is therefore materially misleading because the 1966 and 1973 Spreadsheets did not reallocate assets across the BOM strategy buckets. Moreover, Respondents knew, or were reckless in not knowing, that their failure to reallocate assets across these buckets in a manner consistent with the BOM strategy they promoted was materially misleading.

## D. RESPONDENTS FAILED TO KEEP ADEQUATE RECORDS OF THEIR ALLEGED BACKTESTING OF THE BOM STRATEGY

28. At its seminars, RJL presented performance calculations for several different allocation strategies which purport to demonstrate the superior performance of the BOM strategy over certain time periods. The only documentation of those calculations which RJL retained, however, consists of two two-page Excel spreadsheets which fail to duplicate the advertised investment strategy. The calculations fail to provide for the reallocation of assets that is one of the hallmarks of the BOM strategy.

## E. VIOLATIONS

29. As a result of the conduct described in Sections II.B(iii) and II.C above, RJL willfully violated Sections 206(1), 206(2) and 206(4) of the Advisers Act, which prohibit fraudulent conduct by an investment adviser, and Rule 206(4)-1(a)(5) promulgated thereunder, which makes it "a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of Section 206(4) of the Act for any investment adviser registered [with the Commission] to publish, circulate, or distribute any advertisement which contains any untrue statement of a material fact, or which is otherwise false or misleading."

30. As a result of the conduct described in Sections II.B(iii) and II.C above, Lucia willfully aided and abetted and caused RJL's violations of Sections 206(1), 206(2) and 206(4) of the Advisers Act, which prohibit fraudulent conduct by an investment adviser, and Rule 206(4)-1(a)(5) promulgated thereunder, which makes it "a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of Section 206(4) of the Act for any investment adviser registered [with the Commission] to publish, circulate, or distribute any advertisement which contains any untrue statement of a material fact, or which is otherwise false or misleading."

31. As a result of the conduct described in Sections II.B(iii) and II.C above, RJL willfully violated Section 204 of the Advisers Act and Rule 204-2(a)(16) promulgated thereunder, which requires that investment advisers registered with the Commission "shall make and keep true, accurate and current . . . [a]ll accounts, books, internal working papers, and any other records or documents that are necessary to form the basis for or demonstrate the calculation of the performance or rate of return of any or all managed accounts or securities recommendations in any notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication that the investment adviser circulates or distributes, directly or indirectly, to 10 or more persons."

## III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative and cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondents an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest against RJL pursuant to Section 203(e) of the Advisers Act including, but not limited to, civil penalties pursuant to Section 203 of the Advisers Act;

C. What, if any, remedial action is appropriate in the public interest against Lucia pursuant to Section 203(f) of the Advisers Act including, but not limited to, civil penalties pursuant to Section 203 of the Advisers Act;

D. What, if any, remedial action is appropriate in the public interest against Lucia pursuant to Section 15(b) of the Exchange Act;

E. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Section 9(b) of the Investment Company Act;

F. Whether, pursuant to Section 203(k) of the Advisers Act, RJL should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 204, 206(1), 206(2) and 206(4) of the Advisers Act and Rules 204-2(a)(16) and 206(4)-1(a)(5) thereunder, and whether RJL should be ordered to pay a civil penalty pursuant to Section 203(i) of the Advisers Act; and

G. Whether, pursuant to Section 203(k) of the Advisers Act, Lucia should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 206(1), 206(2) and 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder, and whether Lucia should be ordered to pay a civil penalty pursuant to Section 203(i) of the Advisers Act.

**IV.**

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondents fail to file the directed Answer, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondents personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Commissioner Gallagher
not participating

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67789 / September 5, 2012**

**INVESTMENT ADVISERS ACT OF 1940**
**Release No. 3457 / September 5, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15010**

**In the Matter of**

**Steven Yamashiro,**

**Respondent.**

**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Steven Boyle Yamashiro ("Respondent").

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

## III.

On the basis of this Order and Respondent's Offer, the Commission finds that

1. Yamashiro, age 47, is a resident of Pasadena, California. Yamashiro was the chief executive officer, secretary, chief financial officer, and director of Yamashiro Financial Services, dba Capital Analyst ("Capital Analyst"). From January 1, 2000 to December 31, 2006, Yamashiro was associated with Capital Analyst, a registered investment adviser with the Commission. Capital Analyst's registration with the Commission was cancelled on February 14, 2011. From approximately November 2002 to approximately February 2006, Yamashiro was a registered representative with Cambridge Investment Research, Inc., a registered broker-dealer with the Commission.

2. On March 16, 2011, Yamashiro was indicted by a Grand Jury on eight counts of wire fraud and two counts of money laundering. On December 22, 2011, Yamashiro entered into a plea agreement with the United States Attorney's Office for the Central District of California ("USAO"). On December 27, 2011, Yamashiro pled guilty to two counts of wire fraud in violation of Title 18, United States Code, Section 1343, and one count of money laundering in violation of Title 18, United States Code, Section 1957 before the United States District Court for the Central District of California, in United States v. Steven Boyle Yamashiro, CR No. 11-217-ODW. Yamashiro was associated with Capital Analyst and Cambridge Investment Research, Inc. during the alleged conduct that was the basis of the plea agreement with the USAO. He is scheduled to be sentenced on September 17, 2012 and faces a possible sentence of 63 to 78 months in prison. Under the terms of the plea agreement, Yamashiro agreed to pay full restitution, which the USAO and Yamashiro currently believe is approximately $3,756,725.00.

3. The counts of the indictment to which Yamashiro pled guilty alleged, inter alia, that Yamashiro knowingly and with the intent to defraud, devised, participated in, and executed a scheme to defraud his clients and to obtain money and property from his clients by making materially false and misleading representations and promises, and that he executed the scheme to defraud by means of wire and radio communications in interstate and foreign commerce.

## IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act that Respondent Yamashiro be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities

with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67788 / September 5, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15009**

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| **In the Matter of**<br><br>**Global Pari-Mutuel Services, Inc.,**<br><br>**Respondent.** | **ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934** |

**I.**

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Global Pari-Mutuel Services, Inc. ("Global" or "Respondent").

**II.**

After an investigation, the Division of Enforcement alleges that:

A. Global is a Nevada corporation located in Chandler, Arizona. Global's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act. Global's stock is quoted on the OTC Link operated by OTC Markets Group, Inc. Global's current status as a corporation registered with Nevada's Secretary of State is in default and the company is dormant.

B. Global has failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder, while its common stock was registered with the Commission. Global registered its common stock with the Commission on April 3, 2001 and thereafter filed periodic and annual reports. On June 2, 2010, Global filed a Form 15 with the Commission terminating its registration with the Commission. On December 22, 2010, Global filed a Form 10 with the Commission to re-register its common stock. Thereafter, Global filed an annual report on Form 10-K for the period ending December 31, 2010 and a quarterly report on Form 10-Q for the period ending March 31, 2011. Global filed its last periodic report, a Form 10-Q for the period ending March 31, 2011, on May 18, 2011. Since that date, Global has not filed any periodic or annual reports with the Commission.

## III.

Section 12(j) of the Exchange Act provides as follows:

> The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months or to revoke the registration of a security, if the Commission finds, on the records after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II are true and, in connection therewith, to afford the Respondent an opportunity to establish any defenses to such allegations; and

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or to revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent.

## IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rule of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondent personally or by certified, registered, or Express Mail, or by other means of verifiable delivery.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as a witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67786 / September 5, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15007**

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| **In the Matter of**<br><br>**STARS TO GO, INC.,**<br><br>**Respondent.** | **ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934** |

**I.**

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate and for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act").

**II.**

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Stars To Go, Inc. ("STGO")[1] (CIK No. 796040) is a forfeited California corporation located in Los Angeles, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Prior to being suspended on May 14, 2012, STGO's common stock was quoted on OTC Link operated by OTC Markets Group, Inc.

B. DELINQUENT PERIODIC FILINGS

2. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers with classes of securities registered pursuant to Exchange Act Section 12 to file with the

[1] The short form of the issuer's name is also its stock symbol.

Commission current and accurate information in periodic reports. Specifically, Rule 13a-1 requires issuers to file annual reports and Rule 13a-13 requires issuers to file quarterly reports.

3. STGO filed its last Form 10-K on April 15, 1991, and its last Form 10-Q on November 14, 1990. Since then, STGO has not submitted its required periodic filings.

4. As discussed above, STGO is delinquent in its periodic filings with the Commission and has repeatedly failed to meet its obligations to file timely periodic reports.

5. As a result of the foregoing, STGO has failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

## III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors to institute public administrative proceedings to determine:

A. Whether the allegations set forth in Section II are true and, in connection therewith, to afford the Respondent an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate name of the Respondent.

## IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice [17 C.F.R. § 201.220].

If Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate name of the Respondent, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310].

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67787 / September 5, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15008**

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| **In the Matter of**<br><br>**VISION TWENTY ONE, INC.,**<br><br>**Respondent.** | **ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934** |

**I.**

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate and for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act").

**II.**

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Vision Twenty One, Inc. ("EYES")[1] (CIK No. 1020258) is an inactive Florida corporation located in Baltimore, Maryland with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Prior to being suspended on May 14, 2012, EYES's common stock was quoted on OTC Link operated by OTC Markets Group, Inc.

B. DELINQUENT PERIODIC FILINGS

2. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers with classes of securities registered pursuant to Exchange Act Section 12 to file with the

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[1] The short form of the issuer's name is also its stock symbol.

Commission current and accurate information in periodic reports. Specifically, Rule 13a-1 requires issuers to file annual reports and Rule 13a-13 requires issuers to file quarterly reports.

3. EYES filed its last Form 10-K for the year ended December 31, 2000 on April 17, 2001 and its last Form 10-Q for the three months ended September 30, 2001 on November 14, 2001. Since then, EYES has not submitted its required periodic filings.

4. As discussed above, EYES is delinquent in its periodic filings with the Commission, has repeatedly failed to meet its obligations to file timely periodic reports, and failed to heed a letter sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations or, through its failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such a letter.

5. As a result of the foregoing, EYES has failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

**III.**

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors to institute public administrative proceedings to determine:

A. Whether the allegations set forth in Section II are true and, in connection therewith, to afford the Respondent an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate name of the Respondent.

**IV.**

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice [17 C.F.R. § 201.220].

If Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate name of the Respondent, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310].

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67793 / September 6, 2012**

**ACCOUNTING AND AUDITING ENFORCEMENT**
**Release No. 3415 / September 6, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15012**

**CORRECTED**

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| **In the Matter of**<br><br>**S. W. Hatfield, CPA and**<br>**Scott W. Hatfield, CPA**<br><br>**Respondents.** | **ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE** |

## I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against S. W. Hatfield, CPA and Scott W. Hatfield, CPA ("Respondents") pursuant to Sections 4C[1] and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(i) and (iii) of the Commission's Rules of Practice.

## II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

[1] Section 4C provides, in relevant part, that:

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . (1) not to possess the requisite qualifications to represent others . . . (2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

that 21 issuers included in periodic reports and registration statements filed with the Commission.

2. Scott W. Hatfield, CPA ("Scott Hatfield"), age 57, resides in Dallas, Texas and is the sole proprietor of SWH. He served as the engagement partner on each of SWH's issuer audits and knowingly signed the firm's name to each audit report SWH issued during the period SWH's license was expired. Scott Hatfield has been licensed in Texas as a certified public accountant since 1985.

B. <u>FACTS</u>

1. In 1994, Scott Hatfield obtained SWH's initial license to practice as a public accounting firm from the Texas State Board of Public Accountancy ("TSBPA"). He annually renewed SWH's license through January 2009.

2. Under Texas' Public Accountancy Act,[2] a firm, including a sole proprietorship such as SWH, may not provide attest services[3] unless it holds a validly-issued firm license,[4] and only a license holder may issue a report on a financial statement.[5] Accordingly, an individual license holder may not issue audit reports unless his firm also holds a validly-issued firm license.

3. In addition, each firm licensed by the TSBPA that performs attest services must enroll and participate in a peer review program. A firm that performs attest services only for issuer clients can meet this requirement through the PCAOB inspection process. On the other hand, a firm that performs attest services for any non-issuer clients must also enroll in a peer review program for review of its non-public company attest work.

4. In October 2009, the TSBPA notified Scott Hatfield that SWH's license had not yet been renewed for the upcoming year and would expire on January 31, 2010. It also informed Scott Hatfield that SWH had failed to report the results of a 2006 peer review or the results of any other peer review in the subsequent three years. In or before March 2010, the TSBPA told Scott Hatfield that he could be sanctioned if he issued audit reports without a valid firm license.

5. SWH's license expired on January 31, 2010 and was not renewed until May 19, 2011. Scott Hatfield knew that SWH's license had expired.

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2 *See* Tex. Occ. Code Ch. 901 (the "Public Accountancy Act").

3 The Texas Administrative Code, Rule 501.52(4), defines "Attest service" to include, among other things: "an audit or other engagement required by the [TSBPA] to be performed in accordance with the auditing standards adopted by the AICPA, PCAOB, or another national or international accountancy organization recognized by the [TSBPA]."

4 *See* Tex. Occ. Code § 901.351 (requiring firm licenses).

5 *See* id. § 901.456.

6. Scott Hatfield successfully renewed SWH's firm license on May 19, 2011.

7. Between January 31, 2010 and May 19, 2011, while SWH's public accounting license was expired, SWH issued 38 audit reports that 21 issuers included in periodic reports and registration statements filed with the Commission (see Appendix). Scott Hatfield, as SWH's sole proprietor, consented to the inclusion of SWH's audit reports in these filings. Issuers relied on SWH's audit reports to, among other things, issue securities. Scott Hatfield and SWH billed issuers $199,722 in connection with audits conducted or completed while SWH's license was expired.

8. SWH's audit reports were included in public filings by five issuers quoted on the OTCBB during the period from January 31, 2010 and May 19, 2011. The following chart summarizes the number of days traded, the average trading volume and the low, high, and average close price per these five issuers during this period:

| Issuer | No. Days Traded | Avg. Daily Volume | Close Price | | |
|---|---|---|---|---|---|
| | | | Low | High | Average |
| 8888 Acquisition Corp. (EGHA); (Registration withdrawn Aug. 17, 2011) | 13 | 261 | $ 0.07 | $ 3.00 | $ 1.11 |
| Eight Dragons Co. (EDRG) | 26 | 213 | $ 0.07 | $ 1.70 | $ 0.57 |
| HPC Acquisitions, Inc. (HPCQ) | 23 | 8,665 | $ 0.01 | $ 0.75 | $ 0.15 |
| Truewest Corp. (TRWS) | 7 | 200 | $ 0.10 | $ 3.00 | $ 1.39 |
| X-Change Corp. (XCHC) | 128 | 9,268 | $ 0.20 | $ 1.58 | $ 0.47 |

9. Scott Hatfield authorized seven issuers to include SWH audit reports in registration statements filed with the Commission while SWH's license was expired. Six issuers filed registration statements on Form 10-12G; however only one, SMSA Kerrville Acquisition Corp. ("SMSA Kerrville"), issued securities during the period that SWH's license was expired. Specifically, on December 15, 2010, SMSA Kerrville issued 9.5 million shares of restricted, unregistered common stock in exchange for 100% of the outstanding common stock of another company. In August 2010, the sixth issuer, Asia Green Agriculture Corp., f/k/a SMSA Palestine Acquisition Corp., ("SMSA Palestine"), issued 11,685,617 shares for 100% of the outstanding common stock of Sino Oriental

Agriculture Group Limited, a BVI corporation. SMSA Palestine later filed a Form S-1 on September 20, 2010 and subsequent amendments before going effective on July 15, 2011.[6]

10. Three other issuers[7] disclosed issuances of unregistered, restricted common stock for acquisitions and for services while SWH's firm license was expired. Their Commission filings indicate that they relied on Section 4(2) of the Securities Act of 1933, as amended, for an exemption from registration and that no underwriter was used in related transactions. A fourth issuer, X-Change Corp., issued securities during the period in which SWH's license was expired to convert or retire outstanding debt and to obtain certain intellectual property rights.

11. Under Rule 1-02(a) of Regulation S-X, audit reports must be prepared by "an independent public or certified public accountant." Rule 2-01(a) of Regulation S-X, however, provides that the Commission will not recognize any person (including an unincorporated organization like SWH) as either a public accountant or certified public accountant who is not in good standing as such under the laws of the place of his residence or principal office. Between January 31, 2010 and May 19, 2011, SWH was not duly registered and in good standing under the laws of the state of Texas, where Scott Hatfield resided and SWH maintained its principal office. Accordingly, SWH was not recognized as an accountant by the Commission during this period.

C. VIOLATIONS

1. As a result of the conduct described above, Respondents willfully violated Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder, which prohibit fraudulent conduct in connection with the purchase or sale of securities.

2. As a result of the conduct described above, Respondents do not possess the requisite qualifications to represent others, pursuant to Section 4C(a)(1) and Rule 102(e)(1)(i) of the Commission's Rules of Practice.

3. As a result of the conduct described above, Respondents willfully violated the federal securities laws, pursuant to Section 4C(a)(3) of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.

**III.**

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary that public administrative and cease-and-desist proceedings be instituted to determine:

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6 SMSA Palestine included SWH's audit report in amendments to the registration statement on form S-1 filed November 5, 2010 and December 10, 2010. Neither the initial registration statement on Form S-1 filed on September 20, 2010 nor amendments filed subsequent to 2010 include SWH's audit report.

7 Signet International Holdings, Inc, SMSA Crane Acquisition Corp., and SMSA Gainesville Acquisition Corp.

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondents an opportunity to establish any defenses to such allegations;

B. Whether, pursuant to Section 21C of the Exchange Act, Respondents should be ordered to cease and desist from committing or causing any violation and any future violation of Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder;

C. Whether, pursuant to Section 4C of the Exchange Act and Rule 102(e) of the Commission's Rules of Practice, Respondents should be censured or denied, temporarily or permanently, the privilege of appearing or practicing before the Commission as accountants;

D. Whether, pursuant to Section 21B of the Exchange Act, civil penalties should be levied against either Respondent; and

E. Whether, pursuant to Section 21C(e) of the Exchange Act, Respondents should be subject to disgorgement with prejudgment interest.

## IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Kevin M. O'Neill

By: Kevin M. O'Neill
Deputy Secretary

## Appendix
## Filings Including Audit Reports Issued by S. W. Hatfield, CPA while License Expired
## January 31, 2010 to May 19, 2011

| | Issuer | CIK Code | Ticker | Filing Type | Filing Date | Period Ended | No. | Report Date | Consent Date | Disclosed SWH Fees |
|---|---|---|---|---|---|---|---|---|---|---|
| 1 | **8888 Acquisition Corp.** *(SWH dismissed 10/19/2010; Form 15 Filed 8/17/11)* | 1376866 | EGHA | 10-K | 10/15/2010 | 8/31/2010 | 1 | 10/7/2010 | N/A | $ 6,100 |
| 2 | **Alliance Health, Inc.** *(Form 15 Filed 6/8/11)* | 822434 | ALNH | 10-K | 11/26/2010 | 9/30/2010 | 2 | 11/2/2010 | N/A | $ 5,750 |
| 3 | **Asia Green Agriculture Corp.** f/k/a SMSA Palestine Acquisition Corp. *(SWH dismissed 8/20/10)* | 1440476 | AGAC | 10-K | 3/30/2010 | 12/31/2009 | 3 | 3/15/2010 | N/A | $ 7,200 |
| | | | | S-1/A1 | 11/5/2010 | 12/31/2009 | | 3/15/2010 | 11/4/2010 | |
| | | | | 8-K/A | 11/5/2010 | 8/20/2010 | | 3/15/2010 | 11/4/2010 | |
| | | | | S-1/A2 | 12/10/2010 | 12/31/2009 | | 3/15/2010 | 12/10/2010 | |
| | | | | 8-K/A | 1/18/2011 | 8/20/2010 | | 3/15/2010 | N/A | |
| | | | | 8-K/A | 2/22/2011 | 8/20/2010 | | 3/15/2010 | N/A | |
| | | | | 8-K/A | 3/22/2011 | 8/20/2010 | | 3/15/2010 | N/A | |
| | | | | 8-K/A | 4/19/2011 | 8/20/2010 | | 3/15/2010 | N/A | |
| | | | | 8-K/A | 5/9/2011 | 8/20/2010 | | 3/15/2010 | N/A | |
| 4 | **BTHC X, Inc.** *(SWH resigned 3/29/2010)* | 1375685 | BTXI | 10-K | 3/30/2010 | 3/31/2009 | 4 | 3/23/2010 | N/A | $ 4,100 |
| | | | | 10-K | 3/29/2011 | 12/31/2010 | | 3/23/2010 | N/A | $ 8,100 |
| 5 | **BTHC XIV, Inc.** | 1405646 | BXII | 10-K | 3/10/2010 | 12/31/2009 | 5 | 3/4/2010 | N/A | $ 4,300 |
| | | | | 10-K | 1/18/2011 | 12/31/2010 | 6 | 1/11/2011 | N/A | $ 5,200 |
| 6 | **BTHC XV, Inc.** (*SWH* dismissed 10/18/2010) | 1412090 | BTXV | 10-K | 3/10/2010 | 12/31/2009 | 7 | 3/5/2010 | N/A | $ 4,300 |
| | | | | 10-K | 4/15/2011 | 12/31/2010 | | N/A | N/A | $ 7,375 |
| 7 | **Chile Mining Technologies, Inc. f/k/a Latin America Ventures, Inc.** *(SWH dismissed 5/12/2010)* | 1427714 | LVEN | 10-K | 2/9/2010 | 12/31/2009 | 8 | 2/3/2010 | N/A | $ 6,450 |

| | Issuer | CIK Code | Ticker | Filing Type | Filing Date | Period Ended | No. | Report Date | Consent Date | Disclosed SWH Fees |
|---|---|---|---|---|---|---|---|---|---|---|
| 8 | Eight Dragons Co. | 1100778 | EDRG | 10-K | 3/9/2010 | 12/31/2009 | 9 | 2/23/2010 | N/A | $ 6,950 |
| | | | | 10-K | 1/28/2011 | 12/31/2010 | 10 | 1/26/2011 | N/A | $ 5,713 |
| 9 | HPC Acquisitions, Inc. | 1435224 | HPCQ | 10-K | 3/17/2010 | 12/31/2009 | 11 | 2/11/2010 | N/A | $ 6,725 |
| | | | | 10-K | 3/1/2011 | 12/31/2010 | 12 | 1/6/2011 | N/A | $ 5,750 |
| 10 | Marketing Acquisition Corp. *(SWH resigned 5/4/2010)* | 1363343 | MAQC | 10-K | 3/28/2011 | 12/31/2009 | 13 | 3/2/2010 | N/A | $ 2,250 |
| | | | | 10-K | 3/5/2010 | 12/31/2009 | | 3/2/2010 | N/A | $ 4,500 |
| 11 | Renewable Energy Acquisition Corp. | 1418302 | | 10G | 3/3/2010 | 12/31/2009 | 14 | 2/12/2010 | N/A | |
| | | | | 10-K | 3/9/2011 | 12/31/2010 | 15 | 2/25/2011 | N/A | $ 4,918 |
| 12 | Signet International Holdings, Inc. *(SWH resigned 4/9/2010)* | 1317833 | SIGN | 10-K | 4/12/2010 | 12/31/2009 | 16 | 4/7/2010 | N/A | $ 18,365 |
| 13 | SMSA Crane Acquisition Corp. | 1473287 | SSCR | 10-12G/A | 2/22/2010 | 12/31/2009 | 17 | 2/17/2010 | N/A | |
| | | | | 10-K | 3/7/2011 | 12/31/2010 | 18 | 2/7/2011 | N/A | $ 4,300 |
| 14 | SMSA Gainesville Acquisition Corp. | 1474266 | SACQ | 10-K | 3/16/2010 | 12/31/2009 | 19 | 3/11/2010 | N/A | $ 3,000 |
| | | | | 10-K | 3/8/2011 | 12/31/2010 | 20 | 2/8/2011 | N/A | $ 4,975 |
| 15 | SMSA Humble Acquisition Corp. | 1495900 | SMHQ | 10-12G | 8/27/2010 | 6/30/2010 | 21 | 8/25/2010 | N/A | |
| | | | | 10-12G | 10/29/2010 | 9/30/2010 | 22 | 10/26/2010 | N/A | |
| | | | | 10-12G/A | 12/10/2010 | 9/30/2010 | 23 | 12/8/2010 | N/A | |
| | | | | 10-K | 3/14/2011 | 12/31/2010 | 24 | 2/10/2011 | N/A | $ 4,225 |
| 16 | SMSA Katy Acquisition Corp. | 1495899 | SCQO | 10-12G | 8/25/2010 | 6/30/2010 | 25 | 8/24/2010 | N/A | |
| | | | | 10-12G | 10/27/2010 | 9/30/2010 | 26 | 10/25/2010 | N/A | |
| | | | | 10-12G/A | 11/30/2010 | 9/30/2010 | | 10/25/2010 | N/A | |
| | | | | 10-12G/A | 12/20/2010 | 9/30/2010 | 27 | 12/17/2010 | N/A | |
| | | | | 10-K | 3/14/2011 | 12/31/2010 | 28 | 2/9/2011 | N/A | $ 4,225 |
| 17 | SMSA Kerrville Acquisition Corp. | 1512693 | | 10-12G | 2/15/2011 | 12/31/2010 | 29 | 1/28/2011 | N/A | $ - |
| | | | | 10-12G/A | 3/23/2011 | 12/31/2010 | | 1/28/2011 | N/A | |
| | | | | 10-12G/A | 4/5/2011 | 12/31/2010 | | 1/28/2011 | N/A | |

| | Issuer | CIK Code | Ticker | Filing Type | Filing Date | Period Ended | No. | Report Date | Consent Date | Disclosed SWH Fees |
|---|---|---|---|---|---|---|---|---|---|---|
| 18 | **SMSA Shreveport Acquisition Corp.** *(Form 15 Filed 8/8/11)* | 1501643 | | 10-12G | 11/1/2010 | 9/20/2010 | 30 | 10/27/2010 | N/A | $ - |
| | | | | 10-12G | 1/27/2011 | 12/31/2010 | 31 | 1/25/2011 | N/A | |
| | | | | 10-12G/A | 3/7/2011 | 12/31/2010 | | 1/25/2011 | N/A | |
| 19 | **SMSA Treemont Acquisition Corp.** *(SWH dismissed 5/13/2011)* | 1495898 | SAQU | 10-12G | 8/27/2010 | 6/30/2010 | 32 | 8/25/2010 | N/A | |
| | | | | 10-12G | 10/29/2010 | 9/30/2010 | 33 | 10/26/2010 | | |
| | | | | 10-12G/A | 12/10/2010 | 9/30/2010 | 34 | 12/8/2010 | | |
| | | | | 10-K | 3/14/2011 | 12/31/2010 | 35 | 2/10/2011 | | $ 4,225 |
| 20 | **Truewest Corp.** | 895650 | TRWS | 10-K | 11/15/2010 | 9/30/2010 | 36 | 11/9/2010 | N/A | $ 6,138 |
| 21 | **X-Change Corp.** | 54424 | XCHC | 10-K | 4/21/2010 | 12/31/2009 | 37 | 3/31/2010 | N/A | $ 27,500 |
| | | | | 10-K | 1/18/2011 | 12/31/2010 | 38 | 1/14/2011 | N/A | $ 27,138 |
| | Total disclosed SWH audit fees | | | | | | | | | $ 199,772 |

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**INVESTMENT ADVISERS ACT OF 1940**
**Release No. 3458 / September 6, 2012**

**INVESTMENT COMPANY ACT OF 1940**
**Release No. 30196 / September 6, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15011**

| | |
|---|---|
| **In the Matter of**<br><br>**FOCUS POINT SOLUTIONS, INC., THE H GROUP, INC., and CHRISTOPHER KEIL HICKS,**<br><br>**Respondents.** | **ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 203(e), 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940 AND SECTIONS 9(b) AND 9(f) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER** |

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against Focus Point Solutions, Inc. ("Focus Point"), The H Group, Inc. ("The H Group"), and Christopher Keil Hicks ("Hicks") (collectively "Respondents").

**II.**

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 and Sections 9(b) and 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

## III.

On the basis of this Order and Respondents' Offers, the Commission finds that:

### Summary

1. This matter involves an investment adviser's failure to disclose multiple conflicts of interest. The adviser, Focus Point, of Portland, Oregon, together with its related adviser The H Group, and their principal Hicks, failed to disclose material conflicts of interest in three areas of their advisory business.

2. First, Focus Point received undisclosed compensation through a revenue-sharing agreement with a registered broker-dealer ("Broker"). The Broker agreed to pay Focus Point for all client assets that Focus Point invested in certain mutual funds. In exchange, Focus Point agreed to provide certain custodial support services to the Broker. The agreement created incentives for Focus Point to favor a particular category of mutual funds over other investments. Focus Point did not disclose this conflict of interest to its clients. By failing to disclose this conflict, Focus Point violated and Hicks aided and abetted Focus Point's violations of Sections 206(2) and 207 of the Advisers Act.

3. Second, misleading information about Focus Point's fee structure was provided to the trustees of a mutual fund for which Focus Point was seeking approval to become the sub-adviser. During the process of being hired as a sub-adviser to the fund, Focus Point told the trustees that Focus Point would not receive any compensation beyond its sub-advisory fee. However, unbeknownst to the trustees, Focus Point had an arrangement with the fund's primary adviser that the primary adviser would compensate Focus Point. Focus Point's omission prevented the trustees from evaluating all information reasonably necessary to approve the sub-advisory agreement, information which Focus Point was obligated to provide the trustees. Focus Point thus violated Section 15(c) of the Investment Company Act, and Hicks aided and abetted that violation.

4. Finally, The H Group, which was related to Focus Point, voted client proxies in favor of the proposal to approve Focus Point as the fund's sub-adviser, despite its related adviser having a financial interest in the outcome of the vote. That conflict of interest created an incentive for The H Group to vote in its and its related adviser's best interests rather than in the best interest of The H Group's clients. By voting these proxies despite a conflict of interest, The H Group violated Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-6 thereunder.

### Respondents

5. Respondent Focus Point is a registered investment adviser located in Portland, Oregon. Focus Point provides investment advice and back-office custodial support to both related and unrelated investment advisory firms. As of December 2011, Focus Point served as a non-discretionary investment adviser with approximately $1.7 billion in assets under management.

Focus Point also serves as the sub-adviser to the $65 million Generations Multi-Strategy Fund, a series of the Northern Lights Fund Trust. Focus Point is owned and operated by Respondent Hicks.

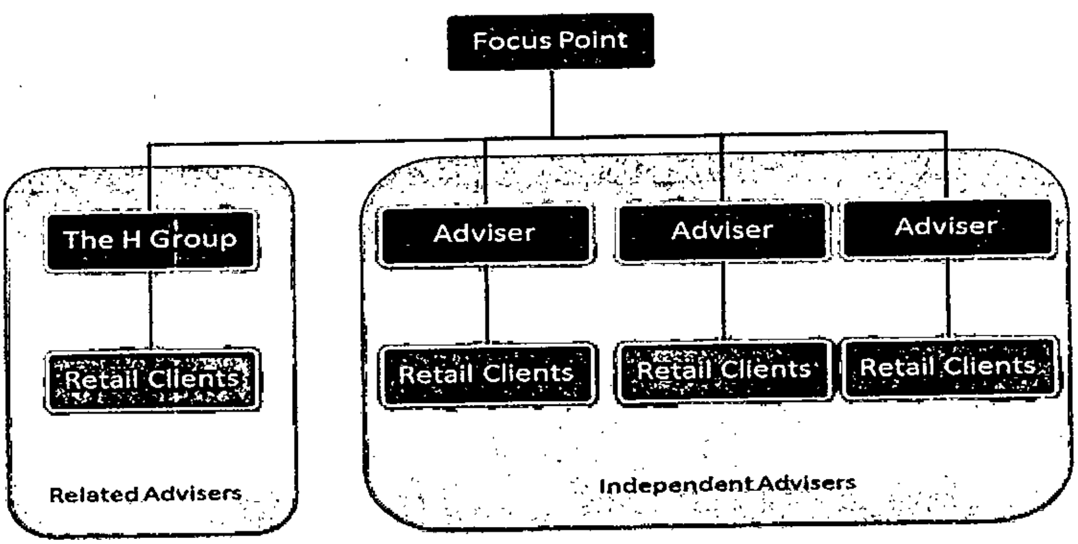
6. Respondent The H Group is a registered investment adviser located in Portland, Oregon. The H Group, which shares common ownership with Focus Point, offers investment advisory services to retail clients. As reported in its Form ADV, The H Group managed approximately $515 million as of December 2011. H Group, whose president and owner is Respondent Hicks, receives investment advice and back-office custodial support from Focus Point.

7. Respondent Christopher Keil Hicks, age 44, resides in Portland, Oregon. Since January 2008, Hicks has served as President and owner of Focus Point and The H Group.

**Facts**

*Focus Point Failed to Disclose Payments*

8. Focus Point provides "turn-key" asset management services and back-office custodial support to approximately 60 investment advisers (the "Advisers"). Including related and unrelated Advisers, Focus Point services approximately $1.7 billion in assets under management, most of which is custodied with the Broker:




9. In addition to back-office custodial support, Focus Point provides investment recommendations to the Advisers. When an Adviser hires Focus Point, Focus Point provides that Adviser access to Focus Point's proprietary asset allocation models made up of mutual fund and ETF selections in different asset classes. The Adviser then selects a model or group of models for each retail client. As of May 2010, Focus Point offered many model portfolios to its advisory clients, using a variety of mutual funds, ETFs, and equity positions, and recommended over- or

under-weighting various asset classes based on Focus Point's macroeconomic views. The majority of Focus Point's recommendations related to "No Transaction Fee" ("NTF") mutual funds. An NTF mutual fund is offered to investors by the Broker without any form of commission charged for the transaction.

10. When the Focus Point investment team believed that a fund addition or deletion was appropriate, they would first present their analysis to Focus Point's Investment Policy Committee, which included Hicks. If approved, the investment team then presented the proposed mutual fund change at a web conference with the Advisers, with an e-mail providing the investment rationale for the change following a few days later. Advisers were given 5 business days to object to the recommendation before Focus Point made the changes for all affected accounts.

11. In September 2007, Focus Point and the Broker entered into a "Custodial Support Services Agreement" ("CSSA"). Under the CSSA Focus Point agreed to perform certain "custodial support services," such as facilitating asset transfers, updating client information for the Broker, handling client account inquiries, and assisting with client paperwork and account reconciliation. In exchange, the Broker agreed to pay Focus Point a certain percentage of every dollar that Focus Point's clients invested in NTF mutual funds.[1] The September 2007 CSSA included a scaling provision, which provided for increased payouts to Focus Point if it achieved higher levels of custodied assets with the Broker. After Focus Point reached the first of these benchmarks, the parties entered into a new CSSA paying Focus Point a higher percentage on NTF assets in April 2010. The scaling provision was removed at that time.

12. Focus Point did not disclose the existence of the CSSA revenue-sharing agreement to any of the Advisers, nor did Focus Point disclose to them that Focus Point had an incentive to prefer NTF funds. Clients were thus unaware that Focus Point might have a bias in favor of the Broker's NTF funds over other investments that would not generate revenue for Focus Point under the revenue-sharing deal with the Broker, leading to potentially conflicted investment advice. Focus Point's Form ADV, a disclosure form filed with the SEC and made available to clients, also did not disclose this conflict. Item 13.A. of former Form ADV Part II[2] specifically requires investment advisers to disclose any arrangement where they receive direct or indirect compensation in connection with giving advice to clients. Focus Point's 13.A. disclosure does not.

## *The Generations Fund*

13. The Generations Multi-Strategy Fund ("Generations") is a mutual fund primarily investing in large-cap equities. Generations is organized as a series of the Northern Lights Fund Trust ("Northern Lights"), which assists independent investment advisers by providing the necessary infrastructure to support all of the services a mutual fund requires. Northern Lights is comprised of over 100 series, including Generations. Since its launch in October 2008,

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[1] The CSSA did not cover any proprietary funds advised by affiliated persons of the Broker, even though the Broker also offered some of these funds as NTFs.

[2] Part 2 of Form ADV was amended in 2010. *See* IA-3060 (July 28, 2010), http://www.sec.gov/rules/final/2010/ia-3060.pdf. Focus Point's Form ADV Part 2A also failed to disclose the conflict.

Generations has been advised by an adviser that is related to Focus Point ("Related Adviser"). The Related Adviser was expressly created for the purpose of advising Generations. The H Group, which is related to both Focus Point and the Related Adviser, placed many of its clients into Generations.[3]

14. In mid-2009, the Related Adviser proposed adding Focus Point as the sub-adviser to Generations and including a 12b-1 fee for the fund.[4] During the process of gaining approval of its sub-advisory agreement, Focus Point made several statements and representations to the Trustees of Northern Lights. Focus Point represented that it did not expect to receive payments or benefits from Generations other than the fee paid pursuant to the sub-advisory agreement.

15. However, unbeknownst to the Trustees, Focus Point had an arrangement with the Related Adviser in which the Related Adviser would pay Focus Point approximately 15 basis points.[5] Focus Point did not disclose this agreement to the Northern Lights' Trustees. Focus Point's omission prevented the Northern Lights Trustees from evaluating the information reasonably necessary to approve the sub-advisory agreement, information which Focus Point was obligated to provide the Trustees.

*November 2009 Proxy Vote*

16. Adding Focus Point as the sub-adviser to Generations required shareholder approval. The vast majority of these shareholders were clients of The H Group, which had recommended Generations to many of its clients. As The H Group and Focus Point have common ownership, H Group's act of voting proxies on a shareholder proposal that could result in additional compensation for Focus Point created a conflict of interest. In the case of such a conflict, The H Group's Proxy Voting Policy called for the proxies to be referred to the investors themselves. Such a referral would have prevented The H Group's conflict of interest from tainting the proxy vote and potentially affecting the results.

17. Despite the requirement in the Proxy Voting Policy, The H Group voted its clients' proxies in favor of the proposals to add Focus Point as a sub-adviser and to include a 12b-1 fee for Generations. Over 2.3 million proxies were voted in total (59% of the outstanding shares), and The H Group voted over 2 million proxies in favor of both proposals.

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[3] Focus Point, The H Group, and the Related Adviser are all owned, fully or partially, by Hicks.

[4] The marketing and selling costs involved with running a mutual fund are commonly referred to as distribution costs. Mutual funds are permitted to charge certain fees known as 12b-1 fees pursuant to Rule 12b-1 under the Investment Company Act to pay for fund distribution. These fees are deducted from a mutual fund to compensate securities professionals for sales efforts and certain administrative services provided to the fund's investors.

[5] A basis point is 1/100th of 1% or 0.0001. Correspondingly, 15 basis points means 0.15%, or 0.0015.

## Violations of Law

18. Section 206(2) of the Advisers Act makes it unlawful for an adviser to use instruments of interstate commerce to engage in any transaction, practice, or course of business that operates as a fraud or deceit upon any client or prospective client. Proof of scienter is not required to establish a violation of Section 206(2), but rather may rest on a finding of negligence. *SEC v. Steadman*, 967 F.2d 636, 643 n.5 (D.C. Cir. 1992) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194-95 (1963).) Section 207 of the Advisers Act makes it unlawful for any person to make any untrue statement of a material fact in any registration application or report filed with the Commission. As a result of the conduct described above, Focus Point willfully violated Sections 206(2) and 207 of the Advisers Act, and Hicks willfully aided and abetted and caused Focus Point's violations.[6]

19. Section 15(c) of the Investment Company Act requires an investment adviser to a registered investment company, such as a mutual fund, "to furnish, such information as may reasonably be necessary to evaluate the terms of any contract whereby [it] undertakes regularly to serve or act as investment adviser ...." to the fund. Section 15(c) of the Investment Company Act requires, among other things, that a majority of a fund's independent directors/trustees approve the advisory contract between the investment adviser and the fund. As a result of the conduct described above, Focus Point willfully violated Section 15(c) of the Investment Company Act, and Hicks willfully aided and abetted and caused Focus Point's violations.

20. Section 206(4) of the Advisers Act makes it "unlawful for any investment adviser ... to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative" and Rule 206(4)-6 thereunder requires advisers to adopt and implement written policies and procedures that are reasonably designed to ensure that the adviser votes client securities in the best interest of clients. As a result of the conduct described above, The H Group willfully violated Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-6 thereunder.

## Undertakings

Respondent Focus Point has undertaken to:

21. Independent Compliance Consultant. With respect to the retention of an independent compliance consultant, Focus Point has agreed to the following undertakings:

a. Focus Point shall retain, within ninety (90) days of the entry of this Order, the services of an independent compliance consultant (the "Independent Consultant") that is not unacceptable to the Commission staff. The Independent Consultant's compensation and expenses shall be borne exclusively by Focus Point.

b. Focus Point shall provide to the Commission staff, within ninety (90) days of

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[6] A willful violation of the securities laws means merely "'that the person charged with the duty knows what he is doing.'" *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)).

the entry of this Order, a copy of the engagement letter detailing the Independent Consultant's responsibilities, which shall include comprehensive compliance reviews as described below in this Order. Focus Point shall require that the Independent Consultant conduct by the end of the first quarter of 2013 and the end of the first quarter of 2014 comprehensive reviews of Focus Point's supervisory, compliance, and other policies and procedures reasonably designed to detect and prevent breaches of the federal securities laws by Focus Point and its employees (the "Reviews").

c. Focus Point shall require that, within forty-five (45) days from the end of the applicable quarterly period, the Independent Consultant shall submit a written and detailed report of its findings to Focus Point and to the Commission staff (the "Report"). Focus Point shall require that each Report include a description of the review performed, the names of the individuals who performed the review, the conclusions reached, the Independent Consultant's recommendations for changes in or improvements to Focus Point's policies and procedures and/or disclosures to clients, and a procedure for implementing the recommended changes in or improvements to Focus Point's policies and procedures and/or disclosures.

d. Focus Point shall adopt all recommendations contained in each Report within sixty (60) days of the applicable Report; provided, however, that within forty-five (45) days after the date of the applicable Report, Focus Point shall in writing advise the Independent Consultant and the Commission staff of any recommendations that Focus Point considers to be unduly burdensome, impractical, or inappropriate. With respect to any recommendation that Focus Point considers unduly burdensome, impractical or inappropriate, Focus Point need not adopt that recommendation at that time but shall propose in writing an alternative policy, procedure or system designed to achieve the same objective or purpose.

e. As to any recommendation with respect to Focus Point's policies and procedures on which Focus Point and the Independent Consultant do not agree, Focus Point and the Independent Consultant shall attempt in good faith to reach an agreement within sixty (60) days after the date of the applicable Report. Within fifteen (15) days after the conclusion of the discussion and evaluation by Focus Point and the Independent Consultant, Focus Point shall require that the Independent Consultant inform Focus Point and the Commission staff in writing of the Independent Consultant's final determination concerning any recommendation that Focus Point considers to be unduly burdensome, impractical, or inappropriate. Focus Point shall abide by the determinations of the Independent Consultant and, within sixty (60) days after final agreement between Focus Point and the Independent Consultant or final determination by the Independent Consultant, whichever occurs first, Focus Point shall adopt and implement all of the recommendations that the Independent Consultant deems appropriate.

f. Within ninety (90) days of Focus Point's adoption of all of the recommendations in a Report that the Independent Consultant deems appropriate, as determined pursuant to the procedures set forth herein, Focus Point shall certify in writing to the Independent Consultant and the Commission staff that Focus Point has adopted and implemented all of the Independent Consultant's recommendations in the applicable Report. Unless otherwise directed by the Commission staff, all Reports, certifications, and other documents required to be provided to the Commission staff shall be sent to Marshall S. Sprung, Deputy Chief, Asset Management Unit, Los Angeles Regional Office, Securities and Exchange Commission, 5670 Wilshire Boulevard, Los Angeles, CA 90036, or such other address as the Commission staff may provide.

g. Focus Point shall cooperate fully with the Independent Consultant and shall provide the Independent Consultant with access to such of its files, books, records, and personnel as are reasonably requested by the Independent Consultant for review.

h. To ensure the independence of the Independent Consultant, Focus Point:

i. Shall not have the authority to terminate the Independent Consultant or substitute another independent compliance consultant for the initial Independent Consultant, without the prior written approval of the Commission staff; and

ii. Shall compensate the Independent Consultant and persons engaged to assist the Independent Consultant for services rendered pursuant to this Order at their reasonable and customary rates.

i. Focus Point shall require the Independent Consultant to enter into an agreement that provides that for the period of engagement and for a period of two (2) years from completion of the engagement, the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Focus Point, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. The agreement will also provide that the Independent Consultant will require that any firm with which the Independent Consultant is affiliated or of which the Independent Consultant is a member, and any person engaged to assist the Independent Consultant in the performance of the Independent Consultant's duties under this Order shall not, without prior written consent of the Commission staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Focus Point, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two (2) years after the engagement.

22. Recordkeeping. Focus Point shall preserve for a period of not less than six (6) years from the end of the fiscal year last used, the first two (2) years in an easily accessible place, any record of Focus Point's compliance with the undertakings set forth in this Order.

23. Notice to Advisory Clients. Within thirty (30) days of the entry of this Order, Focus Point shall provide a copy of the Order to each of Focus Point's existing advisory clients as of the entry of this Order via mail, e-mail, or such other method as may be acceptable to the Commission staff, together with a cover letter in a form not unacceptable to the Commission staff. For a period of one (1) year, Focus Point shall provide a copy of the Order to all of its prospective clients.

24. Deadlines. For good cause shown, the Commission staff may extend any of the procedural dates relating to the undertakings. Deadlines for procedural dates shall be counted in calendar days, except that if the last day falls on a weekend or federal holiday, the next business day shall be considered to be the last day.

25. Certifications of Compliance by Respondent. Focus Point shall certify, in writing,

compliance with its undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Focus Point agrees to provide such evidence. The certification and supporting material shall be submitted to Marshall S. Sprung, Deputy Chief, Asset Management Unit, Los Angeles Regional Office, Securities and Exchange Commission, 5670 Wilshire Boulevard, Los Angeles, CA 90036, or such other address as the Commission staff may provide, with a copy to the Office of Chief Counsel of the Enforcement Division, 100 F Street, NE Washington, DC 20549, no later than sixty (60) days from the date of the completion of the undertakings.

**IV.**

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Sections 203(e), 203(f) and 203(k) of the Advisers Act and Sections 9(b) and 9(f) of the Investment Company Act, it is hereby ORDERED that:

A. Respondents Focus Point and Hicks cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 207 of the Advisers Act and Section 15(c) of the Investment Company Act.

B. Respondent The H Group cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-6 thereunder.

C. Respondents Focus Point, The H Group and Hicks are censured.

D. Respondent Focus Point shall, within 400 days of the entry of this Order, pay disgorgement of $900,000.00 and prejudgment interest of $25,813.92 to the United States Treasury. Payment shall be made in the following four installments: (1) $50,000.00 shall be paid within 35 days of the entry of this Order; (2) $300,000.00 shall be paid within 125 days of the entry of this Order; (3) $300,000.00 shall be paid within 215 days of the entry of this Order; and (4) $275,813.92 shall be paid within 400 days of the entry of this Order. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of disgorgement and prejudgment interest, plus any additional interest accrued pursuant to SEC Rule of Practice 600, shall be due and payable immediately, without further application. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Focus Point as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Marshall S. Sprung, Deputy Chief, Asset Management Unit, Los Angeles Regional Office, Securities and Exchange Commission, 5670 Wilshire Boulevard, Los Angeles, CA 90036.

E. Respondent Focus Point shall, within 35 days of the entry of this Order, pay a civil money penalty in the amount of $100,000.00 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Focus Point as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Marshall S. Sprung, Deputy Chief, Asset Management Unit, Los Angeles Regional Office, Securities and Exchange Commission, 5670 Wilshire Boulevard, Los Angeles, CA 90036.

F. Respondent The H Group shall, within 35 days of the entry of this Order, pay a civil money penalty in the amount of $50,000.00 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying The H Group as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Marshall S. Sprung, Deputy Chief, Asset Management Unit, Los Angeles Regional Office, Securities and Exchange Commission, 5670 Wilshire Boulevard, Los Angeles, CA 90036.

G. Respondent Hicks shall, within 35 days of the entry of this Order, pay a civil money penalty in the amount of $50,000.00 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Hicks as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Marshall S. Sprung, Deputy Chief, Asset Management Unit, Los Angeles Regional Office, Securities and Exchange Commission, 5670 Wilshire Boulevard, Los Angeles, CA 90036.

H. Respondent Focus Point shall comply with the undertakings enumerated in Section III, paragraphs 21 to 25 above.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67795 / September 6, 2012

Admin. Proc. File No. 3-11366

In the Matter of

GREGG BECKER

ORDER VACATING BARS

Gregg Becker seeks to vacate a Commission order (the "Order") entered against him on February 13, 2004 barring him from associating with any broker or dealer and from participating in the offering of any penny stock.[1] The Order was issued in an administrative proceeding instituted under Securities Exchange Act Section 15(b)(6) based on Becker's conviction, in 2002, for securities fraud and related conspiracy charges.[2] After this Order was issued, in 2006, the United States District Court for the Southern District of New York vacated the criminal conviction on constitutional grounds.[3] In 2009, an order of *nolle prosequi* was filed in the district court, disposing of the case with respect to Becker.[4]

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1 *Gregg Becker,* Securities Exchange Act Rel. No. 49244 (Feb. 13, 2004), 82 SEC Docket 677.

2 15 U.S.C. § 70*o*(b), incorporating 15 U.S.C. § 70*o*(b)(4)(B).

3 *United States v. Becker*, No. 01 Cr. 156 (RPP) (S.D.N.Y. Jan. 17, 2006), 2006 U.S. Dist. LEXIS 2076, at *10, *aff'd*, 502 F.3d 122, 130 (2007) (finding that Becker's conviction rested on testimonial statements admitted to the trial in violation of the Sixth Amendment's Confrontation clause, that this evidence was "central[] to the government's case," and that the remaining evidence at trial "with regard to Becker's criminal intent and his membership in the conspiracy was far from overwhelming").

4 *United States v. Becker*, No. 01 Cr. 156 (RPP) (S.D.N.Y. Jan. 16, 2009). We take official notice of the *nolle prosequi* pursuant to our Rule of Practice 452, 17 C.F.R. § 201.452.

In seeking to vacate the Commission's Order, Becker argues that the reversal of the conviction and dismissal of the underlying charges are a "change in circumstances [that] invalidates the" basis for the Order. The Division of Enforcement agrees, noting in its response that "the statutory basis for the bar is no longer present."

We have held that administrative bar orders "will remain in place in the usual case" and are vacated "only in compelling circumstances."[5] We have found such compelling circumstances where, as here, the statutory basis for the bar, in this case Becker's criminal conviction, has been vacated.[6] Under these circumstances, it is appropriate to vacate the Order.

In light of the foregoing, IT IS ORDERED that the order entered against Gregg Becker on February 13, 2004 barring him from associating with any broker or dealer and from participating in the offering of any penny stock, be, and it hereby is, vacated.

By the Commission.

Elizabeth M. Murphy
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

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5 *Salim B. Lewis, Order Granting and Denying in Part Petition to Vacate Administrative Bar Order*, 58 S.E.C. 491, 502 (2005).

6 *See, e.g., Jimmy Dale Swink, Jr.*, 52 S.E.C. 379, 379 (1995) (vacating findings and administrative bar order when an appellate court reversed the criminal conviction that was the basis for the proceeding); *cf. Terry Harris*, Investment Advisers Act Rel. No. 2622 (July 26, 2007), 91 SEC Docket 541, 543 (ordering dismissal of administrative proceeding after finding that "none of the three bases for proceeding under Advisers Action Section 203(f) that were alleged in the [order instituting proceedings] remains valid on the record before us on appeal").

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67805 / September 7, 2012

INVESTMENT ADVISERS ACT OF 1940
Release No. 3459 / September 7, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-15013

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| In the Matter of<br><br>Earl U. Bravo, Sr.<br><br>Respondent. | ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS |

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Earl U. Bravo, Sr. ("Bravo" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

**III.**

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. At relevant times, Respondent was the Chief Operating Officer, Senior Vice President, Secretary, Assistant Treasurer, and head of equity trading of The Chapman Company ("TCC"), a broker dealer registered with the Commission. He also was the Secretary and Assistant Treasurer of Chapman Capital Management, Inc. ("CCM"), an investment adviser registered with the Commission. Bravo, 64 years old, is a resident of Baltimore, Maryland.

2. On August 27, 2012, a final judgment was entered by consent against Bravo, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1), 206(2) and 206(3) of the Advisers Act, in the civil action entitled Securities and Exchange Commission v. Chapman, et al., Civil Action Number 3-1877 (WDQ), in the United States District Court for the District of Maryland.

3. The Commission's complaint alleged a fraudulent scheme by Chapman, TCC, CCM, Bravo, and others, in connection with the June 2000 Initial Public Offering ("IPO") of, and subsequent secondary market trading in, the common stock of EChapman, Inc. ("ECMN"). Among other things, the complaint alleged that, in an effort to salvage the collapsing IPO, Bravo and others backdated transactions so that IPO shares were sold to a CCM client at higher prices; and, through various activities, illegally supported the price of ECMN securities.

**IV.**

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Bravo's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act that Respondent Bravo be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and
>
> barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

**SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-67802; File No. 4-652]**

**Technology and Trading Roundtable**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Notice of roundtable discussion; date change.

**SUMMARY:** The Securities and Exchange Commission will host a one day roundtable entitled "Technology and Trading: Promoting Stability in Today's Markets" to discuss ways to promote stability in markets that rely on highly automated systems. The market technology roundtable, which was scheduled for September 14, 2012, will now be held on October 2, 2012. The roundtable at the Securities and Exchange Commission's Washington, D.C. headquarters is open to the public and will be webcast. As previously announced, the event will begin with a discussion on preventing errors, focusing on current best practices and practical constraints for creating, deploying and operating mission-critical systems, including those used to automatically generate and route orders, match trades, confirm transactions, and disseminate data. The afternoon session will focus on error response, with experts discussing how the market might employ independent filters, objective tests, and other real-time processes or crisis-management procedures to detect, limit, and possibly terminate erroneous market activities when they occur, thereby limiting the impact of such errors.

**DATES:** The roundtable discussion will take place on October 2, 2012. The Commission will accept comments regarding issues addressed at the roundtable until October 23, 2012.

**FOR FURTHER INFORMATION CONTACT:** Arisa Tinaves, Special Counsel, at (202) 551-5676, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010.

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

Dated: September 7, 2012

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67808 / September 10, 2012**

**INVESTMENT ADVISERS ACT OF 1940**
**Release No. 3460 / September 10, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15014**

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| **In the Matter of**<br><br>**JP TURNER & COMPANY, LLC, and WILLIAM L. MELLO**<br><br>**Respondents.** | **ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS** |

## I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against JP Turner & Company, LLC ("JP Turner") and pursuant to Section 15(b) of the Exchange Act and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against William L. Mello ("Mello") (Collectively "Respondents").

## II.

In anticipation of the institution of these proceedings, Respondents have each submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting

Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

**III.**

On the basis of this Order and Respondents' Offers, the Commission finds[1] that:

**Summary**

These proceedings arise out of failure reasonably to supervise three registered representatives (the "Registered Representatives") with a view to preventing and detecting their violations of federal securities laws by JP Turner and Mello, then President of the firm. Between January 1, 2008 and December 31, 2009 (the "relevant period"), for the purpose of generating commission business, these registered representatives "churned" the accounts of seven customers (collectively, the "affected customers") by engaging in excessive trading in disregard of the customers' investment objectives and financial needs. Consequently, these customers paid approximately $845,000 in commissions, fees and margin interest to JP Turner. During the relevant period, Mello, as President of JP Turner, was ultimately responsible for establishing JP Turner's supervisory policies and procedures, and a system to implement these policies and procedures designed to prevent and detect violations by the firm's registered representatives of the securities laws, rules and regulations. JP Turner and Mello failed to establish procedures and systems reasonably designed to prevent and detect the churning of customer accounts. Although JP Turner had a monitoring system to identify actively traded accounts based primarily on "return on investment" ("ROI") levels, *i.e.*, the level of fees and commissions as a percentage of account equity, the system imposed few requirements on, and no meaningful guidance for supervisors in terms of reviewing these accounts and taking meaningful action to investigate the trading activity.

**Respondents**

1. JP Turner is an Atlanta, Georgia-based limited liability company that has been registered with the Commission as a broker-dealer since 1997. JP Turner has approximately 513 independent contractor registered representatives working out of over 203 branch offices that are located throughout the United States. These branch offices, organized as licensees, include 54 offices of supervisory jurisdiction.

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[1] The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

2. Mello, age 63, is a resident of Georgia. Mello co-founded JP Turner in 1997 and at all relevant times served as President of the firm. He is also a substantial stakeholder of the firm. In addition, Mello at all relevant times served as President of JP Turner & Company Capital Management, LLC, an Atlanta, Georgia-based limited liability company that has been registered with the Commission as an investment adviser since 2007.

## Facts

### JP Turner's Supervisory Structure

3. For JP Turner's offices of supervisory jurisdiction ("OSJ"), the registered representatives were directly supervised by branch managers, who in turn reported to, and were supervised by an area vice president ("AVP"). For smaller, non-OSJ offices, registered representatives were supervised directly by an AVP. The AVPs were supervised by the Executive Vice President and Head of Supervision (the "EVP"). The EVP reported to JP Turner's Chief Operating Officer, who in turn reported to Mello, as well as JP Turner's Chief Executive Officer. At all relevant times, Mello, as President, was ultimately responsible for establishing JP Turner's supervisory policies and procedures, and a system to implement these policies and procedures with a view to preventing and detecting violations of the securities laws by JP Turner's registered representatives.

### The Registered Representatives' Misconduct

4. During the relevant period, the Registered Representatives collectively "churned" the accounts of seven customers by knowingly or recklessly engaging in excessive trading in disregard of the customers' investment objectives and financial needs for the purpose of generating commission business. The misconduct generated commissions, fees and margin interest totaling approximately $845,000. JP Turner retained approximately $200,000 of this amount.

5. During the relevant period the affected customer accounts had annualized turnover rates[2] of up to 56, requiring investment returns of up to 73.3 percent to break even.

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[2] An annualized turnover ratio is the number of times per year a customer's securities are replaced by new securities. It is calculated by determining the aggregate amount of purchases in an account over a given period, calculating the ratio of those aggregate purchases to the account's average net equity during that period, and then annualizing that ratio. A turnover rate that exceeds six can reflect excessive trading. See Mihara v. Dean Witter & Co. Inc., 619 F.2d 814, 821 (9th Cir. 1980).

6. Each affected customer: (1) opened and funded his or her account after being contacted by, or otherwise introduced to, one of the Registered Representatives; (2) had excessive trading in the account that did not conform with the customer's investment objectives and financial needs; and (3) was generally unsophisticated in securities trading and relied almost exclusively on the registered representative's recommendations of investment decisions in the accounts.

**Development of AARS**

7. Beginning in late 2006, Mello and other senior managers at JP Turner participated in meetings to design and implement a system to monitor active trading at the firm. JP Turner had previously utilized a monitoring system based on annualized turnover rates, but determined to switch to a system that also tracked ROI. The meetings were generally attended by personnel heads from the compliance, supervisory and information technology departments as well as senior management of the firm. Through these meetings, the firm developed what came to be known as the Active Account Review System ("AARS"), which became operational in November 2007. The mechanics of the system, discussed below, were understood and collectively approved by senior management at JP Turner.

**Mechanics of the AARS**

8. As implemented, on a quarterly basis the AARS identified accounts with specific ROI and/or turnover levels (Levels 1 through 4). Specifically, for each customer account, the system calculated as ROI the total commissions and fees as a percentage of the average equity in the account over the trailing twelve-month period. The AARS flagged actively traded accounts that fell into one of these four levels, and required different supervisory actions at each level. At Levels 1 and 2, first-line supervisors,[3] and at Levels 3 and 4, more senior supervisors, were directed to review the account or take other action.[4]

9. Additionally, for all accounts initially flagged at Level 2 or at a higher level, the compliance department sent the customer a form cover letter with an attached Active Account Suitability Supplement ("suitability supplement") and Active Account Suitability Questionnaire ("suitability questionnaire"). The suitability supplement and accompanying cover letter referenced "some of the risks associated with active trading." Specifically, the suitability supplement explained in relevant part that "active trading" (not defined) could "involve a higher degree of

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3 First line supervisors included: (i) OSJ branch managers supervising the office's registered representatives, (ii) AVPs supervising registered representatives associated with non-OSJ branch offices, and (iii) AVPs supervising the trading of OSJ branch managers.

4 For accounts flagged at Level 2, supervisors were directed to take at least one of the following actions: (1) discuss the trading activity with the broker; (2) discuss the trading activity with the customer; (3) compute a profit-and-loss analysis; or (4) impose commission restrictions. For accounts flagged at Level 3, supervisors had the same options but were required, at a minimum, to conduct a profit-and-loss analysis.

risk," and "should be entered into only by investors who understand the nature of the risk involved[.]" The suitability supplement further explained that "overall commissions on your account may tend to be greater than a buy and hold strategy," and that "[y]our portfolio may tend to be more volatile with shorter-term or more active trading."

10. JP Turner sent the cover letter, suitability supplement and suitability questionnaire once per 12-month period, even if the AARS repeatedly flagged an account as actively traded in that period. The cover letter requested that customers complete, sign, and return the suitability questionnaire identifying their investment objectives and risk tolerance. Customers were also required to sign the suitability supplement certifying that they had read an attached summary of risks associated with active trading. If a customer failed to return these forms, as a matter of practice, compliance personnel restricted trading in the account until the forms were returned and contacted the registered representative who handled that customer's account, who in turn contacted the customer directly to facilitate the return of the forms.

## Deficiencies in the AARS

11. The AARS imposed few requirements on supervisors in connection with their review of actively traded accounts. For example, JP Turner's policies and procedures did not: (i) specify the manner in which an internal review of an account flagged by the AARS was to occur; (ii) provide any guidelines for analyzing the accounts identified on the AARS, other than the levels themselves; or (iii) require contact or follow-up of the trading activity with the customer, particularly when the AARS repeatedly flagged as actively traded a customer's account.

12. The suitability supplement, suitability questionnaire, and associated cover letter omitted information that could have been important for obtaining meaningful customer approval of the active trading in the customer's account. For example, the forms excluded any details concerning the commissions, margin interest and fees associated with the excessive trading and paid by the customer.

13. JP Turner sent to customers the suitability supplement and suitability questionnaire only once per twelve-month period, even if the AARS repeatedly generated active account alerts during that time period for the customer's account. Further, the firm's policies, procedures and systems failed to require supervisors to take any additional heightened supervisory action with respect to registered representatives in connection with customer accounts for which the AARS repeatedly generated active account alerts.

## Other Relevant Systems and Procedures

14. JP Turner's other policies, procedures and systems for supervisory review of trading activity in customer accounts were not reasonably designed to prevent and detect churning by the Registered Representatives. Apart from the AARS, branch managers or AVPs overseeing a producing branch manager were required to perform a daily "trade blotter" review of all trading activity for registered representatives under their supervision. However, the software application utilized in connection with this review did not identify account turnover or ROI, or otherwise

highlight active trading. Further, in connection with this trade blotter review, supervisors utilized a software application to generate certain "alerts" according to parameters specified by compliance personnel at JP Turner and another software application to perform ad-hoc analysis on historical trading activity in the accounts.

**Accounts Managed by the Registered Representatives were Repeatedly Flagged by the AARS**

15. One of the Registered Representatives was ranked as the firm's top revenue generator in 2008 and 2009. This registered representative generated more than $3,000,000 during that period. During the relevant period, he was also the sole or joint registered representative for over 100 customer accounts. Over 37 and 42 accounts were identified on the AARS during 2008 and 2009, respectively. Significantly, nearly all of these accounts were classified in the AARS at Level 4 at some point during the relevant period, including over 17 accounts that were classified at that level on more than three occasions.

16. During the relevant period, the other two Registered Representatives jointly held approximately 94 accounts, including 25 accounts which appeared on the AARS. Of this amount, approximately 23 accounts appeared at Level 3 or 4, including 18 accounts that appeared on multiple consecutive quarters at those levels.

17. If JP Turner and Mello, as President, had established reasonable policies and procedures, and a system to implement the firm's policies and procedures for review of excessive trading in customer accounts, it is likely that the firm could have prevented and detected the violative conduct of the Registered Representatives.

**Applicable Law**

18. Section 17(a) of the Securities Act of 1933 ("Securities Act") prohibits using the mails or instruments of interstate commerce in the offer or sale of securities to (1) employ any device, scheme, or artifice to defraud; (2) use false statements or omissions of material fact to obtain money or property; or (3) engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser of securities. In re Dale E. Frey, Admin. Proc. File No. 3-10310, 2003 SEC LEXIS 306, at *45 (Feb. 5, 2003) (initial decision). Section 10(b) of the Exchange Act and Rule 10b-5 make it unlawful for any person, directly or indirectly, in connection with the purchase or sale of any security to (1) employ any device, scheme, or artifice to defraud; (2) make any untrue statement or omission of a material fact; or (3) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. Id.

19. To establish a claim of churning, the Commission must prove that (1) the trading in the account was excessive in light of the investor's trading objectives, (2) the broker in question exercised control over the trading in the account, and (3) the broker acted with the intent to defraud or with willful and reckless disregard for the investor's interests. See Miley v. Oppenheimer & Co., 637 F.2d 318, 324 (5th Cir. 1981), reh'g denied, 642 F. 2d 1210 (5th Cir. 1981); Moran v.

Kidder Peabody & Co., 609 F. Supp. 661, 666 (S.D.N.Y. 1985); Rush v. Oppenheimer & Co., 592 F. Supp. 1108, 1112 (S.D.N.Y. 1984), vacated, 596 F. Supp. 1529 (S.D.N.Y. 1984), rev'd, 779 F. 2d 885 (2d Cir. 1985). "Churning, in and of itself, may be a deceptive and manipulative device under section 10(b), the scienter required by section 10(b) being implicit in the nature of the conduct." Armstrong v. McAlpin, 699 F.2d 79, 91 (2d Cir. 1983).

20. Section 15(b)(4)(E) of the Exchange Act requires broker-dealers reasonably to supervise persons subject to their supervision, with a view toward preventing violations of the federal securities laws. See e.g., In re Dean Witter Reynolds, Inc., Exchange Act Rel. No. 46578 (October 1, 2002). The Commission has emphasized that the "responsibility of broker-dealers to supervise their employees by means of effective, established procedures is a critical component in the federal investor protection scheme regulating the securities markets." Id. Section 15(b)(4)(E) of the Exchange Act provides for the imposition of a sanction against a broker or dealer who "has failed reasonably to supervise, with a view to preventing violations of the securities laws, another person who commits such a violation, if such other person is subject to his supervision." Section 15(b)(6)(A)(i) parallels Section 15(b)(4)(E) and provides for the imposition of sanctions against persons associated with a broker or dealer. Similarly, under Section 203(f) of the Advisers Act, which incorporates by reference Section 203(e)(6), the Commission may also seek sanctions where an associated person has failed reasonably to supervise, with a view to preventing violations of the federal securities laws and rules thereunder, another person subject to the investment adviser's or associated person's supervision who commits such violations.

## Violations

21. As a result of their conduct described above, the Registered Representatives violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

22. As a result of the conduct described above, JP Turner failed reasonably to supervise the Registered Representatives within the meaning of Section 15(b)(4)(E) of the Exchange Act with a view to preventing and detecting these registered representatives' violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. As a result of the conduct described above, Mello, as President, failed reasonably to supervise these registered representatives within the meaning of Section 15(b)(6) of the Exchange Act, and within the meaning of Section 203(f) of the Advisers Act, with a view to preventing and detecting their violations.

## JP Turner's Remedial Efforts

23. In determining to accept the Offers, the Commission considered remedial acts promptly undertaken by Respondents and cooperation afforded the Commission staff.

**Undertakings**

24. Respondent Mello undertakes to provide to the Commission, within 30 days after the end of the five-month suspension period described below, an affidavit that he has complied fully with the sanctions described in Section IV below.

25. Respondent JP Turner undertakes:

a. to retain, within 30 days of the date of entry of the Order, at its own expense, the services of an Independent Consultant not unacceptable to the Division of Enforcement of the Commission ("Division of Enforcement"), to (i) review JP Turner's written supervisory policies and procedures designed to prevent and detect churning, including but not limited to review of the AARS and related procedures; and (ii) review JP Turner's systems to implement its written supervisory policies and procedures designed to prevent and detect churning.

b. to require the Independent Consultant, at the conclusion of the review, which in no event shall be more than 120 days after the entry of the Order, to submit a Report of the Independent Consultant to JP Turner and the Division of Enforcement. The report shall address the supervisory issues described above and shall include a description of the review performed, the conclusions reached, the Independent Consultant's recommendations for changes or improvements to the policies, procedures and practices of JP Turner and a procedure for implementing the recommended changes or improvements to such policies, procedures and practices.

c. to adopt, implement, and maintain all policies, procedures, and practices recommended in the Report of the Independent Consultant. As to any of the Independent Consultant's recommendations about which JP Turner and the Independent Consultant do not agree, such parties shall attempt in good faith to reach agreement within 180 days of the date of the entry of the Order. In the event that JP Turner and the Independent Consultant are unable to agree on an alternative proposal, JP Turner will abide by the determinations of the Independent Consultant and adopt those recommendations deemed appropriate by the Independent Consultant.

d. to cooperate fully with the Independent Consultant in its review, including making such information and documents available as the Independent Consultant may reasonably request, and by permitting and requiring JP Turner's employees and agents to supply such information and documents as the Independent Consultant may reasonably request.

e. that, in order to ensure the independence of the Independent Consultant, JP Turner (i) shall not have the authority to terminate the Independent Consultant without prior written approval of the Division of Enforcement; and (ii) shall compensate the Independent Consultant, and persons engaged to assist the Independent Consultant, for services rendered pursuant to the Order at their reasonable and customary rates.

f. to require the Independent Consultant to enter into an agreement that provides that, for the period of engagement and for a period of two years from completion of the engagement, the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing, or other professional relationship with JP Turner, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. The agreement will also provide that the Independent Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Independent Consultant in performance of his/her duties under this Order shall not, without prior written consent of the Division of Enforcement in Atlanta, Georgia, enter into any employment, consultant, attorney-client, auditing or other professional relationship with JP Turner, or any of their present or former affiliates, directors, officers, employees or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

g. that no later than 15 months after the date of entry of the Order, JP Turner shall direct the Independent Consultant to conduct a follow-up review of JP Turner's efforts to implement each of the recommendations made by the Independent Consultant and JP Turner shall direct the Independent Consultant to submit a follow-up report to the Commission staff no later than 17 months after the date of entry of the Order. JP Turner shall direct the Independent Consultant to include in the follow-up report the details of JP Turner's efforts to implement each of the Independent Consultant's recommendations and shall separately state whether JP Turner has fully complied with each of the Independent Consultant's recommendations.

h. to certify, in writing, compliance with the undertaking(s) set forth above. The certification shall identify the undertaking(s), provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent JP Turner agrees to provide such evidence. The certification and supporting material shall be submitted to William P. Hicks, Associate Regional Director, with a copy to the Office of Chief Counsel of the Division of Enforcement, no later than 60 days from the date of the completion of the undertakings.

i. For good cause shown and upon timely application by the Independent Consultant or JP Turner, the Commission's staff may extend any of the deadlines set forth above.

26. Respondent JP Turner also undertakes:

a. no later than 60 days after the entry of the Order, to prepare and submit to the Independent Consultant a report (the "Initial Review Report") describing: (i) the scope and methodology of a previous review of JP Turner's supervisory practices, policies, and procedures conducted by Experts Counsel, Inc. in 2012 ("the Experts Counsel Review"); (ii) the total cost associated with the Experts Counsel Review, including the costs incurred implementing related changes to JP Turner's supervisory policies, practices, and procedures, and to the extent the total cost includes costs associated with JP Turner employee time, the methodology used to calculate the cost of such employee time; (iii) all related recommendations made by Experts Counsel; and (iv) all related revisions made to JP Turner's supervisory policies, practices, and procedures as of the date of the submission of the report.

b. to require the Independent Consultant, within 120 days after the submission of the Initial Review Report, to prepare a supplemental report assessing the sufficiency, effectiveness, and completeness of the Experts Counsel Review and any related revisions made to JP Turner's supervisory policies, practices, and procedures; and make any recommendations as the Independent Consultant deems necessary with respect to (i) the review of any of JP Turner's supervisory policies, practices and procedures not previously reviewed by Experts Counsel; and (ii) any additional changes the Independent Consultant deems appropriate with respect to JP Turner's supervisory policies, practices, and procedures.

c. to cooperate fully with the Independent Consultant's review and assessment, including making such information and documents available as the Independent Consultant may reasonably request, and by permitting and requiring JP Turner's employees and agents, including Experts Counsel, to supply such information and documents as the Independent Consultant may reasonably request.

d. to adopt, implement, and maintain all policies, procedures, and practices recommended by the Independent Consultant. As to any of the Independent Consultant's recommendations about which JP Turner and the Independent Consultant do not agree, such parties shall attempt in good faith to reach agreement within 120 days after the submission of the

Initial Review Report. In the event that JP Turner and the Independent Consultant are unable to agree on an alternative proposal, JP Turner will abide by the determinations of the Independent Consultant and adopt those recommendations deemed appropriate by the Independent Consultant.

e. that no later than 15 months after the date of the entry of the Order, JP Turner shall direct the Independent Consultant to conduct a follow-up review of JP Turner's efforts to implement each of the recommendations made by the Independent Consultant and of the recommendations made by Experts Counsel.

f. to certify, in writing, compliance with the undertaking(s) set forth above. The certification shall identify the undertaking(s), provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent JP Turner agrees to provide such evidence. The certification and supporting material shall be submitted to William P. Hicks, Associate Regional Director, with a copy to the Office of Chief Counsel of the Division of Enforcement, no later than 60 days from the date of the completion of the undertakings.

g. For good cause shown and upon timely application by the Independent Consultant or JP Turner, the Commission's staff may extend any of the deadlines set forth above.

**IV.**

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act, it is hereby ORDERED that:

A. Respondent JP Turner is censured.

B. Respondent Mello be, and hereby is, suspended from association in a supervisory capacity with any broker, dealer, or investment adviser for a period of five (5) months, effective on the second Monday following the entry of this Order.

C. Respondent JP Turner shall, within 30 days of the entry of this Order, pay disgorgement of $200,000, prejudgment interest of $16,051, and a civil money penalty in the amount of $200,000, to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 and 31 USC 3717. Payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies JP Turner as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to William P. Hicks, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 950 East Paces Ferry Road, N.E., Suite 900, Atlanta, GA 30326-1382.

D. Respondent Mello shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $45,000 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to 31 USC 3717. Payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Mello as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to William P. Hicks, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 950 East Paces Ferry Road, N.E., Suite 900, Atlanta, GA 30326-1382.

E. Such civil money penalty may be distributed pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended ("Fair Fund distribution"). Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondents agree that in any Related Investor Action, they shall not argue that they are entitled to, nor shall they benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondents' payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondents agree that they shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondents by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

F. Respondents shall comply with the undertakings enumerated in Section III above.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

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**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES ACT OF 1933**
**Release No. 9360 / September 10, 2012**

**Administrative Proceeding**
**File No. 3-15014**

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| **In the Matter of**<br><br>**JP TURNER & COMPANY, LLC, and WILLIAM L. MELLO**<br><br>**Respondents.** | **ORDER UNDER RULE 602(e) UNDER THE SECURITIES ACT OF 1933 GRANTING A WAIVER OF THE RULE 602(c)(3) DISQUALIFICATION PROVISION** |

**I.**

JP Turner & Company, LLC (JP Turner or "Respondent") has submitted a letter, dated February 28, 2012, requesting a waiver of the Rule 602(c)(3) disqualification from the exemption from registration under Regulation E arising from JP Turner's settlement of an administrative proceeding commenced by the Commission.

**II.**

On September 10, 2012, pursuant to JP Turner's Offer of Settlement, the Commission issued an Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions against JP Turner. Under the Order, the Commission found that JP Turner failed reasonably to supervise three registered representatives' violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder. In the Order, the Commission censured JP Turner and ordered JP Turner to undertake to retain an independent consultant and pay disgorgement and prejudgment interest of $216,051 and a civil penalty in the amount of $200,000.

**III.**

The Regulation E exemption is unavailable for the securities of small business investment company issuers or business development company issuers if among other things, any investment adviser or underwriter for the securities to be offered is subject to an order of the Commission entered pursuant to Section 15(b) of the Securities Exchange Act of 1934. Rule 602(e) under the Securities Act provides, however, that the disqualification "shall not apply . . . if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied." 17 C.F.R. § 230.602(e).

IV.

Based upon the representations set forth in JP Turner's request, the Commission has determined that pursuant to Rule 602(e) under the Securities Act a showing of good cause has been made that it is not necessary under the circumstances that the exemption be denied as a result of the Order.

Accordingly, **IT IS ORDERED**, pursuant to Rule 602(e) under the Securities Act, that a waiver from the application of the disqualification provision of Rule 602(c)(3) under the Securities Act resulting from the entry of the Order is hereby granted.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES ACT OF 1933**
**Release No. 9359 / September 10, 2012**

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67810 / September 10, 2012**

**INVESTMENT ADVISERS ACT OF 1940**
**Release No. 3461 / September 10, 2012**

**INVESTMENT COMPANY ACT OF 1940**
**Release No. 30197 / September 10, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15015**

| In the Matter of<br><br>MICHAEL BRESNER;<br>RALPH CALABRO;<br>JASON KONNER; and<br>DIMITRIOS KOUTSOUBOS<br><br>Respondents. | ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940 |
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**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Ralph Calabro ("Calabro"), Jason Konner ("Konner") and Dimitrios Koutsoubos ("Koutsoubos") and pursuant to Section 15(b) of the Exchange Act and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Michael Bresner ("Bresner") (collectively, the "Respondents").

## II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. *Bresner*, age 67, resides in Atlanta, Georgia. Bresner has been employed as Executive Vice President ("EVP") and Head of Supervision of JP Turner & Company, LLC ("JP Turner") since 2005. He has also been an associated person with JP Turner & Company Capital Management, LLC ("JP Turner Capital"), an Atlanta, Georgia based limited liability company that been registered with the Commission as an investment adviser since 2007.

2. *Calabro*, age 37, resides in Matawan, New Jersey. Calabro served as a registered representative of the Parlin, New Jersey branch office of JP Turner from March 2004 until January 2011. He is currently a registered representative at National Securities Corporation.

3. *Konner*, age 37, resides in Brooklyn, New York. Konner was a registered representative at JP Turner from September 2006 to December 2011. He is currently a registered representative at DPEC Capital, Inc.

4. *Koutsoubos*, age 35, resides in Brooklyn, New York. Koutsoubos was a registered representative at JP Turner from July 2000 until August 2009. He is currently a registered representative at Caldwell International Securities.

B. OTHER RELEVANT ENTITY

5. *JP Turner* is an Atlanta, Georgia-based limited liability company that has been registered with the Commission as a broker-dealer since 1997. JP Turner has approximately 513 independent contractor registered representatives working out of over 203 branch offices that are located throughout the United States. These branch offices include 54 offices of supervisory jurisdiction. Although JP Turner is not registered with the Commission as an investment adviser, certain members of the firm serve in senior positions with JP Turner Capital.

C. CHURNING OF JP TURNER CUSTOMER ACCOUNTS BY CALABRO, KONNER AND KOUTSOUBOS

6. Between January 1, 2008 and December 31, 2009 (the "relevant period"), Calabro, Konner, and Koutsoubos collectively "churned" the accounts of seven customers (collectively, the "defrauded customers") by engaging in excessive trading for their own gains in disregard of the customers' conservative investment objectives and low or moderate risk tolerances for the purpose of generating commission business. Their misconduct generated commissions, fees and margin interest totaling approximately $845,000 while the defrauded customers suffered aggregate losses of approximately $2,700,000.

7. During the relevant period, Calabro engaged in churning the accounts of three customers ("Calabro's customers"). Calabro exercised *de facto* control over the accounts of the three customers.

The annualized turnover ratios[1] in the accounts ranged from 8 to 13, and the annualized break-even rates of return ranged from 22.9 percent to 31.8 percent. The trading in these accounts was excessive in light of Calabro's customers' investment objectives and experiences, ages and financial needs.

8. Calabro knowingly or recklessly engaged in the conduct described above. Calabro retained a portion of the commissions and fees earned by JP Turner for the trades. Calabro's customers suffered approximate losses of $2,300,000. Calabro knowingly or recklessly disregarded his customers' investment objectives, financial situations and interests for his own financial gain.

9. During the relevant period, Konner engaged in churning the accounts of two customers ("Konner's customers"). Konner exercised *de facto* control over the accounts of the two customers. The annualized turnover ratios in the accounts were 17 and 18, and the annualized break-even rates of return were 34.4 percent and 28.2 percent respectively. The trading in these accounts was excessive in light of Konner's customers' investment objectives and experiences, ages and financial needs.

10. Konner knowingly or recklessly engaged in the conduct described above. Konner retained a portion of the commissions and fees earned by JP Turner for the trades. Konner's customers suffered approximate losses of $134,000. Konner knowingly or recklessly disregarded his customers' investment objectives, financial situations and interests for his own financial gain.

11. During the relevant period, Koutsoubos engaged in churning the accounts of two customers ("Koutsoubos' customers"). Koutsoubos exercised *de facto* control over the accounts of the two customers. The annualized turnover ratios in the accounts ranged from 28 to 56, and the annualized break-even rates of return ranged from 41.4 percent to 73.3 percent. The trading in these accounts was excessive in light of Koutsoubos' customers' investment objectives and experiences, ages and financial needs.

12. Koutsoubos knowingly or recklessly engaged in the conduct described above. Koutsoubos retained a portion of the commissions and fees earned by JP Turner for the trades. Koutsoubos's customers suffered approximate losses of $193,000. Koutsoubos knowingly or recklessly disregarded his customers' investment objectives, financial situations and interests for his own financial gain.

13. All of the defrauded customers relied almost exclusively on their registered representative to make the investment decisions in their accounts. Each of the defrauded customers also (1) had conservative investment objectives and low or moderate risk tolerance; (2) signed blank or pre-

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[1] An annualized turnover ratio is the number of times per year a customer's securities are replaced by new securities. It is calculated by determining the aggregate amount of purchases in an account over a given period, calculating the ratio of those aggregate purchases to the account's average net equity during that period, and then annualizing that ratio. A turnover rate that exceeds six is presumptive of excessive trading. See Mihara v. Dean Witter & Co. Inc., 619 F.2d 814, 821 (9th Cir. 1980).

filled account documents that identified inaccurate investment objectives, risk tolerance, and/or investment experience levels; and (3) was generally unsophisticated in securities trading.

D. JP TURNER'S SUPERVISORY STRUCTURE

14. For JP Turner's offices of supervisory jurisdiction ("OSJ"), the registered representatives were directly supervised by branch managers, who in turn reported to, and were supervised by one of four area vice presidents ("AVPs"). For smaller, non-OSJ offices, registered representatives were supervised directly by an AVP, who in turn was supervised by Bresner, the Head of Supervision. For his part, Bresner reported to JP Turner's Chief Operating Officer, who in turn reported to two individuals, William Mello, the firm's President, and the firm's CEO.

E. THE ACTIVE ACCOUNT REVIEW SYSTEM AT JP TURNER

15. During the relevant period, JP Turner had in place what was referred to internally as the Active Account Review System (the "AARS"). As implemented, on a quarterly basis the AARS identified accounts with specific commission levels (Levels 1 through 4), and required that certain supervisory actions be taken at each level. Specifically, for each customer account, the system calculated return-on-investment ("ROI") as the total commissions and fees as a percentage of the average equity in the account over the trailing twelve-month period. The AARS flagged actively traded accounts that fell into four levels, requiring different supervisory actions at each level.

16. For each account tagged at Level 1 (ROI between 10 and 15 percent), the system sent an e-mail to first-line supervisors[2] requiring that they conduct a review of the account. Supervisors were required to access the AARS and click a box on a summary account screen that identified the ROI level.

17. At Level 2 (ROI between 15 and 20 percent), the system sent an e-mail to first-line supervisors requiring that they conduct the same unspecified review of the account, with the additional requirement that they take one of four suggested actions: (1) compute a profit and loss analysis, (2) discuss the account with the broker, (3) call the customer, or (4) restrict commissions.

18. Additionally, for all accounts initially tagged at Level 2 or at a higher level, the compliance department sent the customer a form cover letter with an attached Active Account Suitability Supplement ("suitability supplement") and Active Account Suitability Questionnaire ("suitability questionnaire"). The letter requested that customers complete, sign, and return the suitability questionnaire identifying their investment objectives and risk tolerance, as well as the "frequency of trades" associated with the account.

19. At Level 3 (ROI between 20 and 25 percent), AVPs were notified via e-mail, and

2 First line supervisors included: (i) OSJ branch managers supervising the office's registered representatives, (ii) AVPs supervising registered representatives associated with non-OSJ branch offices, and (iii) AVPs supervising the trading of OSJ branch managers.

were required to perform a review of the account and to conduct at a minimum a profit and loss analysis.

20. At Level 4 (ROI greater than 25 percent), Bresner as EVP was notified via e-mail and required to perform a review of the account and take appropriate action.

## F. BRESNER'S FAILURE TO SUPERVISE REASONABLY KONNER AND KOUTSOUBOS

21. During the relevant period, Konner and Koutsoubos both worked as registered representatives in the Brooklyn, New York branch. Once Konner and Koutsoubos had an account reaching Level 4, under the firm's procedures, Bresner was directly responsible for supervising them as it related to review of the account activity and taking any appropriate actions.

22. Konner churned the accounts of two defrauded customers from January 2009 to December 2009, including one customer account from January 2009 to December 2009. That account appeared on the AARS at Level 4 three times during the period Konner churned the account.

23. Koutsoubos churned the accounts of two defrauded customers from January 2008 to July 2009. He churned one customer's account from January 2008 to December 2008. During this period, that account appeared on the AARS four consecutive times, all at Level 4. Koutsoubos also churned another customer account from December 2008 to July 2009. That account appeared on the AARS once at Level 4 during the period the account was churned.

24. As supervisor of Konner, with respect to one of the defrauded customer's account, and Koutsoubos, with respect to two of the defrauded customers' accounts, Bresner failed to take appropriate action in response to the trading in these accounts despite the following red flags: (1) these Level 4 accounts had ROI greater than 25 percent and an annualized turnover rate greater than six, which presumptively indicated excessive trading, (2) two of these accounts repeatedly appeared at Level 4, even after commission restrictions were placed on the accounts, (3) Konner and Koutsoubos each engaged in trading activity that far exceeded the "frequency of trades" identified in the suitability questionnaire signed by two of their defrauded customers, and (4) one of Koutsoubos's defrauded customers had no suitability questionnaire on file, even though the customer's account repeatedly appeared on Level 4.

25. The most restrictive supervisory action Bresner took was to impose commission restrictions on the accounts managed by Konner and Koutsoubos. If Bresner had taken any meaningful follow-up action in supervising Konner and Koutsoubos with respect to the defrauded customers' accounts, such as closely reviewing the files and/or following up with the customers, particularly when the AARS repeatedly identified the same churned accounts at Level 4 over a period of many months, it is likely that he could have prevented or detected the churning by these registered representatives.

G. VIOLATIONS

26. As a result of the conduct described above, Calabro, Konner and Koutsoubos willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in the offer and sale of securities and in connection with the purchase or sale of securities.

27. As a result of the conduct described above, Bresner failed reasonably to supervise Konner and Koutsoubos, persons subject to his supervision, with a view to preventing and detecting violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by Konner and Koutsoubos.

28. Section 15(b) of the Exchange Act provides for the imposition of sanctions against a person associated with a broker or dealer who has failed reasonably to supervise, with a view to preventing and detecting violations of the securities laws, another person who commits such a violation, if such other person is subject to his supervision. Similarly, under Section 203(f) of the Advisers Act, which incorporates by reference Section 203(e)(6), the Commission may also seek sanctions where an associated person has failed reasonably to supervise, with a view to preventing violations of the federal securities laws and rules thereunder, another person subject to the investment adviser's or associated person's supervision who commits such violations.

**III.**

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative and cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondents an opportunity to establish any defenses to such allegations; and

B. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Section 15(b) of the Exchange Act, including, but not limited to, disgorgement and civil penalties pursuant to Section 21B of the Exchange Act;

C. What, if any, remedial action is appropriate in the public interest against Respondent Bresner pursuant to Section 203(f) of the Advisers Act including, but not limited to, disgorgement and civil penalties pursuant to Section 203 of the Advisers Act;

D. What, if any, remedial action is appropriate in the public interest against Respondents Calabro, Konner and Koutsoubos pursuant to Section 9(b) of the Investment Company Act including, but not limited to, disgorgement and civil penalties pursuant to Section 9 of the Investment Company Act; and

E. Whether, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Respondents Calabro, Konner and Koutsoubos should be ordered to cease and desist from committing or causing violations of and any future violations of Section 17(a) of the Securities

Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and whether Respondents Calabro, Konner and Koutsoubos should be ordered to pay disgorgement and interest pursuant to Section 8A(e) of the Securities Act and Section 21C(e) of the Exchange Act.

**IV.**

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondents shall file Answers to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondents fail to file the directed answers, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondents personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
Commissioner Gallagher
not participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67809 / September 10, 2012

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| In the Matters of<br><br>Bear Wagner Specialists LLC<br>Admin. Proc. File No. 3-11445<br>Fleet Specialist, Inc.<br>Admin. Proc. File No. 3-11446<br>LaBranche & Co. LLC<br>Admin. Proc. File No. 3-11447<br>Spear, Leeds & Kellogg Specialists LLC<br>Admin. Proc. File No. 3-11448<br>Van der Moolen Specialists USA, LLC<br>Admin. Proc. File No. 3-11449<br>Performance Specialist Group LLC<br>Admin. Proc. File No. 3-11558<br>SIG Specialists, Inc.<br>Admin. Proc. File No. 3-11559<br><br>Respondents. | **ORDER DENYING REQUEST OF ROBERT J. PEACOCK FOR "REVIEW AND REPEAL" OF COMMISSION'S ORDER OF MAY 26, 2011** |

I.

As part of settlements that resolved proceedings against the seven specialist firms then operating on the New York Stock Exchange, the specialist firms agreed to disgorge ill-gotten gains and pay civil penalties, together totaling over $247 million. This money was placed into seven funds for distribution to investors injured by the transactions covered by the settlements. After distributing this money to investors over the course of several years, $159.8 million remained in the seven funds.

In July 2009, we issued a notice seeking public comment regarding the appropriate disposition of the remaining funds. Exchange Act Rel. No. 60403. The notice stated that comments should be submitted no later than August 31, 2009. Robert J. Peacock submitted several comments regarding the remaining funds, including submissions in June 2010, September 2010, December 2010, and January 2011. In his comment letters, Peacock claimed that he was a "special victim" of the specialist firms' misconduct and he asserted that he had suffered a variety of injuries.

On May 26, 2011, we issued an order approving the transfer of the remaining distribution funds to the U.S. Treasury (the "Transfer Order"). Exchange Act Rel. No. 64553. We expressly addressed Peacock's comments in that order, writing that "Peacock's claimed injuries are speculative and too far removed from the securities law violations at the heart of the settlement orders." Order, at 19. [1]

Peacock filed a federal civil action in the District of New Jersey on June 21, 2011. *Peacock v. United States*, No. 2:11-cv-3551 (D.N.J.). Claiming to be "a special, documented victim of an organized institutional fraud," Peacock seemed to challenge the Transfer Order, and he demanded $25 million from the seven distribution funds, or alternatively, $25 million "in damages" from the named defendants, which included the Commission, the Chairman and the Commissioners, and several other government agencies and officials, including President Obama and Treasury Secretary Geithner. The defendants moved to dismiss Peacock's complaint in September 2011.

The district court granted this motion on April 10, 2012, entering an order dismissing Peacock's complaint for lack of jurisdiction.[2] The district court held that Peacock "has not alleged or identified a cognizable basis for jurisdiction or facts showing an entitlement for relief." The court explained that it lacked jurisdiction to review the Transfer Order because exclusive jurisdiction to review that order rests in the Court of Appeals pursuant to Section 25(a)(1) of the Exchange Act, 15 U.S.C. 78y(a)(1). The court further stated that because Peacock "failed to file an administrative complaint with the SEC notifying the agency of his charges" and his request for damages, he had not exhausted his administrative remedies under the Federal Tort Claims Act.[3]

By letter dated April 24, 2012, Peacock sent the Commission an "Administrative Complaint," which the Commission received on April 30, 2012. In this document, Peacock seeks "review and repeal of the Commission's May 26, 2011 ORDER" and asserts a "total claim of $25,000,000." Peacock stated: "Before submitting an appeal of the Commission's Order before the U.S. Court of Appeals that has jurisdiction of this matter, I have been advised that I must first exhaust my administrative remedies, and this is precisely the reason for the submission of this Administrative Complaint to the SEC."[4]

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[1] Commissioner Paredes dissented from that order, but not on grounds related to Peacock's claimed injuries. The May 26 order is currently under review by the Second Circuit in an appeal brought by a different party. *Martin v. SEC*, No. 11-3011 (2d Cir.).

[2] Dkt. No. 26, *Peacock v. United States*, No. 2:11-cv-3551 (D.N.J.)

[3] It appears that the court was reading Peacock's complaint as broadly as possible, so as to give him, as a pro se litigant, every possible ground on which his complaint could have been sustained.

[4] Similar to his district court complaint, Peacock's administrative complaint may be construed as asserting a claim under the FTCA. The Commission has treated his administrative complaint as such and has denied his FTCA claim in a letter sent at the same time as the issuance of this order.

## II

We deny Peacock's request to "review and repeal" the Transfer Order because our procedural rules regarding Fair Funds expressly preclude such relief.

Rule 1106, 17 C.F.R. 201.1106, restricts public participation in the administration of Fair Funds to the submission of comments pursuant to Rule 1103, 17 C.F.R. 201.1103. Rule 1106 states:

> "Other than in connection with the opportunity to submit comments as provided in Rule 1103, no person shall be granted leave to intervene or to participate or otherwise to appear in any agency proceeding or otherwise to challenge an order of disgorgement or creation of a Fair Fund, or an order approving, approving with modifications, or disapproving a plan of disgorgement or a Fair Fund plan; or any determination relating to a plan based solely upon that person's eligibility or potential eligibility to participate in a fund or based upon any private right of action such person may have against any person who is also a respondent in the proceeding."

By requesting "review and repeal" of the Transfer Order, Peacock seeks "to participate," "to appear," or "otherwise to challenge" a "determination relating to a plan" regarding distribution funds "based solely" on his "eligibility or potential eligibility to participate in a fund." Rule 1106 plainly prohibits him from doing so. If Peacock believed he was aggrieved by the Transfer Order, his exclusive remedy was to seek review of the Transfer Order under Section 25(a) of the Exchange Act, 15 U.S.C. 78y(a)(1).[5]

We note that Peacock availed himself of the comment process, "as provided in Rule 1103." He submitted four comments to the Commission regarding the disposition of the remaining funds, and we addressed his comments in our Transfer Order.

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[5] It might be possible to construe Peacock's submission as a motion for reconsideration. We decline to do so, and we do not reach the issue of whether our procedural rule regarding such motions (Rule 470, 17 C.F.R. 201.470) would apply in the Fair Fund context. We note, however, that Rule 470 requires reconsideration motions to be filed "within 10 days after service of the order complained of," and Peacock did not file his request for "review and repeal" until late-April 2012, nearly a year after we ordered the transfer of the remaining $159.8 million to the U.S. Treasury.

Therefore, it is ORDERED that the request for review and repeal of the Transfer Order filed by Robert J. Peacock be, and hereby is, denied as prohibited by Rule 1106.[6]

By the Commission.

Elizabeth M. Murphy
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

[6] In a letter dated July 2, 2012, Peacock requests "a hearing before the SEC so as to address in detail my complaint against the SEC in the matter of the NYSE Execution Fraud." Our Rules for Fair Funds and Disgorgement Plans do not provide for hearings on such matters. Rule 1106, quoted above, precludes Peacock from appearing "in any agency proceeding" based on his "potential eligibility to participate in a fund." In addition, there is no legal requirement under the federal securities laws, the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.*, or the Commission's Rules of Practice, for a hearing on Peacock's substantive request made in his April 24 submission. Finally, Peacock's written presentations have fully set forth his arguments, so that a hearing would serve no useful purpose.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67821 / September 10, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15016**

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| **In the Matter of**<br><br>**JOSEPH S. BLIMLINE,**<br><br>**Respondent.** | **ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING** |

## I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Joseph S. Blimline ("Respondent" or "Blimline").

## II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From June 2006 through January 2009, Respondent acted as an unnamed principal and was known as the "Chief Operating Officer," and the head of the land management division of Provident Royalties, LLC ("Provident"), a Delaware limited liability company which was not registered with the Commission. Blimline also acted as an undisclosed and unlicensed principal or affiliate of Provident Asset Management, LLC, a Delaware limited liability company which was registered with the Commission as a broker-dealer from March 9, 2004 until March 18, 2010. During this time, Respondent was involved in raising funds through a series of Provident fraudulent offerings which purported to be exempt from registration pursuant to Rule 506 of

Regulation D. In this capacity, Respondent acted as an unregistered broker-dealer in violation of the federal securities laws. Respondent, 37 years old, is incarcerated at the Federal Correctional Institution Big Spring in Texas, after pleading guilty to criminal offenses related to the conduct underlying both the associated civil case and this proceeding.

B. RESPONDENT'S CRIMINAL CONVICTION

1. On July 1, 2009, a complaint was filed against Provident in connection with an offering fraud in which Respondent was involved. This complaint was later amended to include Respondent, seeking to permanently enjoin him from future violations of Section 17(a) of the Securities Act of 1933, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in the civil action entitled *SEC v. Provident Royalties, LLC, et al.*, Civil Action Number 3:09CV1238-L, in the United States District Court for the Northern District of Texas.

2. The Commission's complaint alleged that, from at least June 2006 until January 2009, in connection with a series of preferred stock and limited partnership interests, Blimline misappropriated investor funds, falsely stated to investors the use of their invested funds, made misrepresentations to other Provident principals about the value of properties, failed to disclose his interest (through various entities he controlled) in some properties, and otherwise engaged in a variety of conduct that operated as a fraud and deceit on investors. The complaint also alleged that Blimline, directly or indirectly, sold unregistered securities.

3. On August 31, 2010, Blimline pleaded guilty to one count of conspiracy to commit mail fraud in violation of Title 18 United States Code, Section 1349 before the United States District Court for the Eastern District of Texas, in *United States v. Joseph S. Blimline*, Crim. Information No. 4:10CR00137-001. On May 15, 2012, a judgment in the criminal case was entered against Blimline. He was sentenced to two concurrent prison terms of 20 years followed by three years of supervised release and ordered to make restitution in the amount of $407,552,918.95.

4. The count of the criminal information to which Blimline pleaded guilty alleged, among other things, that Blimline defrauded investors and obtained money and property by means of materially false and misleading statements in connection with the fraudulent sale of limited partnership interests and preferred stock underlying the Commission's complaint described in Paragraph 3 above.

**III.**

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations; and

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act.

**IV.**

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 210 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67823 / September 11, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-15018

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| **In the Matter of**<br><br>**ROBERT CARLSSON,**<br><br>**Respondent.** | **ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS** |

**I.**

The Securities and Exchange Commission ("Commission" or "SEC") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Robert Carlsson ("Respondent").

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the ourpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the entry of this rder Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange ct of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

**III.**

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Carlsson was a licensed securities broker who raised money for BCI Aircraft ing, Inc. ("BCI") from outside investors. During at least 2006 and 2007, Carlsson was a

principal of 21 Capital Group, Inc. ("21 Capital"), a securities broker-dealer registered with the SEC. Carlsson, age 43, is a resident of Chicago, Illinois.

2. In a September 8, 2010 superseding indictment, a grand jury alleged, among other things, that in connection with a 2006 examination by staff of the SEC's Office of Compliance Inspections and Examinations ("OCIE"), Carlsson (and others):

> corruptly obstructed, influenced and impeded and attempted to corruptly obstruct, influence and impede an official proceeding, namely an SEC examination of 21 Capital and defendant CARLSSON, by, among other things: (a) falsely representing and causing to be falsely represented to the SEC examiners that an $80,000 payment received by 21 Capital from defendant BCI was a consulting fee related to an aircraft lease transaction and an initial public offering by defendant BCI, whereas in fact, as defendant CARLSSON knew, the $80,000 payment was a commission for funds defendant CARLSSON had raised for investment with defendant BCI; and (b) falsely representing and causing to be falsely represented in a letter provided to the SEC examiners that defendant BCI waived the rent payments owed to BCI by defendant CARLSSON and 21 Capital because defendant BCI had office space that it was not using, whereas in fact, as defendants HOLLNAGEL, BCI and CARLSSON knew, 21 Capital entered into a lease agreement with defendant BCI prior to the start of defendant BCI's lease for the office space in question, and defendant BCI was paying for 21 Capital's business expenses, generally, which included its rent.

U.S. v. Hollnagel et al., Criminal Action Number 1:10-cr-00195, at Docket No. 46 at 47-48. The grand jury also alleged, in connection with a 2007 examination by OCIE staff, Carlsson (and others):

> corruptly obstructed, influenced and impeded and attempted to corruptly obstruct, influence and impede an official proceeding, namely an SEC examination of 21 Capital and defendant CARLSSON, in that defendant CARLSSON falsely represented during the SEC examination that: (a) his job with defendant BCI simply had been to make introductions between potential investors and Hollnagel and not to sell shares of BCI's investment offerings; and (b) BCI did not pay him commissions on the offer and sale of investments but rather a consulting fee . . . .

. Hollnagel et al., Criminal Action Number 1:10-cr-00195, at Docket No. 46 at 50.

3. On November 8, 2011, Carlsson entered a plea of guilty to one count of obstruction ficial proceeding, Title 18 U.S.C. § 1512, in the criminal action entitled U.S. v. Hollnagel iminal Action Number 1:10-cr-00195, in the United States District Court for the Northern f Illinois.

## IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act, that Respondent be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent; and

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67833 / September 11, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15019**

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| **In the Matter of**<br><br>**Jiangbo Pharmaceuticals, Inc.,**<br><br>**Respondent.** | **ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934** |

**I.**

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondent Jiangbo Pharmaceuticals, Inc. ("Jiangbo" or the "Company").

**II.**

After an investigation, the Division of Enforcement alleges that:

A. Jiangbo is a Florida corporation headquartered in Laiyang, China. Jiangbo is engaged in the business of researching, developing, manufacturing, marketing, and selling pharmaceutical products and health supplements in China. Under the stock symbol "JGBO," the Company began trading on the OTCBB on May 12, 2009 and on the NASDAQ on June 8, 2010. On May 31, 2011, NASDAQ halted trading in Jiangbo's common stock, and it delisted the Company's securities on October 17, 2011. Jiangbo's securities have been registered with the Commission pursuant to Section 12(g) of the Exchange Act.

B. Section 13(a) of the Exchange Act and the rules promulgated thereunder require issuers of securities registered pursuant to Section 12 of the Exchange Act to file current and accurate information in periodic reports with the Commission. Exchange Act Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires issuers to file quarterly reports.

C. Jiangbo is delinquent in its periodic filings with the Commission.

D. Jiangbo has failed to file its requisite periodic reports for its fiscal year ended June 30, 2011, its fiscal quarter ended September 30, 2011, its fiscal quarter ended December 31, 2011, and its fiscal quarter ended March 31, 2012.

E. As a result of the foregoing, Jiangbo has failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder.

## III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondent an opportunity to establish any defenses to such allegations; and

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or to revoke the registration of each class of securities, registered pursuant to Section 12 of the Exchange Act, of the Respondent identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 and 12g-3 or new corporate name of the Respondent.

## IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondent personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS HEREBY FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67845 / September 12, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15020**

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| **In the Matter of**<br><br>**JILAINE H. BAUER, ESQ.,**<br><br>**Respondent.** | **ORDER INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS AND IMPOSING TEMPORARY SUSPENSION PURSUANT TO RULE 102(e)(3)(i)(B) OF THE COMMISSION'S RULES OF PRACTICE** |

## I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against Jilaine H. Bauer, Esq. ("Respondent" or "Bauer") pursuant to Rule 102(e)(3)(i)(B)[1] of the Commission's Rules of Practice [17 C.F.R. § 200.102(e)(3)(i)(B)].

## II.

The Commission finds that:

1. Jilaine H. Bauer, 57, at all relevant times was an attorney, and is the former general counsel, chief compliance officer, secretary, and senior vice president of Heartland

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[1] Rule 102(e)(3)(i) provides, in relevant part, that:

> The Commission, with due regard to the public interest and without preliminary hearing, may, by order, temporarily suspend from appearing or practicing before it any attorney . . . who has been by name: (A) [p]ermanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating . . . any provision of the Federal securities laws or of the rules and regulations thereunder; or (B) [f]ound by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party . . . to have violated (unless the violation was found not to have been willful) . . . any provision of the Federal securities laws or of the rules and regulations thereunder.

Advisors, Inc. ("HAI") and the former vice president of Heartland Group, Inc. ("Heartland Group").

2. On December 11, 2003, the Commission filed a complaint against Bauer and others in the United States District Court for the Eastern District of Wisconsin (the "Court") alleging, among other things, that Bauer engaged in insider trading in the shares of Heartland Group's Short Duration High-Yield Municipal Fund ("Short Duration Fund"). Securities and Exchange Commission v. Heartland Advisors, Inc, *et al.*, Case No. 03-C-1427 (E.D. Wis.). Specifically, the complaint alleged that Bauer sold her shares with knowledge that the Short Duration Fund and Heartland Group's High-Yield Municipal Bond Fund had liquidity and pricing problems. The complaint further alleged that Bauer was unjustly enriched in the amount of approximately $20,000 when she sold her Short Duration Fund shares.

3. On May 25, 2011, the Court granted the SEC summary judgment on its insider trading claims against Bauer, finding that Bauer possessed material, non-public information when she redeemed her shares in the Short Duration Fund on October 3, 2000.

4. On June 15, 2012, the Court entered a judgment finding that Bauer violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, and Section 36(a) of the Investment Company Act of 1940, and that Bauer acted with scienter.

**III.**

Based upon the foregoing, the Commission finds that a court of competent jurisdiction has found that Bauer, an attorney, violated the Federal securities laws within the meaning of Rule 102(e)(3)(i)(B) of the Commission's Rules of Practice. In view of this finding, the Commission deems it appropriate and in the public interest that Bauer be temporarily suspended from appearing or practicing before the Commission.

IT IS HEREBY ORDERED that Bauer be, and hereby is, temporarily suspended from appearing or practicing before the Commission. This Order will be effective upon service on the Respondent.

IT IS FURTHER ORDERED that Bauer may, within thirty days after service of this Order, file a petition with the Commission to lift the temporary suspension. If the Commission receives no petition within thirty days after service of the Order, the suspension will become permanent pursuant to Rule 102(e)(3)(ii).

If a petition is received within thirty days after service of this Order, the Commission will, within thirty days after the filing of the petition, either lift the temporary suspension, or set the matter down for hearing at a time and place to be designated by the Commission, or both. If a hearing is ordered, following the hearing, the Commission may lift the suspension, censure the petitioner, or disqualify the petitioner from appearing or practicing before the Commission for a period of time, or permanently, pursuant to Rule 102(e)(3)(iii).

This Order shall be served upon Bauer personally or by certified mail at her last known address.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**INVESTMENT ADVISERS ACT OF 1940**
**Release No. 3463 / September 12, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15021**

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| **In the Matter of**<br><br>**SJK INVESTMENT MANAGEMENT, LLC,**<br><br>**Respondent.** | **ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(e) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS** |

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(e) of the Investment Advisers Act of 1940 ("Advisers Act") against SJK Investment Management, LLC ("SJK" or "Respondent").

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(e) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

## III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. SJK Investment Management, LLC (SEC Number 801-70340) is an investment adviser that has been registered with the Commission since 2009.

2. On September 23, 2011, a permanent injunction was entered by consent against SJK, permanently enjoining it from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1), 206(2), 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, in the civil action entitled Securities and Exchange Commission v. Stanley J. Kowalewski and SJK Investment Management, LLC, Civil Action Number 1:11-CV-0056-TCB, in the United States District Court for the Northern District of Georgia.

3. The Commission's complaint alleged that beginning in the summer of 2009 and continuing through January 6, 2011, SJK marketed two "fund of funds" (collectively "the Absolute Return Funds") to various entity investors, consisting largely of pension funds, school endowments, hospitals and non-profit foundations. The complaint further alleged that in raising investor proceeds for those funds – which ultimately totaled approximately $65 million – SJK made numerous representations, including that: (a) "substantially all" of the monies invested in the Absolute Return Funds would be invested in "unaffiliated" underlying hedge funds pursuing complex investment strategies, (b) no single underlying fund would be allocated more than 15% of the Absolute Return Funds' monies, (c) SJK would be responsible for its own overhead and operating expenses, including its rent and personnel's salaries, and (d) as compensation for its services, SJK would receive no more than a 1% annual asset management fee and a 10% of profits incentive fee. The complaint also alleged that in December 2009, SJK and its founder, sole owner, CEO and Chief Investment Officer Stanley J. Kowalewski further formed a new, undisclosed fund wholly controlled by SJK and Kowalewski, the Special Opportunities Fund, caused the Absolute Return Funds to "invest" a total of $16.5 million in this new fund, and proceeded to engage in various, undisclosed self-dealing transactions, including having the Special Opportunities Fund: (a) buy Kowalewski's personal home for $2.8 million, at least $1 million more than its likely value, (b) purchase a vacation home for Kowalewski for $3.9 million, (c) pay approximately $1 million of Kowalewski and SJK's personal and business expenses, and (d) pay SJK a $4 million "administration" fee which was immediately passed on to Kowalewski. The complaint further alleged that Kowalewski and SJK sent fraudulent monthly account statements to the investors or their representatives showing substantial positive, but illusory, investment returns generated by the "investments" in the Special Opportunities Fund.

## IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent SJK's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(e) of the Advisers Act that the registration of Respondent SJK be, and hereby is, revoked.

By the Commission,

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67856 / September 13, 2012**

**ACCOUNTING AND AUDITING ENFORCEMENT**
**Release No. 3405 / September 13, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15022**

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| **In the Matter of**<br><br>**R. JEFFREY ROOKS, CPA,**<br><br>**Respondent.** | **ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS** |

## I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against R. Jeffrey Rooks ("Respondent" or "Rooks") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

## II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the

[1] Rule 102(e)(3)(i) provides, in relevant part, that:

> The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any . . . accountant . . . who has been by name . . . permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

## III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Rooks, age 46, is and has been a certified public accountant licensed to practice in the State of Georgia since 1992.

2. On September 5, 2012, a final judgment was entered against Rooks, permanently enjoining him from future violations of Sections 10(b) and 14(e) of the Exchange Act and Rules 10b-5 and 14e-3 thereunder, in the civil action entitled Securities and Exchange Commission v. R. Jeffrey Rooks, Civil Action Number 1:12-CV-2988-CAP, in the United States District Court for the Northern District of Georgia. Rooks was also ordered to pay $18,482.12 in disgorgement, $1,432.68 in prejudgment interest, and a $4,620.54 civil money penalty.

3. The Commission's complaint alleged, among other things, that Rooks traded in the securities of Chattem, Inc., while in possession of material, non-public information that had been tipped to him from an accounting partner who misappropriated the information from an accounting client, while further knowing that the information was obtained in breach of a duty of trust in confidence that the accounting partner owed to the accounting client.

## IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction agreed to in Respondent Rook's Offer.

Accordingly, it is hereby ORDERED, effective immediately, that Rooks is suspended from appearing or practicing before the Commission as an accountant.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar not participating

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT 1934**
**Release No. 67864 / September 14, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15025**

**In the Matter of**

**JOSE LUIS LUNA,**

**Respondent.**

**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Jose Luis Luna ("Luna" or "Respondent").

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

## III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Respondent Luna, 45, is a resident of Aventura, Florida. From May 2008 to December 2009, Luna held a Series 7 license and was the operations manager at LatAm Investments, LLC, a broker-dealer registered with the Commission during that time period.

2. On September 4, 2012, the United States District Court for the Southern District of Florida entered a judgment by consent against Luna in the civil action entitled Securities and Exchange Commission v. Jose Luis Luna, Case No. 1:12-cv-23131-UU (S.D. FL), permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5, and aiding and abetting violations of Section 15(c) of the Exchange Act.

3. The Commission's complaint alleged that, from November 2006 to at least September 2009, Luna knowingly or recklessly assisted in a scheme to defraud certain LatAm customers by charging them millions of dollars in higher prices and excessive fees by excessively marking up or marking down structured notes. The complaint further alleged that, in several instances, Luna provided the customers' agents with term sheets containing altered prices for the notes. The complaint also alleged that, as a result of the scheme, Luna received hundreds of thousands of dollars in salary, commission and other payments during the relevant time period.

## IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Luna's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, Respondent be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent; and

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67857 / September 14, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-15023

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| In the Matter of<br><br>New York Stock Exchange LLC, and NYSE Euronext,<br><br>Respondents. | ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 19(h)(1) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS AND IMPOSING SANCTIONS AND A CEASE-AND-DESIST ORDER |

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 19(h)(1) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against the New York Stock Exchange LLC ("NYSE") and NYSE Euronext (collectively, "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") that the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 19(h)(1) and 21C of the Securities Exchange Act of 1934, Making Findings and Imposing Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

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## III.

On the basis of this Order and Respondents' Offers, the Commission finds that:

### Introduction

When Congress mandated a national market system ("NMS") for trading securities in 1975, it emphasized that consolidated data "would form the heart of the national market system."[1] The Commission since has emphasized the importance of the consolidated data feeds on many occasions, including in its January 2010 Market Structure Concept Release: "As a result, the public has ready access to a comprehensive, accurate, and reliable source of information for the prices and volume of any NMS stock at any time during the trading day. This information serves an essential linkage function by helping assure that the public is aware of the best displayed prices for a stock, no matter where they may arise in the national market system."[2] In addition to providing the view of the market for many investors, consolidated data feeds also play an important role in price discovery and compliance functions. For example, a number of exchanges and other trading centers use the consolidated feeds to check prices at other trading centers to determine whether they may execute an order or whether another trading center has a better price.[3]

Accordingly, exchanges are required to send their best-priced quotations (or "quotes") and trade reports to be included in the consolidated feeds.[4] Exchanges also are permitted to distribute customized market data products directly to customers. However, to preserve the integrity of the consolidated feeds, a Commission rule—Rule 603(a) of Regulation NMS—requires that exchanges distribute market data on terms that are "fair and reasonable" and "not unreasonably discriminatory." This rule prohibits an exchange from releasing data relating to quotes and trades to its customers through proprietary feeds before it sends its quotes and trade reports for inclusion in the consolidated feeds.[5]

The disparities in data transmissions that Rule 603(a) prohibits can have important consequences that risk undermining investor confidence and interfering with the efficiency of the markets. For example, a delay in the release of data to the consolidated feeds in contrast to the proprietary feeds can cause an investor relying on the consolidated feeds to make a trading decision based on a potentially stale picture of current market conditions. An exchange's delay

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[1] H.R. Rep. No. 94-229, 94th Cong., 1st Sess. 93 (1975).

[2] Concept Release on Equity Market Structure, 75 Fed. Reg. 3594, 3600 (January 21, 2010).

[3] Trading centers are required to have and enforce policies and procedures reasonably designed to prevent executions at prices that are inferior to prices that are displayed and available at another market center. <u>See</u> Rule 611(a) of Regulation NMS, 17 CFR § 242.611(a).

[4] <u>See</u> Rules 601 and 602 of Regulation NMS, 17 CFR §§ 242.601 and 602.

[5] <u>See</u> Regulation NMS, 70 Fed. Reg. 37,496, 37,567 (June 29, 2005) (adopting release); <u>see also</u> Concept Release, 75 Fed. Reg. at 3601 (January 21, 2010).

in sending its quotes to the consolidated feeds also can cause inefficient execution decisions at other market centers and, under some circumstances, create the appearance of a "crossed" national best bid and offer ("NBBO"), which occurs when the best bid exceeds the best offer. The appearance of a crossed NBBO can cause both uncertainty and the risk of a trade being executed at worse than the best available price.[6]

Over an extended period, NYSE violated Rule 603(a) in connection with the release of certain data through two proprietary feeds. Beginning in June 2008, one NYSE proprietary feed sent real-time depth-of-book market data, which included information about its current best-priced quotations and execution prices, to its subscribers before NYSE sent data to a Securities Information Processor (the "Network Processor") that made quotes and trades available for sale to the public on a consolidated basis. Another NYSE proprietary feed, during multiple intervals of high-volume trading during the first half of 2010, sent quote data to customers before NYSE sent it to the Network Processor. The disparities ranged from single-digit milliseconds to, on occasion, multiple seconds.

There were several reasons for the disparities. First, NYSE's internal architecture gave its real-time depth-of-book proprietary feed a path to customers that was faster than the path used to send quotes to the Network Processor. Since the inception of this feed in June 2008, NYSE often made its data available to customers sooner than NYSE sent data to the Network Processor. Second, NYSE structured the other proprietary feed to operate independently of the system that sent data to the Network Processor. As a result, this other proprietary feed was not affected when delays were experienced by the NYSE system that sent data to the Network Processor. Third, NYSE's internal system that sent data to the Network Processor had a software issue that caused delays during multiple periods of high trading volume from early to mid-2010. During these periods, NYSE often sent data to the Network Processor after NYSE sent data to customers through the two proprietary feeds at issue.

NYSE did not take adequate steps to comply with Rule 603. Although the business units that designed NYSE's market data systems attempted to ensure that the systems complied with Rule 603, NYSE's compliance department played no role in the design, implementation, or operation of the systems. NYSE also did not systematically monitor its data feeds to ensure they complied with Rule 603, and had no written policies and procedures concerning the rule.

In addition to the data delays, NYSE failed to retain computer files that contained information about NYSE's transmission of market data, including the times that NYSE transmitted individual trade reports and quotes to the Network Processor. As a consequence, basic calculations relevant to NYSE's compliance with Rule 603(a) were burdensome and inexact.

As a result of the foregoing, NYSE violated Rule 603(a) of Regulation NMS and the record retention provisions of Section 17(a)(1) of the Exchange Act and Rule 17a-1 thereunder. NYSE Euronext, which supplied the personnel responsible for these systems and compliance issues, caused the violations.

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[6] A crossed NBBO triggers an exception to the trade-through rule of Regulation NMS. See Rule 611(b)(4) of Regulation NMS, 17 CFR § 242.611(b)(4).

## Respondents

New York Stock Exchange LLC ("NYSE") is a national securities exchange registered with the Commission under Section 6 of the Exchange Act. NYSE first registered as a national securities exchange with the Commission in 1934. NYSE currently is a Delaware limited liability company and a subsidiary of NYSE Euronext.

The Commission previously brought two actions against NYSE. In June 1999, the Commission found that NYSE had failed to detect and halt unlawful proprietary trading by independent floor brokers. In the Matter of New York Stock Exchange, Inc., Admin. Proc. File 3-9925, Exchange Act Release No. 41574 (June 29, 1999). In 2005, the Commission found that NYSE had failed to detect, investigate, and discipline widespread unlawful proprietary trading by specialists on the floor of the exchange. In the Matter of New York Stock Exchange, Inc., Admin. Proc. File 3-11892, Exchange Act Release No. 51524 (April 12, 2005).

NYSE Euronext is a global operator of financial markets and provider of trading technologies. NYSE Euronext is a Delaware corporation with its principal executive offices at 11 Wall Street in New York City. The common stock of NYSE Euronext is registered with the Commission pursuant to Section 12(b) of the Exchange Act, and is listed for trading on NYSE and Euronext Paris. NYSE Euronext has three subsidiaries that are national securities exchanges registered under Section 6 of the Exchange Act: NYSE; NYSE Arca, Inc., a Delaware corporation; and NYSE MKT LLC (formerly NYSE Amex LLC), a Delaware limited liability company. Most of the employees who operate the business of NYSE as an exchange are employees of NYSE Euronext subsidiaries and ultimately report to the senior officers of NYSE Euronext.

## Facts

### A. Market Data Overview

NYSE receives hundreds of millions of orders to buy or sell securities each trading day. These orders and related message traffic go to NYSE's matching engine, known as the Display Book, or "DBK," for processing. DBK matches orders and generates executions, redirects orders for routing to other exchanges, and maintains limit orders in NYSE's "order book" for possible future execution. DBK also generates market data as a result of this activity, including trade reports (prices and sizes of executed trades), quotes (best price available and the number of shares bid or offered at that price), and depth-of-book messages (order-by-order changes in the order book at all price points).

Rule 603(b) of Regulation NMS requires exchanges to act jointly to disseminate consolidated market information through a common processor. To satisfy this requirement, NYSE sends quotes and trade reports in NYSE–listed securities to a Network Processor, where they are combined with quotes and trade reports from other market centers into consolidated feeds that are offered for sale to the public.

The Consolidated Tape Association ("CTA") governs the Network Processor that distributes trade and quote data about securities listed on exchanges other than Nasdaq, including

NYSE-listed securities.[7] CTA is comprised of representatives from the various market centers trading these securities, and operates pursuant to documents known as the "CTA Plan" and the "CQ Plan." The Securities Industry Automation Corporation ("SIAC") is an NYSE Euronext subsidiary that performs much of the market data processing work required under the CTA Plan and the CQ Plan. Pursuant to the CTA Plan and CQ Plan, quote data is distributed through the Consolidated Quote System ("CQS") and trade data is distributed through the Consolidated Trade System ("CTS"). CQS distributes the best bids and offers ("BBOs") for each exchange in each of these securities, and uses those BBOs to calculate market-wide NBBOs for each security. The revenue from the sale of this consolidated data is shared among the CTA's members.

## B. NYSE's Distribution of Market Data

### 1. MDD—the NYSE System that Sends Market Data to the Network Processor

During the relevant time, DBK sent quotes and trade reports to an internal NYSE distribution mechanism known as the "Info Bus." The Info Bus then sent the data to other internal NYSE systems. During the period June 2008 to July 2011, the Info Bus sent quotes and trade reports to the Market Data Distribution system ("MDD") or its predecessor. MDD is the NYSE system that processes quotes and trade reports into the formats required by the CTA and then releases them to the Network Processor that makes them available for sale to the public on a consolidated basis.

### 2. NYSE's Proprietary Feeds

NYSE also earns revenue from selling market data through proprietary data feeds. Two of NYSE's proprietary data products are the subject of this order: Open Book Ultra and PDP Quotes.

#### a. Open Book Ultra

NYSE began offering a proprietary depth-of-book feed, known as Open Book, in 2001. That product provided snapshots every ten seconds of the NYSE order book, excluding orders from NYSE floor participants. Subsequent versions of Open Book shortened the update interval to five seconds and then to one second. In June 2008, NYSE also began to offer Open Book Ultra ("OBU"). Initially, OBU included most but not all of the data reflecting the NYSE order book. By no later than early 2009 and in its current configuration, OBU transmits in real time full depth-of-book data on an order-by-order basis. OBU sends this data in delta, or update, messages, which describe order book changes resulting from the submission, cancellation, modification, or execution of individual displayed orders. OBU thus transmits information about displayed orders at all prices, including those at the current best prices, and the prices of executed trades. When combined with similar depth-of-book feeds offered by some other

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[7] There are two Network Processors: One transmits data for securities listed on Network A (NYSE) and Network B (NYSE Arca, NYSE MKT, other non-Nasdaq exchanges), and is governed by the CTA Plan and CQ Plan. The other transmits data for securities listed on Network C (Nasdaq) and is governed by the Nasdaq UTP Plan. NYSE only conducts trading for NYSE-listed securities (Network A) and sends data pursuant to the CTA Plan and CQ Plan.

exchanges, this data allows a trader to identify most of the displayed exchange-traded liquidity across the entire market. Many traders input this data into computer algorithms that make a high volume of rapid trading and order routing decisions. Approximately 80% of NYSE's trading volume is attributable to subscribers to a package of NYSE proprietary market data products that includes OBU.

From June 2008 through July 2011, the internal path for OBU involved fewer steps than the internal NYSE path that sent data to the Network Processor. By 2010, OBU was releasing its data to proprietary customers in less than one millisecond, on average. While OBU received data directly from DBK, MDD received data from DBK through the Info Bus. As a consequence of this design, NYSE consistently released OBU data to its subscribers sooner than it released quotes and trade reports to the Network Processor.

### b. PDP Quotes

PDP Quotes (also known as "NYSE BestQuotes") contains NYSE's best bid and offer for each security, which is the same information NYSE releases from MDD to the Network Processor for inclusion in CQS. Until 2009, PDP Quotes obtained data *after* it had been partially processed through the predecessor system to MDD. As a result, most delays that affected delivery of data to the Network Processor also would delay PDP Quotes. In January 2008, PDP Quotes customers complained that they sometimes received data from PDP Quotes after the data already had appeared in CQS. NYSE decided to address the complaints by reconfiguring the path for PDP Quotes so that PDP Quotes could receive quotes from the Info Bus independently of MDD. In an effort to comply with Rule 603, NYSE delayed making this change until January 2009, after it launched MDD, which was faster than its predecessor system. Nonetheless, after the path was reconfigured, delays in processing quotes in MDD could, and at times did, result in PDP Quotes releasing quotes to its subscribers before MDD released quotes to the Network Processor.

## C. Disparities Caused by MDD Software Issue

From early through mid-2010, the software that the MDD system used to process quotes and trades was susceptible to delays during times of high trading volume. The development team that designed the software was aware, as early as 2009, that this could be a potential issue but initially focused on ensuring that the system was operational and stable, and decided not to address the potential delay issue unless and until delays actually occurred. In late February 2010, the team became aware of delays and started the development of a software release to fix the problem. The rollout of this release began in late April 2010 and was finished by May 14, 2010.

A review of data for a limited number[8] of high volume time periods in early 2010 revealed multiple 15-second intervals, often near the close of trading, during which MDD experienced average delays exceeding 25, 50, or 100 milliseconds. Several 15-second periods had more than 10% of quotes delayed by more than 1 second and, on one day in February 2010, MDD had a substantial percentage of quotes delayed by more than 5 seconds during a half-minute period before the close of trading. During these periods, OBU and PDP Quotes did not experience similar delays because both operated independently of the MDD system.

The magnitude of the disparities became pronounced after the beginning of the May 6, 2010, market event that became known as the "Flash Crash." By that day, NYSE had fixed the software issue in the path to the Network Processor in approximately half of the relevant computer servers but, under the stress of sustained record-breaking order and trade volumes, servers still running the old software experienced substantial delays transmitting trade reports and quotes in the approximately 1,665 securities they processed. During the two five-minute periods between 2:40 p.m. to 2:50 p.m., these servers processed over 4.8 million quotes. The average delays for those quotes during those two periods were approximately 3.7 and 5.3 seconds, respectively. In contrast, the average processing times for the two proprietary feeds were under 2 milliseconds and under 16 milliseconds, respectively.

The most significant quote delays occurred from 2:43:15 p.m. through 2:46:59 p.m. During each 15-second interval in this time period, the average delays on the affected MDD servers exceeded 4.6 seconds and, in seven of those intervals, exceeded ten seconds. During this period, these MDD servers processed approximately 2 million quotes, of which approximately 1.65 million (81%) had delays exceeding one second. In four of these 15-second periods, every quote was delayed by more than one second.

Although the data delays came to light during the inquiry regarding the Flash Crash, the delays occurred after the start of the Flash Crash and did not cause the extreme volatility that day.[9]

## D. Inadequate Compliance Efforts

NYSE failed to take adequate steps to comply with Rule 603. The business units responsible for NYSE market data distribution made some efforts to ensure that their systems complied with the rule, but they had no formal compliance program for Rule 603 and did not

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[8] As discussed below, NYSE did not retain the timestamps that showed the times MDD released data to the Network Processor. As a result of this failure, and the resulting burden associated with a comprehensive review of NYSE's release of data to the Network Processor, a limited number of time periods were reviewed for quote delays.

[9] The findings in this Order are consistent with the conclusion of the September 30, 2010, Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues, titled Findings Regarding the Market Events of May 6, 2010 (available at http://www.sec.gov/news/studies/2010/marketevents-report.pdf), that "the evidence does not support the hypothesis that delays in [the consolidated trade and quote] feeds triggered or otherwise caused the extreme volatility in security prices observed that day."

have written policies or procedures that addressed any aspect of the rule. The Compliance Department played no role in the decision-making process that led to the design and implementation of OBU in 2008 and the resulting release of OBU data before NYSE released its data to the Network Processor. Similarly, NYSE's reconfiguration of PDP Quotes changed a system in which compliance with Rule 603 was highly likely to one in which compliance depended upon the relative processing speed of MDD, which sometimes lagged PDP Quotes. Despite this compliance risk, the Compliance Department was not involved in the decision. Similarly, neither the relevant business units nor the Compliance Department systematically monitored the comparative speed of MDD and NYSE's proprietary feeds.

The operations and system development staff held weekly meetings during which they discussed problems with MDD but the Compliance Department did not attend these meetings. One result was that the Compliance Department was unaware that the MDD software issue had manifested itself in February 2010. By not involving the Compliance Department at critical junctures, NYSE missed important opportunities to avoid compliance failures.

## E. <u>Failure to Retain Business Records</u>

Beginning in late 2009 or early 2010, MDD generated timestamps reflecting the time that each quote and trade message exited MDD. NYSE stored MDD timestamps for each message in "recovery files" located within the MDD system. These files were available in the event that an MDD server crashed and the processing of quotes and trade reports had to be restarted. Beginning in early 2010, NYSE also stored summary information about MDD processing speed in "statistics files." NYSE typically retained these recovery and statistics files for three days, at which point they were deleted to make space available on the storage disk for more recent files.

NYSE's deletion of these files, which included MDD exit timestamps, substantially complicated its ability to (1) determine when it experienced delays releasing quotes and trade reports to the Network Processor and (2) calculate the length of the delays.

## <u>Legal Discussion</u>

## A. <u>NYSE's Obligations as an Exchange</u>

National securities exchanges, such as NYSE, are critical elements of the national market system. Because of this central role, an exchange is required to satisfy among the most significant regulatory responsibilities of any market participant.[10] These regulatory responsibilities implicate both an exchange's own operations and its role as a self-regulatory organization that acts as a co-regulator with the Commission and other authorities. Accordingly, Sections 6(b), 19(g), and 19(h) of the Exchange Act require that a registered exchange: (1) comply with the Exchange Act, rules issued pursuant to the Exchange Act, and the

[10] <u>See</u> <u>In the Matter of EDGX Exchange, Inc. et al.</u>, Admin. Proc. File 3-14586, Exchange Act Release No. 65556 (October 13, 2011) ("Given the systemic risk that can result from the failure of an exchange to comply with [its] requirements, the operation of a national securities exchange carries with it among the most significant regulatory compliance obligations that are expected of any market participant.").

exchange's own rules and (2) enforce compliance by members of the exchange and persons associated with the members.

## B. Rule 603(a)

Section 11A(c)(1) of the Exchange Act authorizes the Commission to issue regulations concerning the distribution of market data. The Commission set forth standards for the distribution of market data in 2005 when it promulgated Rule 603(a) as part of Regulation NMS. Rule 603(a)(1) requires "exclusive processors" of market data, such as NYSE, to distribute data to securities information processors (which includes, among others, market data vendors in addition to the Network Processor) on terms that are "fair and reasonable." Rule 603(a)(2) requires national securities exchanges, such as NYSE, to distribute their market data to persons on terms that "are not unreasonably discriminatory." Section 11A(c) and Rule 603(a) apply to "information with respect to quotations for or transactions in" securities.

In the adopting release for Regulation NMS, the Commission stated that "independently distributed data could not be made available on a more timely basis than core data is made available to a Network processor. Stated another way, adopted Rule 603(a) prohibits an SRO or broker-dealer from transmitting data to a vendor or user any sooner than it transmits the data to a Network processor."[11] See Regulation NMS, 70 Fed. Reg. 37,496, 37,567 and 37,569 (June 29, 2005) (adopting release); see also Concept Release on Equity Market Structure, 75 Fed. Reg. 3594, 3601 (January 21, 2010). The Commission has recognized that, due to the consolidation process (i.e., the time from the receipt by the Network Processor of the information from exchanges to the time it distributes consolidated information to the public), information from a Network Processor generally reaches market participants later than information from exchanges' proprietary feeds. See Concept Release, 75 Fed. Reg. at 3601 (citing an average consolidation time of approximately 5-10 milliseconds). Nevertheless, exchanges have an obligation under Rule 603(a) to take reasonable steps to ensure—through system architecture, monitoring, or otherwise—that they release data relating to current best-priced quotations and trades through proprietary feeds no sooner than they release data to the Network Processor, including during periods of heavy trading.

Rule 603(a) applies to both of the NYSE proprietary feeds at issue here—OBU and PDP Quotes. PDP Quotes transmits the same quotes in a different format than NYSE sends to the Network Processor. OBU transmits delta messages reflecting order-book changes at all price points, rather than quotes and trade reports, but those delta messages contain information with respect to NYSE's current best-priced quotes and trades.

From the launch of OBU in June 2008, NYSE consistently released OBU data to subscribers before releasing data to the Network Processor. The average gap in NYSE's release of OBU data to its proprietary customers, as compared to the release of quote and trade reports to the Network Processor, ranged from single digit milliseconds to 100 or more milliseconds, with the worst disparities exceeding multiple seconds, including those on May 6, 2010. Further, after NYSE reconfigured PDP Quotes so that it received quotes at the same time as MDD, there were

[11] Exchanges send "core data" to the Network Processors. Core data consists of last sale reports and current highest bids and lowest offers. NetCoalition v. SEC, 615 F.3d 525, 529 (D.C. Cir. 2010).

multiple instances during high-volume trading intervals in which processing delays in MDD resulted in NYSE releasing quotes to PDP Quotes subscribers before releasing them to the Network Processor. For the reasons given above, these disparities did not meet the standards of "fair and reasonable," and "not unreasonably discriminatory," and NYSE violated Rule 603(a). Because the personnel who designed and were responsible for NYSE's market data delivery system, and the personnel responsible for ensuring compliance with Rule 603(a), ultimately reported to senior officers of NYSE Euronext, NYSE Euronext caused NYSE's violations.

## C. Section 17(a) of the Exchange Act and Rule 17a-1

Section 17(a)(1) of the Exchange Act requires every exchange to make and keep for prescribed periods such records as the Commission may require by rule. Rule 17a-1 requires exchanges to:

> keep and preserve at least one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it in the course of its business as such and in the conduct of its self-regulatory activity.

Section 3(a)(37) defines "records" as "accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type, whether expressed in ordinary or machine language."

The MDD statistics and recovery files that contained timestamps reflecting when MDD released messages to the Network Processor were within the scope of Section 17(a)(1) of the Exchange Act and Rule 17a-1 because they were "records" that NYSE made in the course of its business as a national securities exchange. In particular, the time stamps and the MDD statistics files at issue fell within the scope of the Commission's record-preservation requirements because they related to NYSE's compliance with Rule 603(a). By failing to retain these records, NYSE violated Section 17(a)(1) of the Exchange Act and Rule 17a-1 thereunder. Because NYSE Euronext supplied the personnel who designed and were responsible for NYSE's record retention systems, policies, practices, and procedures, and the personnel responsible for complying with applicable statutes and regulations, NYSE Euronext caused NYSE's violations.

## Undertakings

Respondents have undertaken to do the following:

A. Respondents shall retain at their expense and within thirty (30) days of the issuance of this Order, one or more qualified independent consultants (the " Consultant") not unacceptable to the staff of the Division of Enforcement (the "Commission staff") to:

(1) conduct a comprehensive review of the market data delivery systems of NYSE, NYSE Arca, and NYSE MKT to ensure that the systems comply with Rule 603(a) of Regulation NMS;

(2) conduct a comprehensive review of NYSE, NYSE Arca, and NYSE MKT's policies, procedures, and practices regarding compliance with Rule 603(a) of Regulation NMS; and

(3) prepare a written report (the "Report") that:

(a) evaluates the adequacy of NYSE, NYSE Arca, and NYSE MKT's market data delivery systems and related policies, procedures, and practices, to prevent and detect violations of Rule 603(a); and

(b) make any recommendations about how NYSE, NYSE Arca, and NYSE MKT should modify or supplement their market data delivery systems, policies, practices, and procedures, to prevent and detect violations of Rule 603(a) of Regulation NMS, and in particular to reasonably ensure that NYSE, NYSE Arca, and NYSE MKT release data relating to current best-priced quotations and trades through their proprietary feeds no sooner than they release data to a Network Processor; and

Respondents shall provide a copy of the engagement letter detailing the Consultant's responsibilities to Commission staff.

B. Respondents shall cooperate fully with the Consultant, including providing the Consultant with access to Respondents' (and Respondents' affiliated entities, including subsidiaries') files, books, records, and personnel as reasonably requested for the above-mentioned review, and obtaining the cooperation of respective employees or other persons under Respondents' control.

C. Respondents shall require the Consultant to report to Commission staff on its activities as the staff may request.

D. Respondents shall permit the Consultant to engage such assistance, clerical, legal or expert, as necessary and at a reasonable cost, to carry out its activities, and the cost, if any, of such assistance shall be borne exclusively by Respondents.

E. Respondents shall require the Consultant, within thirty (30) days of being retained, unless otherwise extended by Commission staff for good cause, to provide Respondents and Commission staff with an estimate of the time needed to complete the review and prepare the Report and provide a proposed deadline for the Report, subject to the approval of Commission staff.

F. Respondents shall require the Consultant to issue the Report by the approved deadline and provide the Report simultaneously to both Commission staff and Respondents.

G. Respondents shall submit to Commission staff and the Consultant, within thirty (30) days of the Consultant's issuance of the Report, the date by which Respondents will adopt and implement the recommendations in the Report, subject to Sections G(1)-(3) below and subject to the approval of Commission staff.

(1) As to any recommendation that Respondents consider to be, in whole or in part, unduly burdensome or impractical, Respondents may submit in writing to the Consultant and Commission staff a proposed alternative reasonably designed to accomplish the same objectives, within sixty (60) days of receiving the Report. Respondents shall then attempt in good faith to reach an agreement with the Consultant relating to each disputed recommendation and request that the Consultant reasonably evaluate any alternative proposed by Respondents. If, upon evaluating Respondents' proposal, the Consultant determines that the suggested alternative is reasonably designed to accomplish the same objectives as the recommendations in question, then the Consultant shall approve the suggested alternative and amend the recommendations. If the Consultant determines that the suggested alternative is not reasonably designed to accomplish the same objectives, the Consultant shall reject Respondents' proposal. The Consultant shall inform Respondents of the Consultant's final determination concerning any recommendation that Respondents consider to be unduly burdensome or impractical within fourteen (14) days after the conclusion of the discussion and evaluation by Respondents and the Consultant.

(2) In the event that Respondents and the Consultant jointly determine that they are unable to agree on an alternative proposal, Respondents and the Consultant shall jointly confer with the Commission staff to resolve the disputed recommendation.

(3) Within thirty (30) days after final agreement is reached on any disputed recommendation, Respondents shall submit to the Consultant and Commission staff the date by which Respondents will adopt and implement the agreed-upon recommendation, subject to the approval of Commission staff.

H. Respondents shall adopt and implement, on the timetable set forth by Respondents in accordance with Item G, the recommendations in the Report. Respondents shall notify the Consultant and Commission staff when the recommendations have been implemented.

I. Respondents shall require the Consultant to certify, in writing, to Respondents and Commission staff, that Respondents have implemented the agreed-upon recommendations for which the Consultant was responsible and that: (1) NYSE, NYSE Arca, and NYSE MKT's market data delivery systems are reasonably designed and maintained to prevent and detect violations of Rule 603(a); and (2) NYSE, NYSE Arca, and NYSE MKT have established policies, procedures, and practices reasonably designed to prevent and detect violations of Rule 603(a). The Consultant's certification shall be received within sixty (60) days after Respondents have notified the Consultant that the recommendations have been implemented.

J. Within one hundred and eighty (180) days from the date of the applicable certification described in subparagraph I above, Respondents shall require the Consultant to have completed a review of the NYSE, NYSE Arca, and NYSE MKT's revised systems, policies, procedures and practices and submit a written final report ("Final Report") to Respondents and Commission staff. The Final Report shall describe the review made of NYSE, NYSE Arca, and NYSE MKT's revised systems, policies, procedures, and practices and describe how Respondents are implementing, enforcing, and auditing the enforcement and implementation of those systems, policies, practices, and procedures. The Final Report shall include an opinion of the Consultant as to whether the revised systems, policies, procedures, and practices and their implementation and enforcement by Respondents and Respondents' auditing of the implementation and enforcement of those systems, policies, procedures, and practices are reasonably adequate to prevent and detect violations of Rule 603(a).

K. Respondents may apply to Commission staff for an extension of the deadlines described above before their expiration and, upon a showing of good cause by Respondents, Commission staff may, in its sole discretion, grant such extensions for whatever time period it deems appropriate.

L. To ensure the independence of the Consultant, Respondents shall not have the authority to terminate the Consultant without prior written approval of Commission staff and shall compensate the Consultant and persons engaged to assist the Consultant for services rendered pursuant to this Order at their reasonable and customary rates.

M. Respondents shall require the Consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Respondents, or any of their present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the Consultant will require that any firm with which he/she/it is affiliated or of which he/she/it is a member, and any person engaged to assist the Consultant in performance of his/her/its duties under this Order shall not, without prior written consent of Commission staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Respondents, or any of their present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

N. Certification of Compliance by Respondents: Respondents shall certify, in writing, compliance with the undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondents agree to provide such evidence. The certification and supporting material shall be submitted to Robert A. Cohen, Assistant Director, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings.

O. Respondents shall bear the full expense of carrying out these undertakings, including the costs of retaining the Consultant and implementing the Consultant's recommendations.

## IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Sections 19(h)(1) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondents cease and desist from committing or causing any violations and any future violations of Rule 603(a) of Regulation NMS, Section 17(a)(1) of the Exchange Act and Rule 17a-1 thereunder.

B. Pursuant to Section 19(h)(1) of the Exchange Act, Respondent NYSE is censured.

C. Pursuant to Section 21B(a)(2) of the Exchange Act, Respondent NYSE shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of $5,000,000 ($5 million) to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Such payment must be made in one of the following ways: (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying NYSE as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Daniel M. Hawke, Chief, Market Abuse Unit, Division of Enforcement, Securities and Exchange Commission, The Mellon Independence Center, 701 Market Street, Philadelphia, PA 19106-1532.

D. Respondents shall comply with the undertakings enumerated above.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

**SECURITIES ACT OF 1933**
**Release No. 9361 / September 14, 2012**

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67860 / September 14, 2012**

**INVESTMENT ADVISERS ACT OF 1940**
**Release No. 3464 / September 14, 2012**

**INVESTMENT COMPANY ACT OF 1940**
**Release No. 30202 / September 14, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15024**

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|---|---|
| **In the Matter of**<br><br>**WALTER V. GERASIMOWICZ, MEDITRON ASSET MANAGEMENT, LLC, MEDITRON MANAGEMENT GROUP, LLC,**<br><br>**Respondents.** | **ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, SECTIONS 203(e), 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940** |

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Walter V. Gerasimowicz ("Gerasimowicz"), Meditron Asset Management, LLC ("MAM"), and Meditron Management Group, LLC ("MMG") (collectively, "Respondents").

## II.

After an investigation, the Division of Enforcement alleges that:

### A. SUMMARY

1. This matter involves misconduct by MAM, a registered investment adviser, its sole owner and principal, Gerasimowicz, and MMG, an unregistered investment adviser wholly owned by Gerasimowicz, for misappropriating and misusing client assets and repeatedly making material misrepresentations and omissions to clients.

2. From at least September 2009 through September 2011, Gerasimowicz, MAM and MMG diverted approximately $2.65 million from their client, the Meditron Fundamental Value/Growth Fund, LLC ("Meditron Fund" or "Fund"), to prop up a private contracting company controlled by Gerasimowicz that is currently in Chapter 11 bankruptcy proceedings.

3. Gerasimowicz, MAM and MMG repeatedly lied or failed to disclose to Fund investors the dramatic deviations from the Fund's stated investment strategy and deviations from the Fund's disclosed valuation policy. Gerasimowicz and MAM also failed to disclose the material conflict of interest posed by their own investments of approximately $2 million in SMC.

4. Gerasimowicz also misrepresented MAM's regulatory assets under management at $1.1 billion in published articles authored by Gerasimowicz and made available on Respondents' website.

5. MAM, aided and abetted by Gerasimowicz, violated the custody rule applicable to registered investment advisers by failing to distribute annual audited financial statements to Meditron Fund investors within the rule's prescribed time periods.

### B. RESPONDENTS

6. **Gerasimowicz**, age 60, is a resident of New York, New York. He is the Chairman, Chief Executive Officer, Chief Compliance Officer, and sole owner of Respondent MAM, an investment adviser registered with the Commission, and is the sole owner of Respondent MMG, an unregistered investment adviser, through which he manages the Meditron Fund. Gerasimowicz is also the founder and operating manager of Meditron Real Estate Partners, LLC ("MREP"), a private company, and serves as President and Chairman of the Board of Directors of SMC Electrical Contracting Inc., a private contracting company owned by MREP.

7. **MAM** is a New York limited liability company and registered investment adviser with its principal place of business in New York, New York. MAM has been registered with the Commission since April 9, 2003 and is wholly owned by

Gerasimowicz. MAM claimed to have approximately $50 million in regulatory assets under management in its March 24, 2012 Form ADV filing, and claimed that approximately ten percent of its advisory clients also have invested in the Meditron Fund.

8. **MMG** is a Delaware limited liability company, formed on March 14, 2003, and unregistered investment adviser with its principal place of business in New York, New York. MMG is named as the Meditron Fund's manager in the Fund's offering documents and is wholly owned by Gerasimowicz. MMG has no bank or brokerage accounts in its name, and advisory fees for managing the Meditron Fund are paid to MAM and, through MAM, to Gerasimowicz.

## C. OTHER RELEVANT ENTITIES

9. **Meditron Fund**, a Delaware limited liability company formed on March 14, 2003, is a hedge fund managed by Gerasimowicz, MMG and MAM. The Fund had approximately thirteen investors, several of whom are also MAM advisory clients, and claimed to have $4.2 million in assets under management as of MAM's Form ADV filing on March 24, 2012. The Meditron Fund has no board of directors or investment committee, and Gerasimowicz controls the Fund's bank and brokerage accounts. The Fund's custodian was Goldman Sachs Execution & Clearing ("Goldman") until approximately July 2010, and is currently Charles Schwab & Co., Inc.

10. **MREP**, a Delaware limited liability company, was formed by Gerasimowicz on June 28, 2004 as a vehicle for potential investments in real estate ventures. Gerasimowicz is the operating manager and MREP has no other employees. In 2007, MREP functioned as a vehicle for Gerasimowicz, the Meditron Fund, and certain individual MAM advisory clients to co-invest in SMC, which is MREP's sole investment.

11. **SMC Electrical Contracting Inc. ("SMC")**, a New York corporation, is a private contracting company with its principal place of business in New York, New York. SMC is owned by MREP. Gerasimowicz serves as the President and Chairman of the Board of Directors of SMC. On September 30, 2011, SMC filed a petition for relief under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the Southern District of New York.

## D. MEDITRON FUND OFFERING AND RELATED DISCLOSURES

12. Meditron Fund investors received the Fund's Private Placement Memorandum ("PPM"), Operating Agreement, and subscription documents, as well as a one-page document detailing the Fund's historical monthly and annual performance returns.

13. The PPM stated that the Fund's investment objective was to "seek to outperform the S&P 500 Index through the purchase of undervalued securities and their subsequent sale upon reaching price appreciation targets. The Fund's portfolio is normally comprised of 15 to 50 stocks with expected fair values considerably greater than their

current market prices." The PPM also disclosed that the "Fund's portfolio may be heavily weighted in small and mid-cap issues, and is not necessarily composed of stocks which comprise the S&P 500." The PPM represented that the Fund would maintain "a diversified portfolio of long and short positions" with "controlled risk diversification of investments" and "positions will often be hedged selectively to reduce market risk and volatility."

14. The PPM represented that the Fund's manager would select investments by using a "proprietary quantitative stock selection methodology centered upon fair value calculations" and that the Fund's manager would also consider "other fundamental data such as corporate earnings and growth potential." The PPM also represented that the manager of the Fund would "compute[] weekly fair values of the securities." The PPM required the Fund manager to value the Fund's publicly-traded securities based on market prices, or in the absence of such prices, based on prices "reasonably assigned by the Manager."

15. Although the Fund was obligated to pay Gerasimowicz and MMG an annual 1% management fee as well as an incentive allocation of 20% of annual net profits (along with payment for "investment-related expenses, such as brokerage commissions, clearing fees, interest, custodial fees, and similar expenses," and "[o]rganizational expenses (including legal and accounting fees)"), these management fees were actually paid to Gerasimowicz and MAM.

16. While the Operating Agreement provided that any member or manager "may engage in and possess interests in other business ventures of any and every type and description," it limited the ability of the Meditron Fund to transact business with any member or manager to circumstances where "the terms of those transactions are no less favorable than those the [Fund] could obtain from unrelated third parties."

## E. THE SMC ACQUISITION

17. In 2007, Gerasimowicz began raising capital through the offer and sale of limited partnership interests in MREP for the purpose of investing in SMC. Respondents caused the Meditron Fund to invest $200,000 in MREP in June 2007. During the same period, Gerasimowicz recommended and caused seven individual MAM advisory clients to purchase MREP limited partnership interests totaling $750,000, and Gerasimowicz personally invested $50,000 in MREP in May 2007.

18. In July 2007, Gerasimowicz caused MREP to invest $1 million in SMC in exchange for a 50% ownership interest in SMC.

19. In approximately September 2008, SMC fired its President and CEO. In connection with his termination, the President and CEO agreed to allow MREP to acquire his 50% ownership interest in SMC at no additional cost, and MREP became the sole equity owner of the company.

## F. MISAPPROPRIATION AND MISUSE OF MEDITRON FUND ASSETS

20. Beginning at least by the fall of 2008, SMC experienced financial difficulties and Gerasimowicz and MAM began to prop up SMC using their own funds. Between approximately October 2008 and September 2011, when SMC filed for bankruptcy, Gerasimowicz and MAM provided over $2 million in funding to SMC. Neither Gerasimowicz nor MAM disclosed these investments in SMC to the Meditron Fund or to Fund investors.

21. Beginning in approximately September 2009, Respondents began siphoning off Meditron Fund assets for the benefit of SMC. Between September 2009 and September 2011 (the "relevant period"), Gerasimowicz directed at least 36 separate transfers of Meditron Fund assets, totaling approximately $2.65 million, either to SMC or directly to SMC's creditors in order to provide SMC with working capital.

22. In order to obtain the money to make these transfers, Gerasimowicz sold publicly-traded, liquid securities held by the Meditron Fund. Using the proceeds, between September 2009 and June 2010, Respondents directed six separate transfers, totaling $1.025 million, from the Meditron Fund's brokerage account at Goldman, directly to SMC or for its benefit. In the letters of authorization provided to Goldman, Gerasimowicz represented that the monies paid for the purchase of the following securities:

- World Trade Center Memorial Development Bond at 12%
- Erasmus High School Bond at 9%
- Brooklyn High School Bond at 9%
- Brooklyn PS 225K Bond at 8%

23. The letters of authorization list the recipient of the funds as either SMC or MREP, which subsequently transferred the funds to SMC.

24. The $1.025 million transferred from the Meditron Fund's Goldman account, together with the Fund's 2007 $200,000 investment in SMC through MREP, represented approximately 29% of the Fund's assets as of June 30, 2010.

25. In return for the six transfers between September 2009 and June 2010, the Meditron Fund received four promissory notes issued by SMC (the "Notes"). The first Note was issued on December 20, 2009, for $500,000 at a 12% annual interest rate. The second Note was issued on March 1, 2010 for $100,000 at a 9% annual interest rate. The third Note was issued on June 6, 2010 for $225,000 at a 6% annual interest rate. The fourth Note was issued on June 23, 2010 for $200,000 at an 8% annual interest rate. All four Notes were issued for a five-year term and required no interest or principal payments until the end of that term. To date, SMC has made no payments on the Notes, the first of which comes due in December 2014.

26. Between approximately September 2010 and September 2011, and on at least 30 separate occasions, Respondents diverted a total of approximately $1.63 million of Meditron Fund assets, either to SMC or for its benefit.

27. The approximately $2.65 million transferred from the Meditron Fund to SMC between September 2009 and September 2011 represented approximately 80% of the Fund's assets as of December 31, 2011.

28. In making these "investments," Respondents failed to perform the type of disciplined, quantitative-based investment selection strategy as promised in the PPM, or to take any other steps to protect the Meditron Fund's interests in the SMC-related transactions.

29. Gerasimowicz or MAM also did not assess whether the terms obtained by the Fund were "no less favorable than those the [Fund] could obtain from unrelated third parties," as required by the Fund's Operating Agreement. As a matter of fact, however, SMC was unable to acquire funding on these terms from unrelated third parties. To the contrary, SMC was unable to obtain unrelated third-party financing unless Gerasimowicz agreed to personally guarantee repayment. Furthermore, when SMC did manage to obtain a short-term loan for $190,000 from a friend of Gerasimowicz in February 2009, the firm paid an annualized interest rate of approximately 60%, significantly more than the 6%-12% range that Gerasimowicz unilaterally set for the Fund's Notes.

30. Investors continued to purchase membership interests in the Meditron Fund during the relevant period after Respondents began deviating from the Fund's strategy and funneling Fund assets to SMC.

31. Several of MAM's advisory clients also invested in the Meditron Fund.

32. On September 30, 2011, SMC filed a petition for relief under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the Southern District of New York. According to SMC's bankruptcy financials, SMC's net worth is negative and the business is insolvent with liabilities of between $8-$10 million and net assets of approximately $6-$7 million including accounts receivable.

33. SMC's bankruptcy filing lists the Meditron Fund as a creditor holding an unsecured, nonpriority claim of $2.5 million against SMC for loans provided from 2007 through 2011.

34. Despite SMC's bankruptcy and the fact that secured and other creditor claims totaling $3.2 million take priority over the Fund's claims, Respondents continued to value the Fund's SMC Notes and loans at cost.

## G. MISREPRESENTATIONS AND OMISSIONS TO FUND INVESTORS

35. During the relevant period, Respondents solicited potential investors by means of material misrepresentations and omissions. The Fund's PPM represented that the Fund maintained a "diversified portfolio," employed "controlled risk diversification" of investments, and hedged positions to "reduce market risk and volatility." According to the PPM, the Fund's investment objective is to "seek to outperform the S&P 500 Index through the purchase of undervalued securities and their subsequent sale upon reaching price appreciation targets. The Fund's portfolio is normally comprised of 15 to 50 stocks with expected fair values considerably greater than their current market prices."

36. Although the PPM was originally issued in 2003, several years before the Fund first invested in SMC, investors continued to purchase membership interests in the Fund after Respondents began diverting Fund assets to SMC, and Respondents continued to provide potential investors with this same PPM, which misrepresented the Fund's investment strategy.

37. Respondents misrepresented and failed to disclose the fundamental change in the Fund's investment strategy represented by the investment of the majority of its assets in SMC, a private company that ultimately filed for bankruptcy.

38. Respondents misrepresented and failed to disclose to those MAM advisory clients who invested in the Meditron Fund the deviations from the Fund's stated investment strategy and valuation processes as well as conflicts of interest resulting from their own economic interests in SMC.

39. During the relevant period, Gerasimowicz prepared and sent quarterly newsletters on MMG stationery to Meditron Fund investors. Each newsletter misrepresented to investors that generally Fund investments comprised between one and three percent of the Fund's portfolio on an individual basis; that the Fund was well diversified both in terms of individual position as well as across market sectors; and that the Fund's risk was comparable to bonds and lower than the overall market. Each quarterly newsletter also listed the Fund's "Top Ten Long Portfolio Positions." None of the listed positions ever represented more than five percent of the Fund's overall portfolio. Despite the Fund's rapidly increasing and concentrated SMC position, the quarterly newsletters never disclosed the Fund's SMC investment.

40. During the relevant period, Gerasimowicz prepared and sent quarterly account statements on MAM stationery to Meditron Fund investors, listing the investor's capital contribution(s), the investor's net asset value ("NAV") at the end of the quarter, the Fund's quarterly return, and the S&P 500 quarterly return. The statements provided no information about specific portfolio investments, or about the Fund's investment in SMC.

41. Contrary to Gerasimowicz's representations to Fund investors, including those MAM advisory clients invested in the Fund, and contrary to the information

provided to them in the offering documents, quarterly newsletters and account statements, Respondents misappropriated approximately $2.65 million of Meditron Fund assets to provide operating capital for SMC.

42. Fund investors received no written disclosures concerning the 2010 diversion of assets and the Fund's rapidly increasing SMC position (approximately 40% of portfolio as of 2010 year-end) until at least December 2011, in the 2010 audited financial statements, by which time Respondents had diverted approximately 80% of the Fund's portfolio to SMC. Even this disclosure was only made to a subset of Fund investors, as some investors never received the 2010 audited financial statements and thus received no written disclosures concerning the Fund's SMC position. No written disclosures have been made concerning the 2011 diversion of Fund assets to SMC.

43. The Fund's audited financial statements claimed that the Fund employed a fair value methodology (pursuant to ASC 820) to value its investments. Respondents rendered these disclosures false and misleading by failing to disclose that they never performed any valuation to value the Fund's SMC position, nor did they "reasonably assign" a valuation to the SMC position as required under the PPM. In fact, no valuation analysis was performed on the Fund's SMC investments. As reflected in the 2010 audited financial statements, Respondents continued to value these investments at cost despite having no reasonable basis for doing so as SMC's financial condition worsened and the company assumed increasing levels of debt. Respondents continued to take management fees from the Fund based on the inflated NAV.

44. Gerasimowicz did not disclose SMC's September 2011 bankruptcy filing in his December 7, 2011 management representation letter provided to the auditor in connection with the audit of the Fund's 2010 financial statements. The failure to disclose the bankruptcy as a "subsequent event" in the notes to the 2010 audited financial statements is a material omission about an event that impaired a significant asset of the Fund.

## H. MISREPRESENTATIONS CONCERNING ASSETS UNDER MANAGEMENT

45. Gerasimowicz misrepresented MAM's assets under management in articles he wrote for *Worth Magazine*, which advertises itself as a wealth management magazine for high net worth individuals. Specifically, Gerasimowicz authored ten separate magazine articles, dating from April 2010 to November 2011, which misrepresented MAM's assets under management at $1.1 billion. These articles were published in *Worth Magazine* and made available and accessible by hyperlinks on Respondents' website.

## I. FAILURE TO COMPLY WITH ADVISERS ACT CUSTODY RULE

46. During the relevant period, Meditron Fund investors did not receive quarterly account statements from the Fund's qualified custodian. Instead, investors received quarterly account statements from Respondents.

47. During the relevant period, MAM was not subject to an annual surprise examination by an independent public accountant.

48. During the relevant period, Gerasimowicz, MMG and MAM did not distribute annual, audited financial statements prepared in accordance with generally accepted accounting principles ("GAAP") and audited by an independent public accountant that is registered with, and subject to regular inspection by, the Public Company Accounting Oversight Board ("PCAOB") to all Meditron Fund investors within 120 days of the end of its fiscal year.

49. The Fund's 2008 audited financial statements were not completed until August 1, 2010. The Fund's 2009 audited financial statements were not completed until March 30, 2011. The Fund's 2010 audited financial statements were not completed until December 7, 2011.

## J. VIOLATIONS

50. As a result of the conduct described above, Respondents willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in the offer and sale of securities and in connection with the purchase or sale of securities.

51. As a result of the conduct described above, Respondents willfully violated Sections 206(1), (2) and (4) of the Advisers Act and Rule 206(4)-8 thereunder, which prohibit fraudulent conduct by an investment adviser.

52. As a result of the conduct described above, Gerasimowicz willfully aided and abetted and caused MAM's and MMG's violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder.

53. As a result of the conduct described above, Gerasimowicz willfully aided and abetted and caused MAM's violations of Section 206(4) of the Advisers Act, which prohibits fraudulent conduct by an investment adviser, and Rules 206(4)-1 and 206(4)-2 promulgated thereunder, which provide that it shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of Section 206(4) for an investment adviser to, respectively, (i) directly or indirectly, publish, circulate, or distribute any advertisement which contains any untrue statement of a material fact, or which is otherwise false or misleading; or (ii) have custody of client funds or securities

unless a qualified custodian maintains those funds and securities and, for pooled investment vehicles, the adviser distributes annual audited financial statements prepared in accordance with GAAP and audited by an independent public accountant registered with, and subject to regular inspection by, the PCAOB to all members or other beneficial owners of the pooled investment vehicle within 120 days of the end of its fiscal year.

## III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative and cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondents an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest against Respondents MAM and MMG pursuant to Section 203(e) of the Advisers Act including, but not limited to, disgorgement and civil penalties pursuant to Section 203 of the Advisers Act;

C. What, if any, remedial action is appropriate in the public interest against Respondent Gerasimowicz pursuant to Section 203(f) of the Advisers Act including, but not limited to, disgorgement and civil penalties pursuant to Section 203 of the Advisers Act;

D. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Section 9(b) of the Investment Company Act including, but not limited to, disgorgement and civil penalties pursuant to Section 9 of the Investment Company Act; and

E. Whether, pursuant to Section 8A of the Securities Act, Section 21C of the Exchange Act, and Section 203(k) of the Advisers Act, Respondents should be ordered to cease and desist from committing or causing violations of and any future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rules 206(4)-1, 206(4)-2, and 206(4)-8 thereunder, whether Respondents should be ordered to pay a civil penalty pursuant to Section 8A(g) of the Securities Act, Section 21B(a) of the Exchange Act, and Section 203(i) of the Advisers Act, and whether Respondents should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act, Sections 21B(e) and 21C(e) of the Exchange Act, and Section 203 of the Advisers Act.

## IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an

Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondents fail to file the directed answer, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondents personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher not participating

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Release No. 30203 / September 17, 2012

In the Matter of

RECONTRUST COMPANY, N.A.
1800 Tapo Canyon Road
Simi Valley, CA 93063

BOFA ADVISORS, LLC
BOFA DISTRIBUTORS, INC.
BANK OF AMERICA CAPITAL ADVISORS LLC
100 Federal Street
Boston, MA 02110

KECALP INC.
MERRILL LYNCH GLOBAL PRIVATE EQUITY INC.
767 Fifth Avenue, 7th Floor
New York, NY 10153

(812-14068)

ORDER PURSUANT TO SECTION 9(c) OF THE INVESTMENT COMPANY ACT OF 1940 GRANTING A PERMANENT EXEMPTION FROM SECTION 9(a) OF THE ACT

ReconTrust Trust Company, N.A. ("ReconTrust"), BofA Advisors, LLC, BofA Distributors, Inc., Bank of America Capital Advisors LLC, KECALP Inc., and Merrill Lynch Global Private Equity Inc. (collectively, "Applicants") filed an application on August 15, 2012 and amended it on August 20, 2012, requesting temporary and permanent orders under section 9(c) of the Investment Company Act of 1940 ("Act") exempting Applicants and any other company of which ReconTrust is or hereafter becomes an affiliated person (together with Applicants, "Covered Persons") from section 9(a) of the Act with respect to an injunction entered by the United States District Court for the Western District of Washington on August 20, 2012.

On August 20, 2012, the Commission simultaneously issued a notice of the filing of the application and a temporary conditional order exempting the Covered Persons from section 9(a) of the Act (Investment Company Act Release No. 30174) until the Commission takes final action on the application for a permanent order. The notice gave interested persons an opportunity to request a hearing and stated that an order disposing of the application would be issued unless a hearing was ordered. No request for a hearing has been filed, and the Commission has not ordered a hearing.

The matter has been considered and it is found that the conduct of Applicants has been such as not to make it against the public interest or protection of investors to grant the permanent exemption from the provisions of section 9(a) of the Act.

Accordingly,

IT IS ORDERED, pursuant to section 9(c) of the Act, on the basis of the representations contained in the application filed by ReconTrust, et al. (File No. 812-14068), as amended, that Covered Persons be and hereby are permanently exempted from the provisions of section 9(a) of the Act, operative solely as a result of an injunction, described in the application, entered by the United States District Court for the Western District of Washington on August 20, 2012.

By the Commission.

Elizabeth M. Murphy
Secretary

Kevin M. O'Neill
By: Kevin M. O'Neill
Deputy Secretary

Chairman Schapiro
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

September 17, 2012

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| IN THE MATTER OF<br><br>AER ENERGY RESOURCES, INC.<br>ALTO GROUP HOLDINGS, INC.<br>BIZROCKET.COM INC.<br>FOX PETROLEUM, INC..<br>GEOPULSE EXPLORATIONS INC.<br>GLOBAL TECHNOLOGIES GROUP INC.<br>KMA GLOBAL SOLUTIONS<br>INTERNATIONAL, INC.<br>MIKE THE PIKE PRODUCTIONS INC.<br>MOBILE STAR CORP.<br>SAVWATT USA INC.<br>SCORPEX INC.<br>SILVER DRAGON RESOURCES INC<br>STRATEGIC MINING CORP.<br>SURGLINE INTERNATIONAL INC.<br>THRIVE WORLD WIDE INC.<br>ZAMAGE DIGITAL ART IMAGING INC.<br><br>File No. 500-1 : | ORDER OF SUSPENSION<br>OF TRADING |

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of the issuers listed below. As set forth below for each issuer, questions have arisen regarding the accuracy of publicly disseminated information, concerning, among other things: (1) the company's business operations, (2) the company's current financial condition; and/or (3) issuances of shares in company stock.

1. AER Energy Resources, Inc. is a Nevada corporation based in Arizona. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's operations.

2. Alto Group Holdings, Inc. is a Nevada corporation based in Washington State. Questions have arisen concerning the adequacy and accuracy of publicly available information about the company's operations, and concerning issuances of shares in the company's stock.

3. Bizrocket.com Inc. is a Nevada corporation based in Florida. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's revenues.

4. Fox Petroleum, Inc. is a Nevada corporation based in New York. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's operations.

5. Geopulse Explorations Inc. is a Nevada corporation based in New Mexico. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's operations.

6. Global Technologies Group Inc. is a Florida corporation based in Florida. Questions have arisen concerning the adequacy of publicly available information about the company.

7. KMA Global Solutions International Inc. is a Nevada corporation based in Ontario, Canada. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's operations.

8. Mike the Pike Productions Inc. is a Wyoming corporation based in Indiana and California. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's operations and the accuracy of its financial statements.

9. Mobile Star Corp. is a Delaware corporation based in California. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's operations.

10. SavWatt USA, Inc. is a Delaware corporation based in Maryland. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's operations.

11. Scorpex, Inc. is a Nevada corporation based in Nevada. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's operations.

12. Silver Dragon Resources Inc. is a Delaware corporation based in Ontario, Canada. Questions have arisen concerning the adequacy and accuracy of publicly available information about the company's operations.

13. Strategic Mining Corp. is a Wyoming corporation based in Ontario, Canada. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's operations.

14. Surgline International Inc. is a Nevada corporation based in Florida. Questions have arisen concerning the adequacy and accuracy of press releases and public filings concerning the company's operations.

15. Thrive World Wide, Inc. is a Nevada corporation based in Wisconsin. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's operations.

16. Zamage Digital Art Imaging, Inc. is a Nevada corporation. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's operations and the accuracy of its financial statements.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies.

THEREFORE, IT IS ORDERED, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT, on September 17, 2012 through 11:59 p.m. EDT, on September 28, 2012.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Chairman Schapiro
Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

September 17, 2012

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| IN THE MATTER OF<br><br>**FREEDOM ENVIRONMENTAL SERVICES, INC.**<br><br>File No. 500-1 | ORDER OF SUSPENSION OF TRADING |

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Freedom Environmental Services, Inc. ("Freedom") because of questions regarding the adequacy and accuracy of publicly disseminated information by Freedom, and by others, in press releases to investors and in filings with the Commission concerning, among other things: (1) the identity of the persons in control of the company's operations and management; (2) the company's current financial condition; and (3) the misappropriation of corporate funds.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

THEREFORE, IT IS ORDERED, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT, on September 17, 2012 through 11:59 p.m. EDT, on September 28, 2012.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Commissioner Gallagher
not participating

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67883 / September 18, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15032**

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| **In the Matter of**<br><br>**TIMOTHY J. AUBREY,**<br><br>**Respondent.** | **ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS** |

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Timothy J. Aubrey ("Aubrey" or "Respondent").

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

## III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Aubrey, of Moreno Valley, California, was a manager and salesperson for Progressive Energy Partners, LLC ("PEP"). Aubrey helped manage PEP and its salespeople from approximately May 2005 to December 2009. Aubrey holds no securities licenses and has never been registered with the Commission in any capacity. Aubrey is 51 years old.

2. On August 6, 2012, a final judgment was entered against Aubrey, permanently enjoining Aubrey from future violations of Sections 5 and 17(a) of the Securities Act of 1933, and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Jerry L. Aubrey, et al., Civil Action Number SACV 11-1564 JVS (RNBx), in the United States District Court for the Central District of California.

3. The Commission's complaint alleged that PEP conducted an $11 million boiler room fraud that victimized more than 200 investors. From approximately September 2005 to December 2009, PEP fraudulently offered and sold unregistered securities to investors nationwide and in Canada. Aubrey claimed the investors' money would be used to develop and support oil and gas wells. PEP, however, was a Ponzi scheme that paid alleged investor returns with money raised from new investors. In fact, the bulk of the money was used to line Aubrey's and PEP's principal's pockets, fund a lavish lifestyle, and make Ponzi-like payments intended to perpetuate the fraud. Aubrey misappropriated investor funds for his personal use. In addition, Aubrey: 1) misrepresented to investors they could expect a greater than 50% annual return on their investment; 2) failed to disclose to investors that up to 35% of their investment would be used to pay sales commissions; and 3) falsely represented to investors that PEP used an accounting firm to assist with investor distributions. Furthermore, Aubrey solicited potential investors in PEP and received a 2% sales commission on all PEP investments sold. Aubrey was not registered as a broker-dealer or associated with a registered broker-dealer at the time Aubrey managed PEP.

## IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**
**September 18, 2012**

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| **In the Matter of**<br><br>**Enwin Resources, Inc.,**<br><br>**File No. 500-1** | **ORDER OF SUSPENSION OF TRADING** |

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Enwin Resources, Inc. because it has not filed any periodic reports since the period ended May 31, 2009.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT on September 18, 2012 through 11:59 p.m. EDT on October 1, 2012.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67876 / September 18, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15028**

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| **In the Matter of**<br><br>**Enwin Resources, Inc.,**<br><br>**Respondent.** | **ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934** |

**I.**

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the respondent named in the caption.

**II.**

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Enwin Resources, Inc. ("ENWN") [1] (CIK No. 1195584) is a defaulted Nevada corporation located in Zollikon, Switzerland with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ENWN is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended May 31, 2009, which reported a net loss of $156,632 for the prior nine months. As of September 12, 2012, the common stock of ENWN was quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Inc. ("OTC Link"), had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

2. As discussed in more detail above, the Respondent is delinquent in its periodic filings with the Commission, has repeatedly failed to meet its obligations to file timely periodic

[1] The short form of the issuer's name is also its ticker symbol.

reports, and, through its failure to maintain a valid address on file with the Commission as required by Commission rules, failed to receive the delinquency letter sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations.

3. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

4. As a result of the foregoing, the Respondent failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

## III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondent an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondent identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent.

## IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that the Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If the Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon the Respondent personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**September 18, 2012**

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| **In the Matter of**<br><br>**Drucker, Inc.,**<br>**DynaMotive Energy Systems Corp., and**<br>**Gate to Wire Solutions, Inc.,**<br><br>**File No. 500-1** | **ORDER OF SUSPENSION OF TRADING** |

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Drucker, Inc. because it has not filed any periodic reports since the period ended December 31, 2006.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of DynaMotive Energy Systems Corp. because it has not filed any periodic reports since the period ended December 31, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Gate to Wire Solutions, Inc. because it has not filed any periodic reports since the period ended November 30, 2009.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on September 18, 2012 through 11:59 p.m. EDT on October 1, 2012.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67874 / September 18, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15027**

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| **In the Matter of**<br><br>**Drucker, Inc.,**<br>**DynaMotive Energy Systems Corp., and**<br>**Gate to Wire Solutions, Inc.,**<br><br>**Respondents.** | **ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934** |

## I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the Respondents named in the caption.

## II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Drucker, Inc. ("DKIN") [1](CIK No. 1042053) is a Delaware corporation located in Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DKIN is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K/A for the period ended December 31, 2006, which reported a net loss of $315,711 for the prior year. As of September 12, 2012, the common stock of DKIN was quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Inc. ("OTC Link"), had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. DynaMotive Energy Systems Corp. ("DYMTF") (CIK No. 941625) is a British Columbia corporation located in Richmond, British Columbia, Canada with a class of securities

[1]The short form of each issuer's name is also its stock symbol.

registered with the Commission pursuant to Exchange Act Section 12(g). DYMTF is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended December 31, 2008, which reported a net loss of $28,159,410 for the prior year. As of September 12, 2012, the common shares of DYMTF were quoted on OTC Link, had eleven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Gate to Wire Solutions, Inc. ("GWIR") (CIK No. 819927) is a Nevada corporation located in King City, Ontario, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). GWIR is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended November 30, 2009, which reported a net loss of $362,693 for the prior nine months. As of September 12, 2012, the common stock of GWIR was quoted on OTC Link, had nine market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

4. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

5. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

6. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and/or 13a-13 thereunder.

**III.**

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

## IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67872 / September 18, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15026**

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| **In the Matter of**<br><br>**China Mobile Media Technology, Inc.,**<br><br>**Respondent.** | **ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934** |

**I.**

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the respondent named in the caption.

**II.**

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. China Mobile Media Technology, Inc. ("CHMO")[1] (CIK No. 1160764) is a revoked Nevada corporation located in Haidian District, Beijing, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CHMO is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2008, which reported a net loss of $23,151,095 for the prior nine months. As of September 12, 2012, the common stock of CHMO was quoted on OTC Link, (formerly "Pink Sheets") was quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Inc., had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

[1] The short form of the issuer's name is also its ticker symbol.

B. DELINQUENT PERIODIC FILINGS

2. As discussed in more detail above, the Respondent is delinquent in its periodic filings with the Commission, has repeatedly failed to meet its obligations to file timely periodic reports, and, through its failure to maintain a valid address on file with the Commission as required by Commission rules, failed to receive the delinquency letter sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations.

3. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

4. As a result of the foregoing, the Respondent failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

## III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondent an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondent identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent.

## IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that the Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If the Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon the Respondent personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**September 18, 2012**

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|---|---|
| **In the Matter of**<br><br>**China Mobile Media Technology, Inc.,**<br>**File No. 500-1** | **ORDER OF SUSPENSION OF TRADING** |

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of China Mobile Media Technology, Inc. because it has not filed any periodic reports since the period ended September 30, 2008.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT on September 18, 2012, through 11:59 p.m. EDT on October 1, 2012.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

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Commissioner Aguilar
Commissioner Gallagher
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

**INVESTMENT ADVISERS ACT OF 1940**
**Release No. 3465 / September 18, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15029**

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| **In the Matter of**<br><br>**JEREMY LOUDER,**<br><br>**Respondent.** | **ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS** |

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Jeremy Louder ("Respondent").

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

**III.**

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Louder was the majority owner, a member, and a control person of Monarch Vision Advisors, LLC ("Monarch"), an investment adviser formerly registered with the

Commission. Monarch conducted business under the trade name "Quadwealth." Louder, age 32, is a resident of Dallas, Texas.

2. On October 18, 2011, Louder pleaded guilty to one count of conspiracy to commit mail fraud in violation of Title 18 United States Code, Section 371 before the United States District Court for the Eastern District of Texas, in United States v. Jeremy Louder, Crim. No.41:11-CR. Louder's plea agreement includes his consent to a judgment requiring full restitution to victims in an amount to be determined by the Court, and forfeiture to the United States of 11 parcels of real estate in Dallas and Collin Counties and a Ducati motorcycle.

3. The count of the criminal information to which Louder pleaded guilty alleged, inter alia, that Louder defrauded investors and obtained money and property by means of materially false and misleading statements, and that he used the United States mails to send false account statements. In connection with the plea, Respondent admitted that:

(a) Louder and other Quadwealth representatives solicited investments to raise capital for real estate and securities transactions;

(b) Louder and other Quadwealth representatives created materials that contained a series of materially false representations regarding the safety and security of Quadwealth's investments, the viability of Quadwealth's programs, and Quadwealth's intentions with respect to the capital raised. These materials, along with specific representations by Louder and other Quadwealth representatives, were intended to induce individuals to rely upon them and invest with Quadwealth. Among the materially false representations were representations in statements that misled investors into believing that their investments were generating income when in fact these investments had been lost;

(c) Louder and other Quadwealth representatives knew that these representations were false and made them knowing that individuals would rely upon them before making their investments;

(d) Louder and other Quadwealth representatives also knowingly and intentionally failed to disclose material facts to their investors; and

(e) Louder and other Quadwealth representatives knew that these omissions of fact were material and that individuals would rely upon them before making or continuing their investments.

## IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Louder's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Louder be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9362 / September 18, 2012

SECURITIES EXCHANGE ACT OF 1934
Release No. 67878 / September 18, 2012

INVESTMENT ADVISERS ACT OF 1940
Release No. 3467 / September 18, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-15031

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| In the Matter of<br><br>ADVANCED EQUITIES, INC.,<br>DWIGHT O. BADGER, AND<br>KEITH G. DAUBENSPECK,<br><br>Respondents. | **ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTIONS 203(e) AND 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER** |

## I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Sections 203(e) and 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Advanced Equities, Inc., Dwight O. Badger and Keith G. Daubenspeck ("Respondents").

## II.

In anticipation of the institution of these proceedings, the Respondents have submitted Offers of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings, and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Section 15(b) of the Securities Exchange Act of 1934 and Sections 203(e) and 203(f) of the

Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

## III.

On the basis of this Order and the Respondents' Offers, the Commission finds[1] that:

### Summary

1. This matter involves misstatements and omissions and supervisory failures during a $150 million late stage private equity offering in 2009 and a follow-up offering in 2010 by registered broker-dealer and investment adviser Advanced Equities, Inc. ("Advanced Equities") on behalf of a non-public alternative energy company located in the Silicon Valley region of California ("Company A"). During the 2009 offering, Company A was in "stealth mode" and released very little information about itself. Dwight O. Badger ("Badger"), one of Advanced Equities' registered principals, led Advanced Equities' sales efforts for the offering and personally conducted numerous sales calls with investors and Advanced Equities' registered representatives (whom it called "brokers"). Badger also held five internal sales calls with Advanced Equities' brokers. During both the internal and external sales calls, Badger made several significant misstatements about Company A's finances, including, among other things: (a) misstating that Company A had order backlogs in excess of $2 billion, when in fact Company A's actual backlog ranged between approximately $10 million and $42 million; (b) misstating that the U.S. Department of Energy had already granted Company A a loan of between $250 million and $300 million, when in fact Company A had just recently applied for a $96.8 million loan; and (c) misstating that Company A had a $1 billion order from a national grocery store chain, when in fact the grocery store chain only had entered into an order for $2 million and signed a non-binding letter of intent to purchase additional energy in the future. In addition, Advanced Equities' other registered principal and Badger's supervisor, Keith G. Daubenspeck ("Daubenspeck"), failed to respond to red flags that indicated that Badger and certain of Advanced Equities' other brokers were making misstatements to investors and thus, failed reasonably to supervise with a view toward preventing and detecting their violations of the federal securities laws.

### Respondents

2. Advanced Equities, Inc., is an Indiana corporation with headquarters in Chicago, Illinois. Advanced Equities has been registered with the Commission as a broker-dealer pursuant to Section 15 of the Exchange Act since 1993 and as an investment adviser pursuant to Section 203 of the Advisers Act since 2007. It currently employs more than 80 registered representatives (whom it calls "brokers") in its Chicago, Illinois headquarters and its branch offices in San

[1] The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

Francisco, California and New York, New York. It is a wholly-owned subsidiary of Advanced Equities Financial Corporation.

3. Dwight O. Badger, age 42, resides in Lake Forest, Illinois. Badger is a co-founder and, until August 6, 2012, was the registered principal of Advanced Equities and the president and chief executive officer of its parent, Advanced Equities Financial Corporation, of which he owned approximately 8%. Badger has been in the securities industry since 1989 and at all relevant times has held the following FINRA licenses: General Securities Representative (Series 7), General Securities Principal (Series 24) and Uniform Securities Agent State Law (Series 63).

4. Keith G. Daubenspeck, age 49, resides in Chicago, Illinois. Daubenspeck is a co-founder and registered principal of Advanced Equities and is the chairman of the board of directors of its parent, Advanced Equities Financial Corporation, of which he owns approximately 11%. Daubenspeck has been in the securities industry since 1986 and at all relevant times has held the following FINRA licenses: General Securities Representative (Series 7), General Securities Principal (Series 24) and Uniform Securities Agent State Law (Series 63).

**Other Relevant Entities**

5. "Company A" is a private Delaware corporation with headquarters and manufacturing facilities in the Silicon Valley region of California. Company A manufactures a device that uses proprietary technology to produce power on a clean and efficient basis and that, during the relevant time period, sold for approximately $1 million with a recommended maintenance contract. During 2009, Company A operated in "stealth mode" meaning that it provided scant information to the public about its finances, operations or technology. In February 2010, Company A emerged from "stealth mode" and publicly launched its technology. Company A is backed by several leading venture capital firms. Company A has never registered any class of securities with the Commission.

6. Advanced Equities Greentech III Investments, LLC ("Greentech III") is a Delaware limited liability company established on January 23, 2009 by Advanced Equities to purchase and hold shares of Company A on behalf of certain customers who were accredited investors. Greentech III is not registered with the Commission and it has never registered any class of securities with the Commission.

7. Advanced Equities Greentech IV Investments, LLC ("Greentech IV") is a Delaware limited liability company established on January 23, 2009 by Advanced Equities to purchase and hold shares of Company A on behalf of certain customers who were qualified purchasers. Greentech IV is not registered with the Commission and it has never registered any class of securities with the Commission.

**Background**

8. In 2006, after Advanced Equities completed an earlier private equity offering on its behalf, Company A named Badger and Daubenspeck as observers to its board of directors. As a result, Badger and Daubenspeck were permitted to attend Company A's board of director meetings

and to hear and view confidential information about Company A's finances, its current and prospective customers, its technology and its future plans.

9. Badger and Daubenspeck often attended Company A's board meetings either separately or together. Badger and Daubenspeck both attended Company A's fourth quarter 2008 board meeting on December 4, 2008 and its first quarter 2009 board meeting on March 3, 2009.

10. During Company A's December 2008 board meeting, Badger and Daubenspeck made a presentation to the board proposing to lead the company's $150 million "Series F" offering. The purpose of the offering was to provide Company A with working capital and a contribution to a proposed Power Purchase Agreement ("PPA") company through which Company A would be able to sell electricity without requiring its customers to purchase the company's proprietary hardware. At the time of their presentation, Badger and Daubenspeck were aware of Company A's planned uses for the funds raised through the offering.

11. At the time of Badger and Daubenspeck's presentation and throughout all of 2009, Company A was in "stealth mode," meaning that it provided little information to the public about its finances, operations or technology.

12. As part of their presentation, Badger and Daubenspeck told Company A that Advanced Equities hoped to complete the Series F offering during the month of January 2009 by raising all of the funds from a small number of high net-worth investors, each of whom could invest at least $20 million. They also agreed that the offering would require very little effort from Company A and would not disrupt Company A's business.

13. Advanced Equities and Company A reached an agreement in late December 2008 or early January 2009 to set the pre-money valuation of the Series F offering at $1.45 billion, meaning that the cost of each share of Company A stock purchased during the offering was $18.52.

14. In early January 2009, Advanced Equities began soliciting investors for direct investments in Company A.

15. By at least mid-January 2009, however, Advanced Equities, Badger and Daubenspeck realized that they needed to extend the timing of the offering and solicit investments of smaller dollar amounts from more potential investors in order to raise the entire $150 million.

16. Because Company A did not accept direct investments of less than $2 million, Advanced Equities established two limited liability companies (Greentech III and Greentech IV) on January 23, 2009 through which accredited investors and qualified purchasers could invest as little as $25,000 in Company A. Greentech III held investments from accredited investors and Greentech IV held investments from qualified purchasers.

17. As a condition to raising funds through Greentech III and Greentech IV, Advanced Equities, Badger and Daubenspeck agreed that Company A would not need to increase its involvement in the sales process or speak directly with any investors who indirectly invested in Company A through the Greentech funds.

18. Instead, Company A only agreed to meet or speak with investors who were willing to make direct investments of $2 million or more. As a result, Advanced Equities was the primary source of information about Company A and the offering for most of the firm's brokers and for the investors in Greentech III and Greentech IV.

19. Consistent with its "stealth mode" status, Company A expected Advanced Equities to focus its sales pitches on the promise of Company A's technology, management team and advisers and the progress it had made in its manufacturing process. Company A placed strict limitations on the amount and type of information that Advanced Equities could provide to investors, including requesting that Advanced Equities provide only very general information about Company A's finances and not share customer names or other proprietary information with investors in Greentech III and Greentech IV.

20. Company A also provided Advanced Equities with a two-page investment overview for potential investors in Greentech III and Greentech IV. The overview did not specify a specific dollar amount of order backlog and instead stated that Company A had a "significant backlog of signed contracts and LOIs [Letters of Intent]."

21. Unlike Advanced Equities' typical offerings during which its brokers passed information directly from the particular companies to investors, Badger took full control of the sales campaign for the 2009 offering on behalf of Company A and instructed Advanced Equities' brokers to have their customers call into presentations led by Badger so he could personally and directly present information about Company A to them.

22. Between approximately January 5 and March 27, 2009, Badger led at least 49 external investor presentations and at least five internal sales calls with Advanced Equities' brokers about the Company A offering.

23. Daubenspeck participated in two of the internal sales calls with Advanced Equities' brokers on February 2 and February 24, 2009, but did not participate in any of the external investor presentations.

24. In an email to one of Company A's board members on January 31, 2009, Badger described his conduct in the offerings as: "I have spoken to all of our prior investors personally. I have had over 200 one on one calls with investors myself. Every minute of my day for 3 and ½ weeks has been telling this story. All under NDA [non-disclosure agreement] with no financials, no info, just the basic story . . ."

25. The internal sales calls and external sales presentations were the primary source of information about Company A and the offering for most of Advanced Equities' brokers.

26. Daubenspeck and a small number of Advanced Equities' brokers and investment bankers (along with some of their direct investor customers) also traveled to Company A's headquarters for a presentation by Company A's CEO and CFO on January 13, 2009. As part of the presentation, Company A told the attendees about its current order backlog, including contracts for 17 systems from six customers (approximately $17 million). Company A also told the

attendees that it had conditional purchase orders for 15 systems from three customers (approximately $15 million), a Letter of Intent for 10 systems from one customer (approximately $10 million) and Letters of Intent for its proposed PPA company of $1.25 billion.

27. On or around January 14, 2009, when they returned to Chicago from the presentation at Company A's headquarters, Daubenspeck and the investment bankers provided Badger with information about the presentation.

28. Ultimately, between early January and late March 2009, Advanced Equities raised approximately $122 million from direct investors and the approximately 609 investors in Greentech III and Greentech IV. So far, there has been no liquidity event for this investment.

**Misstatements About Company A**

29. Despite his up-to-date knowledge about Company A's operations and sales from participating in board of director meetings and the agreement to refrain from disclosing financial or other proprietary information during the offering, Badger made several misstatements about Company A's order backlog, customers and its application for a loan from the DOE during internal sales calls, external sales presentations and other communications with Advanced Equities' brokers and investors.

30. On January 20, 2009, in response to an email from brokers in Advanced Equities' New York office about an investor's concerns about the limited financial information contained in Company A's investor overview, Badger stated that Company A has "2,000 [units] from the CIA." The sale of 2,000 units would have been huge. An order that size would have generated approximately $2 billion in revenue for Company A. In reality, however, Company A did not have any orders, contracts or agreements with the CIA at that time.

***February 2, 2009 Internal Sales Call***

31. On February 2, 2009, Badger and Daubenspeck presented information to Advanced Equities' brokers during an internal sales call.

32. During the call, Badger misstated that Company A's projected revenue of $2 billion "is currently under contract and backordered." In reality, Company A only had between $10 million and $42 million (10 to 42 individual hardware units) under contract as order backlog at that time.

33. During the February 2, 2009 call, Daubenspeck remained silent during Badger's misstatements and also misstated that Company A's CEO had shown him emails with a "$2 billion order from the CIA, which is not even in [Company A's] numbers." In reality, Company A did not have any order or other agreement from the CIA for any dollar amount at that time.

*February 24, 2009 Internal Sales Call*

34. On February 24, 2009, Badger and Daubenspeck presented information to Advanced Equities' brokers during an internal sales call.

35. During the call, Badger made the following misstatements:

a. Badger misstated that Company A had a "$1 billion contract" with a well-known national grocery store chain that he referred to by name. In reality, the national grocery store chain only had entered into a contract for two systems (approximately $2 million) and had expressed its interest in purchasing energy in the future through Company A's proposed PPA company through a non-binding letter of intent.

b. Badger misstated that Company A "was getting funded by the Department of Energy at 50 basis points over Treasuries" with "$300 million of revenue just from the Department of Energy loan guarantee." In reality, Company A had submitted an application in February 2009 for a $96.8 million loan from the Department of Energy, but had not received any funding yet or even an indication that its application would be granted.

36. During the February 24, 2009 call, Daubenspeck remained silent during Badger's misstatements.

*March 9, 2009 Internal Sales Call*

37. After attending Company A's March 3, 2009 board meeting, Badger presented information to Advanced Equities' brokers during an internal sales call.

38. During the call, Badger misstated again that Company A was "getting $300 million from the Department of Energy" when, in reality, Company A had not yet received any funding from the Department of Energy and had only applied for a $96.8 million loan.

*March 23, 2009 Internal Sales Call*

39. On March 23, 2009, approximately one week before the Series F offering ended, Badger presented information to Advanced Equities' brokers on another internal sales call.

40. During the call, Badger misstated that Company A had "over $1 billion in backlog from [a well-known national grocery store chain]." In reality, Company A did not have $1 billion in backlog from the national grocery store chain at that time.

## Misstatements To Investors In The Greentech Funds

41. During investor sales presentations between early January and late March 2009, Badger repeated certain of the misstatements that he had made during the internal sales calls. Among other things, Badger, and through him Advanced Equities, made the following misstatements:

a. Badger told certain investors that Company A had an order backlog of $2 billion to $3 billion.

b. Badger told certain investors that Company A had a $1 billion contract with a well-known national grocery store chain.

c. Badger told certain investors that Company A was getting a loan of $270 million or that it had applied for a $300 million loan from the Department of Energy.

d. Badger told certain investors that Company A had a $2 billion order from the CIA.

42. After hearing the misstatements from Badger, certain of Advanced Equities' brokers, including certain members of Advanced Equities' investment banking team and the broker-in-charge of Advanced Equities' New York branch office, repeated these misstatements to investors in email messages and telephone calls. Among other things, the brokers told investors that Company A had $2 billion or more in order backlog.

43. Certain of these brokers, including certain members of Advanced Equities' investment banking team and the broker-in-charge of Advanced Equities' New York branch office, were among the brokers who traveled to Company A's headquarters with Daubenspeck on January 13, 2009 and received additional information about Company A. As a result, these brokers knew or should have known that Badger's misstatements about Company A's backlog, grocery chain contract and its Department of Energy loan application were not true.

## Badger's Misstatements In 2010

44. In early 2010, Advanced Equities began soliciting prior investors to make additional investments in Company A through ten of Advanced Equities' limited liability companies, including Greentech III and Greentech IV, under the hope that Company A would accept the additional funds as an investment.

45. Between approximately February 2010 and March 2010, Advanced Equities raised an additional $47 million from prior investors and sent the money to Company A as an additional investment at the $1.45 billion valuation.

46. Badger led Advanced Equities' sales efforts and conducted several sales presentations with existing and potential investors, including an "update" call on March 5, 2010.

47. During the March 5, 2010 call, Badger misstated that Company A had applied for a $400 million loan from the Department of Energy and that the Department of Energy had approved Company A to "draw the first hundred million" on the loan. In reality, Company A only had applied for a $96.8 million loan from the Department of Energy and never had the ability to draw down any amount of the loan.

48. Ultimately, Company A declined to accept the $47 million and returned the money to Advanced Equities and the investors in late March 2010.

**Daubenspeck's Failure To Reasonably Supervise**

49. Daubenspeck supervised Badger and had the ability and authority to affect Badger's conduct, including hiring and firing authority. Daubenspeck also had final approval for all management decisions within Advanced Equities.

50. In addition to Badger, Daubenspeck directly supervised Advanced Equities' investment bankers, all of whom were also brokers, and the broker-in-charge of Advanced Equities' New York office.

51. During the 2009 offering for Company A, Daubenspeck was the Advanced Equities employee primarily responsible for obtaining information from Company A, supervising the investment bankers in conducting due diligence for the offering and sharing information with Badger for use with Advanced Equities' brokers and investors.

52. Daubenspeck learned specific information about Company A during his attendance at Company A's December 4, 2008 and March 3, 2009 board of director meetings and the presentation at Company A's headquarters on January 13, 2009 and in other conversations with Company A's management and directors. As a result, Daubenspeck knew or should have known the correct amount of Company A's order backlog, the status and amount of its application for a loan from the Department of Energy and the names and amounts of customer orders.

53. On February 2, 2009, Daubenspeck participated in an internal sales call with Advanced Equities' brokers. During the course of the call, Daubenspeck remained silent after he heard Badger misstate that Company A's $2 billion in projected revenue was "under contract and backordered." Despite the red flags raised by Badger's misstatements during the internal call and the obvious risk that Badger's false information would be repeated to investors by Badger and Advanced Equities' brokers, Daubenspeck did not take reasonable steps to correct Badger's misstatements. Instead, through his silence, Daubenspeck failed reasonably to prevent Badger from conveying false information to the brokers and from continuing to make misstatements in future calls with Advanced Equities' brokers and investors.

54. Daubenspeck not only knew or should have known of Badger's misstatements on the February 2, 2009 call, but also helped add to the misinformation about Company A's order backlog by stating on the call that Company A's CEO had shown him emails with a "$2 billion order from the CIA, which is not even in [Company A's] numbers."

55. On February 24, 2009, Daubenspeck participated in another internal sales call with Advanced Equities' brokers. During the course of the call, Daubenspeck remained silent after he heard Badger misstate that Company A had a $1 billion contract with the well-known national grocery store chain and that Company A "was getting funded by the Department of Energy at 50 basis points over Treasuries" with "$300 million of revenue just from the Department of Energy loan guarantee." Despite the red flags raised by Badger's misstatements during the internal call and the obvious risk that Badger's false information would be repeated to investors by Badger and Advanced Equities' brokers, Daubenspeck did not take reasonable steps to correct Badger's misstatements. Instead, through his silence, Daubenspeck failed reasonably to prevent Badger from conveying false information to the brokers and from continuing to make misstatements in future calls with Advanced Equities' brokers and investors.

56. After hearing the misstatements on the two internal sales calls, Daubenspeck also failed to take reasonable steps to follow up with the investment bankers and the broker-in-charge of Advanced Equities' New York office to ensure that they did not repeat to investors Badger's misstatements or Daubenspeck's statement about the $2 billion CIA order. Instead, through his silence and failure to take reasonable steps in response to the red flags raised by Badger's conduct, Daubenspeck failed reasonably to prevent at least one of Advanced Equities' investment bankers and the broker-in-charge of the New York office from misstating the amount of Company A's backlog in communications with investors.

57. Had Daubenspeck taken reasonable steps in response to the red flags, it is likely that he could have prevented and detected Badger's and certain of the other brokers' violations of the antifraud provisions.

## Violations

58. As a result of the conduct described above, Badger willfully[2] violated Sections 17(a)(2) and 17(a)(3) of the Securities Act which prohibit fraudulent conduct in the offer or sale of securities.

59. As a result of the conduct described above, Advanced Equities and certain of Advanced Equities' brokers willfully violated Sections 17(a)(2) and 17(a)(3) of the Securities Act which prohibit fraudulent conduct in the offer or sale of securities.

60. Section 15(b)(4)(E) of the Exchange Act allows for the imposition of a sanction against a broker or dealer who "has failed reasonably to supervise, with a view to preventing violations of the [federal securities laws], another person who commits such a violation, if such other person is subject to his supervision." Section 15(b)(6) incorporates by reference Section 15(b)(4)(E) and allows for the imposition of sanctions against persons associated with a broker or dealer for failing reasonably to supervise. The Commission has repeatedly emphasized that the duty to supervise is a critical component of the federal regulatory scheme. See, e.g., Merrill

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[2] A willful violation of the securities laws means merely "'that the person charged with the duty knows what he is doing.'" Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949)).

Lynch, Pierce, Fenner & Smith Inc., Exchange Act Rel. No. 63760 (Jan. 25, 2011) (citing Smith Barney, Harris Upham & Co. Inc., et al., Exchange Act Rel. No. 21813 (March 5, 1985)).

61. As a result of the conduct described above, Daubenspeck failed reasonably to supervise Badger and certain other brokers with a view to detecting and preventing Badger's and the other brokers' willful violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act.

**Undertakings**

62. Advanced Equities undertakes to:

a. Retain, within 60 days of the date of the Order, at its own expense, the services of an Independent Consultant not unacceptable to the staff of the Division of Enforcement of the Commission (the "Commission staff"), to: (i) review the effectiveness of Advanced Equities' policies and procedures regarding sales practices, due diligence practices and supervisory procedures; (ii) review Advanced Equities' systems for implementing its policies and procedures; and (iii) make recommendations concerning these policies and procedures with a view to assuring compliance with the federal securities laws.

b. No later than ten (10) days following the date of the Independent Consultant's engagement, provide to the Commission staff a copy of the engagement letter detailing the Independent Consultant's responsibilities pursuant to paragraph 62.a above.

c. Require the Independent Consultant, at the conclusion of the review, which in no event shall be more than 120 days after the entry of the Order, to submit a report to Advanced Equities and the Commission staff. The report shall address the issues described in the Order and shall include a detailed description of the review performed, the conclusions reached, the Independent Consultant's recommendations for changes or improvements to the policies, procedures and practices of Advanced Equities and a procedure for implementing the recommended changes or improvements to such policies, procedures or practices.

d. Adopt, amend, implement and maintain all policies, procedures, and practices recommended in the report of the Independent Consultant within 180 days of the date of entry of the Order. As to any of the Independent Consultant's recommendations about which Advanced Equities and the Independent Consultant do not agree, such parties shall attempt in good faith to reach agreement within 210 days of the date of the entry of the Order. In the event that Advanced Equities and the Independent Consultant are unable to agree on an alternative proposal, Advanced Equities will abide by the determinations of the Independent Consultant and adopt those recommendations deemed appropriate by the Independent Consultant.

e. Retain the Independent Consultant to conduct a follow up review and submit a written Final Report to Advanced Equities and the Commission staff no later than one year after the date of entry of this Order. In the Final Report, the Independent Consultant shall address Advanced Equities' compliance with this Order, its implementation of the policies and procedures adopted under this Order and make any further recommendations he or she deems necessary. Within 30 days of its receipt of the Independent Consultant's Final Report, Advanced Equities shall adopt the recommendations contained in the Final Report.

f. Cooperate fully with the Independent Consultant in its review, including making such information and documents available as the Independent Consultant may reasonably request, and by permitting and requiring Advanced Equities' employees and agents to supply such information and documents as the Independent Consultant may reasonably request.

g. In order to ensure the independence of the Independent Consultant, Advanced Equities: (i) shall not have the authority to terminate the Independent Consultant without the prior written approval of the Commission staff; and (ii) shall compensate the Independent Consultant for services rendered pursuant to the Order at their reasonable and customary rates.

h. Require the Independent Consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Advanced Equities, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the Independent Consultant will require that any firm with which he or she is affiliated or of which he or she is a member, and any person engaged to assist the Independent Consultant in performance of his or her duties under this Order shall not, without prior written consent of the Commission staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Advanced Equities, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

i. Advanced Equities may apply to the Commission staff for an extension of the deadlines described above before their expiration, and upon a showing of good cause by Advanced Equities, the Commission staff may in its sole discretion, grant such extensions for whatever time period it deems appropriate.

63. Advanced Equities further undertakes to:

a. Deliver, within 30 days of the entry of this Order, by certified U.S. mail, a copy of the Commission's Order in this matter to each customer of Advanced

Equities who invested in Company A at any time between January 1, 2009 and December 31, 2010.

b. Implement, within 120 days of the entry of this Order, a new, internal training program covering sales practices and provide the Commission staff with a detailed description of the program within 5 days after its adoption.

c. Use its best efforts to locate purchasers for any of its customers who purchased the securities of Company A through Greentech III or Greentech IV in 2009 and who wish to sell their securities at a price equivalent to their original purchase price.

d. Post information concerning all of its future offerings on its password-protected Venture Gateway system or any successor systems. Advanced Equities will obtain approval from the chief executive officer or chief financial officer of each company for which Advanced Equities is conducting an offering of all information posted on the Venture Gateway system, including all financial information received by Advanced Equities. All presentations and other information posted on the Venture Gateway system will be maintained and preserved in accordance with the requirements of Rule 17a-4 under the Exchange Act for at least four (4) years.

e. Cooperate fully with the Commission in any and all investigations, litigations or other proceedings relating to or arising from the matters described in the Order. In connection with such cooperation, Advanced Equities has undertaken:

1. To produce, without service of a notice or subpoena, any and all documents and other information reasonably requested by the Commission staff, with a custodian declaration as to their authenticity, if requested;

2. To use its best efforts to cause Advanced Equities' current and former employees to be interviewed by the Commission staff at such times and places as the staff reasonably may direct. Live interviews on one week's notice or telephone interviews on 72 hours' notice, at the option of the option of the staff, shall be deemed to be reasonable;

3. To use its best efforts to cause Advanced Equities' employees to appear and testify truthfully and completely without service of a notice or subpoena in such investigations, depositions, hearings or trials as may be reasonably requested by the Commission staff; and

4. In connection with any interviews of Advanced Equities' employees to be conducted pursuant to this undertaking, requests for such interviews may be provided by the Commission staff to its General Counsel, Advanced Equities, Inc., 311 South Wacker Drive, Suite 6150, Chicago, Illinois 60606, or such other counsel that may be substituted by Advanced Equities.

64. Advanced Equities shall certify, in writing, compliance with the undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Anne C. McKinley, Assistant Regional Director, Chicago Regional Office, 175 W. Jackson Blvd., Suite 900, Chicago, Illinois 60604, with a copy to the Office of Chief Counsel of the Division of Enforcement, 100 F Street, NE, Washington, DC 20549 no later than sixty (60) days from the date of the completion of the undertakings.

65. Daubenspeck shall provide to the Commission, within 15 days after the end of the twelve month suspension period described below, an affidavit that he has complied fully with the sanctions described in Section IV below.

66. Daubenspeck shall cooperate fully with the Commission in any and all investigations, litigations or other proceedings relating to or arising from the matters described in the Order. In connection with such cooperation, Daubenspeck has undertaken:

1. To produce, without service of a notice or subpoena, any and all documents and other information reasonably requested by the Commission staff, with a custodian declaration as to their authenticity, if requested;

2. To appear and be interviewed by the Commission staff at such times and places as the staff reasonably may direct. Live interviews on one week's notice or telephone interviews on 72 hours' notice, at the option of the staff, shall be deemed to be reasonable;

3. To appear and testify truthfully and completely without service of a notice or subpoena in such investigations, depositions, hearings or trials as may be reasonably requested by the Commission's staff; and

4. In connection with any interviews or testimony to be conducted pursuant to this undertaking, requests for such interviews or testimony may be provided by the Commission staff to his attorney, Steven S. Scholes, McDermott, Will & Emery, 227 West Monroe Street, Chicago, Illinois 60606, or such other counsel that may be substituted by Daubenspeck.

In determining whether to accept Advanced Equities' and Daubenspeck's Offers, the Commission has considered Advanced Equities' undertakings in paragraphs 63.a-e and Daubenspeck's undertakings in paragraph 66, above.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in the Respondents' Offers.

Accordingly, pursuant to Section 8A of the Securities Act, Section 15(b) of the Exchange Act and Sections 203(e) and 203(f) of the Investment Advisers Act it is hereby ORDERED that:

A. Advanced Equities

1. Respondent Advanced Equities shall cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act.

2. Respondent Advanced Equities is censured.

3. Respondent Advanced Equities shall, within 30 days of the entry of this Order, pay a civil money penalty of $1,000,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Advanced Equities, Inc. as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Robert J. Burson, Senior Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 175 West Jackson Blvd., Suite 900, Chicago, Illinois 60604.

4. Respondent Advanced Equities shall comply with the undertakings enumerated in Section III, paragraphs 62.a-i and 64, above.

B. Badger

1. Respondent Badger shall cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act.

2. Respondent Badger be, and hereby is, barred from association with any broker, dealer, investment adviser, municipal securities dealer or transfer agent with the right to reapply for reentry after one (1) year to the appropriate self-regulatory organization, or if there is none, to the Commission.

3. Any reapplication for association by Respondent Badger will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

4. Respondent Badger shall pay a civil money penalty in the amount of $100,000 to the United States Treasury. Payment shall be made in the following installments: $30,000 to be paid within thirty (30) days after entry of this Order and the remaining $70,000 to be paid in ten (10) equal installments of $7,000 on the last day of each month from October 31, 2012 until July 31, 2013. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Payments must be made in one of the following ways:

(1) Respondent may transmit payments electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondent may make direct payments from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Dwight O. Badger as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Robert J. Burson, Senior Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 175 West Jackson Blvd., Suite 900, Chicago, Illinois 60604.

C. Daubenspeck

1. Respondent Daubenspeck be, and hereby is, suspended from association in a supervisory capacity with any broker, dealer, investment adviser, municipal securities dealer or transfer agent for a period of twelve (12) months, effective on the second Monday following the entry of this Order.

2. Respondent Daubenspeck, shall, within thirty (30) days of the entry of this Order, pay a civil money penalty in the amount of $50,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Keith G. Daubenspeck as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Robert J. Burson, Senior Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 175 West Jackson Blvd., Suite 900, Chicago, Illinois 60604.

3. Respondent Daubenspeck shall comply with the undertaking enumerated in Section III, paragraph 65, above.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Commissioner Gallagher
not participating

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67884 / September 18, 2012**

**ACCOUNTING AND AUDITING ENFORCEMENT**
**Release No. 3408 / September 18, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15033**

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| **In the Matter of**<br><br>**Michael K. Krohn, CPA**<br><br>**Respondent.** | **CORRECTED**<br>**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS** |

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against Michael K. Krohn ("Krohn" or "Respondent") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

[1] Rule 102(e)(3)(i) provides, in relevant part, that:

> The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any . . . accountant . . . who has been by name . . . permanently enjoined by any court of competent jurisdiction, by reason of his misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

## II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below

On the basis of this Order and Respondent's Offer, the Commission finds that:

## III.

1. Krohn, age 36, resides in Round Rock, Texas. He is and has been a certified public accountant licensed to practice by the State of Arizona. Krohn provided accounting advice to entities regarding the offering of securities in violation of the federal securities laws.

2. On August 6, 2012 the Commission filed a complaint against Krohn in SEC v. The Companies (TC), LLC, et al., (Civil Action No. 2:12-cv-00765-DN). On August 9, 2012, the court entered an order permanently enjoining Krohn, by consent, from future violations of Sections 5(a), 5(c), 17(a)(2), and 17(a)(3) of the Securities Act of 1933.

3. The Commission's complaint alleged, among other things, that Krohn, in violation of federal securities laws and in connection with the sale of approximately $11.9 million of securities to approximately 169 investors, made material misrepresentations and omissions regarding, among other things, the value of company assets. The alleged misrepresentations and omissions were contained in private placement memoranda ("PPMs") used in unregistered offerings. The complaint alleged that Krohn participated in drafting and providing content for the PPMs and solicited investors. The complaint further alleged that the securities were not registered, in violation of the federal securities laws, because the PPMs wrongfully relied on the exemption to registration pursuant to Regulation D, Rule 506. The complaint alleged that the offerings did not meet the Regulation D, Rule 506 requirements because the securities were offered through general solicitation.

## IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction agreed to in Respondent Krohn's Offer.

Accordingly, it is hereby ORDERED, effective immediately, that:

A. Krohn is suspended from appearing or practicing before the Commission as an accountant.

B. After two years from the date of this order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Respondent, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Respondent, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify any criticisms of or potential defects in the respondent's or the firm's quality control system that would indicate that the respondent will not receive appropriate supervision;

(c) Respondent has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and

(d) Respondent acknowledges his responsibility, as long as Respondent appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

The Commission will consider an application by Respondent to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Respondent's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Commissioner Gallagher
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67884 / September 18, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15033**

| | |
|---|---|
| **In the Matter of**<br><br>**Michael K. Krohn, CPA**<br><br>**Respondent.** | **ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS** |

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against Michael K. Krohn ("Krohn" or "Respondent") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings

[1] Rule 102(e)(3)(i) provides, in relevant part, that:

> The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any . . . accountant . . . who has been by name . . . permanently enjoined by any court of competent jurisdiction, by reason of his misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below

On the basis of this Order and Respondent's Offer, the Commission finds that:

**III.**

1. Krohn, age 36, resides in Round Rock, Texas. He is and has been a certified public accountant licensed to practice by the State of Arizona. Krohn provided accounting advice to entities regarding the offering of securities in violation of the federal securities laws.

2. On August 6, 2012 the Commission filed a complaint against Krohn in SEC v. The Companies (TC), LLC, et al., (Civil Action No. 2:12-cv-00765-DN). On August 9, 2012, the court entered an order permanently enjoining Krohn, by consent, from future violations of Sections 5(a), 5(c), 17(a)(2), and 17(a)(3) of the Securities Act of 1933.

3. The Commission's complaint alleged, among other things, that Krohn, in violation of federal securities laws and in connection with the sale of approximately $11.9 million of securities to approximately 169 investors, made material misrepresentations and omissions regarding, among other things, the value of company assets. The alleged misrepresentations and omissions were contained in private placement memoranda ("PPMs") used in unregistered offerings. The complaint alleged that Krohn participated in drafting and providing content for the PPMs and solicited investors. The complaint further alleged that the securities were not registered, in violation of the federal securities laws, because the PPMs wrongfully relied on the exemption to registration pursuant to Regulation D, Rule 506. The complaint alleged that the offerings did not meet the Regulation D, Rule 506 requirements because the securities were offered through general solicitation.

**IV.**

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction agreed to in Respondent Krohn's Offer.

Accordingly, it is hereby ORDERED, effective immediately, that:

A. Krohn is suspended from appearing or practicing before the Commission as an accountant.

B. After two years from the date of this order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Respondent, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Respondent, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify any criticisms of or potential defects in the respondent's or the firm's quality control system that would indicate that the respondent will not receive appropriate supervision;

(c) Respondent has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and

(d) Respondent acknowledges his responsibility, as long as Respondent appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

The Commission will consider an application by Respondent to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Respondent's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman Schapiro not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3468 / September 18, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-15034

| | |
|---|---|
| In the Matter of<br><br>Ryan M. Armour,<br><br>Respondent. | ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS |

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Ryan M. Armour ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

From March 2007 through March 2011, Armour was a managing director and 50% owner of Kingsbury Bridge Advisors, LLC ("Kingsbury"), an investment adviser registered with the Commission. Armour, 31 years old, is a resident of Illinois.

2. On May 14, 2012, Armour pled guilty to one count of bank fraud in violation of Title 18 United States Code, Section 1344 before the United States District Court for the Northern District of Illinois, in United States v. Ryan Armour, Crim. Information No. 1:2012-CR-317. On September 10, 2012, a judgment in the criminal case was entered against Armour.

3. The criminal information to which Armour pled guilty alleges, inter alia, that Kingsbury was employed to provide investment advisory services to a trust established to pay medical and living expenses for Individual A ("the Trust"). Armour also undertook responsibility for reviewing Individual A's mail, determining what bills needed to be paid, preparing checks to pay those bills, and providing the checks to Individual B, trustee, to approve and sign as maker. In approximately April 2007, Individual A was diagnosed with Alzheimer's disease, and thereafter her mental and physical health deteriorated. From approximately December 15, 2008 through August 10, 2010, Armour negotiated approximately 66 checks on the Trust bank account, naming either himself or R.C. Venture Partners, LLC, as payee and by forging the signature of Individual B as maker. In this manner, Armour stole a total of approximately $682,500 from the Trust. Armour had no right or claim to these funds and forged the endorsement of Individual B as maker without his knowledge or consent.

**IV.**

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Armour's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Armour be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order;

and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar,
Commissioner Gallagher
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3466 / September 18, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-15030

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|---|---|
| In the Matter of<br><br>JEFFREY BROWN,<br><br>Respondent. | ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS |

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Jeffrey Brown ("Brown" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

## III.

On the basis of this Order and Respondent's Offer, the Commission finds that

1. Brown was a part owner, a member, and a control person of Monarch Vision Advisors, LLC ("Monarch"), an investment adviser formerly registered with the Commission. Monarch conducted business under the trade name "Quadwealth." Brown, age 41, is a resident of Dallas, Texas.

2. On July 29, 2011, Brown pleaded guilty to one count of conspiracy to commit mail fraud in violation of Title 18 United States Code, Section 371 before the United States District Court for the Eastern District of Texas, in United States v. Jeffrey Brown, Crim. No.41:11-CR. Brown's plea agreement includes his consent to a judgment requiring full restitution to victims in an amount to be determined by the Court, and forfeiture to the United States of 11 parcels of real estate in Dallas and Collin Counties and a Ducati motorcycle.

3. The count of the criminal information to which Brown pleaded guilty alleged, inter alia, that Brown defrauded investors and obtained money and property by means of materially false and misleading statements, and that he used the United States mails to send false account statements. In connection with the plea, Respondent admitted that:

(a) Brown and other Quadwealth representatives solicited investments to raise capital for real estate and securities transactions;

(b) Brown and other Quadwealth representatives created materials that contained a series of materially false representations regarding the safety and security of Quadwealth's investments, the viability of Quadwealth's programs, and Quadwealth's intentions with respect to the capital raised. These materials, along with specific representations by Brown and other Quadwealth representatives, were intended to induce individuals to rely upon them and invest with Quadwealth. Among the materially false representations were the following:

1. Investors could "earn over 100% in annual returns from real estate investments."
2. Investors could "employ $100,000 of [their] home's equity to generate over $1,000,000 in future retirement income and additional net worth."
3. Brown and another Quadwealth principal "manage[d] over $70 Million dollars worth of assets."
4. "[s]ince 2006, another Quadwealth principal has purchased over $18.5 Million dollars worth of real estate. . . realizing over $5.9 Million dollars in gross profit."

5. Quadwealth investments were safe, liquid, had a high rate of return, were tax efficient, and generated income.

6. Quadwealth investments were "investment grade" and were "guaranteed to never lose value."

7. Investors who purchased Tier Two or Tier Three memberships would receive better investment opportunities than those who purchased Tier One memberships.

(c) Brown and other Quadwealth representatives knew that these representations were false and made them knowing that individuals would rely upon them before making their investments.

(d) Brown and other Quadwealth representatives also knowingly and intentionally failed to disclose material facts to their investors. Among the intentional omissions of material fact were the following:

1. Quadwealth would use investor funds to pay the family members of Brown and others, despite the fact that little or no work was performed by certain of these family members; and

2. Quadwealth would use investor funds to pay for the personal expenditures of Brown and others.

(e) Brown and other Quadwealth representatives knew that these omissions of fact were material and that individuals would rely upon them before making their investments.

## IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Brown's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Brown be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Commissioner Gallagher
not participating

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67889 / September 19, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-14720**

**In the Matter of**

**Alchemy Ventures, Inc., KM Capital Management, LLC, Zanshin Enterprises, LLC, Mark H. Rogers, Steven D. Hotovec, Joshua A. Klein, Yisroel M. Wachs, Frank K. McDonald, and Douglas G. Frederick,**

**Respondents.**

**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AS TO YISROEL M. WACHS**

**I.**

In these proceedings, instituted on January 26, 2012 pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Respondent Yisroel M. Wachs ("Respondent") has submitted an Offer of Settlement ("Offer") which the Securities and Exchange Commission ("Commission") has determined to accept.

**II.**

Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 as to Yisroel M. Wachs ("Order"), as set forth below.

## III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

**Summary**

1. These proceedings arise from trading access that KM Capital Management, LLC ("KM"), an unregistered firm, and Wachs extended to an individual who subsequently used that trading access to profit from an account intrusion and market manipulation scheme. On 26 occasions from January to August 2010, the individual made profitable trades through KM contemporaneous with unauthorized trading in the same securities in hijacked online brokerage accounts of innocent and unknowing account holders at multiple U.S. broker-dealers.

2. By effecting securities transactions for the individual, Wachs, acting directly and through KM, acted as an unregistered broker in willful[2] violation of Section 15(a) of the Exchange Act. Wachs also willfully aided and abetted and caused KM's violation of Section 15(a).

**Respondent**

3. From January to August 2010 (the "relevant period"), Yisroel M. Wachs was a principal of, and associated with, KM. In that capacity, Wachs caused KM to extend market access to traders through KM. Wachs has never held securities licenses or been registered with the Commission in any capacity. Wachs, age 30, is a resident of Philadelphia, Pennsylvania and Jerusalem, Israel.

**Other Relevant Parties**

4. KM Capital Management, LLC is a Pennsylvania limited liability company with its principal place of business in Philadelphia, Pennsylvania. KM has never been registered with the Commission in any capacity. During the relevant period, approximately 10 individuals traded as many as two million shares per month on U.S. exchanges in omnibus accounts held in KM's name at a registered broker-dealer.

5. Joshua A. Klein is a principal of, and associated with, KM. In that capacity, Klein caused KM to extend market access to traders through KM. Klein has never held securities licenses or been registered with the Commission in any capacity. Klein, age 29, is a resident of Philadelphia, Pennsylvania.

**Sponsored Market Access**

6. Sponsored market access is a form of trading access whereby a broker-dealer permits customers to enter orders into the public market without the orders first passing through the broker-dealer's trading systems.

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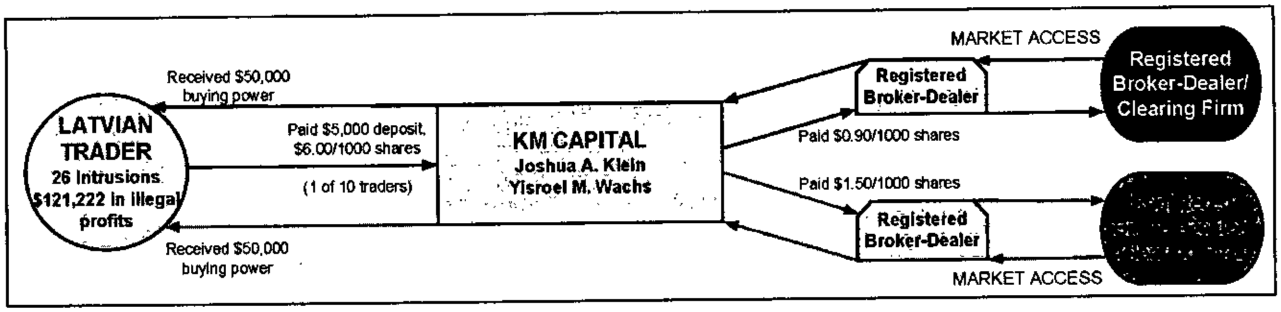
[1] The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other persons or entities in this or any other proceeding.

[2] A willful violation of the securities laws means merely "'that the person charged with the duty knows what he is doing.'" *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)).

7. The following chart illustrates the relationships through which KM, Klein, and Wachs extended market access to an individual identified as a citizen of Latvia ("the Latvian trader") who conducted an account intrusion and market manipulation scheme:




8. During the relevant period, KM, and Klein and Wachs through KM, received sponsored market access from registered broker-dealers and passed the sponsored market access on to KM's traders.

9. In connection with extending sponsored market access to traders, KM, Klein, and Wachs participated in the order-taking and order-routing process, extended credit to the traders in connection with securities transactions, and handled customer funds and securities.

10. During the relevant period, KM, at the direction of Klein and Wachs, maintained a website and made postings on internet message boards soliciting traders to trade through KM. Approximately 10 traders were trading through KM's omnibus accounts via sponsored market access during the relevant period.

11. In November 2009, the Latvian trader requested to receive market access through KM. KM, at the direction of Klein and Wachs, entered into an independent contractor agreement with the Latvian trader.

12. The independent contractor agreement stated that the Latvian trader was responsible for 100% of any trading losses that he incurred through KM's account and required the Latvian trader to contribute $5,000 of his own money as a risk deposit.

13. Pursuant to the independent contractor agreement, KM, at the direction of Klein and Wachs, provided the Latvian trader with sponsored access trading software and instructed the software provider to assign the Latvian trader a user ID and password so that he could use the software to trade online through KM's account. In so doing, KM, at the direction of Klein and Wachs, provided order-taking and order-routing services and controlled an electronic trading system for the Latvian trader to trade in the public market.

14. Klein and Wachs were ultimately responsible for authorizing traders to trade through KM's account, for determining whether to terminate a trader's access, and for controlling the trading parameters in the trading software, including the amount of margin each trader received.

15. KM used the trading software to extend the trader $50,000 in "buying power" through KM's account, which was a portion of the trading margin that KM received from its registered broker-dealer. Although KM extended credit to the Latvian trader to purchase securities, KM's capital was not ultimately at risk because it was entitled to recoup losses from the Latvian trader and

the trading software allowed KM's principals to review his trading in real time and would automatically cut off his trading access if trading losses caused his deposit balance to fall below $1,000, effectively allowing KM to ensure that he would never lose money in excess of his deposit balance.

16. In March 2010, KM opened an omnibus account with a different registered broker-dealer and provided the Latvian trader with sponsored access trading software and a user ID and password so that he also could trade online through the new KM account. KM extended the Latvian trader the same level of buying power in the new KM account.

17. KM charged the Latvian trader a commission of $6.00 per thousand shares traded, which exceeded the commissions ranging from $0.90 to $1.50 per thousand shares traded that KM paid its registered broker-dealers. Klein and Wachs were responsible for setting the commission rate and directed KM to charge transaction-based compensation for extending the market access.

18. During the relevant period, Klein and Wachs directed KM to maintain documentation tracking the Latvian trader's deposit balance against all commissions, fees, and profits or losses from his trading activity through KM's accounts.

**Account Intrusions**

19. On 26 occasions between January and August 2010, the Latvian trader made profitable trades through KM's account contemporaneous with unauthorized trading in the same securities in hijacked online brokerage accounts at multiple U.S. broker-dealers.

20. On each occasion, the Latvian trader first established a long or short position in a security through KM's account. Then the Latvian trader surreptitiously gained access to an online brokerage account and made large unauthorized trades in the same security to manipulate the stock price in his favor. Finally, during or shortly after the manipulative trading in the intruded account, the Latvian trader closed out his position through KM at the artificial market price to generate a profit.

21. The Latvian trader generated ill-gotten gains of $121,222 from the scheme through the electronic trading system provided by KM. The Latvian trader engaged in similar manipulative trading through other unregistered firms, and generated total profits of more than $850,000 from 159 account intrusions between June 2009 and August 2010.

22. By extending market access to traders in the manner described above, including through participating in the order-taking and order-routing process, extending credit in connection with securities transactions, handling customer funds and securities, and allocating trades conducted by the traders against their deposits, KM, and Wachs, directly and through KM, engaged in the business of effecting transactions in securities for the account of others.

23. As described above, Wachs was aware of his role in furthering improper or illegal activity by KM and provided substantial assistance to KM in connection with conduct that constituted a violation of the federal securities laws.

## Violations

24. As a result of the conduct described above, Wachs willfully violated Section 15(a) of the Exchange Act, which prohibits certain persons and entities, while acting as brokers, from effecting transactions in securities when such person or entity is not registered with the Commission as a broker.

25. As a result of the conduct described above, Wachs willfully aided and abetted and caused KM's violation of Section 15(a) of the Exchange Act, which prohibits certain persons and entities, while acting as brokers, from effecting transactions in securities when such person or entity is not registered with the Commission as a broker.

## IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondent shall cease and desist from committing or causing any violations and any future violations of Section 15(a) of the Exchange Act.

B. Respondent is censured.

C. Respondent shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $35,000 to the United States Treasury. If timely payment is not made, interest shall accrue pursuant to 31 U.S.C. Section 3717. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Yisroel M. Wachs as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Jina L. Choi, Market Abuse Unit, Division of Enforcement, Securities and Exchange Commission, 44 Montgomery St, 28th Floor, San Francisco, CA 94104.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Commissioner Walter
Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3471 / September 19, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-15035

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|---|---|
| In the Matter of<br><br>James F. Turner II,<br><br>Respondent. | ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS |

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against James F. Turner II ("Turner" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Turner was the Chief Investment Officer and a shareholder of Clay Capital Management, LLC ("Clay Capital"), an unregistered investment adviser based in Summit, New Jersey. From January 2007 to December 2010, Clay Capital managed a hedge fund called the Clay Capital Fund, LP ("Clay Fund"). Turner, 45 years old, is a resident of Traverse City, Michigan.

2. On August 29, 2012, a final judgment was entered by consent against Turner, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, Sections 10(b) and 14(e) of the Securities Exchange Act of 1934 and Rules 10b-5 and 14e-3 thereunder in the civil action entitled Securities and Exchange Commission v. Clay Capital Management, LLC, et al., Civil Action Number 2:11-cv-05020, in the United States District Court for the District of New Jersey.

3. The Commission's complaint alleges that Turner engaged in insider trading in the securities of Autodesk, Inc. ("Autodesk"), Moldflow Corporation ("Moldflow"), and Salesforce.com, Inc. ("Salesforce"). The Commission's complaint also alleges that Turner obtained material nonpublic information from his brother-in-law, an Autodesk employee, about Autodesk's earnings in advance of Autodesk's public earnings announcement in February 2008 and about Autodesk's planned acquisition of Moldflow ahead of the public merger announcement in May 2008. The Commission's complaint further alleges that Turner obtained material nonpublic information about Salesforce's earnings from his close friend, a Salesforce employee, in advance of Salesforce's public earnings announcement in February 2008. The Commission's complaint alleges that Turner traded on the basis of the material nonpublic information for the Clay Fund's accounts, his personal accounts and his family members' accounts, and that Turner also recommended that other friends and family members trade the same securities. The Commission's complaint also alleges that, in total, the illicit trading generated gains of nearly $3.9 million.

4. On December 19, 2011, Turner pled guilty to securities fraud in violation of Title 15 United States Code, Sections 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Section 240.10b-5, before the United States District Court for the District of New Jersey, in United States v. James Turner, Crim. No. 2:11-cr-00868. On April 16, 2012, a judgment in the criminal case was entered against Turner. He was sentenced to a prison term of twelve months followed by three years of supervised release and ordered to pay a fine in the amount of $25,000.

5. In connection with his guilty plea, Turner admitted the facts set out in the transcript of his plea allocution that is attached as Exhibit A to the Offer.

**IV.**

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar, Commissioner Paredes not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67890 / September 19, 2012

INVESTMENT ADVISERS ACT OF 1940
Release No. 3469 / September 19, 2012

INVESTMENT COMPANY ACT OF 1940
Release No. 30207 / September 19, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14619

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|---|---|
| In the Matter of<br><br>WESTERN PACIFIC CAPITAL MANAGEMENT, LLC AND KEVIN JAMES O'ROURKE,<br><br>Respondents. | ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, SECTIONS 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940 AS TO KEVIN JAMES O'ROURKE |

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest to enter this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Kevin James O'Rourke ("Respondent" or "O'Rourke").

II.

Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b) and 21C the Securities Exchange Act of 1934, Sections 203(f) and 203(k) of the Investment Advisers Act of 1940, and Sections 9(b) of the Investment Company Act of 1940 as to Respondent ("Order"), as set forth below.

## III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that

## SUMMARY

1. This proceeding involved misconduct by Western Pacific Capital Management, LLC ("Western Pacific"), a registered investment adviser, and its sole owner and principal, Kevin James O'Rourke ("O'Rourke"), for failing to disclose a conflict of interest, misusing client assets to benefit the adviser, and repeatedly making material misrepresentations to clients.

2. In 2005 and 2006, Western Pacific served as a placement agent for Ameranth, Inc. ("Ameranth") for an unregistered offering of Ameranth stock. In exchange, Western Pacific received a success fee of 10% of the capital it raised. At the time, neither Western Pacific nor O'Rourke were registered brokers or affiliated with a registered broker. O'Rourke urged many Western Pacific clients to invest in Ameranth without disclosing that Western Pacific would financially benefit from their investments. O'Rourke also advised clients to invest in a hedge fund, the Lighthouse Fund, LP ("Lighthouse" or the "Fund"), without disclosing that the Fund would initially invest primarily in Ameranth, for which Western Pacific would receive a 10% success fee. In all, Western Pacific earned $482,745 in success fees as a placement agent for Ameranth.

3. Between 2006 and 2008, O'Rourke misused Fund assets and lied to his clients who invested in the Fund. To resolve a dispute with a client who no longer wanted his $800,000 of Ameranth stock, O'Rourke caused the Fund to buy some of the stock and permitted the client to use the remainder of the stock to fund the client's investment in the Fund. O'Rourke ultimately redeemed the client's interest in the Fund for cash. In addition, in response to client inquiries regarding the Fund's liquidity, O'Rourke

[1] The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

repeatedly misstated that the Fund was liquid or had less than 25% of its holdings in illiquid securities, when in fact approximately 90% of the Fund's assets were illiquid.

## RESPONDENTS

4. **Western Pacific** is a California limited liability corporation with its principal place of business in Del Mar, California. Western Pacific registered with the Commission as an investment adviser effective May 13, 2009 and has approximately $75 million in assets under management in 250 accounts. From June 2004 until it registered with the Commission, Western Pacific was an investment adviser registered with the State of California.

5. **O'Rourke** is Western Pacific's founder, president, and sole control person. At all relevant times, O'Rourke was responsible for the management of Western Pacific's business. O'Rourke was a registered representative with various registered brokers from 1987 through 2001. In 1993, the NASD censured O'Rourke and ordered him to pay a $5,000 fine for forging a client's signature based on her oral authorization to liquidate a security.

## OTHER REVELVANT ENTITIES

6. **Lighthouse** is a California limited partnership formed in 2005, with its principal place of business in Del Mar, California. Lighthouse is an unregistered pooled investment vehicle.

7. **Ameranth** is a Delaware corporation formed in 1996, with its principal place of business in San Diego, California. Ameranth is not a public company. Ameranth developed and licensed software for the hospitality, financial services, and healthcare industries.

## BACKGROUND

8. In 2005 and 2006, Ameranth conducted an unregistered offering of securities (the "Offering"). Pursuant to the Offering, Ameranth offered three million shares of Series D Preferred Stock, with a purchase price of two dollars per share. For each two dollars invested, the investor received one Series D Preferred Share ("Ameranth Stock") and a warrant to purchase a single share of Ameranth common stock. The offering memorandum states that the investment is speculative and high-risk, and that in the company's ten-year history it had experienced only cumulative net losses. The offering memorandum also disclosed that two placement agents, which were not identified, would receive a 10% success fee on the gross proceeds they raised.

9. Western Pacific was one of the two placement agents Ameranth retained for the Offering. As such, it received a success fee of 10% of the capital it raised. As a placement agent, Western Pacific collected investor questionnaires, responded to investor questions, and confirmed that investor subscriptions had been accepted so that the investor could wire money to the company. Western Pacific was also involved with developing the terms of the Offering. Western Pacific has never been registered as a

broker. O'Rourke, who offered and sold the Ameranth Stock on Western Pacific's behalf, has not been affiliated with a registered broker since 2001.

10. From June 2005 through November 2006, Western Pacific raised $4,827,445 for the Offering, and Ameranth paid Western Pacific $482,745 in success fees. O'Rourke, through meetings, telephone conversations, and emails, advised individual Western Pacific clients to invest in Ameranth. Of the $482,745 in success fees Western Pacific received, $250,495 was attributable to individual clients purchasing Ameranth Stock and $200,000 was attributable to O'Rourke investing $2 million of Lighthouse assets in Ameranth. The $482,745 in success fees Western Pacific received were substantial when compared to its management fees. In 2005 and 2006, Western Pacific earned management fees totaling $557,865.

11. In early 2005, O'Rourke formed Lighthouse. From mid-2005 through mid-2008, the Fund's general partner paid Western Pacific for management services provided to the Fund.

12. In June 2005, the Fund received its first investments from four Western Pacific clients who contributed $2,015,925. The Fund continued to raise money from additional investors, but the Fund's value never exceeded $3.1 million. The Fund's investors were all clients of Western Pacific. Following their respective investments in the Fund, all but one of the Fund's investors maintained separate accounts over which Western Pacific had discretionary authority. The client that did not maintain a separate account ("Client A") invested all of the money Western Pacific had previously managed for him in the Fund.

**WESTERN PACIFIC AND O'ROURKE FAILED TO DISCLOSE THAT WESTERN PACIFIC WOULD RECEIVE A 10% SUCCESS FEE**

13. Western Pacific and O'Rourke, with scienter, failed to disclose to each of their clients, prior to their participation in the Offering that Western Pacific would receive a 10% success fee. Such information would have been material to a reasonable investor in deciding whether to participate in the Offering.

14. None of the written disclosures available to the clients made clear that Western Pacific had a conflict of interest when advising them to purchase Ameranth Stock. Ameranth's offering documents disclosed that a success fee would be paid to two "placement agents," but did not identify the placement agents. Neither Western Pacific nor O'Rourke provided a separate, written disclosure regarding the firm's receipt of the success fee.

15. O'Rourke also raised approximately $2 million for Lighthouse from four advisory clients without disclosing his conflict of interest. Before raising funds for Lighthouse, Western Pacific agreed to purchase $2 million in Ameranth Stock. From June 17 through June 30, 2005, O'Rourke raised the first $2 million for the Fund from four Western Pacific clients. Immediately thereafter, O'Rourke transferred $2 million to Ameranth. As a result, Western Pacific received $200,000 in success fees due to

Lighthouse's $2 million investment. O'Rourke, with scienter, failed to disclose to any of the four Lighthouse investors that he intended to use their money to buy $2 million in Ameranth Stock and in so doing generate $200,000 in success fees for Western Pacific. Such information would have been material to a reasonable investor in deciding whether to invest in the Fund.

**O'ROURKE IMPROPERLY USED LIGHTHOUSE FUND ASSETS TO RESOLVE A DISPUTE WITH A WESTERN PACIFIC CLIENT**

16. In 2006, a dispute arose between O'Rourke and a client ("Client B") regarding the client's $800,000 investment in the Offering, for which Western Pacific had received $80,000 in success fees. Client B had money invested with O'Rourke, had referred business to O'Rourke, and had promised that he would substantially increase the amount invested with O'Rourke.

17. Before the Offering closed, Client B told O'Rourke that he no longer wanted to invest in Ameranth and requested the return of his money. Ameranth, however, insisted that Client B had committed to the $800,000 investment. Ultimately, O'Rourke used Lighthouse to pay back Client B—increasing the Fund's Ameranth position by 40%. Specifically, in October 2006, O'Rourke caused Lighthouse to purchase $300,000 of Ameranth Stock from Client B; in March 2007, O'Rourke allowed Client B to contribute his remaining $500,000 of Ameranth Stock to the Fund in exchange for a partnership interest in the Fund; and in late 2008, after Client B had requested full redemption from the Fund, O'Rourke paid Client B $410,000 as a complete redemption of his investment in Lighthouse.

18. O'Rourke's $410,000 distribution to Client B improperly preceded the completion of an earlier redemption request from another Lighthouse investor and Western Pacific client ("Client C"). More than a year before Client B made his redemption request, Client C had requested a full redemption of his $522,425 investment in the Fund, which was valued at $575,342 as of September 30, 2007. O'Rourke and Client C agreed that he would receive his redemption in four quarterly payments and that he would be fully redeemed within a year. O'Rourke failed to make the redemption payments to Client C as promised and ultimately failed to provide Client C a full redemption, instead providing Client B with a full redemption. In late 2007 and early 2008, O'Rourke made two payments to Client C totaling $300,000, leaving approximately $222,425 remaining to be redeemed. O'Rourke promised the next payment to Client C in September 2008. Instead of making the promised payment to the Client C, however, O'Rourke paid Client B the $410,000. While O'Rourke made an additional $100,000 payment to Client C in early 2009, approximately $122,425 remains outstanding.

**O'ROURKE REPEATEDLY MISREPRESENTED THE FUND'S LIQUIDITY TO LIGHTHOUSE INVESTORS**

19. From 2005 to at least 2008, O'Rourke lied when Fund investors inquired about the Fund's liquidity. O'Rourke repeatedly misrepresented that the Fund was liquid, and at times stated that the Fund's illiquid investments (including Ameranth)

comprised only about 25% of Fund assets. Specifically, O'Rourke sent the following emails from his Western Pacific email account:

- On June 6, 2005, O'Rourke emailed Client A regarding the Fund, stating that "your account will have exactly the same liquidity availability that you currently enjoy at Waterhouse." At the end of June, O'Rourke invested 99% of the Fund's assets in Ameranth.

- On October 12, 2005, in response to Client A's email notifying O'Rourke that there were "liquidity requirements" for a line of credit he had, O'Rourke told Client A, who had invested $1 million in the Fund, that "[a]s far as liquidity is concerned, we consider [Lighthouse] to be a very liquid investment, but the subscription agreement provides for some advance notification as the fund stays pretty much fully invested at all times . . . and we ask for some time to liquidate some of the investments to provide for any requested redemptions."

- On February 19, 2007, O'Rourke emailed Client A that "[w]e do hold some 'illiquid' positions as you know. . . . The percent of illiquid investments is about 25%."

- On March 8, 2007, in response to Client A's request for further confirmation regarding the Fund's illiquid positions, O'Rourke stated that "[t]he percentage of illiquid investments is 'about 25%' . . .," that the Fund's size was about "$7 million," and that as a result $1.55 million was invested in Ameranth and $200,000 was invested in another illiquid investment. Less than a month later, however, O'Rourke emailed the Fund's administrator that as of the end of March 2007, the Fund held $2,665,000 worth of Ameranth stock. The Fund's total assets at that time were less than $3 million.

- In February 2008, O'Rourke and a client who had invested $150,000 in the Fund ("Client D"), exchanged emails regarding the Fund's liquidity. Among other things, Client D asked O'Rourke to confirm that the two illiquid investments in the Fund made up only "25% of the portfolio?" On February 2, 2008, O'Rourke responded to Client D without clarifying that the illiquid investments actually comprised almost all of Lighthouse's assets. Two days later, when inquiring as to whether "[i]f needed, can some portion of funds be withdrawn," Client D specifically asked O'Rourke whether there was "any liquidity to investments in the Lighthouse Fund." In response, O'Rourke stated that "[o]ther than the two companies that you know of . . . all of the other investments are liquid." Again, O'Rourke did not clarify that almost all of the Fund's assets were in the two illiquid investments, misleading Client D into believing that there was sufficient liquidity in the Fund to accommodate withdrawals.

## VIOLATIONS

20. As a result of the conduct described above, Respondent willfully violated Sections 206(1) and 206(2) of the Advisers Act by employing devices, schemes or artifices to defraud clients, and engaging in transactions, practices or courses of business that defrauded clients or prospective clients.

21. As a result of the conduct described above, Respondent willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-8 promulgated thereunder, which prohibits fraudulent conduct by advisers to "pooled investment vehicles" with respect to investors or prospective investors in those pools.

22. As a result of the conduct described above, Respondent willfully violated Section 15(a)(1) of the Exchange Act, which prohibits any entity from making use of the mails or any means or instrumentality of interstate commerce to effect transactions in securities without registering as a broker-dealer or, if a natural person, without being associated with broker-dealer.

23. As a result of the conduct described above, Respondent willfully violated Section 206(3) of the Advisers Act, which prohibits any investment adviser, when acting as broker for a person other than its client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which it is acting and obtaining the consent of the client to such transaction.

## IV.

In view of the foregoing, the Commission deems it appropriate, in the public interest to impose the sanctions agreed to in Respondent O'Rourke's Offer.

Accordingly, pursuant to Section 15(b) and 21C of the Exchange Act, Sections 203(f) and 203(k) of the Advisers Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent O'Rourke cease and desist from committing or causing any violations and any future violations Section 15(a) of the Exchange Act, and Sections 206(1), 206(2), 206(3), and 206(4) of the Advisers Act and Rules 206(4)-8 promulgated thereunder.

B. Respondent O'Rourke be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization;

prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock,

with the right to apply for reentry after two (2) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

C. Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

D. Respondent shall, within 10 days of the entry of this Order, pay disgorgement of $482,745 and prejudgment interest of $169,195.85 to the United States Treasury. O'Rourke and Western Pacific shall be jointly and severally liable for these amounts. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Western Pacific as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Bruce Karpati, Co-Chief, Asset Management Unit, New York Regional Office, Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, NY 10281-1022.

E. Respondent shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of $130,000 to the United States Treasury. O'Rourke and Western Pacific shall be jointly and severally liable for this amount. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
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HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Western Pacific as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Bruce Karpati, Co-Chief, Asset Management Unit, New York Regional Office, Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, NY 10281-1022.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Commissioner Paredes
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67891 / September 19, 2012**

**INVESTMENT ADVISERS ACT OF 1940**
**Release No. 3470 / September 19, 2012**

**INVESTMENT COMPANY ACT OF 1940**
**Release No. 30208 / September 19, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-14619**

| In the Matter of<br><br>WESTERN PACIFIC CAPITAL MANAGEMENT, LLC AND KEVIN JAMES O'ROURKE,<br><br>Respondents. | ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, SECTIONS 203(e) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940 AS TO WESTERN PACIFIC CAPITAL MANAGEMENT, LLC |
|---|---|

## I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest to enter this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Western Pacific Capital Management, LLC ("Respondent" or "Western Pacific").

## II.

Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order pursuant to Sections 15(b) and 21C the Securities Exchange Act of 1934, Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, and Sections 9(b) of the Investment Company Act of 1940 as to Respondent ("Order"), as set forth below.

## III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that

## SUMMARY

1. This proceeding involved misconduct by Western Pacific Capital Management, LLC ("Western Pacific"), a registered investment adviser, and its sole owner and principal, Kevin James O'Rourke ("O'Rourke"), for failing to disclose a conflict of interest, misusing client assets to benefit the adviser, and repeatedly making material misrepresentations to clients.

2. In 2005 and 2006, Western Pacific served as a placement agent for Ameranth, Inc. ("Ameranth") for an unregistered offering of Ameranth stock. In exchange, Western Pacific received a success fee of 10% of the capital it raised. At the time, neither Western Pacific nor O'Rourke were registered brokers or affiliated with a registered broker. O'Rourke urged many Western Pacific clients to invest in Ameranth without disclosing that Western Pacific would financially benefit from their investments. O'Rourke also advised clients to invest in a hedge fund, the Lighthouse Fund, LP ("Lighthouse" or the "Fund"), without disclosing that the Fund would initially invest primarily in Ameranth, for which Western Pacific would receive a 10% success fee. In all, Western Pacific earned $482,745 in success fees as a placement agent for Ameranth.

3. Between 2006 and 2008, O'Rourke misused Fund assets and lied to his clients who invested in the Fund. To resolve a dispute with a client who no longer wanted his $800,000 of Ameranth stock, O'Rourke caused the Fund to buy some of the stock and permitted the client to use the remainder of the stock to fund the client's investment in the Fund. O'Rourke ultimately redeemed the client's interest in the Fund for cash. In addition, in response to client inquiries regarding the Fund's liquidity, O'Rourke

[1] The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

repeatedly misstated that the Fund was liquid or had less than 25% of its holdings in illiquid securities, when in fact approximately 90% of the Fund's assets were illiquid.

## RESPONDENTS

4. **Western Pacific** is a California limited liability corporation with its principal place of business in Del Mar, California. Western Pacific registered with the Commission as an investment adviser effective May 13, 2009 and has approximately $75 million in assets under management in 250 accounts. From June 2004 until it registered with the Commission, Western Pacific was an investment adviser registered with the State of California.

5. **O'Rourke** is Western Pacific's founder, president, and sole control person. At all relevant times, O'Rourke was responsible for the management of Western Pacific's business. O'Rourke was a registered representative with various registered brokers from 1987 through 2001. In 1993, the NASD censured O'Rourke and ordered him to pay a $5,000 fine for forging a client's signature based on her oral authorization to liquidate a security.

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6. **Lighthouse** is a California limited partnership formed in 2005, with its principal place of business in Del Mar, California. Lighthouse is an unregistered pooled investment vehicle.

7. **Ameranth** is a Delaware corporation formed in 1996, with its principal place of business in San Diego, California. Ameranth is not a public company. Ameranth developed and licensed software for the hospitality, financial services, and healthcare industries.

## BACKGROUND

8. In 2005 and 2006, Ameranth conducted an unregistered offering of securities (the "Offering"). Pursuant to the Offering, Ameranth offered three million shares of Series D Preferred Stock, with a purchase price of two dollars per share. For each two dollars invested, the investor received one Series D Preferred Share ("Ameranth Stock") and a warrant to purchase a single share of Ameranth common stock. The offering memorandum states that the investment is speculative and high-risk, and that in the company's ten-year history it had experienced only cumulative net losses. The offering memorandum also disclosed that two placement agents, which were not identified, would receive a 10% success fee on the gross proceeds they raised.

9. Western Pacific was one of the two placement agents Ameranth retained for the Offering. As such, it received a success fee of 10% of the capital it raised. As a placement agent, Western Pacific collected investor questionnaires, responded to investor questions, and confirmed that investor subscriptions had been accepted so that the investor could wire money to the company. Western Pacific was also involved with developing the terms of the Offering. Western Pacific has never been registered as a

broker. O'Rourke, who offered and sold the Ameranth Stock on Western Pacific's behalf, has not been affiliated with a registered broker since 2001.

10. From June 2005 through November 2006, Western Pacific raised $4,827,445 for the Offering, and Ameranth paid Western Pacific $482,745 in success fees. O'Rourke, through meetings, telephone conversations, and emails, advised individual Western Pacific clients to invest in Ameranth. Of the $482,745 in success fees Western Pacific received, $250,495 was attributable to individual clients purchasing Ameranth Stock and $200,000 was attributable to O'Rourke investing $2 million of Lighthouse assets in Ameranth. The $482,745 in success fees Western Pacific received were substantial when compared to its management fees. In 2005 and 2006, Western Pacific earned management fees totaling $557,865.

11. In early 2005, O'Rourke formed Lighthouse. From mid-2005 through mid-2008, the Fund's general partner paid Western Pacific for management services provided to the Fund.

12. In June 2005, the Fund received its first investments from four Western Pacific clients who contributed $2,015,925. The Fund continued to raise money from additional investors, but the Fund's value never exceeded $3.1 million. The Fund's investors were all clients of Western Pacific. Following their respective investments in the Fund, all but one of the Fund's investors maintained separate accounts over which Western Pacific had discretionary authority. The client that did not maintain a separate account ("Client A") invested all of the money Western Pacific had previously managed for him in the Fund.

**WESTERN PACIFIC AND O'ROURKE FAILED TO DISCLOSE THAT WESTERN PACIFIC WOULD RECEIVE A 10% SUCCESS FEE**

13. Western Pacific and O'Rourke, with scienter, failed to disclose to each of their clients, prior to their participation in the Offering that Western Pacific would receive a 10% success fee. Such information would have been material to a reasonable investor in deciding whether to participate in the Offering.

14. None of the written disclosures available to the clients made clear that Western Pacific had a conflict of interest when advising them to purchase Ameranth Stock. Ameranth's offering documents disclosed that a success fee would be paid to two "placement agents," but did not identify the placement agents. Neither Western Pacific nor O'Rourke provided a separate, written disclosure regarding the firm's receipt of the success fee.

15. O'Rourke also raised approximately $2 million for Lighthouse from four advisory clients without disclosing his conflict of interest. Before raising funds for Lighthouse, Western Pacific agreed to purchase $2 million in Ameranth Stock. From June 17 through June 30, 2005, O'Rourke raised the first $2 million for the Fund from four Western Pacific clients. Immediately thereafter, O'Rourke transferred $2 million to Ameranth. As a result, Western Pacific received $200,000 in success fees due to

Lighthouse's $2 million investment. O'Rourke, with scienter, failed to disclose to any of the four Lighthouse investors that he intended to use their money to buy $2 million in Ameranth Stock and in so doing generate $200,000 in success fees for Western Pacific. Such information would have been material to a reasonable investor in deciding whether to invest in the Fund.

**O'ROURKE IMPROPERLY USED LIGHTHOUSE FUND ASSETS TO RESOLVE A DISPUTE WITH A WESTERN PACIFIC CLIENT**

16. In 2006, a dispute arose between O'Rourke and a client ("Client B") regarding the client's $800,000 investment in the Offering, for which Western Pacific had received $80,000 in success fees. Client B had money invested with O'Rourke, had referred business to O'Rourke, and had promised that he would substantially increase the amount invested with O'Rourke.

17. Before the Offering closed, Client B told O'Rourke that he no longer wanted to invest in Ameranth and requested the return of his money. Ameranth, however, insisted that Client B had committed to the $800,000 investment. Ultimately, O'Rourke used Lighthouse to pay back Client B—increasing the Fund's Ameranth position by 40%. Specifically, in October 2006, O'Rourke caused Lighthouse to purchase $300,000 of Ameranth Stock from Client B; in March 2007, O'Rourke allowed Client B to contribute his remaining $500,000 of Ameranth Stock to the Fund in exchange for a partnership interest in the Fund; and in late 2008, after Client B had requested full redemption from the Fund, O'Rourke paid Client B $410,000 as a complete redemption of his investment in Lighthouse.

18. O'Rourke's $410,000 distribution to Client B improperly preceded the completion of an earlier redemption request from another Lighthouse investor and Western Pacific client ("Client C"). More than a year before Client B made his redemption request, Client C had requested a full redemption of his $522,425 investment in the Fund, which was valued at $575,342 as of September 30, 2007. O'Rourke and Client C agreed that he would receive his redemption in four quarterly payments and that he would be fully redeemed within a year. O'Rourke failed to make the redemption payments to Client C as promised and ultimately failed to provide Client C a full redemption, instead providing Client B with a full redemption. In late 2007 and early 2008, O'Rourke made two payments to Client C totaling $300,000, leaving approximately $222,425 remaining to be redeemed. O'Rourke promised the next payment to Client C in September 2008. Instead of making the promised payment to the Client C, however, O'Rourke paid Client B the $410,000. While O'Rourke made an additional $100,000 payment to Client C in early 2009, approximately $122,425 remains outstanding.

## O'ROURKE REPEATEDLY MISREPRESENTED THE FUND'S LIQUIDITY TO LIGHTHOUSE INVESTORS

19. From 2005 to at least 2008, O'Rourke lied when Fund investors inquired about the Fund's liquidity. O'Rourke repeatedly misrepresented that the Fund was liquid, and at times stated that the Fund's illiquid investments (including Ameranth) comprised only about 25% of Fund assets. Specifically, O'Rourke sent the following emails from his Western Pacific email account:

- On June 6, 2005, O'Rourke emailed Client A regarding the Fund, stating that "your account will have <u>exactly</u> the <u>same</u> <u>liquidity</u> availability that you currently enjoy at Waterhouse." At the end of June, O'Rourke invested 99% of the Fund's assets in Ameranth.

- On October 12, 2005, in response to Client A's email notifying O'Rourke that there were "liquidity requirements" for a line of credit he had, O'Rourke told Client A, who had invested $1 million in the Fund, that "[a]s far as liquidity is concerned, we consider [Lighthouse] to be a very liquid investment, but the subscription agreement provides for some advance notification as the fund stays pretty much fully invested at all times . . . and we ask for some time to liquidate some of the investments to provide for any requested redemptions."

- On February 19, 2007, O'Rourke emailed Client A that "[w]e do hold some 'illiquid' positions as you know. . . . The percent of illiquid investments is about 25%."

- On March 8, 2007, in response to Client A's request for further confirmation regarding the Fund's illiquid positions, O'Rourke stated that "[t]he percentage of illiquid investments is 'about 25%' . . .," that the Fund's size was about "$7 million," and that as a result $1.55 million was invested in Ameranth and $200,000 was invested in another illiquid investment. Less than a month later, however, O'Rourke emailed the Fund's administrator that as of the end of March 2007, the Fund held $2,665,000 worth of Ameranth stock. The Fund's total assets at that time were less than $3 million.

- In February 2008, O'Rourke and a client who had invested $150,000 in the Fund ("Client D"), exchanged emails regarding the Fund's liquidity. Among other things, Client D asked O'Rourke to confirm that the two illiquid investments in the Fund made up only "25% of the portfolio?" On February 2, 2008, O'Rourke responded to Client D without clarifying that the illiquid investments actually comprised almost all of Lighthouse's assets. Two days later, when inquiring as to whether "[i]f needed, can some portion of funds be withdrawn," Client D specifically asked O'Rourke whether there was "any liquidity to investments in the Lighthouse Fund." In response, O'Rourke stated that "[o]ther than the two companies that you know of . . . all of the other investments are liquid." Again, O'Rourke did not clarify that almost all of the Fund's assets were in the two illiquid investments, misleading Client D into believing that there was sufficient liquidity in the Fund to accommodate withdrawals.

## VIOLATIONS

20. As a result of the conduct described above, Respondent Western Pacific willfully violated Sections 206(1) and 206(2) of the Advisers Act by employing devices, schemes or artifices to defraud clients, and engaging in transactions, practices or courses of business that defrauded clients or prospective clients.

21. As a result of the conduct described above, Respondent Western Pacific willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-8 promulgated thereunder, which prohibits fraudulent conduct by advisers to "pooled investment vehicles" with respect to investors or prospective investors in those pools.

22. As a result of the conduct described above, Respondent Western Pacific willfully violated Section 15(a)(1) of the Exchange Act, which prohibits any entity from making use of the mails or any means or instrumentality of interstate commerce to effect transactions in securities without registering as a broker-dealer or, if a natural person, without being associated with broker-dealer.

23. As a result of the conduct described above, Respondent Western Pacific willfully violated Section 206(3) of the Advisers Act, which prohibits any investment adviser, when acting as broker for a person other than its client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which it is acting and obtaining the consent of the client to such transaction.

## IV.

In view of the foregoing, the Commission deems it appropriate, in the public interest to impose the sanctions agreed to in Respondent Western Pacific's Offer.

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act, Sections 203(e) and 203(k) of the Advisers Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent Western Pacific shall cease and desist from committing or causing any violations and any future violations of Section 15(a) of the Exchange Act and Sections 206(1), 206(2), 206(3), and 206(4) of the Advisers Act and Rules 206(4)-8 promulgated thereunder.

B. The registration of Respondent Western Pacific as an investment adviser be, and hereby is, revoked.

C. Respondent shall, within 10 days of the entry of this Order, pay disgorgement of $482,745 and prejudgment interest of $169,195.85 to the United States Treasury. O'Rourke and Western Pacific shall be jointly and severally liable for these amounts. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Western Pacific as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Bruce Karpati, Co-Chief, Asset Management Unit, New York Regional Office, Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, NY 10281-1022.

D. Respondent shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of $130,000 to the United States Treasury. O'Rourke and Western Pacific shall be jointly and severally liable for this amount. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch

HQ Bldg., Room 181, AMZ-341
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Payments by check or money order must be accompanied by a cover letter identifying Western Pacific as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Bruce Karpati, Co-Chief, Asset Management Unit, New York Regional Office, Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, NY 10281-1022..

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
not participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 67900 / September 20, 2012

ACCOUNTING AND AUDITING ENFORCEMENT
Rel. No. 3407 / September 20, 2012

Admin. Proc. File No. 3-14323

In the Matter of

MICHAEL C. PATTISON, CPA
c/o Patrick J. Richard
James H. Vorhis
Nossaman LLP
50 California Street, 34th Floor
San Francisco, CA 94111

OPINION OF THE COMMISSION

RULE 102(e) PROCEEDING

**Grounds for Remedial Action**

**Civil Injunction**

Certified public accountant was permanently enjoined from violating internal accounting controls and books and records provisions of the federal securities laws. *Held*, it is in the public interest to permanently disqualify respondent from appearing or practicing before the Commission as an accountant.

APPEARANCES:

*Patrick J. Richard* and *James H. Vorhis*, of Nossaman LLP, for Michael C. Pattison, CPA.

*Marc J. Fagel*, *Susan F. LaMarca*, and *Robert L. Tashjian*, for the Division of Enforcement.

Appeal filed: October 21, 2011
Last brief received: January 26, 2012

I.

Michael C. Pattison, a certified public accountant ("CPA") and former Controller of Embarcadero Technologies, Inc. ("Embarcadero") from January 2000 through July 2005, appeals from an initial decision of an administrative law judge.[1] The law judge decided this matter based on cross-motions for summary disposition, granting the Division's motion and denying Pattison's motion. The law judge found that Pattison was enjoined from violating internal accounting controls and books and records provisions of the federal securities laws and permanently denied him the privilege of appearing or practicing before the Commission pursuant to Rule 102(e)(3) of the Commission's Rules of Practice.[2] We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

## A. District Court Injunctive Proceeding

On September 24, 2010, following a civil trial in the United States District Court for the Northern District of California, a jury found that Pattison violated Section 13(b)(5) of the Securities Exchange Act of 1934[3] and Exchange Act Rule 13b2-1[4] in connection with Pattison's involvement in backdating stock options.[5] On June 9, 2011, the District Court issued a corrected order finding that the jury's verdict was "supported by substantial evidence in the record," and

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[1] *Michael C. Pattison, CPA*, Initial Decision Rel. No. 434 (Sep. 29, 2011), 102 SEC Docket 46456.

[2] 17 C.F.R. § 201.102(e)(3).

[3] Exchange Act Section 13(b)(5) provides that "[n]o person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2)." 15 U.S.C. § 78m(b)(5). Section 13(b)(2)(A) and (B), respectively, require that every issuer subject to the statute make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the issuer's assets, and devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions and assets are handled as prescribed in the statute. 15 U.S.C. §§ 78m(b)(2)(A) and (B).

[4] Exchange Act Rule 13b2-1 provides that "[n]o person shall directly or indirectly, falsify or cause to be falsified, any book, record or account" subject to Section 13(b)(2)(A). 17 C.F.R. § 240.13b2-1. *See also supra* note 3.

[5] The jury did not find Pattison liable on claims that he had violated or aided and abetted violations of antifraud provisions or aided and abetted violations of reporting provisions of the federal securities laws.

denying Pattison's motions for judgment as a matter of law and a new trial.[6] On that same date, the District Court entered a separate corrected final judgment against Pattison, permanently enjoining him from violating Exchange Act Section 13(b)(5) and Exchange Act Rule 13b2-1.[7] The District Court ordered Pattison to disgorge $74,446 and pay a civil money penalty of $50,000. Pattison has appealed the District Court's final judgment to the United States Court of Appeals for the Ninth Circuit.[8] That appeal is pending. The District Court's findings are summarized below.

**1. Embarcadero and its Employee Stock Option Policy**

Embarcadero is a software company headquartered in San Francisco, California. In April 2000, Embarcadero held an initial public offering and remained a publicly-traded company through June 2007. From late 2000 until the third quarter of 2004, Embarcadero's chief executive officer ("CEO"), Stephen Wong, granted stock options to employees pursuant to authorization from the company's Compensation Committee.

A stock option "is the right to purchase a share of stock from a company at a fixed price, referred to as the 'strike price,' on or after a specified vesting date."[9] A recipient who exercises the option by purchasing stock from the company at the strike price is then free to sell the same stock at its current market price.[10] Companies generally grant stock options with a strike price

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6 *SEC v. Michael C. Pattison,* Corrected Order Denying Plaintiff's Motion to Strike; Denying Defendant's Motion for Judgment as a Matter of Law; and Denying Defendant's Motion for a New Trial, No. C-08-4238 EMC (N.D. Cal. June 9, 2011) (amending order issued on Feb. 22, 2011).

7 *SEC v. Michael C. Pattison,* Corrected Order and Judgment Granting Motion for Entry of Final Judgment, No. C-08-4238 EMC (N.D. Cal. June 9, 2011) (amending order issued on Feb. 23, 2011).

8 *SEC v. Raj P. Sabhlok and Michael C. Pattison,* No. C-08-4238 EMC (N.D. Cal. July 28, 2011). Sabhlok, the other party in the complaint, was Embarcadero's Chief Financial Officer during the period at issue and consented to an injunction from violating or aiding and abetting the violation of various reporting, recordkeeping, internal controls, and antifraud provisions of the federal securities laws, a $200,000 civil money penalty, and a $300,000 forfeiture under Section 304(a) of the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7243(a). *SEC v. Raj P. Sabhlok and Michael C. Pattison,* No. C-08-4238 CRB (N.D. Cal. Apr. 21, 2010).

9 *United States v. Reyes,* 577 F.3d 1069, 1073 (9th Cir. 2009).

10 *SEC v. Jasper,* 678 F.3d 1116, 1119 (9th Cir. 2012) (citation omitted).

equal to the market price on the date the stock option is granted.[11] "Backdating" stock options refers to "the practice of recording an option's grant date and strike price retrospectively."[12] Where the backdating results in a strike price that is lower than the fair market value of the stock on the date of the actual grant, the option is referred to as "in the money" because it has immediate positive value on that date.[13]

Pattison, who had been a practicing accountant since 1987, was the only licensed CPA in Embarcadero's Finance Department and served as the company's Controller from January 2000 through July 2005. As Controller, Pattison oversaw Embarcadero's day-to-day accounting functions and was responsible for communicating with auditors and preparing financial statements that were filed with the Commission.[14] During that time, he was also responsible for "recording all equity account activity," including activity related to the issuance of stock options to employees.

Embarcadero's stock option plan, which was approved by the Board of Directors and stockholders in February 2000, governed the manner in which the company issued and accounted for stock options. In that plan, Embarcadero adopted an accounting convention promulgated in 1972 referred to as the Accounting Principles Board Opinion No. 25 ("APB 25"). Under APB 25, a company granting an in-the-money stock option is required "to record an expense for the 'profit,' treated as compensation to the option recipient over the [option's] vesting period."[15] In other words, the benefit to the option recipient is recorded on the company's corporate books and

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[11] *Reyes*, 577 F.3d at 1073.

[12] *Id.*; *see also New Mexico State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1093 (9th Cir. 2011) ("Backdating of options occurs when a company's officers or directors responsible for administering the [company's] stock option plan monitor the price of the company stock and then award a stock option grant as of a certain date in the past when the share price was lowest, thus locking in the largest possible gain for the option recipient.").

[13] *See SEC v. Berry*, 580 F. Supp. 2d 911, 913 n.2 (N.D. Cal. 2008). If a stock option is issued at a strike price equal to the fair market value of the stock on the date of the actual grant, then the option is "at the money," whether or not backdating has occurred. *See SEC v. Reyes*, 491 F. Supp. 2d 906, 908 (N.D. Cal. 2007).

[14] Because the company's stock was registered with the Commission pursuant to Exchange Act Section 12(g) and traded on Nasdaq, Exchange Act Section 13 required Embarcadero to file with the Commission annual reports (Form 10-K) that included audited financial statements and quarterly reports (Form 10-Q). 15 U.S.C. § 78m.

[15] *New Mexico State Inv. Council*, 641 F.3d at 1093, 1096.

in the company's financial statements as a non-cash compensation expense.[16] Otherwise, "the company's reported net income is overstated for each of the years the options vest, potentially deceiving the market and investors."[17] Pattison knew that under APB 25 "in-the-money" options had to be reported as a compensation expense.

Although Embarcadero adopted a method of accounting for in-the-money stock options, Pattison knew that the company nevertheless understood that it had not and would not grant that type of stock option. For example, Embarcadero's legal counsel told Pattison that the company would not backdate stock options. Pattison drafted and distributed a July 1, 2002 internal controls memorandum explaining that "since the IPO[,] no option has ever been issued at below fair market value. Therefore, there have been no additional deferred comp charges. The Company does not intend to issue below fair market value options in the future." Pattison authored another internal controls memorandum, dated March 14, 2003, in which he stated that there would be no stock option grants below fair market value. Pattison also knew that, consistent with the memoranda and the advice provided by Embarcadero's legal counsel, Embarcadero publicly stated that it had not granted in-the-money stock options. For example, Embarcadero stated in Forms 10-K covering fiscal years 2003 and 2002 that it adopted APB 25, and that "[s]ince the date of the initial public offering, all stock options grants made during the year were at fair market value, which is defined as the closing share price on the day prior to the option grant date."

### 2. Pattison Did Not Properly Record Backdated Stock Option Grants

From late 2000 through 2004, Wong nonetheless granted in-the-money stock options, and Pattison did not properly record these transactions. Near the end of each quarter, Pattison compiled and sent to Wong a proposed list of employees who were to receive in-the-money stock options. These stock options were backdated, *i.e.*, the date of the strike price on the stock option was earlier than the date that Wong approved the grant.[18] After receiving approval from Wong, Pattison sent the information to E*Trade, which maintained Embarcadero's stock options data, where he entered the backdated information instead of the date on which Wong approved the grant. E*Trade then entered the backdated information provided by Pattison into a database used to track Embarcadero's stock option grants. At Pattison's direction, an administrative assistant prepared stock option agreements for Embarcadero's employees. The assistant relied on the backdated information in the E*Trade database to prepare the agreement.

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16 *Reyes*, 577 F.3d at 1073.

17 *New Mexico State Inv. Council*, 641 F.3d at 1093; *see also Jasper*, 678 F.3d at 1120.

18 *See supra* notes 12 & 13 and accompanying text.

Embarcadero's auditors reviewed the company's stock option activity each quarter. In connection with that review, Pattison provided the auditors with quarterly summaries of stock option activity. Although it was important to the auditors to know whether stock options were backdated in connection with their review of the company's financial statements and disclosures, neither the quarterly summaries that Pattison prepared for them nor Pattison himself informed the auditors that stock options were backdated.

At Wong's instruction, Pattison also "parked" stock options, *i.e.*, reserved stock options for later use by purportedly having assigned them to an employee. For example, in April 2002, Pattison represented through the E*Trade template and in a quarterly summary provided to the auditors that a purported employee named Kent Scantland received 75,000 stock options. Pattison knew, however, that Scantland was no longer an employee and that the stock options were not intended for him. When Pattison asked Wong what to do about "the 75K place marker to Kent Scantland" and informed him that the auditors "tend[ed] to spend a fair deal of time on the options," Wong replied, "If you can wipe it, then we should do so since it is out of the money." After the auditors tested the Scantland grant as part of their review, they recorded in their workpapers Pattison's explanation that the Scantland grant had been an error and recorded in the wrong place under the wrong name. Pattison did not tell the auditors that Wong instructed him to "sock away" stock options or to "wipe" the Scantland grant.

Pattison parked stock options on a second occasion. In May 2004, Embarcadero's Vice President of Human Resources asked to speak with Pattison about an allegation that he "put some options in an employee's account for another employee." Pattison admitted that he did so, to which the vice president responded that, "It is just wrong on so many levels."

In 2006, Embarcadero's Audit Committee retained a law firm to conduct an internal investigation after receiving a report from the company's auditors about past stock option grants. Embarcadero's Board of Directors formed a "Special Committee" to analyze the company's past stock options practices, "including all option grants from the Company's initial public offering in April 2000 to August 2006 . . . ." The Special Committee concluded that "about half" of the "1,086 individual stock option grants on 119 different dates, representing more than 6.5 million shares of common stock" "were misdated and mispriced from the time of the initial public offering until March 2005." On December 18, 2006, Embarcadero issued a press release announcing the Audit Committee's conclusion that all of the company's previously issued financial statements should not be relied upon. Embarcadero thereafter filed a restatement of certain portions of its financial statements variously covering fiscal years 2006 through 2002. The restatement explained that as a result of the revised accounting for the options in question, Embarcadero's stock-based compensation expense figures from the time of the initial public offering in April 2000 through December 31, 2005 had been understated by a total of $14.6 million.

### 3. District Court Judgment

The District Court found that

> [t]he weight of the evidence established that [Pattison] systematically backdated stock option grants on a regular basis, misrepresented the dates of actual approval by CEO Wong, failed to affirmatively disclose the practice to the Board and . . . auditors, and failed to insure that an accounting expense was taken for the . . . 'in-the-money' grants he facilitated. The weight of the evidence also shows that he thereby circumvented internal controls against backdated options.

The District Court concluded that the "jury found that [Pattison] acted knowingly when he falsified records and/or circumvented internal controls to make it appear that no stock option grants were backdated and below fair market value." The District Court enjoined Pattison from violating Exchange Act Section 13(b)(5) and Exchange Act Rule 13b2-1, and ordered him to disgorge $74,446 and pay a civil money penalty of $50,000.

## B. Administrative Proceedings

On April 5, 2011, based on the injunction, we issued an Order Instituting Proceedings pursuant to Rule of Practice 102(e)(3)(i) and temporarily suspended Pattison from appearing or practicing before the Commission.[19] Pattison filed a timely petition to lift the temporary suspension, which the Division of Enforcement opposed.[20] We denied Pattison's petition and directed that a hearing be held before a law judge.[21] After a prehearing conference, Pattison and the Division each moved for summary disposition pursuant to Rule 250 of the Commission's Rules of Practice.[22] On September 29, 2011, an administrative law judge found there was no genuine issue with regard to any material fact and granted the Division's motion pursuant to Rule 250. The law judge found that the District Court "permanently enjoined Pattison from violating federal securities laws, by reason of his misconduct, in an action brought by the Commission." In determining the appropriate sanction, the law judge found it "in the public interest to permanently disqualify Pattison from appearing or practicing before the Commission." This appeal followed.

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19 17 C.F.R. § 201.102(e)(3)(i).

20 *See* 17 C.F.R. § 201.102(e)(3)(ii).

21 *See* 17 C.F.R. § 201.102(e)(3)(iii).

22 17 C.F.R. § 201.250.

**III.**

Rule of Practice 102(e) has been the primary tool available to the Commission to preserve the integrity of its processes and ensure the competence of the professionals who appear and practice before it.[23] The Commission adopted the rule as a "means to ensure that those professionals, on whom the Commission relies heavily in the performance of its statutory duties, perform their tasks diligently and with a reasonable degree of competence."[24] The rule generally enables the Commission to initiate administrative disciplinary proceedings against professionals who do not possess the requisite qualifications to represent others, lack character or integrity, engage in unethical or improper professional conduct, have violated or have been enjoined from violating or aiding and abetting the violation of the federal securities laws, have had their license to practice revoked or suspended, or have been convicted of a felony or misdemeanor involving moral turpitude.[25] The sanctions available in such proceedings include a censure, temporary suspension, and permanent disqualification from practice before the Commission.[26]

In a proceeding under Rule 102(e)(3), the Division has the burden to show that the petitioner has been permanently enjoined by a court of competent jurisdiction, by reason of his misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of the federal securities laws, or has been found by a court of competent jurisdiction in an action brought by the Commission, or by the Commission in an administrative proceeding, to

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23 *Chris G. Gunderson, Esq.*, Exchange Act Rel. No. 61234 (Dec. 23, 2009), 97 SEC Docket 24040, 24046 (citing *Marrie v. SEC*, 374 F.3d 1196, 1200 (D.C. Cir. 2004) (stating that Rule of Practice 102(e) "is directed at protecting the integrity of the Commission's processes, as well as the confidence of the investing public in the integrity of the financial reporting process"); *Touche Ross & Co. v. SEC*, 609 F.2d 570, 582 (2d Cir. 1979) (stating that Rule of Practice 2(e), the predecessor to Rule of Practice 102(e), "represents an attempt by the Commission to protect the integrity of its own processes," and upholding the validity of Rule of Practice 2(e) as "reasonably related" to the purposes of the federal securities laws).

24 *Gunderson*, 97 SEC Docket at 24046 (citing *Touche Ross*, 609 F.2d at 582).

25 *See* 17 C.F.R. §§ 201.102(e)(1)-(3).

26 *See* 17 C.F.R. §§ 201.102(e)(1), 201.102(e)(3)(iv). According to Rule of Practice 102(f), "practicing before the Commission" includes, but is not be limited to, "[t]ransacting any business with the Commission," and "[t]he preparation of any statement, opinion or other paper by any attorney, accountant, engineer or other professional or expert, filed with the Commission in any registration statement, notification, application, report or other document with the consent of such attorney, accountant, engineer or other professional or expert." 17 C.F.R. § 201.102(f).

have violated or aided and abetted the violation of the federal securities laws.[27] Once that burden has been met, the burden shifts to the petitioner to show cause why he should not be censured or temporarily or permanently disqualified from appearing and practicing before the Commission.[28] A petitioner in a Rule 102(e)(3) proceeding may not collaterally attack any finding made against him or fact admitted by him the in the underlying proceeding.[29]

Here, the Division satisfied its burden by showing that the District Court, a court of competent jurisdiction, in an action brought by the Commission, found Pattison in violation of internal accounting controls and books and records provisions of the federal securities laws and, based on its findings, permanently enjoined him from violating those provisions. The sole issues therefore are whether Pattison has shown cause why he should not be sanctioned, and if he has not, to determine the appropriate remedial sanction.

Pattison, however, challenges the Division's right to bring this proceeding under Rule 102(e)(3). He argues that "the Commission should be required to base any administrative discipline, including a permanent suspension, under a subsection of Rule 102(e)(1)" because "any other ruling leaves open the chance of administrative sanctions with no standard." Pattison points to Rule 102(e)(1)(ii), which permits the Commission to discipline an accountant for "improper professional conduct," and to Rule 102(e)(1)(iv), which defines that term, with respect to persons licensed to practice as accountants, to mean:

> (A) intentional or knowing conduct, including reckless conduct, that results in a violation of applicable professional standards; or
>
> (B) either of the following two types of negligent conduct:
>
> (1) a single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted.

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27 17 C.F.R. § 201.102(e)(3)(iv); *see also Gunderson*, 97 SEC Docket at 24047.

28 *Id.*

29 17 C.F.R. § 201.102(e)(3)(iv); *see also Gunderson*, 97 SEC Docket at 24048 ("Gunderson may not contest, in this administrative proceeding, the findings made against him by the district court in the federal injunctive action.").

> (2) repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.[30]

From this, he concludes that "the conduct for which an accountant is disciplined must be done with a certain level of mens rea."

Pattison argues that proceeding under Rule 102(e)(3), as the Division did here, would allow the Division to "seek discipline after *any* permanent injunction, regardless of the level of scienter involved in the underlying claim, or the type of claim" (emphasis in original). He characterizes as "immaterial" the citations by the Division and law judge to analogous settlements under Rule 102(e)(3) because those matters were "not prosecuted through the administrative tribunal." Pattison states that he was entitled to summary disposition because the Division failed to "provide notice of its basis for discipline" or "adequately allege liability" under Rule 102(e)(1).

Pattison's argument fails to recognize the distinct bases for disciplinary action provided under subsections (3) and (1) of Rule 102(e). The Commission may, pursuant to Rule 102(e)(3)(i)(A), suspend or bar a respondent based on an injunction. This does not create a "chance of administrative sanctions with no standard." To the contrary, the Rule has a structured, precise standard: Once the respondent has requested a hearing, the Division must establish that the respondent has been "permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the federal securities laws or of the rules and regulations thereunder" as the basis for the proceeding. Rule 102(e)(3) thus reflects our determination that a finding by a court of competent jurisdiction that a respondent has violated securities laws, or that an injunction against future violations is warranted, is a sufficient standard of unfitness for practice before the Commission that we "will afford a hearing only to consider mitigating or other factors why neither censure nor temporary or permanent disqualification should be imposed."[31] "The overall purpose of the . . . amendment [that added paragraph (3) to Rule 102(e)] is to prevent situations in which the investing public places its trust in, or reliance upon, attorneys, accountants, engineers, and other professionals or experts who have

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30 17 C.F.R. § 201.102(e)(1)(iv).

31 *See Final Amendment to Rule 2(e) of the Rules of Practice*, Exchange Act Rel. No. 9164 (May 10, 1971), 1971 WL 126066, at *1 (adding to Rule 2(e) new language enabling the Commission to "restrict practice before the Commission by persons found to have violated or to have participated in violations of the securities laws and by persons who have been permanently enjoined from violating the securities laws, whether or not a finding of past violation has been made"). Furthermore, "no distinction will be made between injunctions and findings which have been contested and those which have been entered upon consent." *Id.*

demonstrated an unwillingness or inability to comply with the requirements of the Federal securities laws . . . ."[32]

Rule 102(e)(3) then permits the respondent to show cause why he or she should not be censured or temporarily or permanently disqualified from appearing and practicing before the Commission. Under this provision, the Commission acts "with due regard to the public interest."[33] The standards by which we are guided in assessing the public interest are those set forth in *Steadman v. SEC*[34] in determining the appropriate remedial sanction under Rule 102(e)(3).[35] As noted, we also consider any mitigative factors established by the respondent.

Rule 102(e)(3)(i)(A) is analogous to our statutory authority under Exchange Act Section 15(b)(6)(A)(iii) to discipline a regulated person who is enjoined from any action, conduct, or practice specified in Exchange Act Section 15(b)(4)(C).[36] Matters brought pursuant to this provision require only that the Division establish that the respondent is a person associated or seeking to become associated, or, at the time of the alleged misconduct, was associated or was seeking to become associated with a broker or dealer, or is a person participating, or at the time of the alleged misconduct, was participating in a penny stock offering, and that the person "is

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[32] *Id.* Pattison incorrectly states that Rule 102(e)(3) permits the Division to "seek discipline after *any* permanent injunction, regardless of the level of scienter involved in the underlying claim, or the type of claim." Subpart 3 is limited to injunctions based on violations of the federal securities laws. Thus, the standard for the presumption of unfitness to practice before the Commission is directly related to the individual's failure to comply with statutes administered by the Commission.

[33] 17 C.F.R. § 102(e)(3)(i); *see also Gunderson*, 97 SEC Docket at 24044 (under Rule 102(e)(3), permanently disqualifying attorney, in Commission adjudicatory appeal from a law judge's initial decision, from appearing or practicing before the Commission based on injunction against violating registration and antifraud provisions of the federal securities laws); *Herbert M. Campbell*, Initial Decision Rel. No. 266 (Oct. 27, 2004), 83 SEC Docket 3997 (under Rule 102(e)(3), permanently disqualifying attorney, in Commission adjudicatory proceeding before a law judge, from appearing or practicing before the Commission based on injunction against violating reporting and antifraud provisions of the federal securities laws).

[34] 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

[35] *Gunderson*, 97 SEC Docket at 24048.

[36] 15 U.S.C. § 78*o*(b)(6)(A)(iii). Exchange Act Section 15(b)(4)(C) authorizes the Commission to sanction a broker or dealer or an associated person of a broker or dealer who is permanently or temporarily enjoined from acting as a certain kind of securities professional, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security. 15 U.S.C. § 78*o*(b)(4)(C).

enjoined from any action, conduct, or practice" specified in Exchange Act Section 15(b)(4)(C).[37] Once this has been established, the respondent charged under Exchange Act Section 15(b)(6)(A)(iii) is not permitted to collaterally attack the underlying injunction or findings of the court.[38] Courts have repeatedly upheld this principle.[39] A respondent who wishes to challenge

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[37] *See, e.g.*, *Vladimir Boris Bugarski*, Exchange Act Rel. No. 66842 (Apr. 20, 2012), 103SEC Docket 53374, 53378 ("It is undisputed that the district court enjoined Respondents from conduct in connection with the purchase or sale of securities and that, at the time of the alleged misconduct, Respondents were participating in an offering of penny stock. Accordingly, we find that the threshold statutory requirements [under Exchange Act Section 15(b)(6)(A)(iii)] for the imposition of sanctions have been satisfied."); *Phillip J. Milligan*, Exchange Act Rel. No. 61790 (Mar. 26, 2010), 98 SEC Docket 26791, 26796 (finding that "the statutory requirements for the imposition of sanctions have been satisfied" under Exchange Act Section 15(b)(6)(A)(iii) where the record established that the respondent had been enjoined from engaging in fraudulent conduct in connection with the purchase or sale of securities and that, at the time the enjoined conduct occurred, the respondent was associated with a broker-dealer); *Thomas J. Donovan*, 58 S.E.C. 1032, 1042-43 (2005) (finding that respondent was formerly associated with a broker-dealer and enjoined from further violations of the antifraud provisions of the federal securities laws, and that Exchange Act Section 15(b)(6)(A)(iii) authorized the Commission to sanction respondent); *Michael T. Studer*, 57 S.E.C. 890, 893 (2004) (finding that the respondent was associated with a broker or dealer and enjoined from engaging in any conduct or practice in connection with either (a) the activity of a broker or dealer or (b) the purchase or sale of a security, and that Exchange Act Section 15(b)(6)(A)(iii) authorized the Commission to sanction the respondent), *aff'd*, 148 F. App'x 58 (2d Cir. 2005) (unpublished).

[38] *See Milligan*, 98 SEC Docket at 26796-97 (finding in a proceeding brought under Exchange Act Section 15(b)(6)(A)(iii), where the respondent was a person enjoined from any action, conduct, or practice specified in Exchange Act Section 15(b)(4)(C), that "[w]e have repeatedly held that a respondent in a follow-on proceeding may not challenge the findings made by the court in the underlying proceeding and we consider those findings in determining the appropriate sanction.") (citing *James E. Franklin*, Exchange Act Rel. No. 56649 (Oct. 12, 2007), 91 SEC Docket 2708, 2713 ("It is well established that [respondents are] collaterally estopped from challenging in [follow-on] administrative proceeding the decisions of the district court in the injunctive proceeding.")).

[39] *Studer v. SEC*, 148 F. App'x 58, 59 (2d Cir. 2005) (unpublished) (finding that respondent, in an appeal of a follow-on administrative proceeding "is prohibited from relitigating the factual and legal conclusions of the district court regarding his violations of federal securities laws"); *see also Gann v. SEC*, 361 F. App'x 556, 558 (5th Cir. 2010) (unpublished) (finding, in an appeal of a follow-on administrative proceeding, that "[b]ecause the factual issues in this case were fully litigated and resolved in the district court, we treat the district court's findings of fact as conclusive and binding on the parties"); *Brownson v. SEC*, 66 F. App'x 687, 688

(continued...)

the underlying injunction or court's findings may only do so by filing an appeal in the appropriate United States Court of Appeals.[40]

By contrast, Rule 102(e)(1), codified by the Sarbanes-Oxley Act of 2002,[41] authorizes the Commission to discipline professionals for "improper professional conduct," defined for accountants as conduct that the Commission finds "results in a violation of applicable professional standards," and meets certain mens rea requirements. Thus, a proceeding under Rule 102(e)(1)(ii) does not necessarily involve conduct that is illegal, nor does it involve a situation where another adjudicatory tribunal has already made findings of misconduct and imposed a sanction. Unlike proceedings brought under Rule 102(e)(3), the Commission itself must make the determination as to whether the respondent's conduct fits within certain standards carefully defined under Rule 102(e)(1), including, with respect to accountants, whether professional standards have been violated with a defined mens rea. If such conduct falls within the proscriptions of Rule 102(e)(1), the Commission must then determine whether a sanction is appropriate. Similarly, proceedings brought, for example, under Exchange Act Section 15(b)(4)(A) or (D) require the Commission to make its own findings of misconduct before it can determine the appropriate sanction, if any.[42] That is because, as with Rule 102(e)(1), the Commission does not have in the record findings made by another adjudicatory tribunal to serve as a basis for a sanction determination. In proceedings brought under Rule 102(e)(3) based on an underlying injunction, however, the Commission may rely on the findings of a court that an injunction against future violative conduct is warranted.[43]

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39 (...continued)
(unpublished) (9th Cir. 2003) (finding, in an appeal of a follow-on administrative proceeding, that respondent's "plea agreement and criminal conviction are substantial evidence supporting the SEC's conclusion that it is in the public interest to permanently bar [respondent] from association with a broker or dealer. *See Hinkle Northwest, Inc. v. SEC*, 641 F.2d 1304, 1308 (unpublished) (9th Cir. 1981) (stating that collateral estoppel may be used where party seeks to apply finding from criminal case to subsequent civil proceeding).").

40 *Franklin*, 91 SEC Docket at 2713-14 (finding, in a proceeding instituted under Exchange Act Section 15(b)(6)(A), that "[t]he appropriate forum for Franklin's challenge to the validity of the injunction and the district court's evidentiary rulings is through an appeal to the United States Court of Appeals . . . ."), *petition denied*, 285 F. App'x 761 (D.C. Cir. 2008) (per curiam).

41 Pub. L. No. 107-204, § 602, 116 Stat. 745 (2002).

42 15 U.S.C. §§ 78*o*(b)(4)(A), (D).

43 17 C.F.R. § 201.102(e)(3)(i)(A). Alternatively, the Commission may rely on findings by a court in an action brought by the Commission, or by the Commission in an

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Accordingly, we reject Pattison's contention that this matter should have been brought under Rule 102(e)(1) and find that the Division appropriately brought this proceeding under Rule 102(e)(3).

**B. Public Interest Factors**

In assessing the need for sanctions in the public interest, we consider, among other things: the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.[44] Our "inquiry into . . . the public interest is a flexible one, and no one factor is dispositive."[45] We also consider the extent to which the sanction will have a deterrent effect.[46]

We find that Pattison's conduct was egregious and recurrent. For every quarterly period over four years, Pattison facilitated improper backdating by falsifying Embarcadero's books and records and circumventing Embarcadero's system of internal accounting controls. Corporate books and records are "'the bedrock elements of our system of corporate disclosure and accountability,'" and thus "accurate recordkeeping is an essential ingredient in promoting management responsibility."[47] Likewise,

> [i]nternal controls safeguard assets and assure the reliability of financial records, one of their main jobs being to prevent and detect errors and irregularities that arise in the accounting systems of the company. Internal accounting controls are

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43 (...continued)
administrative proceeding, that a respondent has violated or aided and abetted the violation of the federal securities laws. 17 C.F.R. § 201.102(e)(3)(i)(B).

44 *Steadman,* 603 F.2d at 1140.

45 *David Henry Disraeli*, Exchange Act Rel. No. 57027 (Dec. 21, 2007), 92 SEC Docket 852, 875, *petition denied,* 33 F. App'x 334 (D.C. Cir. 2008) (per curiam).

46 *Franklin*, 91 SEC Docket at 2708, 2719 & n.28 (citing *Ahmed Mohamed Soliman*, 52 S.E.C. 227, 231 n.12 (1995); *Lester Kuznets*, 48 S.E.C. 551, 555 (1986); *McCarthy v. SEC*, 406 F.3d 179, 188, 190 (2d Cir. 2005)).

47 *SEC v. World-Wide Coin Inv., Ltd.*, 567 F. Supp. 724, 746 (N.D. Ga. 1983) (citation omitted).

basic indicators of the reliability of the financial statements and the accounting system and records from which financial statements are prepared.[48]

Pattison's actions betrayed these principles and, as the District Court found, had profound effects. Embarcadero understated corporate expenses by more than $14 million. The company possessed books and records and filed public reports with the Commission that failed to accurately and fairly reflect its transactions and disposition of its assets. It suffered the receipt of decreased payments when employees exercised backdated stock options. The Company's share value was potentially diluted as a result of enhanced incentives to exercise stock options. In 2007, Embarcadero restated portions of its financial statements going back as far as fiscal year 2002, and faced negative tax consequences associated with the restatement. In addition to being enjoined, Pattison was ordered to disgorge $74,446—representing the portion of his profit attributable to exercising his own backdated stock options—and pay a second-tier civil money penalty of $50,000, which the District Court judge determined was reflective of the jury's view that Pattison "knowingly engaged in conduct violative of regulatory and statutory laws."[49] We therefore reject Pattison's characterization of his misconduct as a "mere technical violation" arising "from a single decision made to delegate option-granting authority to the CEO in the fourth quarter of 2000."

We find that Pattison acted with a high degree of scienter. Pattison had been a practicing accountant for roughly fifteen years and was the only licensed CPA in Embarcadero's Finance Department. Despite knowing that APB 25 required the company to record in-the-money stock option grants as outgoing compensation and that the company did not intend to grant in-the-money stock options, in part based on internal controls memoranda that Pattison authored, Pattison nonetheless facilitated the improper granting of in-the-money stock options. He did so by entering backdated information into Embarcadero's E*Trade database, directing his administrative assistant to prepare stock option agreements for Embarcadero's employees based on the backdated information, providing to the company's auditors, without further elaboration, quarterly summaries that he knew contained backdated information, and parking backdated stock

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48 *Id.* at 750 (citation omitted); *see also Management's Report on Internal Control over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports*, Exchange Act Rel. No. 47986 (June 18, 2003), 80 SEC Docket 1196, 1217 ("The establishment and maintenance of internal control over financial reporting has always been an important responsibility of management. An effective system of internal control over financial reporting is necessary to produce reliable financial statements and other financial information used by investors.").

49 *See supra* note 7, Corrected Order and Judgment Granting Motion for Entry of Final Judgment, at 6.

options in various inactive employee accounts for later use.[50] The District Court determined that "[a] reasonable inference is that Defendant consciously intended to hide the actual grant approval dates from the auditors and keep backdated options from being publicly reported. Certainly, the jury could have so found."[51] We conclude that Pattison's repeated efforts to conceal improper backdating further demonstrate that he acted with a high degree of scienter.[52]

Pattison asserts that the Initial Decision and the District Court improperly determined that he acted with scienter and argues that the jury found him liable for a violation that did not require a showing of scienter. He contends that "[t]he 'knowing' standard of Section 13(b)(5) is not the same as 'scienter.' A 'knowing' violation of Section 13(b)(5) means that Pattison was found to have acted intentionally, but not that he acted with the 'intent to deceive, manipulate, or defraud' as is required for scienter-based claims. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1975)." The District Court, in fact, found that Pattison acted with an intent to deceive.[53] It did

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[50] As the District Court found, "every stock option grant during the period in question has a grant date selected with hindsight, yet [Pattison] *never* expressly disclosed the date of actual approval by CEO Wong on any document. Nor did [Pattison] ever explicitly communicate to [the] auditors Embarcadero's practice of selecting grant dates with hindsight." *See supra* note 6, Corrected Order Denying Plaintiff's Motion to Strike; Denying Defendant's Motion for Judgment as a Matter of Law; and Denying Defendant's Motion for a New Trial, at 14-15 (emphasis in original).

[51] *See supra* note 6, Corrected Order Denying Plaintiff's Motion to Strike; Denying Defendant's Motion for Judgment as a Matter of Law; and Denying Defendant's Motion for a New Trial, at 15.

[52] *See Milligan*, 98 SEC Docket at 26798-99 & n.20 (finding that respondent acted with a high degree of scienter based on his attempts to conceal misconduct) (citing *Justin F. Ficken*, Exchange Act Rel. No. 58802 (Oct. 17, 2008), 94 SEC Docket 10887, 10892).

[53] "Mr. Pattison fails to explain how a knowing falsification is really anything different from an intent to deceive. In other words, if a person intentionally makes a false statement (found here), that is tantamount to an intent to deceive. . . . As noted in the legislative history for § 13, '[t]he knowledge required is that the person be aware that he is or may be making a false statement or causing corporate records to be falsified through a conscious undertaking or due to his conscious disregard for the truth.' S. Rep. 95-114, at 4107." *SEC v. Michael C. Pattison*, Order Denying Defendant's Motion for Judgment of Law and Motion for a New Trial; and Granting in Part and Denying in Part Defendant's Motion to Amend Judgment, No. C-08-4238 EMC (N.D. Cal. June 9, 2011), at 14. Pattison also claims that, because the District Court used a general verdict form, "one cannot even determine whether Mr. Pattison was found liable for a 'knowing falsification of records' or, instead, an internal controls violation." The jury, however, found that Pattison violated Exchange Act Section 13(b)(5) pursuant to a jury

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so, not as a misstatement of the jury's finding of a violation, but in connection with the Court's assessment of the necessity of imposing an injunction as a remedy for that violation. Pattison is estopped from attacking here the factual findings or legal conclusions of the underlying injunctive proceeding.[54] In any event, we are unpersuaded by his argument.

We do not construe the term "scienter" so narrowly. While it is true that the United States Supreme Court in *Ernst & Ernst* defined scienter as "a mental state embracing intent to deceive, manipulate, or defraud," it did so in the context of a securities fraud case. There, the Court predicated the actor's state of mind on elements, *i.e.*, deceit, manipulation, and fraud, that explicitly were the basis for the violation at issue. The Supreme Court, however, also discussed scienter more generally as "knowing or intentional misconduct," given that the issue in that case was "whether scienter is a necessary element" of a private cause of action under Exchange Act Section 10(b) and Rule 10b-5 thereunder, or "whether negligent conduct alone is sufficient."[55] Courts have consistently relied on the broader definition of scienter in the context of violations of the federal securities laws.[56] We, too, have viewed scienter through a wider lens.[57]

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53 (...continued)
instruction specifically providing that a knowing falsification was required, and that knowingly, as used in Exchange Act Section 13(b)(5) "means intentionally; recklessness is not sufficient." *Id.* at 14.

54 *Supra* note 29, *see also supra* note 38.

55 *Ernst & Ernst*, 425 U.S. at 197.

56 *See, e.g., Dura Pharm., Inc.*, 544 U.S. 336, 341 (2005) ("scienter, *i.e.*, a wrongful state of mind, see *Ernst & Ernst*, [425 U.S. 185] at 197"); *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1051 (9th Cir. 2011) ("The requisite state of mind for a securities fraud case is scienter, which is knowing or intentional conduct, or reckless conduct 'to the extent that it reflects some degree of intentional or conscious misconduct, or what we have called deliberate recklessness.'") (citation omitted), *cert. denied*, 132 S. Ct. 2713 (2012); *Graham v. SEC*, 222 F.3d 994, 1000 (2d Cir. 2000) (scienter in aiding and abetting cases is established by showing defendant rendered assistance to violator of federal securities laws "knowingly or recklessly"); *SEC v. Falstaff Brewing Corp.*, 629 F.2d 62, 77 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980) (finding that scienter is "[a] knowledge of what one is doing and the consequences of those actions"); *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 167 (2d Cir. 1980) (finding that "scienter is 'knowing or intentional misconduct'").

57 *See Phlo Corp.*, Exchange Act Rel. No. 55562 (Mar. 30, 2007), 90 SEC Docket 1089, 1103 (finding that "[t]he scienter requirement [in an aiding and abetting violation] may be satisfied by showing that [respondent] knew of, or recklessly disregarded, the wrongdoing and her role in furthering it"); *cf. Michael J. Marrie, CPA*, Exchange Act Rel. No. 48246

(continued...)

Here, the District Court found that Pattison acted with scienter based on his conduct. Specifically, the District Court found:

> While the instant case is a civil action and not a criminal action, the § 13 jury instruction that the parties agreed upon stated that *knowing* falsification was required – in other words, the SEC (although it did not have to) agreed to the criminal liability scienter requirement. Accordingly, there was scienter in this case (in the sense of a knowing falsification); at least, the jury so found.[58]

The District Court found that Pattison provided sincere assurances against future violations but that he also had not recognized the wrongful nature of his conduct. For example, the Court found that Pattison voluntarily disclosed his misconduct to attorneys representing Embarcadero's Special Committee and voluntarily met with the Commission during its investigation. But the Court also found that Pattison either placed blame for stock options backdating on others or denied any wrongdoing. Indeed, Pattison continues to dispute that his conduct was egregious and argues that "books and records claims do not fall under the antifraud provisions of the securities laws, and should not be addressed with the 'severest of sanctions.'" We are concerned that, despite his assurances against future violations, Pattison's failure to appreciate the gravity of his misconduct raises troubling questions about his fitness to appear and practice before the Commission.

Pattison asserts that the likelihood is low that his occupation will present opportunities for future violations. He states that he has "worked for the last seven years without any blemish on his record. He has not moved professionally towards the public sector, and even submitted a Declaration in the District Court action expressly stating he had no intention to work for a public company again." He also asserts that his "employment history since leaving Embarcadero bears

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57 (...continued)
(July 29, 2003), 80 SEC Docket 2694, 2704-05 & n.14 ("The question is not whether an accountant recklessly intended to aid in the fraud committed by the audit client, but rather whether the accountant recklessly violated applicable professional standards [in connection with a proceeding brought under Rule 102(e)(1)]."), *reversed on other grounds*, 374 F.3d at 1205 (rejecting respondents' contention that, because the Commission borrowed the definition of recklessness used in substantive antifraud provisions for purposes of a proceeding under Rule 102(e)(1), the Commission also was required to adopt other elements of a securities fraud violation, such as the requirements of an intent to defraud and materiality).

58 To the extent that Pattison contends that scienter must be an element of the underlying violations in order for us to evaluate the degree of scienter under the *Steadman* factors, he is incorrect. *See Steadman*, 603 F.2d at 1140 ("We heartily endorse the Commission's view that while scienter is not required to make out violations of several of the statutory sections involved here, the respondent's state of mind is highly relevant in determining the remedy to impose.").

that out. Pattison has changed jobs—he no longer works for a public company and instead performs trust and estate work [as an accountant] for a company owned by a private individual."

Pattison, however, remains licensed as a CPA. Moreover, the Court found that Pattison stated in his deposition that his work for the company is "[m]uch the same as what I would do at a public accounting firm."[59] Should the company go public or be acquired by a public company, the accuracy of its historical books and records could be critical, and Pattison could potentially find himself in a position to handle the company's future accounting duties. Moreover, Pattison's statement that he "is not likely to appear before the Commission again, but . . . has demonstrated over these last seven years that he possesses the skills and moral character to do so in the future," suggests the possibility of his eventually appearing and practicing before the Commission. We conclude that a reasonable likelihood exists that Pattison's occupation will present opportunities for future violations.[60]

Pattison asserts that the law judge improperly granted summary disposition because he presented mitigating facts that required an evidentiary hearing. Rule of Practice 250(b) provides that a hearing officer may grant a motion for summary disposition without an in-person hearing if "there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law."[61] Once the Division showed that it had satisfied the criteria for summary disposition, Pattison had the opportunity to produce documents, affidavits, or some other evidence to demonstrate that there was a genuine and material factual dispute that the law judge could not resolve without a hearing.

Pattison's submissions below "relate[d] to the appropriateness of the sanction," which we have considered fully above, but did not raise "the existence of a genuine issue of material

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[59] *See supra* note 53, Order Denying Defendant's Motion for Judgment of Law and Motion for a New Trial; and Granting in Part and Denying in Part Defendant's Motion to Amend Judgment, at 12.

[60] Pattison cites to *SEC v. Monarch Fund*, 608 F.2d 938, 943 (2d. Cir. 1979), and *SEC v. Nat'l Student Mktg. Corp.*, 457 F. Supp. 682 (D. D.C. 1978) for the proposition that "the more time that has passed since a violation, the lesser the need for an injunctive sanction." Pattison's citations are inapposite. In these cases, the courts considered the propriety of imposing an injunction. As we have discussed, the propriety of Pattison's injunction is not at issue. Moreover, these cases suggest that courts consider the amount of time that has elapsed since the last violation as one among many factors in evaluating whether there exists a reasonable likelihood of future violations.

[61] 17 C.F.R. § 201.250(b).

fact."[62] An in-person hearing therefore was not required. Pattison states that it is mitigating that he has worked for the last seven years without a blemish on his record, has not moved professionally towards the public sector, and voluntarily told the Special Committee that he backdated stock option grants. We already have accepted these facts as true and taken them into consideration above.

Pattison also states that he "was still working at Embarcadero for almost a year after the alleged violations occurred and thus his compliance with these statutes began while he was still working at Embarcadero." Yet Pattison also highlights the fact that, by the end of 2004, the company, not Pattison, decided to enforce the prohibition against granting in-the-money stock options and that none was granted thereafter as a result. Pattison asserts that he was "absolved by a jury of all fraud and [aiding and abetting] false reporting charges," and the violation occurred nearly seven years ago. While we accept these statements as true, we do not agree that the need for a permanent suspension is diminished given the other facts of this case. Pattison also argues that we should consider as mitigating that the District Court prevented him from presenting "his key accounting expert"[63] and improperly admitted as evidence Embarcadero's Form 10-K for the 2006 fiscal year, which restated numerous portions of financial statements for previous years, and that the Division failed to designate expert witnesses at the trial. Pattison is prohibited from attempting to relitigate the District Court's findings.[64]

Pattison argues that a permanent suspension is "far in excess of other accountants who have had securities fraud judgments entered against them for backdating stock options." The

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62 *Gary M. Kornman*, Exchange Act Rel. No. 59403 (Feb. 13, 2009), 95 SEC Docket 14246, 14264 & n.62 (citing *Seghers*, 548 F.3d at 134), *petition denied*, 592 F.3d 173 (D.C. Cir. 2010).

63 Pattison attached to his reply brief the accounting expert's "anticipated testimony" that he asserts he "was required to provide to the District Court," and which was intended to support his argument that his conduct was not egregious. Commission Rule of Practice 452, 17 C.F.R. § 201.452, permits the admission of additional evidence where the evidence is material and where there exist reasonable grounds for failing to produce the evidence earlier. Pattison has not met the rule's requirements. He filed no motion to adduce this additional evidence. Nor did he provide an explanation for his failure to adduce the document earlier (*i.e.*, before the law judge or in earlier filings on appeal) or respond when the Division challenged his submission. Pattison also does not explain how this attachment is material. We nevertheless admit it as a matter of discretion.

64 *See supra* note 54.

cases to which Pattison cites, however, were settled matters.[65] We have repeatedly observed that comparisons to sanctions in settled cases are inappropriate because respondents who offer to settle may properly receive lesser sanctions than they otherwise might have. That is because, "in settlement cases we take into account pragmatic considerations such as the avoidance of time-and-manpower-consuming adversary proceedings."[66]

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[65] In all of the cited cases, respondents settled both the underlying injunctive matter and the follow-on Rule 102(e) proceeding. *See Antonio Canova*, Exchange Act Rel. No. 59758 (Apr. 13, 2009), 95 SEC Docket 16041; *Anthony Bonica*, Exchange Act Rel. No. 62242 (June 8, 2010), 98 SEC Docket 28963; *Clinton Ronald Greenman*, Exchange Act Rel. No. 61147 (Dec. 10, 2009), 97 SEC Docket 23380; *John Wilroy*, Exchange Act Rel. No. 61148 (Dec. 10, 2009), 97 SEC Docket 23384; *Gregory Pasko*, Exchange Act Rel. No. 61149 (Dec. 10, 2009), 97 SEC Docket 23388; *Lisa Roberts*, Exchange Act Rel. No. 60345 (July 20, 2009), 96 SEC Docket 18982; *Kevin Brooks*, Exchange Act Rel. No. 59785 (Apr. 17, 2009), 95 SEC Docket 16159; *Dennis Kavelman and Arcangelo Loberto*, Exchange Act Rel. No. 59648 (Mar. 30, 2009), 95 SEC Docket 15530.

Pattison also refers to the result in *Robert W. Armstrong, III*, 58 S.E.C. 542 (2005), a litigated case, where an accountant was found to have violated the antifraud provisions and was not permanently suspended under Rule 102(e). *Armstrong* is not applicable here. That matter was brought under Rule 102(e)(1), which, as we have explained, involves procedures and standards different from those in a Rule 102(e)(3) proceeding. Moreover, "in light of the unique circumstances [in that case], we . . . determined, as an exercise of our equitable discretion, not to impose any suspension" pursuant to Rule 102(e)(1) without providing any analysis or identifying the unique circumstances leading to this result. Accordingly, *Armstrong* provides no precedential guidance with respect to the imposition of sanctions pursuant to Rule 102(e)(3).

[66] *Nassar and Co., Inc.*, 47 S.E.C. 20, 26 & n.37 (1978) (citing cases), *aff'd*, 600 F.2d 280 (D.C. Cir. 1979); *see also Justin F. Ficken*, Exchange Act Rel. No. 58802 (Oct. 17, 2008), 94 SEC Docket 10887, 10892-93 (rejecting respondent's argument in an administrative proceeding based on an underlying injunction that he should not receive a harsher sanction than that imposed on other individuals who committed violations similar to the one for which he was enjoined but where the other individuals settled their administrative proceedings); *Leslie A. Arouh*, 57 S.E.C. 1099, 1123 (2004) (rejecting respondent's argument that sanction was unjust where more culpable respondent received lesser sanction); *cf. Dennis Todd Lloyd Gordon*, Exchange Act Rel. No. 57655 (Apr. 11, 2008), 93 SEC Docket 5089, 5118 (where NASD had previously offered to settle charges for lesser sanctions than ultimately imposed after litigation, Commission rejected argument that NASD's alleged willingness to accept a lesser sanction in settlement shows that NASD did not consider that more stringent sanctions were necessary, noting "it is well established that those who offer to settle may properly receive lesser sanctions than they otherwise might have based on 'pragmatic considerations such as the avoidance of time-and-manpower-consuming adversary proceedings.'").

The appropriate sanction in any case, moreover, depends on the particular facts and circumstances presented.[67] Litigated cases typically present a fuller, more developed record of facts and circumstances for purposes of assessing appropriate sanctions than do settled matters.[68] Here, the record shows that, although Pattison was not found liable on the fraud charge in the injunctive action, the Court made extensive findings in justification of the injunction against him concerning the egregiousness of the conduct and his level of scienter. As discussed above, these violations go to the heart of an accountant's obligations in any practice before the Commission and justify the bar against such practice.[69]

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[67] *See Robert L. Burns*, Advisers Act Rel. No. 3260 (Aug. 5, 2011), 101 SEC Docket 44807, 44824 n.52 ("[I]t is well established that the appropriateness of a sanction 'depends on the facts and circumstances of each particular case and cannot be precisely determined by comparison with the action taken in other proceedings.'") (citing *Paz Sec., Inc.*, Exchange Act Rel. No. 57656 (Apr. 11, 2008), 93 SEC Docket 5122, 5134, *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009) (citing *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973)); *cf. World Trade Fin. Corp.*, Exchange Act Rel. No. 66114 (Jan. 6, 2012), 102 SEC Docket 49942, 49966 & n.82 (noting, in review of FINRA matter, that the "appropriate sanction, however, depends on the facts and circumstances of each case and cannot be precisely determined by comparison with action taken in other proceedings.") (citing *Butz*, 411 U.S. at 187); *see also McCarthy*, 406 F.3d at 188 (stating that an appeals court's review of Commission sanctions "receives only limited benefit from comparison to sanctions imposed in other cases due to the highly fact-dependent nature of the propriety of sanctions"); *Hiller v. SEC*, 429 F.2d 856, 858 (2d Cir. 1970) (rejecting respondent's argument that the imposition of lesser sanctions in other cases involving purportedly more serious violations is inconsistent and stating that "we cannot disturb the sanctions ordered in one case because they were different from those imposed in an entirely different proceeding") (citing *Tager v. SEC*, 344 F.2d 5, 8-9 (2d Cir. 1965) ("Failing a gross abuse of discretion, the courts should not attempt to substitute their untutored views as to what sanctions will best accord with the regulatory powers of the Commission.")).

[68] *See Nassar and Co., Inc.,* 47 S.E.C. at 26. In the settled matters cited by Pattison, for example, we do not have a record that would permit a comparison with all the *Steadman* factors influencing a sanction decision, such as the likelihood that a respondent's occupation will present opportunities for future violations.

[69] Pattison argues that a bar is unprecedented and that no accountant has "ever been permanently barred from practicing in front of the Commission for a books and records violation." For the reasons discussed in the text, we believe the bar against practice before the Commission is justified here because of the connection between the nature of the violation and the duties involved in any practice by an accountant before the Commission.

As we have stated, "[t]he Commission disciplines professionals pursuant to Rule 102(e) in order to 'protect the integrity of its processes.'"[70] The Commission adopted the rule as a "means to ensure that those professionals, on whom the Commission relies heavily in the performance of its statutory duties, perform their tasks diligently and with a reasonable degree of competence."[71] We believe that permanently disqualifying Pattison from appearing or practicing before the Commission is remedial because it will prevent Pattison and deter others from disregarding their professional responsibilities and protect the investing public by encouraging reliable corporate disclosure and accountability through accurate recordkeeping and diligent compliance with internal accounting controls.

An appropriate order will issue.[72]

By the Commission (Chairman SCHAPIRO and Commissioners WALTER, PAREDES and GALLAGHER); Commissioner AGUILAR not participating.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

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70 *Robert W. Armstrong, III*, 58 S.E.C. 542, 571-72 & n.62 (2005) (citing *Touche Ross & Co. v. SEC*, 609 F.2d 570, 582 (2d Cir. 1979) (stating that Rule of Practice 2(e), the predecessor to Rule of Practice 102(e), "represents an attempt by the Commission to protect the integrity of its own processes" and upholding the validity of Rule of Practice 2(e) as "reasonably related" to the purposes of the federal securities laws).

71 *Gunderson*, 97 SEC Docket at 24046 (citing *Touche Ross*, 609 F.2d at 582).

72 We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 67900 /September 20, 2012

ACCOUNTING AND AUDITING ENFORCEMENT
Rel. No. 3407 / September 20, 2012

Admin. Proc. File No. 3-14323

In the Matter of

MICHAEL C. PATTISON, CPA
c/o Patrick J. Richard
James H. Vorhis
Nossaman LLP
50 California Street, 34th Floor
San Francisco, CA 94111

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's Opinion issued this day, it is

ORDERED that Michael C. Pattison, CPA be, and he hereby is, permanently disqualified from appearing or practicing before the Commission as an accountant.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67899 / September 20, 2012**

**ACCOUNTING AND AUDITING ENFORCEMENT**
**Release No. 3406 / September 20, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15037**

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| **In the Matter of**<br><br>**STEVEN Y. MOSKOWITZ,**<br><br>**Respondent.** | **ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS** |

## I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against Steven Moskowitz ("Moskowitz" or "Respondent") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

## II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.3 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e)

[1] Rule 102(e)(3)(i) provides, in relevant part, that:

> The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any . . . accountant . . . who has been by name . . . permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

## III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Moskowitz, age 47, resides in Flushing, New York. From 2002 until 2010, Moskowitz served as the Chief Financial Officer ("CFO"), Chief Operating Officer, Chief Accounting Officer, and Secretary of Spongetech Delivery Systems, Inc. ("Spongetech"). Moskowitz has never been a certified public accountant. As Spongetech's CFO, he oversaw Spongetech's day-to-day financial operations, the preparation of its financial statements, and its filing of annual and quarterly reports with the Commission, which Moskowitz signed and certified to be accurate.

2. Spongetech was, at all relevant times, a Delaware corporation with its principal place of business in New York, New York, that sold soap-filled sponges. In April 2006, Spongetech registered the resale of shares of its common stock with the Commission by filing a Form SB-2 with the Commission. Spongetech later filed periodic reports with the Commission under Section 15(d) of the Securities Exchange Act of 1934 ("Exchange Act"). On September 28, 2009, Spongetech filed a registration statement for its common stock with the Commission under Section 12(g) of the Exchange Act, which became effective on the same date. From 2006 until October 5, 2009, Spongetech's common stock was quoted on the Over-the-Counter Bulletin Board as "SPNG" and then as "SPNGE." On October 5, 2009, the Commission issued an order temporarily suspending the trading of Spongetech common stock. Since the expiration of the trading suspension, Spongetech's common stock has continued to trade on an unsolicited basis in the grey market.

3. On June 12, 2012, a judgment was entered against Moskowitz, by consent, in the civil action entitled *SEC v. Spongetech Delivery Systems, Inc., et al.*, Civil Action No. 10-2031, in the United States District Court for the Eastern District of New York. The judgment permanently enjoined Moskowitz from violations of Sections 5 and 17(a) of the Securities Act of 1933 ("Securities Act"), Sections 10(b) and 13(b)(5) of the Exchange Act, and Exchange Act Rules 10b-5, 13b2-1, 13b2-2, and 15d-14, and from aiding and abetting violations of Sections 13(a), 13(b)(2)(A), 13(b)(2)(B), and 15(d) of the Exchange Act and Exchange Act Rules 12b-20, 13a-13, 15d-1, and 15d-13. The judgment also, among other things, barred Moskowitz from serving as an officer or director of a public company, and engaging in any offering of penny stock pursuant to Securities Act Section 20(g) and Exchange Act Section 21(d)(6).

4. The Commission's complaint alleged that from at least April 2007, Moskowitz and others engaged in a scheme to increase demand illegally for, and profit from, the unregistered sale of publicly-traded stock in Spongetech by, among other things, "pumping" up demand for Spongetech stock through false public statements about non-existent Spongetech customers, fictitious sales orders, and phony revenue. They also repeatedly and fraudulently understated the number of Spongetech's outstanding shares in press releases and public filings. The purpose of flooding the market with false public information was to fraudulently inflate the

price for Spongetech shares so Moskowitz and others could then "dump" the shares by illegally selling them to the public through affiliated entities in unregistered transactions. Among other things, the complaint further alleged that Spongetech, at the direction of Moskowitz and a co-defendant, filed periodic reports with the Commission that contained materially false and misleading statements and materially overstated revenues, created materially false purchase orders, invoices, and other documents, and failed to ensure that Spongetech maintained accurate books and records or implemented effective internal controls.

**IV.**

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction agreed to in Respondent Moskowitz's Offer.

Accordingly, it is hereby ORDERED, effective immediately, that Steven Y. Moskowitz is suspended from appearing or practicing before the Commission as an accountant.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

**17 CFR Parts 240 and 249**

**[Release No. 34-67901; File No. S7-19-10]**

**RIN 3235-AK69**

**Extension of Temporary Registration of Municipal Advisors**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule; extension.

**SUMMARY:** The Securities and Exchange Commission ("Commission") is amending interim final temporary Rule 15Ba2-6T, which provides for the temporary registration of municipal advisors under the Securities Exchange Act of 1934 ("Exchange Act"), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), to extend the date on which Rule 15Ba2-6T (and consequently Form MA-T) will sunset from September 30, 2012, to September 30, 2013. Under the amendment, all temporary registrations submitted pursuant to Rule 15Ba2-6T also will expire no later than September 30, 2013.

**DATES:** Effective Date: September 30, 2012. The expiration of the effective period of interim final temporary Rule 15Ba2-6T (17 CFR 240.15Ba2-6T) and Form MA-T (17 CFR 249.1300T) is delayed from September 30, 2012, to September 30, 2013.

**FOR FURTHER INFORMATION CONTACT:** Molly Kim, Senior Special Counsel, Office of Market Supervision, at (202) 551-5644; Yue Ding, Attorney-Adviser, Office of Market Supervision, at (202) 551-5842; Mary N. Simpkins, Senior Special Counsel, Office of Municipal Securities, at (202) 551-5683; Dave Sanchez, Attorney Fellow, Office of Municipal Securities, at (202) 551-5540; John L. McWilliams, III, Attorney Fellow, Office of Municipal Securities, at

(202) 551-5688; or any of the above at Division of Trading and Markets, Commission, 100 F Street, NE, Washington, DC 20549-7010.

**SUPPLEMENTARY INFORMATION**: The Commission is extending the expiration date for interim final temporary Rule 15Ba2-6T and Form MA-T under the Exchange Act.

## I. DISCUSSION

Section 15B(a)(1) of the Exchange Act,[1] as amended by Section 975(a)(1)(B) of the Dodd-Frank Act,[2] makes it unlawful for a municipal advisor to provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, unless the municipal advisor is registered with the Commission. Section 15B(a)(2) of the Exchange Act,[3] as amended by Section 975(a)(2) of the Dodd-Frank Act, provides that a municipal advisor may be registered by filing with the Commission an application for registration in such form and containing such information and documents concerning the municipal advisor and any person associated with the municipal advisor as the Commission by rule may prescribe as necessary or appropriate in the public interest or for the protection of investors.

The registration requirement for municipal advisors became effective on October 1, 2010. On September 1, 2010, the Commission adopted interim final temporary Rule 15Ba2-6T under the Exchange Act,[4] which permits municipal advisors to temporarily satisfy the statutory

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1 15 U.S.C. 78o-4(a)(1).

2 Pub. L. 111-203, 124 Stat. 1376 (2010).

3 15 U.S.C. 78o-4(a)(2).

4 17 CFR 240.15Ba2-6T.

registration requirement by completing Form MA-T[5] through the Commission's public website.[6] Rule 15Ba2-6T serves as a transitional step to the implementation of a permanent registration program, makes relevant information available to the public and municipal entities, and permits municipal advisors to continue their business after October 1, 2010.

Under Rule 15Ba2-6T, as initially adopted, all temporary registrations submitted pursuant to that rule would have expired on the earlier of: (1) the date that the municipal advisor's registration is approved or disapproved by the Commission pursuant to a final rule adopted by the Commission establishing another manner of registration of municipal advisors and prescribing a form for such purpose;[7] (2) the date on which the municipal advisor's temporary registration is rescinded by the Commission; or (3) on December 31, 2011. Also, as initially adopted, Rule 15Ba2-6T itself would have expired on December 31, 2011. On December 21, 2011, however, the Commission amended Rule 15Ba2-6T to extend the date on which that rule

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5 17 CFR 249.1300T.

6 See Securities Exchange Act Release No. 62824 (September 1, 2010), 75 FR 54465 (September 8, 2010) ("Interim Release"). The Commission received seven comment letters on the Interim Release. See letters from Brad R. Jacobsen, dated September 7, 2010; John J. Wagner, Kutak Rock LLP, dated September 28, 2010; Joy A. Howard, Principal, WM Financial Strategies, dated October 5, 2010; Steve Apfelbacher, President, National Association of Independent Public Finance Advisors, dated October 8, 2010; Carolyn Walsh, Vice President and Senior Counsel, Center for Securities, Trust and Investments, American Bankers Association, Deputy General Counsel, ABA Securities Association, dated October 13, 2010; Amy Natterson Kroll and W. Hardy Callcott, Bingham McCutchen LLP, on behalf of the National Association of Energy Service Companies, dated October 13, 2010; and Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated November 15, 2010.

7 On December 20, 2010, the Commission proposed for public comment rules for the permanent registration of municipal advisors. See Securities Exchange Act Release No. 63576 (December 20, 2010), 76 FR 824 (January 6, 2011) ("Proposing Release").

and Form MA-T would sunset from December 31, 2011, to September 30, 2012.[8] Accordingly, as amended, all temporary registrations submitted pursuant to Rule 15Ba2-6T will expire no later than September 30, 2012. Further, existing Rule 15Ba2-6T will expire on September 30, 2012.

As stated in the Interim Release and the Extension Release, the Commission believes that providing a temporary registration process for municipal advisors, pursuant to an interim final temporary rule, is necessary and appropriate, is consistent with the intent of Congress in enacting Section 975 of the Dodd-Frank Act, and can provide investors and municipal entities with basic and important information while the Commission considers a permanent registration program.[9] As noted above, however, Rule 15Ba2-6T and Form MA-T, as extended, will expire on September 30, 2012. Accordingly, the Commission has determined that it is necessary and appropriate to extend the expiration date of Rule 15Ba2-6T and Form MA-T to September 30, 2013.

The extension will provide a method for municipal advisors to continue to temporarily satisfy the registration requirement under Section 15B of the Exchange Act until the Commission promulgates a final rule that establishes another manner of registration of municipal advisors, prescribes a form for such purpose, and develops an electronic registration system. The extension will prevent a gap between the time at which the temporary rule expires and at which municipal advisors must be registered with the Commission under a permanent registration

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8 See Securities Exchange Act Release No. 66020 (December 21, 2011), 76 FR 80733 (December 27, 2011) ("Extension Release"). In the Extension Release, the Commission inadvertently omitted a reference to Subpart N and 17 CFR 249.1300T in the "Statutory Authority and Text of Rule and Amendments" section. As such, Subpart N, which consists of 17 CFR 249.1300T, was deleted from the Code of Federal Regulations. On July 12, 2012, the Commission adopted a technical amendment to restore Subpart N and 249.1300T to Title 17 of the Code of Federal Regulations. See Securities Exchange Act Release No. 66020A (July 12, 2012), 77 FR 42176 (July 18, 2012).

9 See Interim Release, supra note 6, at 54466 and Extension Release, supra note 8, at 80733-34.

regime. The Commission notes that it is adopting the amendment to Rule 15Ba2-6T only to extend the expiration date of that rule and, consequently, the expiration date of Form MA-T. The Commission is not making any other amendments to Rule 15Ba2-6T or Form MA-T.

The Commission is amending Rule 15Ba2-6T(e) to provide that all temporary registrations submitted pursuant to Rule 15Ba2-6T will expire on the earlier of: (1) the date that the municipal advisor's registration is approved or disapproved by the Commission pursuant to a final rule adopted by the Commission establishing another manner of registration of municipal advisors and prescribing a form for such purpose; (2) the date on which the municipal advisor's temporary registration is rescinded by the Commission; or (3) on September 30, 2013. The Commission is also amending Rule 15Ba2-6T(f) to provide that the interim final temporary rule will expire on September 30, 2013. Thus, absent further action by the Commission, Rule 15Ba2-6T and Form MA-T will expire on September 30, 2013 at 11:59 p.m. Eastern Time.

As previously noted in the Extension Release, the Commission has considered the seven comment letters received on the Interim Release and, given the limited nature of this extension and the Commission's ongoing process of considering permanent rules for the registration of municipal advisors, the Commission is not making any other changes to Rule 15Ba2-6T and Form MA-T.[10] Making other changes to the temporary registration regime could require municipal advisors relying on the temporary rule and form to make adjustments or amendments to their operations or forms that otherwise may be applicable only until the permanent regime becomes effective. The Commission also notes that the comment letters received in response to the Interim Release were addressed in the Proposing Release and were considered for purposes of the proposed rules for the registration of municipal advisors.

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10 See Extension Release, supra note 8, at 80734.

The amendments to Rule 15Ba2-6T will be effective on September 30, 2012. The Administrative Procedure Act ("APA") generally requires an agency to publish notice of a proposed rulemaking in the Federal Register.[11] This requirement does not apply, however, if the agency "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[12] The Commission notes that extending the expiration date of the temporary municipal advisor registration regime will not affect the substantive provisions of Rule 15Ba2-6T and Form MA-T. The extension will merely allow municipal advisors to continue to comply with the statutory registration requirement and thus continue to operate as municipal advisors until a permanent registration regime becomes effective. Extending the expiration date of Rule 15Ba2-6T and Form MA-T also will prevent a regulatory gap from developing between the temporary and permanent registration regimes. The extension, consequently, is designed to be temporally limited in scope until the Commission establishes a permanent registration regime for municipal advisors. For these reasons, and the reasons discussed throughout this release, the Commission believes that there is good cause to extend the expiration date of Rule 15Ba2-6T and Form MA-T to September 30, 2013 and to find that notice and solicitation of comment on the extension is impracticable, unnecessary, or contrary to the public interest.[13]

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11 See 5 U.S.C. 553(b).

12 See 5 U.S.C. 553(b)(3)(B).

13 This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the rule amendments to become effective notwithstanding the requirements of 5 U.S.C. 801 (if a federal agency finds that notice and public comment are "impracticable, unnecessary, or contrary to the public interest," a rule "shall take effect at such time as the Federal agency promulgating the rule determines"). Because the Commission is not publishing the rule amendments in a notice of proposed rulemaking, no analysis is required under the Regulatory Flexibility Act. See 5 U.S.C. 601(2) (for purposes of the Regulatory

The APA also generally requires that an agency publish a substantive rule in the Federal Register not less than 30 days before its effective date.[14] However, this requirement does not apply if the agency finds good cause and publishes such cause with the rule.[15] For reasons similar to those explained above, the Commission finds good cause not to delay the effective date of the extension.

In connection with the adoption of Rule 15Ba2-6T and Form MA-T, the Commission submitted to the Office of Management and Budget ("OMB") a request for approval of the "collection of information" requirements contained in the temporary rule and form in accordance with the Paperwork Reduction Act of 1995.[16] OMB initially approved the collection of information on an emergency basis with an expiration date of March 31, 2011. The Commission subsequently submitted a request for extension of the approval, and OMB extended the approval to March 31, 2014. The collection of information to which Rule 15Ba2-6T and Form MA-T relates is "Rule 15Ba2-6T and Form MA-T – Temporary Registration of Municipal Advisors." The OMB control number for the collection of information is 3235-0659. Since the Commission is not amending Rule 15Ba2-6T or the disclosure requirements contained in Form MA-T other than to extend the expiration date for Rule 15Ba2-6T and Form MA-T, this amendment will not change the "collection of information" previously approved by the OMB.

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Flexibility Act, the term "rule" means any rule for which the agency publishes a general notice of proposed rulemaking).

14 See 5 U.S.C. 553(d).

15 See 5 U.S.C. 553(d)(3).

16 44 U.S.C. 3501 et seq.

The Commission is sensitive to the costs and benefits of its rules. The Commission has previously considered and discussed the costs and benefits of Rule 15Ba2-6T and Form MA-T.[17] Since the Commission is not amending Rule 15Ba2-6T and Form MA-T other than to extend the expiration date, the Commission believes that the same general analysis will continue to apply for the period of the extension. However, the Commission notes that allowing municipal advisors to continue to comply with the statutory registration requirement until a permanent registration regime becomes effective and preventing a regulatory gap from developing between the temporary and permanent registration regimes are important benefits.

Since the Commission is only extending the expiration date for Rule 15Ba2-6T and Form MA-T and is not substantively changing them, the Commission's estimated burden for each municipal advisor to complete and amend Form MA-T remains unchanged.[18] However, the Commission estimates that as a result of the amendment, approximately 180[19] new municipal

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17 For a detailed description of the costs and benefits of Rule 15Ba2-6T and Form MA-T, see Interim Release, supra note 6, at 54474-75. See also Extension Release, supra note 8, at 80734-35.

18 The Commission notes that in the Interim Release, it estimated that approximately 1,000 municipal advisors would be required to complete Form MA-T. See Interim Release, supra note 6, at 54473. It further conservatively estimated that all 1,000 municipal advisors would have to amend their forms once between September 1, 2010, and December 31, 2011, recognizing that the actual number would likely be lower than 1,000. See id. In the Extension Release, the Commission estimated that, as a result of the extension of Rule 15Ba2-6T and Form MA-T, approximately 162 new municipal advisors will register between January 1, 2012, and September 30, 2012, at a total labor cost of approximately $168,000. See Extension Release, supra note 8, at 80735. With regard to the 162 new municipal advisors and the municipal advisors already registered pursuant to Rule 15Ba2-6T, the Commission estimated that, between January 1, 2012, and September 30, 2012, there will be approximately 160 amendments and withdrawals at a total labor cost of approximately $22,000. See id.

19 The Commission estimates that, between October 1, 2012, and September 30, 2013, there will be approximately 15 initial registrations per month, which is the average number of initial registrations the Commission has received per month between January 2011 and July 2012.

advisors will register between October 1, 2012, and September 30, 2013, at a total labor cost of approximately \$198,000.[20] With regard to the 180 new municipal advisors and the municipal advisors already registered pursuant to Rule 15Ba2-6T, the Commission estimates that, between October 1, 2012, and September 30, 2013, there will be approximately 96[21] amendments and withdrawals at a total labor cost of approximately \$13,000.[22]

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or

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20 180 (estimated number of initial registrations) × 2.5 hours (estimated time to complete Form MA-T) = 450 hours; 450 hours × \$279 (hourly rate for a Compliance Manager) = \$125,550. The \$279 per hour figure for a Compliance Manager is from SIFMA's Management & Professional Earnings in the Securities Industry 2011, modified by Commission staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. 180 (estimated number of new municipal advisors that will hire outside counsel) × 1 hour (estimated time spent by outside counsel to help a new municipal advisor to comply with the rule) × \$400 (hourly rate for outside legal services) = \$72,000. This is based on an estimated \$400 per hour cost for outside legal services. This is the same estimate used for the Commission's consolidated audit trail rule. See Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722 (August 1, 2012). \$125,550 + \$72,000 = \$197,550. See Interim Release, supra note 6, at 54473-74. The estimated burden for each municipal advisor to complete Form MA-T and the estimated use of outside counsel by each municipal advisor remains unchanged from the Interim Release.

21 The Commission estimates the number of amendments and withdrawals based on the number of amendments to, and withdrawals from, registration on Form MA-T that the Commission received as of July 31, 2012. Specifically, between September 2010 and July 2012, the Commission received 192 amendments and withdrawals on Form MA-T, or an average of approximately 8 amendments and withdrawals each month. The Commission estimates that for the 12 months between October 1, 2012 and September 30, 2013, the Commission will continue to receive an average of 8 amendments and withdrawals each month, or 96 amendments and withdrawals in total.

22 96 (estimated number of amendments and withdrawals) × 0.5 hours (estimated time to amend Form MA-T) = 48 hours; 48 hours × \$279 (hourly rate for a Compliance Manager) = \$13,392. See Interim Release, supra note 6, at 54473-74. The estimated burden for each municipal advisor to complete an amended Form MA-T remains unchanged from the Interim Release. The \$279 per hour figure for a Compliance Manager is from SIFMA's Management & Professional Earnings in the Securities Industry 2011, modified by Commission staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation.[23] In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition.[24] Section 23(a)(2) of the Exchange Act prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[25]

In the Interim Release, the Commission considered the effects of Rule 15Ba2-6T and Form MA-T on efficiency, competition, and capital formation.[26] Since the Commission is not amending Rule 15Ba2-6T and Form MA-T other than to extend their expiration date, the Commission believes that the same analysis applies and continues to believe that Rule 15Ba2-6T and Form MA-T, as extended, will not result in a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

## II. Statutory Authority and Text of Rule and Amendments

Pursuant to the Exchange Act, and particularly Section 15B (15 U.S.C. 78o-4), the Commission is amending § 240.15Ba2-6T and restating § 249.1300T of Title 17 of the Code of Federal Regulations in the manner set forth below.

**List of Subjects in 17 CFR Parts 240 and 249**

Reporting and recordkeeping requirements, Municipal advisors, Temporary registration requirements.

**Text of Rule and Amendments**

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23 See 15 U.S.C. 78c(f).

24 See 15 U.S.C. 78w(a)(2).

25 See id.

26 See Interim Release, supra note 6, at 54475.

For the reasons set out in the preamble, Title 17, Chapter II, of the Code of Federal Regulations is amended as follows.

**PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934**

1. The general authority citation for Part 240 continues to read as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; 18 U.S.C. 1350, 12 U.S.C. 5221(e)(3), and Sec. 939A, Pub. L. 111-203, 124 Stat. 1376, (2010), unless otherwise noted.

*     *     *     *     *

**§ 240.15Ba2-6T [Amended]**

2. In § 240.15Ba2-6T, remove the words "September 30, 2012" wherever they appear and add, in their place, the words "September 30, 2013".

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**PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934**

3. The authority citation for Part 249 continues to read in part as follows:

**Authority:** 15 U.S.C. 78a et seq. and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

*     *     *     *     *

4. Subpart N, consisting of § 249.1300T, continues to read as follows:

**Subpart N – Forms for Registration of Municipal Advisors**

**§ 249.1300T Form MA-T – For temporary registration as a municipal advisor, and for amendments to, and withdrawals from, temporary registration.**

The form shall be used for temporary registration as a municipal advisor, and for amendments to, and withdrawals from, temporary registration pursuant to Section 15B of the Exchange Act, (15 U.S.C. 78o-4).

[Note: The text of Form MA-T does not, and the amendments will not, appear in the Code of Federal Regulations.]

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

September 21, 2012

Commissioner Aguilar
Commissioner Paredes
not participating
Commissioner Gallagher
Disapproved

**UNITED STATES OF AMERICA**
**before the**
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67912 / September 21, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15040**

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| **In the Matter of**<br><br>**CAMERON H. LINTON, ESQ.**<br><br>**Respondent.** | **ORDER INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS** |

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against Cameron H. Linton, Esq. ("Respondent" or "Linton") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings

[1] Rule 102(e)(3)(i) provides, in relevant part, that:

The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any attorney . . . who has been by name . . . permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III, Paragraph 2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

## III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Linton, age 57, is and has been an attorney licensed to practice law in the State of Florida. From approximately 2009 to 2012, Linton's law practice has included writing legal opinion letters for clients involving transactions under the federal securities laws.

2. On April 30, 2012, the Commission filed a complaint against Linton in SEC v. Christel S. Scucci, et al., Civil Action No. 6:12CV646-ORL-37 KRS (M.D. Fla.). On September 14, 2012, the court entered an order permanently enjoining Linton from violation of Section 5 of the Securities Act of 1933 ("Securities Act"). Linton was also enjoined from providing professional legal services to any person in connection with the offer or sale of securities pursuant to, or claiming, an exemption under Securities Act Rule 144, or any other exemption from the registration provisions of the Securities Act, including, without limitation, participating in the preparation of any opinion letter relating to such offerings. Linton was also permanently barred from participating in an offering of penny stock pursuant to Section 20(g) of the Securities Act and Section 21(d)(6) of the Securities Exchange Act of 1934. Linton was also ordered to pay $6,250 in disgorgement of ill-gotten gains and a $7,500 civil money penalty.

3. The Commission's complaint alleged, among other things, that from January 2010 through October 2011, clients of Linton's unlawfully sold approximately 3.3 billion shares of penny stock in unregistered transactions. They were able to acquire and sell most of this stock only because Linton, their attorney, issued baseless legal opinions stating that the transactions were exempt from the registration requirement of Section 5 of the Securities Act. Linton failed to make necessary factual and legal determinations when he concluded that the transactions qualified for an exemption from Section 5 of the Securities Act pursuant to Securities Act Rule 144. When Linton wrote the opinion letters, he lacked an understanding of the applicable legal principles and failed to substantiate the factual predicate for his opinions. But for Linton's legal opinion letters, the issuers' transfer agents would not have transferred the stock to Linton's clients without a restrictive legend. Thus, the complaint alleged that Linton was a substantial factor and a necessary participant in the unregistered sales of the issuers' securities in violation of Section 5 of the Securities Act.

## IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction agreed to in Respondent Linton's Offer.

Accordingly, it is hereby ORDERED, effective immediately, that:

Linton is suspended from appearing or practicing before the Commission as an attorney.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67911 / September 21, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15039**

| | |
|---|---|
| **In the Matter of**<br><br>**Bradford Keith Dent,**<br><br>**Respondent.** | **ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING** |

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Bradford Keith Dent ("Dent" or "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From October 1997 until June 2008, which includes a portion of the time in which he was engaged in the conduct underlying the indictment described below, Dent was a registered representative with Carty & Company, Inc., a broker-dealer registered with the Commission. Dent, age 48, is a resident of Jonesboro, Arkansas.

B. RESPONDENT'S CRIMINAL CONVICTION

2. On February 9, 2012, a judgment of conviction was entered against Dent in the United States District Court for the Western District of Tennessee upon Dent's entry of a plea of guilty to one count of securities fraud in violation of 18 U.S.C. § 1348 (*United States v. Bradford Keith Dent*, Crim. Case No. 2:10-CR-20345-01). On May 31, 2012, the Court sentenced Dent to 30 months in prison and two years of supervised release, and ordered Dent to pay restitution in the amount of $126,000.00. The Court initially ordered Dent to self-surrender on June 14, 2012 to begin his term of incarceration. The Court subsequently extended the date of Dent's self-surrender to August 28, 2012.

3. The count of the criminal indictment on which Dent was convicted alleged that Dent, while employed by Carty & Company, a broker-dealer with offices in Memphis, Tennessee, created losing trades in a customer account and that he transferred the "losses" in the customer account as gains to proprietary accounts of Carty & Company in order to offset losses in the company proprietary, or error, accounts that Dent had accumulated as a result of his unauthorized day trading activities in the accounts.

III.

In view of the foregoing, the Commission deems it necessary and appropriate in the public interest that public administrative proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations; and

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b)(6) of the Exchange Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 210 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman Schapiro
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

**INVESTMENT ADVISERS ACT OF 1940**
**Release No. 3473 / September 21, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15038**

| | |
|---|---|
| In the Matter of<br><br>STOCK MARKETS INSTITUTE, INC. and SERGEY PERMINOV<br><br>Respondents. | **ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 203(e), 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER** |

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") against Stock Markets Institute, Inc. ("SMI") and Sergey Perminov ("Perminov") (collectively, "Respondents").

**II.**

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

## III.

On the basis of this Order and Respondents' Offers, the Commission finds that:

### Summary

1. This matter involves misrepresentations and omissions of material fact regarding the returns achieved in 2008 and 2009 by SMI, a registered investment adviser and online financial newsletter publisher that provides a service commonly referred to as "auto-trading."

### Respondents

2. SMI is a Delaware corporation with its principal place of business in the Russian Federation. SMI has been registered with the Commission as an investment adviser since 2006. SMI was founded in 2002 by Perminov.

3. Perminov, age 62, resides in the Russian Federation. Perminov is the founder, president, and 80% owner of SMI and manages the operations of SMI.

### Background

4. SMI publishes investment newsletters and offers auto-trading services under the name "OptionSmart" and through the website "www.optionsmart.com." SMI publishes several paid subscription newsletters, including, during 2008, QQQQ Picks, and during 2009, QQQQ Picks and QQQQ Enhanced Picks. During the relevant period, these two newsletters recommended strategies employing bull call spreads and bear put spreads. The newsletters also included auto-trade alerts that recommended a specific spread trading strategy that required, on average, three or four trades per month.

5. To utilize the auto-trading feature of the QQQQ Picks and QQQQ Enhanced Picks newsletters, a subscriber had to open a brokerage account at one of the broker-dealers registered with the Commission through which SMI provided auto-trading services. The subscriber also had to execute an auto-trading agreement with that broker-dealer and configure his or her auto-trade settings, by, among other things, specifying the amount per trade based on dollar values, number of options contracts, or percentage of account equity. Once that happened, SMI would approve the subscriber for auto-trading and begin emailing trade alerts to the broker-dealer, who then executed the alerts for each auto-trading customer on a best-efforts basis.

6. Perminov is, and at all times relevant, was, the ultimate decision maker as to the strategies recommended by these newsletters, the types and timing of the trade alerts sent by SMI, and the information published on its website.

7. In 2009, the QQQQ Picks newsletter had approximately 167 subscribers and net revenues of $111,413. The QQQQ Enhanced Picks newsletter had approximately 133 subscribers and net revenues of $160,618. SMI had a net loss of $62 for 2009.

8. SMI marketed its services to subscribers by promoting on its website the success of its auto-trading strategies. From at least July 2009 to November 2009, SMI made several misrepresentations and omissions of material fact on its website regarding the performance of the trading alerts for the QQQQ Picks and QQQQ Enhanced Picks newsletters.

9. On at least July 20, 2009 and November 19, 2009, SMI represented that its 2008 QQQQ Picks newsletter's "Spreads Performance" consisted of 100% winning trades (16 of 16), with an average gain per trade of 16.5%. These representations were supported by historical performance tables that purported to provide the following trade information: (i) options traded; (ii) entry date; (iii) entry debit/credit (price); (iv) exit date; (v) exit debit/credit (price); (vi) profitability; and (vii) number of days held.

10. SMI inflated its 2008 performance results for the QQQQ Picks newsletter by failing to disclose a number of trade alerts that resulted in significant losses. SMI failed to disclose 12 trade alerts that had been issued in 2008 and had resulted in losses ranging from 43.5% to 100%. When the 12 losing trade alerts are factored into that newsletter's results for the 2008 calendar year, the effect is an average loss per trade of 28%, not the average gain of 16.5% touted by SMI.

11. On July 20, 2009, SMI represented that its 2009 QQQQ Picks newsletter's performance from January 1, 2009 to July 20, 2009 consisted of 100% winning trades (43 of 43). On November 19, 2009, SMI represented that the performance of its QQQQ Enhanced Picks newsletter, from its inception in April 2009 through November 19, 2009, consisted of 100% winning trades (52 of 52). These representations were supported by historical performance tables that purported to provide the following trade information: (i) options traded; (ii) entry date; (iii) entry debit/credit (price); (iv) exit date; (v) exit debit/credit (price); (vi) profitability; and (vii) number of days held.

12. SMI inflated its number of winning trades in 2009 by reporting trades made by different broker-dealers in connection with a single winning trade alert as separate trades where the broker-dealers obtained different prices when executing that trade alert. SMI also failed to disclose trade alerts that resulted in losses. As of July 20, 2009, only 35 winning trade alerts were actually issued by the QQQQ Picks newsletter, and SMI failed to disclose that there were also four losing trade alerts. Similarly, as of November 20, 2009, only 37 winning trade alerts were actually issued by the QQQQ Enhanced Picks newsletter, and SMI failed to disclose that there were also two losing trade alerts.

13. During the relevant period, SMI when reporting its performance results did not include losses from positions that it considered to be "rolled." If an options position was set to result in a loss, SMI typically issued a "rollover" alert, which recommended that the existing

position be "rolled" into a new position by closing out both legs of the existing spread and opening two legs of a new spread using an option of the same type (call or put) at a different, more distant, expiration date and/or different strike price. All of the losing trades that SMI failed to disclose resulted from positions that had been "rolled over" by SMI, some of them on more than one occasion. For "rolled" positions, instead of reporting gains or losses from each alert separately, SMI calculated whether the original alert produced a gain or loss by adding up the gains and/or losses resulting from the original alert and any rollover alerts associated with that original alert when the last position was closed.

14. The losing trades discussed above should have been included in SMI's performance results because the positions that were "rolled" were in fact closed out at a loss, and additional premiums were paid to execute the new positions. SMI did not inform investors that its reporting methodology excluded a number of positions that had been closed and resulted in losses, and it did not disclose the amount of the losses or how the losses impacted its returns for the newsletters' performance.

15. Beginning in May 2009, SMI opened a brokerage account through which it made trades for its own account based on the same trade alerts that it issued to the broker-dealers for the QQQQ Enhanced Picks newsletter. It opened a subsequent brokerage account through which it made trades for its own account based on the trade alerts that it issued for the QQQQ Picks newsletter in July 2010. After opening these accounts, SMI on its website provided links to its account statements, where investors could view all of the trades made pursuant to the alerts issued by these two newsletters, the prices at which such trades were executed, and the resulting gains or losses.

16. Prior to the institution of this action, SMI voluntarily changed its performance results reporting to only report information based on actual trades conducted through its control accounts and to report "rollover" trades as distinct and separate transactions. In addition, SMI no longer reports different execution prices obtained by auto-trading broker-dealers based on the same alert and no longer makes any representations as to the number of winning or losing recommendations in any calendar period

17. As a result of the conduct described above, SMI willfully violated Section 206(2) of the Advisers Act, which makes it unlawful for any investment adviser to engage in any act, practice or course of business which operates as a fraud or deceit upon any client or prospective client, and Section 206(4) of the Advisers Act, which makes it unlawful for an investment adviser to engage in any act, practice or course of business which is fraudulent, deceptive or manipulative. SMI also willfully violated Rule 206(4)-1(a)(2), which, *inter alia*, makes it unlawful for an advertisement published by an investment adviser to refer to any past specific recommendations which were profitable to any person without providing a complete list of all recommendations made within the immediately preceding period of at least one year. SMI also willfully violated Rule 206(4)-1(a)(5), which makes it unlawful for an investment adviser to distribute an advertisement which contains any untrue statement of a material fact, or which is otherwise false and misleading.

18. As a result of the conduct described above, Perminov willfully aided and abetted and caused SMI's violations of Sections 206(2) and 206(4) of the Advisers Act and Rules 206(4)-1(a)(2) and (5) thereunder.

**SMI's Remedial Acts**

19. In determining to accept the Offers, the Commission considered remedial acts undertaken by SMI.

**Undertakings**

20. SMI has undertaken to[1]:

a. Make available to current and potential subscribers the complete performance histories for all of its newsletters from the date that control accounts were instituted for the newsletter; provided that SMI shall not be required to disclose open recommendations made within the prior 30 days to persons who are not current subscribers of the applicable newsletter;

b. Establish internal procedures and controls reasonably designed to ensure the accuracy of SMI's representations regarding the performance of its trading recommendations to any investor or potential investor, including those on its website;

c. Retain, within sixty (60) days of the entry of this Order, the services of an independent compliance consultant (the "Independent Consultant") that is not unacceptable to the Commission staff. The Independent Consultant's compensation and expenses shall be borne exclusively by SMI;

[1] SMI has begun certain of these Undertakings.

d. SMI shall require that the Independent Consultant perform annual reviews ("Reviews") of SMI's internal controls, policies and procedures, performance representations, and advertising materials for compliance with the Advisers Act for a period of two years, with the first review as of December 31, 2012 and the second review as of December 31, 2013;

e. SMI shall provide to the Commission staff, within thirty (30) days of retaining the Independent Consultant, a copy of an engagement letter detailing the Independent Consultant's responsibilities, which shall include the Reviews to be made by the Independent Consultant as described in this Order.

f. SMI shall require that, within forty-five (45) days from the end of each annual review, the Independent Consultant shall submit a written and dated report of its findings to SMI and to the Commission staff (the "Report"). SMI shall require that each Report include a description of the review performed, the names of the individuals who performed the review, the conclusions reached, the Independent Consultant's recommendations for changes in or improvements to SMI's policies and procedures and/or disclosures to investors, and a procedure for implementing the recommended changes in or improvements to SMI's policies and procedures and/or disclosures.

g. SMI shall adopt all recommendations contained in the Report within sixty (60) days of the date of the receipt of the Report; provided, however, that within forty-five (45) days after the date of the applicable Report, SMI shall in writing advise the Independent Consultant and the Commission staff of any recommendations that SMI considers to be unduly burdensome, impractical, or inappropriate. With respect to any recommendation that SMI considers unduly burdensome, impractical or inappropriate, SMI need not adopt that recommendation at that time but shall propose in writing an alternative policy, procedure or system designed to achieve the same objective or purpose. As to any recommendation with respect to SMI's policies and procedures on which SMI and the Independent Consultant do not agree, SMI and the Independent Consultant shall attempt in good faith to reach an agreement within sixty (60) days after the date of the applicable Report. Within fifteen (15) days after the conclusion of the discussion and evaluation by SMI and the Independent Consultant, SMI shall require that the Independent Consultant inform SMI and the Commission staff in writing of the Independent Consultant's final determination concerning any recommendation that SMI considers to be unduly burdensome, impractical, or inappropriate. SMI shall abide by the determinations of the Independent Consultant and, within sixty (60) days after final agreement between SMI and the Independent Consultant or final determination by the Independent Consultant, whichever occurs first, SMI shall adopt and implement all of the recommendations that the Independent Consultant deems appropriate.

h. Within ninety (90) days of SMI's adoption of all of the recommendations in a Report that the Independent Consultant deems appropriate, as determined pursuant to the procedures set forth herein, SMI shall certify in writing to the Independent Consultant and the Commission staff that SMI has adopted and implemented all of the Independent Consultant's recommendations in the applicable Report. Unless otherwise directed by the Commission staff, all Reports, certifications, and other documents required to be provided to the Commission staff shall be sent to Kathryn Pyszka, Assistant Regional Director, Chicago Regional Office, Securities and Exchange Commission, 175 W. Jackson Blvd., Suite 900, Chicago, Illinois, 60604, or such other address as the Commission staff may provide.

i. SMI shall cooperate fully with the Independent Consultant and shall provide the Independent Consultant with access to such of its files, books, records, and personnel as are reasonably requested by the Independent Consultant for review; provided that SMI may satisfy its obligation to provide access to the Independent Consultant by physical delivery of documents to the Independent Consultant by email, ftp site and phone calls with personnel, and the Independent Consultant shall not be required to conduct on-site inspections of SMI's offices unless the Independent Consultant determines that an on-site inspection is necessary to perform its duties, in which case SMI shall cooperate with the Independent Consultant to arrange a reasonable on-site inspection. To ensure the independence of the Independent Consultant, SMI: (1) shall not have the authority to terminate the Independent Consultant or substitute another independent compliance consultant for the initial Independent Consultant, without the prior written approval of the Commission staff; and (2) shall compensate the Independent Consultant and persons engaged to assist the Independent Consultant for services rendered pursuant to this Order at their reasonable and customary rates.

j. SMI shall require the Independent Consultant to enter into an agreement that provides that for the period of engagement and for a period of two (2) years from completion of the engagement, the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with SMI, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. The agreement will also provide that the Independent Consultant will require that any firm with which the Independent Consultant is affiliated or of which the Independent Consultant is a member, and any person engaged to assist the Independent Consultant in the performance of the Independent Consultant's duties under this Order shall not, without prior written consent of the Commission staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with SMI, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two (2) years after the engagement.

k. Within ten (10) days of the entry of this Order, SMI shall post prominently on its website a description of this Order in a form and location acceptable to the Commission staff, with a hyperlink to the entire Order. SMI shall maintain the posting and hyperlink on its website for a period of twelve (12) months from the entry of this Order.

l. For good cause shown, the Commission staff may extend any of the procedural dates relating to the undertakings. Deadlines for procedural dates shall be counted in calendar days, except that if the last day falls on a weekend or federal holiday, the next business day shall be considered to be the last day.

m. SMI shall certify, in writing, compliance with its undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and SMI agrees to provide such evidence. The certification and supporting material shall be submitted to Kathryn Pyszka, Assistant Regional Director, Chicago Regional Office, Securities and Exchange Commission, 175 W. Jackson Blvd., Suite 900, Chicago, Illinois, 60604, or such other address as the Commission staff may provide, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings.

## IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Sections 203(e), 203(f) and 203(k) of the Advisers Act, it is hereby ORDERED that:

A. SMI cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 206(4) of the Advisers Act and Rules 206(4)-1(a)(2) and (5) thereunder.

B. Perminov cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 206(4) of the Advisers Act and Rules 206(4)-1(a)(2) and (5) thereunder.

C. SMI and Perminov are censured.

D. Perminov shall, within 14 days of the entry of this Order, pay a civil money penalty in the amount of $40,000 to the United States Treasury. If timely payment is not made by the date the payment is required by this Order, interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

(1) Perminov may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) Perminov may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(3) Perminov may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Perminov as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Kathryn Pyszka, Assistant Regional Director, Chicago Regional Office, Securities and Exchange Commission, 175 W. Jackson Blvd., Suite 900, Chicago, Illinois, 60604.

E. SMI shall pay a civil money penalty in the amount of $75,000 to the United States Treasury, plus post judgment interest. Perminov shall be jointly and severally liable for this penalty. Payment shall be made in the following installments: $40,000 shall be paid within 14 days of the issuance of this Order, and SMI shall make 11 monthly payments of $3,000, which are due on the 27th day of each month beginning in September 2012, and a final payment in the amount of $2,000, plus any remaining balance, which is due on September 15, 2013. Payments shall be deemed made on the date they are received by the Commission and shall be applied first to post judgment interest, which accrues pursuant to 31 U.S.C. 3717 on any unpaid amounts due after 14 days of issuance of this Order. Prior to making the final payment set forth herein, SMI shall contact the staff of the Commission for the additional amount due for the final payment. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance plus any additional interest accrued pursuant to pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Payment must be made in one of the following ways:

(1) SMI may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) SMI may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(3) SMI may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying SMI as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Kathryn Pyszka, Assistant Regional Director, Chicago Regional Office, Securities and Exchange Commission, 175 W. Jackson Blvd., Suite 900, Chicago, Illinois, 60604.

F. SMI shall comply with its undertakings enumerated in Paragraphs 20(a) through 20(m) above.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-67906; File No. SR-OCC-2012-14)

September 21, 2012

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Advance Notice Relating to the Clearance and Settlement of Over-the-Counter Options

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4(n)(1)(i),[2] notice is hereby given that on August 30, 2012, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the advance notice described in Items I, II, and III below, which Items have been prepared primarily by OCC. The Commission is publishing this notice to solicit comments on the advance notice from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

The proposed changes contained in the advance notice will permit OCC to provide central clearing of index options on the S&P 500 that are negotiated bilaterally in the over-the-counter market and submitted to OCC for clearance.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the advance notice and discussed any comments it received on the advance notice. The text of these statements may be examined at the places specified in Item IV below. OCC

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4(n)(i).

has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[3]

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

The purpose of this proposed rule change and advance notice is to allow OCC to provide central clearing of OTC index options on the S&P 500 Index. The proposed rule change replaces a previously proposed rule change which was withdrawn by OCC.[4] OCC will clear the proposed OTC options in a manner that is highly similar to the manner in which it clears listed options, with only such modifications as are appropriate to reflect the unique characteristics of OTC options.

**OTC Options**

OCC has entered into a license agreement with Standard & Poor's Financial Services LLC ("S&P") that allows OCC to clear OTC options on three equity indices published by the S&P: the S&P 500 Index, the S&P MidCap 400 Index and the S&P Small Cap 600 Index. The initial OTC options to be cleared by OCC will consist of options on the S&P 500 Index. OCC may clear OTC options on other indices and on individual equity securities in the future, subject to Commission approval of one or more additional rule filings. The current rule filing defines "OTC option" and "OTC index option" generically in order to simplify future amendments to provide for additional underlying interests. OTC options will have predominantly common terms and characteristics, but also include unique terms negotiated by the parties. Transactions in OTC options will not be executed through the facilities of any exchange, but will instead be

[3] The Commission has modified the text of the summaries prepared by OCC.

[4] Securities Exchange Act Release No. 34-66090 (January 3, 2012), 77 FR 1107 (January 9, 2012) (SR-OCC-2011-19).

entered into bilaterally and submitted to OCC for clearance through one or more providers of trade affirmation services.[5]

OTC options will be similar to exchange-traded standardized equity index options called "FLEX Options" that are currently traded on certain options exchanges.[6] FLEX Options are exchange-traded put and call options that allow for customization of certain terms. For example, FLEX index Options traded on the Chicago Board Options Exchange have six customizable terms: (1) underlying index, (2) put or call, (3) expiration date, (4) exercise price, (5) American or European exercise style, and (6) method of calculating settlement value. OCC is the issuer and guarantor of FLEX Options and clears FLEX Options traded on multiple exchanges.

Similar to FLEX Options, OTC options will allow for customization of a limited number of variable terms with a specified range of values that may be assigned to each as agreed between the buyer and seller. Parties submitting transactions in OTC options for clearing by OCC will be able to customize six discrete terms: (1) underlying index;[7] (2) put or call; (3) exercise price; (4) expiration date; (5) American or European exercise style; and (6) method of

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[5] The initial provider of the trade affirmation services in connection with the OTC options will be MarkitSERV.

[6] Note that FINRA Rule 2360(a)(16) refers to FLEX Options as "FLEX Equity Options," which it defines as "any options contract issued, or subject to issuance by, The Options Clearing Corporation whereby the parties to the transaction have the ability to negotiate the terms of the contract consistent with the rules of the exchange on which the options contract is traded." OCC does not believe this definition would capture OTC options as they are not traded on any exchange. Nevertheless, as discussed below, OCC is working with FINRA to amend certain of FINRA's rules to clarify the proper application of such rules to OTC options.

[7] Initially, however, the S&P 500 Index will be the only permitted underlying index.

calculating exercise settlement value on the expiration date.[8] The variable terms and permitted values will be specified in the proposed Section 6 of Article XVII of the By-Laws. With respect to future OTC options accepted for clearing, OCC intends that such future OTC options will conform to the general variable terms and limits on the variable terms set forth in proposed Section 6 of the By-Laws, and will either amend the Interpretations and Policies thereunder to specify additional requirements for specific OTC options or publish such requirements on OCC's website.

**Clearing of OTC Options**

OCC proposes to clear OTC options subject to the same basic rules and procedures used for the clearance of listed index options. The proposed rules require that the counterparties to the OTC options must be eligible contract participants ("ECPs"), as defined in Section 3a(65) of the Securities Exchange Act of 1934,[9] as amended (the "Exchange Act") and Section 1a(18) of the Commodity Exchange Act,[10] as amended (the "CEA"). Because an OTC option will be a "security" as defined in the Exchange Act, the proposed rules also require that the transactions be cleared through a clearing member of OCC that is registered with the Commission as a broker-dealer or one of the small number of clearing members that are "non-U.S. securities firms" as defined in OCC's By-Laws. OCC is not proposing to require clearing members to meet any

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[8] The expiration date of an OTC option must fall on a business day. The method of determining the exercise settlement value of an OTC option on its expiration date may be either the opening settlement value or the closing settlement value of the underlying index (calculated by S&P using the opening or closing price, as applicable, in the primary market of each component security of the underlying index on the specified expiration date), in each case as reported to OCC by CBOE.

[9] 15 U.S.C. 78c(a)(65).

[10] 7 U.S.C. 1a(18).

different financial standards for clearing OTC options. However, clearing members must be specifically approved by OCC to clear OTC options pursuant to new Interpretation and Policy .11 to Section 1 of Article V in order to assure the operational readiness of such clearing members to clear OTC options. Clearing members seeking to clear OTC options will be required to submit a business expansion request and complete an operational review. The operational review consists of an initial meeting with the clearing member's staff to evaluate the staff's experience, confirm the staff's familiarity with current OCC systems and procedures, complete an operational questionnaire, perform a high level review of the clearing member's systems and processing capabilities, and review other pertinent operational information. Successful testing of messaging capability between the clearing member, MarkitSERV and OCC is also necessary. These procedures will determine whether the firm is operationally ready to clear OTC Index Options.

Exercise of an OTC option will be settled by payment of cash by the assigned writer and to the exercising holder through OCC's cash settlement system on the business day following exercise in exactly the same manner as is the case with exercise settlement of listed index options. As in the case of listed index options, the exercise-settlement amount will be equal to the difference between the current value of the underlying interest and the exercise price of the OTC option, times the multiplier that determines the size of the OTC option. In the case of OTC index options on the S&P 500, the multiplier will be fixed at 1. The multipliers for additional OTC index options that OCC may in the future clear may be fixed at such value as OCC determines and provides for in its By-Laws and Rules.

OCC will calculate clearing margin for the OTC options using its STANS margin system on the same basis as for listed index options and will otherwise apply the same risk management practices to both OTC options and listed index options, including new risk modeling enhancements for longer-tenor options discussed below under "Risk Management Enhancement for Longer-Tenor Options." Because OCC currently clears listed options on all three of the underlying indexes on which OCC is currently licensed to clear OTC options, and because the customizable terms of these OTC options are relatively limited and the range of values that customizable terms may be given is limited, OCC does not believe that valuation and risk management for these OTC options present challenges that are different from those faced in the listed options market. Nevertheless, as discussed further below, OCC is proposing special OTC Options Auctions to be used in the unlikely event that OCC would be unable to close out positions in OTC options of a failed clearing member through other means.

OTC options may be carried in a clearing member's firm account, in market-maker accounts or in its securities customers' account, as applicable. Although customer positions in OTC options will be carried in the securities customers' account (an omnibus account), OCC will use a "customer ID" to identify positions of individual customers based on information provided by clearing members.[11] However, positions are not presently intended to be carried in individual customer sub-accounts, and positions in OTC options will be margined at OCC in the omnibus customers' account on the same basis as listed options. If a clearing member takes the other side of a transaction with its customer in an OTC option, the transaction will result in the creation of a long or short position (as applicable) in the clearing member's customers' account and the opposite short or long position in the clearing member's firm account. The positions

[11] Such customer IDs are necessary in order to allow OCC to comply with certain terms of OCC's license agreement with S&P. As described further below, customer IDs will be used for other purposes as well.

could also be includable in the internal cross-margining account, subject to any necessary regulatory approvals.

The trade data for an OTC option trade will be entered into the system of MarkitSERV or another trade confirmation/affirmation vendor approved by OCC for this purpose (the "OTC Trade Source").[12] While MarkitSERV will be the only OTC Trade Source at launch, OCC will permit additional OTC Trade Sources in the future in response to sufficient market demand from OCC's clearing members and subject to the ability of any such OTC Trade Source to meet OCC's requirements for operational readiness and interoperability with OCC's systems, as well as requirements with respect to relevant business experience and reputation, adequate personnel and expertise, financial qualification and such other factors as OCC deems relevant. OCC will receive confirmed trades from the OTC Trade Source. It will be permissible for parties to submit trades for clearance that were entered into bilaterally at any time in the past, provided that the eligibility for clearance will be determined as of the date the trade is submitted to OCC for clearance.[13] The OTC Trade Source will process the trade and submit it as a confirmed trade to OCC for clearing. If the trade meets OCC's validation requirements, OCC will so notify the

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[12] MarkitSERV, LLC is owned by Markit Group Limited, Markit Group Holdings Limited and The Depository Trust & Clearing Corporation. MarkitSERV Limited is a wholly-owned U.K. subsidiary of MarkitSERV, LLC. MarkitSERV, LLC and MarkitSERV Limited (collectively, "MarkitSERV") provide derivatives transaction processing, electronic confirmation, portfolio reconciliation services, and other related services for firms that conduct business in the over-the-counter derivatives markets through a variety of electronic systems, including the MarkitWire system. MarkitWire, owned by MarkitSERV Limited, is an OTC derivatives electronic confirmation/affirmation service offered by MarkitSERV as part of its post-trade processing suite of products. The role of MarkitSERV and MarkitWire in OCC's clearing of OTC options is described in further detail below.

[13] OCC's license agreement with S&P imposes certain requirements relating to minimum time remaining to expiration of an OTC option.

OTC Trade Source, which will notify the submitting parties. Customers of clearing members may have direct access to the OTC Trade Source for purposes of entering or affirming trade data and receiving communications regarding the status of transactions, in which case mechanisms will be put in place for a clearing member to authorize a customer to enter a trade for the clearing member's customers' account or for the clearing member to affirm a trade once entered.

In order for a clearing member to be approved for clearing OTC options, the clearing member must enter into a standard agreement with MarkitSERV (or another OTC Trade Source with which the clearing member intends to enter trade data, if and when OCC enters into arrangements with other OTC Trade Sources). At launch, OTC options will not be subject to the same clearing member trade assignment rules and procedures through which exchange-traded options can be cleared by a clearing member other than the executing clearing member. This functionality may be added at a later date. OCC and MarkitSERV will adopt procedures to permit a customer that has an account with Clearing Member A ("CM A") to enter into an OTC option transaction with Clearing Member B ("CM B") and have the position included in its account at CM A and cleared in CM A's customers' account at OCC.

OTC options will be fungible with each other to the extent that there are OTC options in the system with identical terms. However, OCC will not treat OTC options as fungible with index options listed on any exchange, even if an OTC option has terms identical to the terms of the exchange-listed option.

Clearing members that carry customer positions in cleared OTC options will be subject to all OCC rules governing OCC-cleared options generally, as well as all applicable rules of the Commission and of any self-regulatory organization, including the Financial Industry Regulatory Authority ("FINRA"), of which they are a member. Section 8 of Article III of

OCC's By-Laws provides that, subject to the By-Laws and Rules, "the Board of Directors may suspend Clearing Members and may prescribe and impose penalties for the violation of the By-Laws or the Rules of the Corporation, and it may, by Rule or otherwise, establish all disciplinary procedures applicable to Clearing Members and their partners, officers, directors and employees." As a condition to admission, Section 3(c) of Article V of the By-Laws provides that a clearing member must agree, among other things, to "pay such fines as may be imposed on it in accordance with the By-Laws and Rules." Rule 305 permits OCC to impose restrictions on the clearing activities of a clearing member if it finds that the financial or operational condition of the clearing member makes it necessary or advisable to do so for the protection of OCC, other clearing members, or the general public. Rule 1201(a) provides that OCC "may censure, suspend, expel or limit the activities, functions or operations of any Clearing Member for any violation of the By-Laws and Rules or its agreements with the Corporation." In addition to, or in lieu of, such actions, OCC is permitted under the same paragraph to impose fines. Rule 1202(b) establishes procedures for taking any such disciplinary actions. The foregoing provisions are sufficient to permit OCC to fine or otherwise discipline a clearing member that fails to abide by OCC's By-Laws and Rules applicable to OTC options, or to prohibit such clearing member from continuing to clear such options.

Regulatory Status of the OTC Options

An OTC option will be a "security" as defined in both the Securities Act of 1933, as amended (the "Securities Act") and, as noted above, the Exchange Act. OCC will be the "issuer" of the OTC options. The OTC options will be neither "swaps" nor "security-based swaps" for purposes of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[14]

Most of OCC's clearing members are members of FINRA and subject to FINRA's rules, which have different provisions for "listed" and "OTC options" and contain various definitions distinguishing between the two. In some cases, OTC options would fall into neither category under FINRA's definitions and in other cases, they would fall within what OCC perceives to be the wrong category. FINRA and OCC are working together to implement appropriate amendments to FINRA rules to clarify the proper application of such rules to cleared OTC options.

**MarkitSERV Trade Submission Mechanics**

MarkitSERV provides an interface to OCC that allows OCC to receive messages containing details of transactions in OTC options submitted for clearing by clearing members with access to MarketWire and also allows OCC to transmit messages to MarkitWire participants identifying the status of submitted transactions. MarkitWire applications use product-specific templates to simplify deal entry and negotiations. The templates specify the data required for a given product and also the business validation rules for each field. MarkitSERV has included OCC's validation requirements for OTC options in its trade templates.

[14] Section 1a(47)(A)(i) of CEA, 7 U.S.C. 1a(47)(A)(i), as added by Section 721(a)(21) of Dodd-Frank, defines "swaps" broadly to include options on indices. However, Section 1a(47)(B)(iii) of the CEA, 7 U.S.C. 1a(47)(B)(iii), excludes from the "swap" definition any option on any index of securities that is subject to the Securities Act and the Exchange Act. A contract that is excluded from the definition of a "swap" under Section 1a(47)(B) of the CEA, 7 U.S.C. 1a(47)(B) (other than Section 1a(47)(B)(x), 7 U.S.C 1a(47)(B)(x)) is not a "security-based swap" for purposes of Section 3a(68) of the Exchange Act, 15 U.S.C. 78c(a)(68).

The trade data for each OTC option transaction must be entered into MarkitWire. MarkitSERV will use a "confirmation/affirmation" procedure in which one party to the trade enters the trade data to the MarkitWire platform, which issues a confirmation to the counterparty to be affirmed, rejected or requested to be revised. If the trade details are confirmed, the trade will then be submitted to OCC for clearance and MarkitSERV will affirm such submission to both parties. OCC then validates the trade information for compliance with applicable requirements, such as the identification of an account of an eligible clearing member in which each side of the trade will be cleared, that the variable terms are within permissible ranges, and that minimum size requirements under OCC's license agreement with S&P are met. This validation will be completed by OCC immediately upon submission. OCC's clearing system will automatically accept the trade if it passes the validation process and will otherwise reject it.[15] A trade that is rejected by OCC may be corrected and submitted as a new transaction. Clearing members and customers with access to MarkitSERV will be able to determine whether a trade has been accepted or rejected both through MarkitSERV and, in the case of clearing members, through their interface with OCC's clearing system.

<u>MarkitSERV's Regulatory Status</u>[16]

MarkitSERV is not registered as a clearing agency under the Exchange Act, and the Commission staff has asked OCC to consider whether MarkitSERV would be required to so

[15] Once accepted, a trade is guaranteed by OCC. Note, however, that OTC options for which the premium payment date communicated by MarkitSERV to OCC is prior to the business day on which the OTC option is submitted to OCC for clearing (referred to as a "Backloaded OTC Option") will not be accepted and guaranteed until the selling clearing member has met its initial morning cash settlement obligations to OCC on the following business day.

[16] MarkitSERV offers different services in different markets, and this discussion is addressed only to the "confirmation/affirmation" procedure to be used in submitting trades to OCC.

register in order to provide the proposed services to the OTC options market. OCC believes that no such registration is necessary based upon relevant interpretive guidance issued by the Commission.

Section 3(a)(23)(A) of the Exchange Act[17] defines a "clearing agency" broadly. The definition includes, in relevant part, "any person who . . . provides facilities for comparison of data respecting the terms of settlement of securities transactions[.]" In 1998, the Commission issued a release entitled "Confirmation and Affirmation of Securities Trades; Matching" (the "Matching Release").[18] In the Matching Release, the Commission published "its interpretation that a 'matching' service that compares securities trade information from a broker-dealer and the broker-dealer's customer is a clearing agency function." The Matching Release distinguishes between such a matching service and a "confirmation/affirmation service" where the "vendor intermediary will only transmit information between the parties to a trade, and the parties will confirm and affirm the accuracy of the information." The Commission noted that "matching" constitutes the "comparison of data respecting the terms of settlement of securities transactions" and that such services therefore trigger status as a clearing agency, while confirmation/affirmation services would not, by themselves, constitute such a data comparison. The Commission concluded in the Matching Release that "an intermediary that captures trade information from a buyer and a seller of securities and performs an independent reconciliation or matching of that information is providing facilities for the comparison of data within the scope of Exchange Act Section 3(a)(23)." The Commission stated that "matching" is "so closely tied to

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[17] 15 U.S.C. 78c(a)(23)(A).

[18] Securities Exchange Act Release No. 34-39829 (April 13, 1998), 63 FR 17943 (April 13, 1998).

the clearance and settlement process that it is different not only in degree but also different in kind from the . . . confirmation and affirmation process." The Matching Release goes on to state: "a vendor that provides confirmation/affirmation services only will exchange messages between a broker-dealer and its institutional customer. The broker-dealer and its institutional customer will compare the trade information contained in those messages, and the institution itself will issue the affirmed confirmation." This is precisely what occurs when a counterparty to a trade affirms the trade data through MarkitSERV and requests submission to OCC for clearance. MarkitSERV transmits messages only; it does not "compare" or "match" trade data submitted by two parties.

The "confirmation/affirmation" functionality (as described above) to be provided by MarkitSERV (through MarkitWire) with respect to OTC options is functionally identical to the confirmation/affirmation service described in the Matching Release and OCC believes such service would not be a "matching" service within the meaning of the release. OCC believes that MarkitSERV will not be a "clearing agency" with respect to the services to be provided in connection with OTC options. The confirmation/affirmation service described in the Matching Release referred "to the transmission of messages among broker-dealers, institutional investors, and custodian banks regarding the terms of a trade executed for the institutional investor." MarkitWire's confirmation/affirmation process will allow for the transmission of messages among OCC's clearing members (most of which are registered broker-dealers), their customers (all of whom will be ECPs and will therefore be large and financially sophisticated market participants) and OCC, which is itself registered and subject to the Commission's oversight as a clearing agency.

By contrast, the "matching" services contemplated in the Matching Release would involve "the process whereby an intermediary compares the broker dealer's trade data submission . . . with the institution's allocation instructions . . . to determine whether the two descriptions of the trade agree." MarkitWire performs no such comparison. Under the confirmation/affirmation procedure, trade data is entered into MarkitWire by one party and such data is made available to the counterparty to be affirmed, rejected or requested to be revised. MarkitWire merely facilitates the transfer of information between the parties sufficient to allow the comparison to be made. A binding transaction (*i.e.*, an "affirmed confirmation" in the language of the Matching Release) is not produced through any action of MarkitSERV, but is instead created by the completion, by the counterparty, of an affirmation of the trade data entered by the first party. MarkitWire provides no "independent reconciliation or matching" of trade data. Rather MarkitWire is providing essentially a messaging service among OCC and the parties to trades in OTC Options. The Matching Release is clear as to the distinction between a matching service and a confirmation/affirmation service, and OCC believes that there is no ambiguity that the services to be provided by MarkitWire with respect to OTC options fall into the latter, rather than the former, category.

**Risk Management Enhancements for Longer-Tenor Options**

Although OCC's license agreement with S&P allows OCC to clear OTC options with tenors of up to fifteen years, OCC has elected at this time to clear only OTC options on the S&P 500 index with tenors of up to five years. However, OCC currently clears FLEX Options on the S&P 500 with tenors of up to 15 years. While OCC believes that its current risk management practices are adequate for current clearing activity, OCC is in the process of implementing risk modeling enhancements with respect to longer-tenor options, including OTC options. The enhancements are part of OCC's ongoing efforts to test and improve its risk management operations with respect to all longer-tenor options that OCC currently clears. These procedures will be submitted for review in a separate "advance notice" filing and OCC will not commence clearing of OTC options until such procedures have been approved and implemented.

The proposed enhancements are as follows:

- First, OCC will introduce indicative over-the-counter quotations into the daily dataset of prices used to risk manage OCC-cleared products. These quotations will be obtained from a service provider that will collect OTC dealer polling information on a daily basis and provide such data to OCC.
- Second, OCC will introduce variations in the implied volatilities used in the modeling of all cleared options whose residual tenors are at least three years. To date, OCC's margin methodology has assumed that implied volatilities of option contracts are static over the two-day risk horizon. While OCC's backtesting has identified few exceedances related to implied volatility shocks, such shocks could occur and taking them into account in OCC's margin model will allow more robust risk management. OCC proposes to achieve this result by incorporating into the risk factors included in OCC's models time series of proportional changes in implied volatilities for a range of representative volatilities.
- Third, OCC will introduce a valuation adjustment into its calculation of portfolio net asset value. This adjustment will be based on the aggregate sensitivity of the longer-tenor options in a portfolio to the overall level of implied volatilities at three and five years, and to the implied volatility skew.

A review of individual S&P 500 Index put and call options positions that are in the money by varying amounts and have expiration dates between four and nine years out indicates that the inclusion of modeled implied volatilities tends to result in less margin being held against short call positions and more being held against short put positions. These results are consistent with what would be expected given the strong negative correlation that exists between changes in implied volatility and market returns. On average, OCC observed a decrease in the margin requirement of approximately 24% on the nine call options tested and a 63% increase associated with the nine put options.

**Proposed By-Law and Rule Changes**

The specific proposed changes to OCC's By-Laws and Rules to provide for the clearing of OTC options relate primarily to: (i) specification of customizable terms; (ii) procedures for submission and acceptance of trades for clearance; and (iii) specification of criteria for eligibility of clearing members to clear transactions in OTC options and limitation of the types of customers for whom clearing members may effect transactions in OTC options. Otherwise, the currently proposed OTC options will be cleared and settled under the same provisions applicable to clearance of listed index options. Many of the proposed amendments are self-explanatory, and OCC has therefore attempted to confine the following discussion to a broad overview with specific explanation only where the reasons for the change may be less obvious.

Article I of the By-Laws contains defined terms used throughout the By-Laws and Rules. OCC proposes to modify certain existing definitions and include certain new definitions in order to incorporate OTC options into existing rules and facilitate the creation of new provisions unique to OTC options. Throughout the By-Laws and Rules, OCC proposes to replace the term "Exchange transaction," which is currently defined in Article I, in relevant part, as "a transaction on or through the facilities of an Exchange for the purchase, writing or sale of a cleared contract" with the term "confirmed trade" so as to make the relevant portions of the By-Laws and Rules applicable to transactions in OTC options as well as listed options, without causing confusion about the role of the OTC Trade Source in OCC's clearing of OTC options. "Confirmed trade" is proposed to be defined in Article I to include transactions "effected on or through the facilities of an exchange" or "affirmed through the facilities of an OTC Trade Source" in order to include transactions in both listed options and OTC options. The current definition of "confirmed trade" in Rule 101 is proposed to be deleted as unnecessary given the new definition. Much of the length of this rule filing is attributable to the fact that the term "Exchange transaction" is used so many places in the rules. OCC has entered into agreements in the past which reference the term "Exchange transaction" or "exchange transaction." OCC is also proposing to add an Interpretation and Policy to the new definition of "confirmed trade" in order to avoid any ambiguity concerning how such terms should be interpreted in any such agreement.

OCC proposes to add a new Interpretation and Policy .11 to Section 1 of Article V of the By-Laws, providing the additional criteria that must be met by a clearing member in order to clear OTC index options. Among these new criteria are that clearing members seeking to clear OTC index options on underlying indices published by Standard & Poor's Financial Services LLC ("S&P") must execute and maintain in effect a short-form license agreement in such form as specified from time to time by S&P. The current form of S&P short-form index license agreement is attached hereto as Exhibit 3.

The Interpretations and Policies under Section 1, Article VI allow clearing members to adjust their positions with OCC for certain enumerated reasons. OCC proposes to amend the Interpretations and Policies to clarify that adjustment of positions in OTC options will be effected through a manual process (as opposed to the electronic process available to post-trade adjustments in listed options), to the extent permitted by OCC. For the same reason, OCC is proposing to amend Rule 403 to prohibit clearing member trade assignment ("CMTA") transactions in OTC options. Trade "give-ups" that are effected through the CMTA process in the case of listed options will, in the case of OTC options, be effected through MarkitSERV before the trades are submitted to OCC for clearing.

Article XVII of the By-Laws governs index options in general and OCC is proposing amendments to Article XVII in order to set forth the terms applicable to the initial OTC options proposed to be cleared by OCC — options on the S&P 500 Index — and to differentiate OTC index options from other index options cleared by OCC. For example, certain amendments to the definitions are necessary because OTC options will be permitted to have a much wider range of expiration dates than exchange-traded options (other than FLEX Options). Additional definitional amendments ensure that OTC index options will constitute a separate class of options from other cash-settled index options even if both index options have the same terms and cover the same underlying interest.

Section 3 of Article XVII provides for adjustment of the terms of outstanding index options as necessary to reflect possible changes in the underlying index — such as those creating a discontinuity in the level of the index — that could theoretically make an adjustment necessary to protect the legitimate expectations of holders and writers of options on the index. Pursuant to paragraph (g) of Section 3, most but not all such adjustments would be made, in the case of listed index options, by an adjustment panel consisting of representatives of the exchanges on which the options are traded. In the case of OTC options, any such adjustments will be made by OCC in its sole discretion. However, in exercising that discretion, OCC may take into consideration adjustment made by the adjustment panel with respect to exchange-traded options covering the same underlying index.[19]

OCC proposes to add a new Section 6 to Article XVII to set forth certain provisions unique to OTC index options, including the variable terms allowed for OTC index options and the general limitations on such variable terms. In general, all OTC index options must conform to the terms and limitations set forth in Section 6, and additional specific requirements applicable to specific OTC index options will either be set forth in the Interpretations and Policies under Section 6 or published separately on OCC's website. Section 6 also makes clear that although OTC index options are not fungible with exchange-traded index options, OTC index options of the same series (*i.e.*, options having identical terms) will be fungible with each other. In addition to the terms and limitations applicable to OTC index options, Section 6 will establish that clearing members will be deemed to have made a number of representations and warranties in connection with their activities in OTC options each time they affirm a confirmed trade entered into an OTC Trade Source.

OCC has submitted a rulemaking petition to the Commission[20] seeking an amendment to Commission Rule 238[21] that would exempt the OTC Options from most provisions of the Securities Act. Unless another exemption from the registration requirements of the Securities

[19]Because index options, unlike options on individual stocks, rarely, if ever, require adjustments, allocation of the adjustment authority may have little practical significance.

[20] *See* SEC File No. 4-644 (Submitted January 13, 2012), *available at* http://www.sec.gov/rules/petitions/2012/petn4-644.pdf.

[21] 17 CFR 230.238.

Act is available, OCC intends to rely upon Rule 506 of Regulation D[22] under the Securities Act, which is a safe harbor under the Securities Act exemption in Section 4(a)(2)[23] for offerings by an issuer not involving a public offering. OCC intends to satisfy the conditions of Rule 506 of Regulation D as in effect at the time OCC relies upon the safe harbor. Participants in the existing markets for OTC equity options offered and sold in the United States commonly rely on the private offering exemption under these provisions and such reliance is therefore consistent with existing practice. OTC Options will be available for purchase only by highly sophisticated investors that are both "eligible contract participants," as defined in Section 3a(65) of the Exchange Act,[24] and "accredited investors," as defined in Rule 501(a) under Regulation D.[25] Section 6(f) of Article XVII includes representations of clearing members necessary to ensure that there is no general solicitation or general advertising in connection with the offer or sale of the OTC Options until such time as OCC notifies clearing members that such restriction no longer applies.

Chapter IV of the Rules sets forth the requirements for reporting of confirmed trades to OCC, and Rule 401 thereunder governs reporting of transactions in listed options by participant Exchanges. OCC is proposing to add new Rule 404 to govern the details of reporting of confirmed trades in OTC options by an OTC Trade Source.

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[22] 17 CFR 230.506.

[23] 15 U.S.C. 77d(a)(2).

[24] 15 U.S.C. 77c(a)(65).

[25] 17 CFR 230.501.

As discussed above, positions in OTC options will generally be margined in the same manner as positions in listed options using STANS and pursuant to Chapter VI of the Rules. However, OCC proposes to amend Rule 611 to establish different procedures for the segregation of long positions in OTC options for margining purposes. Long positions in listed options are held in a clearing member's customers' account or firm non-lien account and by default are deemed to be "segregated," meaning that they are not subject to OCC's lien and are given no collateral value when determining the margin requirement in the account. Such positions may be unsegregated only when a clearing member instructs OCC to unsegregate a long position and represents to OCC that the long position is part of a spread transaction carried for a single customer whose margin requirement on the corresponding short position has been reduced in recognition of the spread. OCC will then unsegregate the long position and so reduce OCC's margin requirement. However, in case of long positions in OTC options that are carried in a clearing member's customers' account and for which OCC has received a customer ID, OCC proposes that it will automatically unsegregate such long positions if OCC identifies a qualifying short position in OTC options carried under the same customer ID. Clearing members will not be required to give an affirmative instruction to OCC to unsegregate a long position in OTC options or make a separate representation regarding the spread transaction. Instead, by carrying a qualifying spread position in a customer account, clearing members are deemed to have represented to OCC that the customer's margin has been reduced in recognition of the spread. Based on discussion with the clearing members, it is OCC's understanding that, in practice, broker-dealers reduce customers' margin requirements to reflect spread positions. Therefore, OCC believes that automatic recognition of such spreads by OCC together with the deemed representation will greatly increase operational efficiency while providing equal assurance that long positions in OTC options will be unsegregated only if an identified customer will receive the benefit of the reduced margin required for spread transactions.

Rule 1001 sets forth the amount of the contribution that each clearing member is required to make to the clearing fund. OCC proposes to amend Rule 1001(c) so that, for purposes of calculating the daily average number of cleared contracts held by a clearing member in open positions with OCC during a calendar month (which number is used in turn to determine the clearing member's contribution to the clearing fund), open positions in OTC options will be adjusted as needed to account for any differences between the multiplier or unit of trading with respect to OTC options relative to non-OTC options covering the same underlying index or interest so that OTC options and non-OTC options are given comparable weight in the computation.[26]

In general, the rules in Chapter XI governing the suspension of a clearing member will apply equally to clearing members that transact in OTC options. Rule 1104 provides broad authority for OCC to liquidate a suspended clearing member's margin and clearing fund deposits "in the most orderly manner practicable." Rule 1106 provides similarly worded authority to close out open positions in options and certain other cleared contacts carried by a suspended clearing member. In 2011, the Commission approved an OCC rule change providing OCC the express authority to use a private auction as one of the means by which OCC may close out open positions and liquidate margin and clearing fund deposits of a suspended clearing member.[27]

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[26] For example, the index multiplier applicable to OTC index options on the S&P 500 Index will be fixed at 1. In comparison, the index multiplier applicable to listed index options is 100.

[27] *See* Securities Exchange Act Release No. 34-65654 (October 28, 2011), 76 FR 68238 (November 3, 2011) (SR-OCC-2011-08). OCC subsequently filed a rule change, currently pending Commission approval, providing detailed procedures for the conduct of such an auction.

OCC anticipates it will use this auction process for OTC options as well. As an additional tool to ensure its ability to close out positions in OTC options promptly, OCC is proposing to amend Rule 1106 to provide for an alternative auction procedure specifically applicable only to OTC index options and related positions hedging, or hedged by, OTC index options (an "OTC Options Auction"). An OTC Options Auction would be used only in unusual circumstances where OCC determines it is not feasible to close out open positions in OTC index options through the other means provided for in OCC's Rules and By-Laws.[28] The amendments to Rule 1106 summarize the OTC Options Auction procedures and incorporate by reference the detailed procedures contained in a document entitled "OTC Options Auction Procedures," which will be posted on the Corporation's website and otherwise made available to clearing members upon request of OCC. A copy of the OTC Options Auction Procedures was attached to the filing as Exhibit 5.

Rule 1106(e)(2)(C) clarifies that, in the event that the liquidation of a clearing member results in a deficiency that would otherwise result in a proportionate charge against the clearing fund contributions of other clearing members, each OTC Index Option Member (as defined below) that failed to purchase or assume its share of an auction portfolio will be the first to absorb the deficiency, through a "Priority Charge" against such clearing members' clearing fund contributions. The Priority Charge is a "first loss" mechanism, and is not intended to increase a clearing member's total maximum exposure to OCC.

*See* Securities Exchange Act Release No. 34-67443 (July 16, 2012), 77 FR 42784 (July 20, 2012) (SR-OCC-2012-11).

[28] OCC anticipates that these procedures would be applicable to other OTC derivatives that may be cleared by OCC in the future. However, OCC has limited the currently proposed rule to OTC index options, and will amend it as and if appropriate to apply to other over-the-counter products that OCC may propose to clear in the future.

Under the OTC Options Auction procedures, all clearing members authorized to clear transactions in OTC index options ("OTC Index Option Members"), other than the defaulting clearing member, will be required to participate in the OTC Options Auction by submitting competitive bids for all or a portion of the defaulting clearing member's OTC index option portfolio. Each such participant will be subject to a minimum participation level based on the participant's proportionate share of the total "risk margin" requirement posted by all OTC Index Options Members in the previous month for all positions (not limited to OTC option positions) held in accounts eligible to hold OTC options positions ("OTC Eligible Accounts"), after removing the defaulting clearing member.[29] This method of calculating the minimum participation level in the OTC Options Auction results in all OTC Index Option Members being required to participate in the OTC Options Auction based on their clearing activity related to all positions in OTC Eligible Accounts. Required participation ensures that the OTC Options Auction will have sufficient participants authorized to clear transactions in OTC index options and that the most active clearing members in OTC index options will submit bids for the largest percentage of the auction portfolio, increasing the likelihood of the acquisition of OTC options positions by clearing members with appropriate financial strength, risk management capabilities and trading expertise. Each participant may submit bids at varying quantities and varying prices, so long as the participant's bids equal or exceed its minimum participation level. A participant may use bids from non-OTC Index Options Members and non-clearing members in order to meet its minimum participation level, subject to certain Corporation requirements including that it

[29] This minimum participation level will be multiplied by 1.15 to calculate each participant's minimum bid size, such that the sum of all participants' bids will equal 115% of the auction portfolio, in order to increase the likelihood that the entire auction portfolio will be allocated to participants.

guarantee the performance of such third parties. Each bid will indicate what percentage of the auction portfolio the participant is bidding on and the amount of the bid. Bids will be stated in terms of a price for the entire auction portfolio, and may be either positive or negative. (Negative bids imply an auction portfolio that has a negative net asset value and indicate how much the Corporation would be required to pay the participant to assume the relevant percentage of the auction portfolio.) The Corporation will rank the submitted bids from best to worst and the auction portfolio will be allocated among the bidding participants accordingly until the auction portfolio is exhausted. The bid price that is sufficient to clear the entire auction portfolio will become the single price to be used for all winning bids, even if a participant's stated bid was better.

In order to provide a strong incentive to ensure competitive bidding by the OTC Index Option Members required to participate in an OTC Options Auction, OTC Index Options Members who fail to win their minimum participation in the auction will be subject to a potential priority charge against its clearing fund contribution. If the cost of liquidating a suspended clearing member's positions exhausts the clearing member's margin and clearing fund contribution and any other assets of the suspended clearing member available to OCC, then OCC, pursuant to Section 5 of Article VIII of the By-Laws, would ordinarily withdraw the amount of the deficiency from the clearing fund and charge it on a proportionate basis against all other clearing members' computed contributions as fixed at the time. When an OTC Options Auction has been held in respect of a suspended OTC Index Options Member, however, some or all of any such remaining loss would be assessed first against the clearing fund contributions of any OTC Options Auction participant(s) whose bids are insufficiently competitive to be allocated a portion of the auction portfolio equal to such participant's minimum required participation.

This priority charge would be made regardless of the reason for the shortfall—*i.e.*, whether or not the loss resulted from the closing out of OTC options positions. The priority charge would be calculated based on an "assessment ratio," which is formulated to provide incentive to all OTC Options Auction participants to participate to their full minimum participation level in the auction. The method of calculating the assessment ratio is such that if the net asset value of the auction portfolio is zero the assessment ratio will also be zero and no priority charge will be made. As the absolute net asset value of the auction portfolio (whether positive or negative) increases, the assessment ratio also increases, all other factors being equal. If all OTC Options Auction participants submit bids such that each receives an allocation of OTC options positions equal to its minimum participation level, no priority charge will be made regardless of whether or not there is a liquidation shortfall. If a liquidation shortfall remains after any priority charges, or if no priority charges were required, the Corporation will then make a proportionate charge against the clearing fund contributions of all clearing members, including those that participated in the OTC Options Auction, in the usual manner pursuant to Section 5 of Article VIII of OCC's By-Laws.

In order to protect the estate of the suspended clearing member, OCC reserves some discretion in supervising the auction. In the event that the bid price that clears the entire auction portfolio is determined by OCC to be an outlier bid, OCC may choose as the winning bid a price that clears at least 80% of the auction portfolio. The remaining auction portfolio will then be re-auctioned as described above.

OCC anticipates that the likelihood of having to use this alternative auction is small. Nevertheless, in view of the fact that positions in OTC index options are expected to be large and that there may be no active trading market in options with terms precisely identical to the terms of the OTC index options in question, OCC believes that this is an appropriate failsafe provision. It should be noted that the Chicago Mercantile Exchange Inc. ("CME") has rules allowing its clearing house and certain CME committees to administer an auction process to liquidate positions in interest rate swaps ("IRS") in the event of a default of a CME clearing member authorized to submit IRS for clearing (an "IRS Member").[30] Although the financial safeguards supporting IRS clearing, including its "guaranty fund," and the IRS auction process are different from OCC's clearing fund and OTC Options Auction in that, among other things, there is a separate guaranty fund for IRS, the IRS auction shares certain similarities with the OTC Options Auction. In particular, the IRS auction process requires mandatory participation of IRS clearing members with open interest in a position being auctioned and, in order to provide incentive for IRS Members to submit quality bids in an IRS auction, provides that in the event there is a loss to CME's clearing house associated with an IRS Member's default, IRS Members that do not submit quality bids in an IRS auction are subject to having their IRS guaranty fund deposit assessed before assessments are made against other IRS clearing members' guaranty fund deposits. In its original rule filing, OCC had proposed a different failsafe solution whereby OCC could terminate open positions of a suspended clearing member by setting a close-out value that non-defaulting clearing members holding the opposite side of the suspended clearing member's positions would be required to accept or pay in settlement of the terminated positions. However, clearing members objected to that proposed method and have advocated the auction procedures

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30 *See* CME Rules 8G14, 8G25 and 8G802.B. *See also* Commodity Futures Trading Commission Rule Change Submission No. 12-061RR of CME, the Board of Trade of the City of Chicago Inc. and the New York Mercantile Exchange, available at: http://www.cmegroup.com/market-regulation/files/12-061rr.pdf

proposed here in lieu of the early termination proposal.[31] Clearing members in an OTC advisory group were active in designing the OTC Options Auction procedures, including the priority charges.

**Impact of Clearing OTC Options on Other OCC-Cleared Products**

Cleared OTC options will not be fungible with listed options. However, an OTC option may have economic characteristics that are substantially similar or identical to the characteristics of options in series of listed options that OCC clears. While it is possible that in any given instance a market participant may elect to enter into an OTC option in lieu of an economically similar listed product, OCC does not believe that its clearing of OTC options will adversely affect the efficiency or liquidity of the listed markets. The OTC options markets currently exist to accommodate a variety of commercial and other needs of market participants, including the ability to customize the terms of transactions. While the availability of an OCC guarantee for OTC transactions in which the parties would otherwise be exposed to each others' creditworthiness may cause transactions that currently occur in the non-cleared OTC markets to migrate to the cleared-OTC markets, OCC does not believe it will cause significant migration from the listed markets to the cleared OTC markets. The limitation of the OTC options markets to ECPs as well as the significant minimum transaction size and tenor requirements that are applicable to certain transactions in the currently proposed OTC options under the S&P License Agreement will limit the use of cleared OTC options and should help to ensure that there is no substantial migration from the listed markets to the OTC markets for this product. The existing

[31] *See* comment letter from Alessandro Cocco, Managing Director of J.P. Morgan Clearing Corporation and J.P. Morgan Securities LLC, to Ms. Elizabeth M. Murphy, Secretary, Securities and Exchange Commission (January 30, 2012), *available at* http://www.sec.gov/comments/sr-occ-2011-19/occ201119-2.pdf.

bilateral OTC options markets have existed for years alongside the listed options markets, and OCC believes that dealers in such bilateral options often use the listed markets to hedge positions taken in such bilateral options and other OTC derivatives.

**Notice of Launch Date**

Following approval of this rule change by the Commission, OCC expects to provide notice to its clearing members of the date on which it intends to implement this rule change and begin clearing OTC options.

* * *

The proposed changes to OCC's By-Laws are consistent with the purposes and requirements of Section 17A of the Exchange Act[32] because they are designed to permit OCC to clear OTC options subject to the same basic rules, procedures and risk management practices that have been used successfully by OCC in clearing transactions in listed options. OCC believes that clearance and settlement of OTC options pursuant to this rule filing is fully consistent with OCC's obligations with respect to the prompt and accurate clearance and settlement of securities transactions and the protection of securities investors and the public interest. The proposed rule change is not inconsistent with any existing rule of OCC.

The proposals contained in the advance notice shall not take effect until all regulatory actions required with respect to the proposals are completed.

(B) Clearing Agency's Statement on Burden on Competition

OCC does not believe that the proposed changes contained in the advance notice will have any impact or impose any burden on competition.

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[32] 15 U.S.C. 78q-1.

(C) Clearing Agency's Statement on Comments on the Advance Notice Received from Members, Participants, or Others

Written comments were not and are not intended to be solicited with respect to the advance notice, and, except as discussed below, none have been received. OCC has been actively engaged with a number of clearing members that have expressed an interest in clearing OTC Options. The following are the only substantive written comments that were received, and they have been addressed, in the manner indicated:

- OCC received a written comment that the role of the Default Management Advisory Committee, as described in the OTC Options Auction procedures that were attached as Exhibit 5 to this rule filing, should be clarified. OCC has revised the procedures to clarify that the Default Management Advisory Committee will be a standing committee and will be formed from the inception of OCC's clearing of OTC Options. It will not be an *ad hoc* committee formed at the time of a default.
- OCC received a written comment asking that the Membership/Risk Committee have a role in setting exercise settlement values with respect to OTC index options in unusual circumstances pursuant to Section 4(a)(2) of Article XVII of the ByLaws. OCC has revised the rules to provide that OCC will consult with that committee when appropriate in setting exercise settlement values pursuant to Section 4(a)(2).
- OCC received a written comment asking for limitations on the indemnification of OCC by clearing members under Section 6(f) of Article XVII of the ByLaws. In response to this comment OCC has added an

exclusion from the indemnity for claims, liabilities, or expenses that result primarily from OCC's gross negligence or willful misconduct or from OCC conduct that causes the offer or sale of the OTC Options to become subject to the registration provisions of Section 5 of the Securities Act.[33]

## III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

The proposed changes contained in the advance notice may be implemented pursuant to Section 806(e) (1)(G) of Clearing Supervision Act[34] if the Commission does not object to the proposed changes within 60 days of the later of (i) the date that the advance notice was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. The clearing agency shall not implement the proposed changes contained in the advance notice if the Commission objects to the proposed changes.

The Commission may extend the period for review by an additional 60 days if the proposed changes raise novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. Proposed changes may be implemented in fewer than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies the clearing agency in writing that it does not object to the proposed changes and authorizes the clearing agency to implement the proposed changes on an earlier date, subject to any conditions imposed by the Commission.

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33 15 U.S.C. 77e.

34 12 U.S.C. 5465.

OCC has also filed the advance notice as a proposed rule change pursuant to Section 19(b)(1) of the Act[35] and Rule 19b-4 thereunder.[36] Pursuant to those provisions, within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove the proposed rule change or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

The clearing agency shall post notice on its web site of proposed changes that are implemented.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or

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35 15 U.S.C. 78s(b)(1).

36 17 CFR 240.19b-4.

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-OCC-2012-14 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-OCC-2012-14. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the advance notice that are filed with the Commission, and all written communications relating to the advance notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings also will be available for inspection and copying at the principal office of OCC and on OCC's website at

http://www.optionsclearing.com/components/docs/legal/rules_and_bylaws/sr_occ_12_14.pdf.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-OCC-2012-14 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

By the Commission.

Kevin M. O'Neill

Kevin O'Neill
Deputy Secretary

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67914 / September 24, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-15041

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| In the Matter of<br><br>Roger L. Shoss,<br><br>Respondent. | ORDER OF SUSPENSION PURSUANT TO RULE 102(e)(2) OF THE COMMISSION'S RULES OF PRACTICE |

I.

The Securities and Exchange Commission ("Commission") deems it appropriate to issue an order of forthwith suspension against Roger L. Shoss ("Shoss") pursuant to Rule 102(e)(2) of the Commission's Rules of Practice [17 C.F.R. §201.102(e)(2)].[1]

II.

The Commission finds that:

A. Shoss, age 68, at all relevant times was an attorney licensed in Texas with an office in Houston, Texas.

B. On May 22, 2012, a jury returned a guilty verdict against Shoss on one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 371, in a proceeding before the United States District Court for the Middle District of Florida captioned *United States v. Shoss, et al.*, Case # 8:11-cr-00366-T-30TBM. The criminal proceeding stemmed from Shoss's activities in connection with four defunct, publicly-traded issuers during the period February 2005 through at least July 2006. On August 9, 2012, a judgment of conviction was entered against Shoss.

C. As a result of his conviction, Shoss was sentenced to 18 months in federal prison, followed by 36 months of home confinement on supervised release. A final forfeiture money judgment, in the amount of $800,000, was also entered. A final order of forfeiture was entered for

[1] Rule 102(e)(2) provides, in relevant part, that, "Any . . . person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission."

Shoss's residence in Houston, which was purchased with proceeds traceable to the wire fraud conspiracy.

## III.

In view of the foregoing, the Commission finds that Shoss has been convicted of a felony within the meaning of Rule 102(e)(2) of the Commission's Rules of Practice.

Accordingly, it is hereby ORDERED, that Shoss is forthwith suspended from appearing or practicing before the Commission pursuant to Rule 102(e)(2) of the Commission's Rules of Practice.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar not participating

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67919 / September 24, 2012**

**INVESTMENT ADVISERS ACT OF 1940**
**Release No. 3474 / September 24, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15044**

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| In the Matter of<br><br>JCSD Capital, LLC,<br><br>Respondent. | **ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(e) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER** |

## I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(e) of the Investment Advisers Act of 1940 ("Advisers Act") against JCSD Capital, LLC ("JCSD Capital" or "Respondent").

## II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934 and Section 203(e) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

## III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

### Summary

1. These proceedings arise out of a violation of Rule 105 of Regulation M of the Exchange Act by JCSD Capital, an investment adviser based in Walnut Creek, California. Rule 105 prohibits short selling of equity securities during a restricted period prior to a public offering and then purchasing the subject securities in the offering. JCSD Capital violated Rule 105 in March 2010 in connection with certain short sales it effected within the Rule 105 restricted period preceding its participation in a public offering by Bank of Commerce Holdings ("BOCH"), resulting in profits of $59,522.

### Respondent

2. JCSD Capital, LLC, is a limited liability company organized under Delaware law and headquartered in Walnut Creek, California. During the relevant time period, JCSD Capital was the investment adviser to a single fund: JCSD Partners, LP (the "JCSD Fund"), and the trading described in this Order was conducted by JCSD Capital on behalf of this fund. The JCSD Fund is a hedge fund that primarily invests in the securities of public companies. At the end of 2011, JCSD Capital had approximately $50 million in assets under management. As such, JCSD Capital is not registered with the Commission as an investment adviser.

### Background

3. As amended in 2007, Rule 105 of Regulation M provides in pertinent part:

> In connection with an offering of equity securities for cash pursuant to a registration statement or a notification on Form 1-A . . . or Form 1-E . . . filed under the Securities Act of 1933 ("offered securities"), it shall be unlawful for any person to sell short . . . the security that is the subject of the offering and purchase the offered securities from an underwriter or broker or dealer participating in the offering if such short sale was effected during the period ("Rule 105 restricted period") . . . [b]eginning five business days before the pricing of the offered securities and ending with such pricing.

17 C.F.R. § 242.105(a); Short Selling in Connection With a Public Offering, Exchange Act Release No. 56,206, 72 Fed. Reg. 45,094, 45,107 (Aug. 10, 2007).

4. The Commission adopted Rule 105 "to foster secondary and follow-on offering prices that are determined by independent market dynamics." Id. At 45,094. Rule 105 prohibits the conduct irrespective of the short seller's intent in effectuating the short sale. "The

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[1] The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

prohibition on purchasing offered securities ... provides a bright line demarcation of prohibited conduct consistent with the prophylactic nature of Regulation M." Id. at 45,096.

5. JCSD Capital sold short 3,600, 3,400 and 1,000 shares of BOCH on March 17, 18 and 19, 2010, respectively, for a total of 8,000 shares sold short, at prices ranging between $5.10 and $5.16 per share.

6. On Tuesday, March 23, 2010, following the close of the market, BOCH announced a public secondary offering of common stock (the "Offering"), which was priced after the close of the market on March 23, 2010 at $4.25 per share.

7. On Wednesday, March 24, 2010, JCSD Capital purchased a total of 130,000 shares of BOCH common stock in the Offering at $4.25 per share.

8. Because JCSD Capital sold short shares of BOCH for the JCSD Fund during the restricted period and then purchased shares in the Offering, JCSD Capital violated Rule 105. As a result of its violation of Rule 105, JCSD Capital made a profit for the JCSD Fund of $7,062 on the shares sold short. In addition, JCSD Capital improperly obtained a benefit for the JCSD Fund of $52,460 from the remaining 122,000 offering shares it received at a discount from BOCH's market price. Accordingly, the total profit from participating in the Offering was $59,522.

9. At the time of the violation, JCSD Capital had no policies, procedures or controls in place designed to detect or prevent Rule 105 violations.

10. As a result of the conduct described above, JCSD Capital willfully[2] violated Rule 105 of Regulation M of the Exchange Act.

**JCSD Capital's Remedial Efforts**

11. After JCSD Capital learned of its Rule 105 violation, it developed and implemented policies and procedures relating to its Rule 105 compliance.

12. In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent JCSD Capital and cooperation afforded the Commission staff.

**IV.**

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent JCSD Capital's Offer.

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[2] A willful violation of the securities laws means merely "'that the person charged with the duty knows what he is doing.'" *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "'also be aware that he is violating one of the Rules or Acts.'" *Id.* (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)).

Accordingly, pursuant to Section 21C of the Exchange Act and Section 203(e) of the Advisers Act, it is hereby ORDERED that:

A. Respondent JCSD Capital cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. Respondent JCSD Capital is censured;

C. Respondent JCSD Capital shall, within 14 days of the entry of this Order, pay disgorgement of $59,522 and prejudgment interest of $4,939 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed via overnight delivery to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying JCSD Capital, LLC as a Respondent in these proceedings and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Scott W. Friestad, Associate Director, Division of Enforcement, U.S. Securities and Exchange Commission, 100 F St., N.E., Washington, D.C. 20549-5010.

D. Respondent JCSD Capital shall, within 14 days of the entry of this Order, pay a civil monetary penalty in the amount of $29,761 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 and 31 U.S.C. § 3717. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed via overnight delivery to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying JCSD Capital, LLC as a Respondent in these proceedings and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Scott W. Friestad, Associate Director, Division of Enforcement, U.S. Securities and Exchange Commission, 100 F St., N.E., Washington, D.C. 20549-5010.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67920 / September 24, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15045**

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| **In the Matter of**<br><br>**DAVID MURA,**<br><br>**Respondent.** | **ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934** |

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against David Mura ("Respondent" or "Mura").

**II.**

After an investigation, the Division of Enforcement alleges that:

A. SUMMARY

1. Mura violated Section 15(a) of the Exchange Act by acting as an unregistered broker-dealer in connection with his solicitation of investors in promissory notes (the "LLC Promissory Notes") issued by several small, related New York Limited Liability Companies (the "LLCs") located in Pittsford, New York.

2. While Mura engaged in these solicitation efforts, he was a registered representative and branch office manager of J.P. Turner & Company, LLC ("J.P. Turner"), a broker-dealer registered with the Commission. Despite his association with J.P. Turner, Mura conducted the offering of the LLC Promissory Notes outside the scope of his employment with J.P. Turner, in violation of Section 15(a) of the Exchange Act.

3. Mura also directed Edward Tackaberry ("Tackaberry"), who worked for the LLCs under Mura's supervision, and an investor in an LLC Promissory Note ("Investor 1") to solicit potential investors and to otherwise participate in the offering of the LLC Promissory Notes. Tackaberry and Investor 1 both followed Mura's instruction, and several individuals who were solicited by Tackaberry and/or Investor 1 eventually invested in the LLC Promissory Notes. Through these actions, Tackaberry and Investor 1 violated Section 15(a) of the Exchange Act, and Mura aided, abetted and caused Tackaberry's and Investor 1's violations of Section 15(a) of the Exchange Act.

B. RESPONDENT

1. Mura is 62 years old and a resident of Pittsford, New York. From September 2002 through April 2011, Mura was a registered representative and branch office manager of J.P. Turner, a registered broker-dealer headquartered in Atlanta, Georgia. From in or around mid-2007 through in or around 2012, Mura led a team of individuals that managed the LLCs, and directed, and participated in, an effort to solicit investors in the LLC Promissory Notes. During this time, no offerings of securities issued by the LLCs were registered with the Commission in any capacity.

C. OTHER RELEVANT ENTITIES AND INDIVIDUALS

1. Rising Storm Technologies LLC ("Rising Storm"), a predecessor to the LLCs, was formed in 2006 to pursue various business ideas. Mura invested in Rising Storm and, in or around 2008, caused the LLCs to take over some or all of Rising Storm's business ideas.

2. The LLCs consist of, inter alia, Charge-On Demand LLC, Innovations Group Enterprises LLC, and Stucco LLC, all of which were registered with the New York Secretary of State in 2008. The LLCs were formed to pursue several supposedly entrepreneurial business ideas. The LLCs, which were all managed by the same small management team led by Mura, issued the LLC Promissory Notes to a number of investors from in or around January 2008 through in or around September 2009.

3. Edward Tackaberry, age 60, is a resident of Fairport, New York. From 1981 through 2006, Tackaberry was a registered representative of various broker-dealers. In September 2007, Tackaberry was barred from association with any broker or dealer based on permanent injunctions imposed by a federal district court upon finding, in a case brought by the Commission, that he committed securities fraud in a scheme that did not involve the LLCs. (In the Matter of Mark Palazzo and Edward Tackaberry, Admin. Proc. File No. 3-12844, Exchange Act Release No. 56550A (September 27, 2007); SEC v. Pittsford Capital Income Partners, L.L.C., 06 Civ. 6353 T(P) (W.D.N.Y. Aug. 30, 2007)). Tackaberry began working for Rising Storm in 2006 as a product salesman, and at Mura's direction, thereafter became involved in the solicitation of investors and otherwise participated in the offering of the LLC Promissory Notes.

D. ALLEGATIONS

1. From September 2002 through April 2011, Mura was a registered representative and branch office manager of J.P. Turner. In or around 2006, Mura became familiar with Rising Storm when he leased to Rising Storm vacant office space that was adjacent to Mura's J.P. Turner office. Mura and two or more of his retail broker-dealer customers at J.P. Turner invested in Rising Storm.

2. In 2008, Mura formed, or caused to be formed, the LLCs, for the purpose of commercializing several of Rising Storm's most promising business ideas and to pursue various, purportedly entrepreneurial, business ideas of their own. Shortly thereafter, Mura ousted the founder of Rising Storm, who also participated in the management of the LLCs, and installed his own management team to help run the LLCs. Mura accomplished this ouster through, among other things, threats of violence and death against the founder of Rising Storm. Mura oversaw all important decisions and exercised ultimate managerial control over the LLCs from approximately 2008 through 2012.

3. From in or around January 2008 through September 2009, Mura solicited a number of individuals to invest in the LLCs. More specifically, Mura led meetings with potential investors in the LLCs during which he made many oral representations regarding the LLCs and their operations, what an investment in the LLCs would involve and how it would be documented, and encouraged potential investors to invest in the LLCs by purchasing the LLC Promissory Notes, which are securities under the federal securities laws. No private placement memoranda or other comprehensive offering materials were prepared or distributed to potential investors in connection with the offering. Mura told most, or all, of the prospective investors that he worked full-time as a financial professional and was a registered representative of J.P. Turner.

4. Mura also directed others to solicit potential investors in the LLC Promissory Notes. For example, after Investor 1 invested in an LLC Promissory Note, Mura encouraged him to solicit other investors, and Mura agreed that the LLCs would pay Investor 1 a finder's fee of 7.5% of all investments made by Investor 1's friends and family. Several individuals identified by Investor 1 decided to, and did, invest in the LLC Promissory Notes after discussing the potential investment with Investor 1, Mura, and others. Mura also directed Tackaberry to become involved in the solicitation of investors in the LLCs. Tackaberry did so by serving as several prospective investors' first contact at the LLCs, describing the investments and how they would be documented, arranging meetings with Mura and other members of the LLCs' management team to discuss the LLCs and the potential investment, negotiating the terms of investment with some of the investors, and documenting several investment transactions.

5. During the relevant period, in exchange for their investments, investors received LLC Promissory Notes, the offering of which was not registered with the Commission. The LLC Promissory Notes obligated the issuing LLC to repay the principal in twenty-four months plus 8% interest per annum. The LLC Promissory Notes also entitled the investors to "further consideration" consisting of a stated percentage of the

issuing LLC's profits. In almost all cases, the LLC Promissory Notes were issued by just one of the LLCs, although the specific LLC issuing a given promissory note changed over time. The LLCs did not make interest payments to the investors, contrary to the terms of the LLC Promissory Notes.

6. In or around 2010, Mura persuaded most investors to exchange their purported interests in the LLCs for an interest in Worldwide Medical LLC ("Worldwide Medical"). Worldwide Medical does not have significant assets or revenues, and the investors' interests in Worldwide Medical are worth far less than the principal they initially invested in the LLC Promissory Notes.

7. In the aggregate, at least seventeen individuals invested over $850,000 in Rising Storm and the LLCs between July 2007 and September 2009. Mura played an active role in soliciting approximately $765,000 from approximately twelve of these investors after he took over the LLCs. At least seven of these twelve investors invested all, or a significant portion of, their qualified retirement accounts in the LLCs.

8. Mura caused investor funds to be deposited into the LLCs' bank accounts, over which Mura and his wife had authority, and against which Mura and his wife regularly issued checks. Mura caused the LLCs to pay him more than $50,000 from June 2008 through December 2009. These payments were made with funds that had been received from investors.

9. Mura conducted the LLC Promissory Note offering outside the scope of his employment with J.P. Turner. Mura did not place the LLC Promissory Notes in J.P. Turner accounts on behalf of the investors, and did not disclose to J.P. Turner his solicitation of these investments or the scope of his managerial role at the LLCs. Nor did Mura separately register as a broker-dealer for purposes of offering and selling the LLC Promissory Notes. Moreover, Mura repeatedly misled J.P. Turner about his outside business activities.

E. <u>VIOLATIONS</u>

1. As a result of the conduct described above, Respondent willfully violated Section 15(a)(1) of the Exchange Act, which makes it unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with Section 15(b) of the Exchange Act.

2. As a result of the conduct described above, Respondent willfully aided, abetted and caused Tackaberry's and Investor 1's violations of Section 15(a)(1) of the Exchange Act.

## III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative and cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations; and

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act including, but not limited to, disgorgement, and civil penalties pursuant to Section 21B of the Exchange Act.

C. Whether, pursuant to Section 21C of the Exchange Act, Respondent should be ordered to cease and desist from committing or causing violations or future violations of Section 15(a) of the Exchange Act; whether Respondent should be ordered to pay disgorgement pursuant to Section 21C(e) of the Exchange Act and penalties pursuant to Section 21B(a)(2) of the Exchange Act; and whether other appropriate relief should be granted in the public interest.

## IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Commissioner Aguilar, Commissioner Gallagher not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67918 / September 24, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-15043

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|---|---|
| In the Matter of<br><br>DAVID GENGLER,<br><br>Respondent. | ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS |

## I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against David Gengler ("Gengler" or "Respondent").

## II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

## III.

On the basis of this Order and Respondent's Offer, the Commission finds that

1. Gengler was a registered representative associated with broker-dealers registered with the Commission from 1998 until October of 2003. Gengler, 36 years old, is a resident of Utah.

2. On September 5, 2012, a final judgment was entered by consent against Gengler, permanently enjoining him from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. David Gengler, et al., Civil Action Number 1:08-cv-00235, in the United States District Court for the Eastern District of Virginia.

3. The Commission's complaint alleged that Gengler sold packages of personal mentoring, software and classes to investors from December 2002 until early 2007. In doing so, he made misrepresentations to convince unsuspecting, often inexperienced investors into believing that if they purchased the packages they would make extraordinary profits trading securities. The complaint also alleged that in furtherance of the fraudulent scheme, Gengler urged investors to engage in securities transactions and opined as to the advisability of securities transactions.

## IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Gengler's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Gengler be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and
>
> barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar not participating

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES ACT OF 1933**
**Release No. 9363 / September 24, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15042**

| In the Matter of PRESCIENT CAPITAL PARTNERS, LTD. AND STEVEN C. YOUNG Respondents. | ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER |
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## I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), against Prescient Capital Partners, Ltd. and Steven C. Young ("Respondents").

## II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

## III.

On the basis of this Order and Respondents' Offers, the Commission finds[1] that:

### Summary

1. These proceedings arise out of unregistered offerings of securities by Prescient Capital Partners, Ltd. ("PCP") and its owner, Steven C. Young ("Young"), in the form of loan participations issued by PCP. The offerings raised over $7 million from 23 investors from 2010 through 2011. In connection with the offers and sales of these investments, PCP, through its owner, Young, acted as a middleman between borrowers seeking short-term bridge loans for commercial real estate ventures and investors whom it called "loan participants." These investors provided funds that PCP loaned to commercial borrowers. Investors received a pro rata share of the loan, including the interest payments made by the borrower. PCP and Young ostensibly intended to offer and sell the investments in reliance on the registration exemption contained in Regulation D, Rule 506 under the Securities Act of 1933 ("Securities Act"), but failed to comply with the regulatory requirements. PCP and Young made multiple general solicitations using mail, email, social media, and Internet websites and videos, and they solicited and accepted investments from at least four unaccredited, unsophisticated investors. The unregistered, non-exempt offerings violated Sections 5(a) and 5(c) of the Securities Act.

### Respondents

2. **Steven C. Young,** 46, lives in Oconomowoc, Wisconsin. He is the founder and sole owner of PCP. He is not registered with the Commission in any capacity.

3. **Prescient Capital Partners, Ltd.** is a close corporation incorporated and located in the state of Wisconsin. It is not registered with the Commission in any capacity and has never registered an offering of securities under the Securities Act or a class of securities under the Exchange Act. PCP is solely owned and controlled by Steven C. Young.

### Background

4. From 2009 through January 2012, (the "relevant period"), Respondents sought investors called "loan participants" to invest in loans made by PCP. PCP made short-term bridge loans for commercial real estate ventures, typically for duration of one or two years until the borrower could arrange long-term conventional financing. The borrowers paid PCP fees based on a percentage of the loan amount. Investors received a pro rata share of the loan, including the future interest payments made by the borrower. The offer and sale of these investments were not registered with the Commission pursuant to the Securities Act.

5. Respondents had full responsibility for administering the investment program. This included (a) preparing, executing, and filing loan documents; (b) accepting the monthly payments made by the borrowers on the loans, and making the interest payments to investors; and (c) taking

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[1] The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

necessary steps to ensure interest and principal were timely paid. The investors had no responsibility for administering the loan. Return on the investments depended entirely on the efforts of Young and PCP.

6. From 2010 through 2011, Respondents offered and sold investments in five different loans totaling over $7 million. They offered and sold the investments to 23 investors.

7. Respondents did not have adequate procedures in place to establish a reasonable belief that investors were accredited or sophisticated in accordance with registration exemptions contained in Regulation D, Rule 506. For example, although PCP had an accreditation questionnaire for investors, in most instances, Respondents did not ensure that investors completed and returned the questionnaire, and they failed to verify the information in completed questionnaires.

8. With respect to two of the securities offerings, at least four of the investors were unaccredited and unsophisticated. Respondents failed to provide the unaccredited investors with financial statements and other disclosures required when a Rule 506 offering is sold to unaccredited investors.

9. During the relevant period, Respondents made general solicitations of investors by means of mail, email, social media, and Internet websites and videos. These solicitations were prohibited by Rules 506(b)(1) and 502(c) of Regulation D.

10. As a result of the conduct described above, with respect to each of the securities offerings, Respondents committed violations of Sections 5(a) and 5(c) of the Securities Act, which prohibit the unregistered, non-exempt offer or sale of securities.

**Respondents' Remedial Efforts**

In determining to accept the Offers, the Commission considered remedial acts promptly undertaken by Respondents and cooperation afforded the Commission staff.

**IV.**

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Section 8A of the Securities Act, it is hereby ORDERED that:

A. Respondents cease and desist from committing or causing any violations and any future violations of Sections 5(a) and (c) of the Securities Act.

B. Respondents shall, jointly and severally, pay disgorgement of $28,987 and prejudgment interest of $981 to the United States Treasury. Payment shall be made in the following installments: (1) $7,492 within seven days of the entry of this Order, (2) $7,492 within 90 days of the entry of this Order, (3) $7,492 within 180 days of the entry of this Order, and

(4) $7,492 within 270 days of the entry of this Order. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Steven C. Young and/or PCP as Respondents in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Steven L. Cohen, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549.

C. Respondents acknowledge that the Commission is not imposing a civil penalty based upon their cooperation in the Commission investigation and/or related enforcement action. If at any time following the entry of the Order, the Division of Enforcement ("Division") obtains information indicating that Respondents knowingly provided materially false or misleading information or materials to the Commission or in a related proceeding, the Division may, at its sole discretion and without prior notice to Respondents, petition the Commission to reopen this matter and seek an order directing that Respondents pay a civil money penalty. Respondents may not, by way of defense to any resulting administrative proceeding: (1) contest the findings in the Order; or (2) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67924 / September 25, 2012

INVESTMENT COMPANY ACT OF 1940
Release No. 30213 / September 25, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-15046

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| In the Matter of<br><br>Hold Brothers On-Line Investment Services, LLC,<br>Demostrate, LLC,<br>Trade Alpha Corporate, Ltd,<br>Steven Hold,<br>Robert Vallone, and<br>William Tobias<br><br>Respondents. | ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND CEASE-AND-DESIST ORDERS |

## I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Hold Brothers On-Line Investment Services, LLC ("Hold Brothers"), Steven Hold ("Steve Hold"), Robert Vallone ("Vallone"), and William Tobias ("Tobias"); and that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Exchange Act against Demostrate, LLC ("Demostrate") and Trade Alpha Corporate, Ltd ("Trade Alpha," and together with Hold Brothers, Steve Hold, Vallone, Tobias, and Demostrate, the "Respondents").

## II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the

Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 and Section 9(b) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and Cease-and-Desist Orders ("Order"), as set forth below.

## III.

On the basis of this Order and Respondents' Offers, the Commission finds[1] that:

A. SUMMARY

1. As gatekeepers to the capital markets, broker-dealers have a responsibility to establish, maintain, and enforce adequate policies and procedures and risk controls in light of the specific risks associated with the broker-dealer's business. In particular, broker-dealers that provide access to the markets must ensure that they have policies and procedures and systems of controls in place that are reasonably designed to ensure, among other things, compliance with all regulatory requirements that are applicable in connection with the access they provide. These controls must be reasonably designed to identify and prevent, among other things, abusive trading practices. Further, if a broker-dealer identifies suspicious activity, whether through the access it provides or not, it must address such activity in an appropriate and timely manner.

2. From at least January 2009 through September 2010 (the "Relevant Period"), overseas traders who accessed the U.S. markets through respondent Hold Brothers, a registered broker-dealer, engaged in a manipulative trading strategy typically referred to as "layering" or "spoofing" (hereinafter, collectively, "layering"). Hold Brothers failed to adequately monitor for and investigate, in light of red flags, the manipulative trading by these overseas traders. The manipulative trading was profitable.

3. Certain of the overseas traders conducted their manipulative trading on the U.S. markets through two Hold Brothers "customer" accounts, which were accounts of two foreign companies – respondents Trade Alpha and Demostrate – created and partially owned by Steve Hold. Steve Hold funded Demostrate and Trade Alpha, and Demostrate and Trade Alpha provided the capital for the manipulative trading by these traders. Hold Brothers controlled the overseas traders by, among other things, determining and allocating buying power, establishing stop-loss limits, and, through Hold Brothers affiliated personnel, dictating the profit distribution between Demostrate and Trade Alpha and the traders.

4. Throughout the Relevant Period, the three individual respondents – Steve Hold, Vallone, and Tobias – became aware of red flags, including several emails, suggesting that the

[1] The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

overseas traders who traded through Hold Brothers were engaging in manipulative trading. The individual respondents recklessly continued to provide traders with buying power and/or access to the U.S. markets, and failed to conduct adequate follow-up despite these warnings. In addition, Hold Brothers failed to make and keep current the requisite records related to certain brokerage orders given or received for the purchase or sale of securities and failed to furnish promptly to the staff certain order records requested by the staff.

5. By virtue of this conduct, (a) Trade Alpha and Demostrate violated Section 9(a)(2) of the Exchange Act; (b) Hold Brothers willfully violated Sections 9(a)(2) and 17(a) of the Exchange Act and Rules 17a-4 and 17a-8 thereunder, and failed reasonably to supervise the Demostrate traders in connection with their violations of the securities laws; (c) Steve Hold, Vallone, and Tobias willfully aided and abetted and caused Hold Brothers', Demostrate's and Trade Alpha's violations of Section 9(a)(2) of the Exchange Act; and (d) Steve Hold failed reasonably to supervise Vallone in connection with Vallone's violations of the securities laws.

## B. RESPONDENTS

6. Hold Brothers is a Delaware limited liability company wholly-owned by, among others, respondent Steve Hold. Hold Brothers is a FINRA member that has been registered as a broker-dealer pursuant to Section 15(b) of the Exchange Act since January 1995. Hold Brothers has branch offices in several states, including New York, New Jersey, Pennsylvania, and California.

7. Demostrate is a limited liability company organized under the laws of Nevis. Steve Hold is an owner of Demostrate. Overseas traders who traded for Demostrate were organized in groups by location, and the groups were assigned alpha-numeric identifiers, e.g., P18 or P69.

8. Trade Alpha is a limited liability company organized under the laws of the British Virgin Islands. Steve Hold is an owner of Trade Alpha.

9. Steve Hold, age 41, resides in Warren, New Jersey. Steve Hold is the president and co-founder of Hold Brothers. Steve Hold holds Series 7, 24, 55, and 63 licenses.

10. Tobias, age 43, resides in Hoboken, New Jersey. Tobias is an associated person of Hold Brothers and is the managing member of Demostrate. Tobias holds Series 7, 27, 28, 55, and 63 licenses.

11. Vallone, age 62, resides in Princeton Junction, New Jersey. Until August 2012, Vallone was the Chief Compliance Officer and Chief Financial Officer of Hold Brothers. Vallone holds Series 7, 8, 23, 27, and 63 securities licenses.

## C. BACKGROUND

12. During the Relevant Period, Hold Brothers was a limited liability company made up of one Class A member, Hold Brothers, Inc., which was wholly owned by Steve Hold and

another individual, and a number of Class B members who conducted proprietary day trading activities. In addition to the Class B proprietary trading members, Hold Brothers executed trades on behalf of retail customer traders, all of whom engaged in some form of day trading. The firm's primary business was to provide market access to its proprietary and customer traders.

13. The majority of Hold Brothers' Class B proprietary traders were located in the United States, while the majority of Hold Brothers' customer traders were located in other countries. Hold Brothers' proprietary trading business consisted of approximately 40 traders. These proprietary traders traded the firm's capital, were monitored for risk and compliance purposes by Hold Brothers personnel, were licensed by the appropriate self-regulatory organization, were associated persons of the firm, and shared with Hold Brothers profits derived from their trading.

14. The vast majority of Hold Brothers' traders located overseas were associated with one of two "customers," either Trade Alpha in 2009 or Demostrate in 2010 (hereinafter, collectively, "Demostrate" or the "Demostrate traders").[2] These traders traded Demostrate's capital and were monitored for risk and compliance purposes by personnel of Hold Brothers and a Hold Brothers affiliate. As an owner, Steve Hold shared in the Demostrate trading profits. Unlike Hold Brothers' proprietary traders, however, Hold Brothers did not consider the Demostrate traders to be associated with the firm, nor did any of these traders hold licenses from any self-regulatory organization.

15. Demostrate maintained a brokerage account at Hold Brothers. Demostrate's managing member was Tobias. Demostrate was Hold Brothers' largest "customer," both in terms of the number of trades and revenues generated. All Demostrate trading occurred in a single account held at Hold Brothers. All of the persons who traded through Demostrate's account were located outside the United States, primarily in China. Hold Brothers assisted Demostrate and its traders in accessing the securities markets by providing these foreign traders with access to front-end trading platforms and access to the U.S. securities markets.

## D. HOLD BROTHERS CONTROLLED THE DEMOSTRATE TRADERS

16. During the Relevant Period, Demostrate had no physical offices or employees in the U.S. Hold Brothers and Hold Brothers' affiliate employees supervised Demostrate traders and their trading activity. The primary tasks performed by Tobias as Demostrate's managing member included accounting for and distributing trading profits to the Demostrate traders, while monitoring and review of trading was performed by employees of Hold Brothers or Hold Brothers affiliates, at the behest of Hold Brothers. In addition, Hold Brothers affiliated employees negotiated the most important aspect of the relationship between Demostrate and the foreign traders – the amount of the trading profits that the traders could retain.

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[2] Prior to the formation of Demostrate in 2009, Hold Brothers' largest "customer" was Trade Alpha. In late 2009, all of the Trade Alpha traders became authorized traders of Demostrate.

17. Hold Brothers provided each Demostrate trader with buying power representing the aggregate capital each trader was allowed to expend on stock purchases at any given time. Hold Brothers employees established and controlled changes made to buying power for each trader, determined whether buying power would be increased or decreased, and determined the dollar amount of securities a Demostrate trader could buy and/or sell.

18. Hold Brothers and Hold Brothers employees monitored Demostrate traders for daily profit and loss and the amount of risk the positions taken by Demostrate traders posed. In addition, Hold Brothers employees established stop-loss limits to limit the amount of risk a Demostrate trader could assume. If the trader exceeded his or her daily loss limit, Hold Brothers, not Demostrate, shut down the trader.

19. Hold Brothers also performed a limited compliance review of Demostrate trading activity. If, in this review, Hold Brothers determined that a Demostrate trader had engaged in prohibited activity, for example, wash sales or crossed trades, Hold Brothers personnel, not Demostrate personnel, levied sanctions on the Demostrate trader. Punishment ranged from a warning to suspension of trading privileges, and occasionally resulted in Hold Brothers withholding a trader's trading profits. Demostrate had very limited involvement in this disciplinary system.

20. Based on all of the above, the Demostrate traders were controlled by, or under common control with, Hold Brothers, and therefore were associated persons of a broker or dealer, as defined in Section 3(a)(18) of the Exchange Act.

E. <u>THE MANIPULATIVE TRADING SCHEME</u>

21. During the Relevant Period, certain Demostrate traders repeatedly manipulated the markets of U.S. listed and over-the-counter stocks by engaging in the practice of layering.

22. Layering concerns the use of non-bona fide orders, or orders that the trader does not intend to have executed, to induce others to buy or sell the security at a price not representative of actual supply and demand. More specifically, a trader places a buy (or sell) order that is intended to be executed, and then immediately enters numerous non-bona fide sell (or buy) orders for the purpose of attracting interest to the bona fide order. These non-bona fide orders are not intended to be executed. The nature of these orders is to induce, or trick, other market participants to execute against the initial, bona fide order. Immediately after the execution against the bona fide order, the trader cancels the open, non-bona fide orders, and repeats this strategy on the opposite side of the market to close out the position.

23. Certain overseas traders trading for Demostrate engaged in extensive manipulative activity. Such traders induced algorithms to trade in a particular security by placing and then cancelling layers of orders in that security, creating fluctuations in the national best bid or offer of that security, increasing order book depth, and using the non-bona fide orders to send false signals regarding the demand for such security, which the algorithms misinterpreted as reflecting sincere demand. These overseas traders' orders were intended to deceive and did

deceive certain algorithms into buying (or selling) stocks from (or to) the Demostrate traders at prices that had been artificially raised (or lowered) by the Demostrate traders.

Example of Layering by a Demostrate Trader

24. The pattern of layering against algorithmic traders is illustrated by the activity of a Demostrate trader who traded under the identifier "PEBC" in group P69 from Nanjing, China. On June 4, 2010, the trader layered the stock of W.W. Grainger (NYSE: "GWW") on NASDAQ and the Boston Stock Exchange.

25. That day, at 11:08:55.152 a.m., the trader placed an order to sell 1,000 GWW shares at $101.34 per share. Prior to the trader placing the order, the inside bid was $101.27 and the inside ask was $101.37. The trader's sell order moved the inside ask to $101.34. From 11:08:55.164 a.m. to 11:08:55.323 a.m., the trader placed eleven orders offering to buy a total of 2,600 GWW shares at successively increasing prices from $101.29 to $101.33. During this time, the inside bid rose from $101.27 to $101.33, and the trader sold all 1,000 shares she offered to sell for $101.34 per share, completing the execution at 11:08:55.333. At 11:08:55.932, less than a second after the trader placed the initial buy order, the trader cancelled all open buy orders. At 11:08:55.991, once the trader had cancelled all of her open buy orders, the inside bid reverted to $101.27 and the inside ask reverted to $101.37.

26. Because the trader was now short 1,000 GWW shares, at 11:09:00.881, the trader placed an order to buy 1,000 GWW shares at $101.30, thereby changing the inside bid to $101.30. From 11:09:00.929 a.m. to 11:09:01.060 a.m., the trader placed eleven orders offering to sell a total of 2,600 GWW shares at successively decreasing prices from $101.35 to $101.31. During this time, the inside ask declined from $101.37 to $101.31, and the trader bought all 1,000 GWW shares she offered to buy for $101.30 per share, completing the execution at 11:09:00.977. At 11:09:01.662, less than a second after the trader placed the initial sell order, the trader cancelled all open sell orders. At 11:09:01.792, once the trader had cancelled all of her open sell orders, the inside bid reverted to $101.24 and the inside ask reverted to $101.37. This round trip transaction, which took less than seven seconds to complete, yielded the trader approximately $40. As described below, this strategy was repeated over and over again.

The Demostrate Traders' Manipulative Trading was Profitable

27. The manipulative trading consisted of anywhere from 67 percent to 95 percent or more of the overall trading activity in several of the groups of overseas traders trading for Demostrate – and it was profitable. During the Relevant Period, overseas traders trading for Demostrate in the several groups that engaged in layering entered into more than 325,000 layered transactions which corresponded to the entry of more than 8 million layered orders.

28. The two Demostrate trading groups that engaged in the most layering were also the most profitable, cumulatively making the owners of Demostrate approximately $1.8 million dollars in trading revenue.

29. Because the overseas traders were agents of Demostrate and traded through Demostrate's accounts, the traders' conduct can be imputed to Demostrate. In addition, because Hold Brothers controlled the Demostrate traders, the overseas traders' conduct can be imputed to Hold Brothers.

### F. STEVE HOLD, VALLONE, AND TOBIAS KNEW OR WERE RECKLESS IN NOT KNOWING THAT THE DEMOSTRATE TRADERS WERE ENGAGING IN LAYERING

30. As early as 2009, Steve Hold, Tobias, and Vallone were on notice that Demostrate traders were engaging in layering and failed to respond sufficiently to red flags informing them of the conduct. Hold Brothers and its personnel, including the individual respondents, periodically solicited information for compliance reviews from the Demostrate traders concerning the traders' manipulative trading strategies. For example:

- In April 2009, a Hold Brothers employee requested from a trader in a Demostrate trading group an explanation of the trader's trading strategy. The trader emailed his strategy to a Chinese-speaking Hold Brothers employee. This employee translated the document and provided it to Vallone, among others. The document describes a layering strategy, including moving the bid and ask prices of securities by entering multiple orders, and the cancellation of the orders after the intended to be executed order was filled.

- In February 2010, a Hold Brothers employee requested from a trader in a Demostrate trading group an explanation of the trader's trading strategy. This employee sent an email to Steve Hold, Vallone, and Tobias, among others, relating a conversation with a Demostrate trader who explained his trading strategy: "float a invisible sell, say at 26.60. . . . Then they will float a few visible buys at 26.40, 26.41, 26.42, etc. At some point, someone will hit that floating invisible sell at 26.60. Then they'll reverse the course to cover the short position."

- In May 2010, a Hold Brothers employee requested from a trader in a Demostrate trading group an explanation of the trader's trading strategy. This employee sent an email to Steve Hold, Vallone, and Tobias, among others, discussing the trading strategy of several Demostrate traders, stating that the traders "will try to float both buy and sell orders in-between the current inside bid and ask price. . . . [Then] they will try to push the price down, and then up to make the spread back and forth."

31. Despite these and other red flags, Steve Hold, Vallone, and Tobias did not take sufficient steps to determine whether the strategies identified above accurately reflected the trading or whether the trading strategies themselves were manipulative, particularly in light of language in emails such as "push the price down, and then up."

32. Hold Brothers and the individual respondents were also informed by FINRA and national securities exchanges – that is, organizations that either regulate Hold Brothers or handle the orders that Hold Brothers places in the marketplace – that potentially manipulative trading was occurring at Demostrate. For example:

- In May 2009, a Hold Brothers senior executive wrote two separate emails to Steve Hold, among others, noting that he had fielded complaints from two exchanges involving "massive amounts of orders and cancelling" and traders "who were trying to make a stock look active by sending/canceling a lot of orders." The senior executive wrote, "from a compliance perspective the problem with this is, when you send an order, you have to send it in good faith that it will be filled."

- In February 2010, in an effort to develop a new compliance report to detect improper trading behavior, a series of internal emails among various Hold Brothers executives, including Vallone, noted that "the SEC is now investigating spoofing incidents . . . and we have been asked to be proactive about this problem." After a discussion of the proper definition of spoofing, a manager asked, "[w]ouldn't [Demostrate trading group] P69 (Sterling) be guilty of this?"

- In late March 2010, Hold Brothers received an inquiry from FINRA, which was described in an email as a "spoofing inquiry." After a follow-up call with FINRA in April 2010, a senior Hold Brothers executive emailed Steve Hold, Vallone, and Tobias describing FINRA's concern about possible spoofing by three Demostrate traders during March 2010.

33. Despite receiving such correspondence, which constituted red flags, Steve Hold, Vallone, and Tobias failed to take sufficient steps to conduct an appropriate review of the trading practices at Demostrate.

34. Hold Brothers was on notice during the Relevant Period that certain trading groups of Demostrate generated a high number of cancelled orders and that those cancellations were suspicious. In April 2010, another Hold Brothers employee informed Steve Hold and Tobias about the high number of orders entered and then cancelled by three Demostrate traders in the P18 trading group. This employee noted that "all the cancels is a problem." The next day, Steve Hold asked his staff to check order and execution data to determine what percentage of orders were cancelled for one Demostrate trading group. Trading group P69 was chosen for review. The review showed that the 55 traders in the group had entered 52,000 executed orders for 11 million shares but, during the same period, had cancelled 152,000, or nearly three times as many orders for 21 million shares. Despite identifying the activity as "a problem," Respondents failed to take sufficient steps to identify the reason for these cancellations.

35. Based on the red flags set forth above, the Respondents knew or were reckless in not knowing that certain of the Demostrate overseas traders were engaging in layering. Neither Hold Brothers nor any of the individual respondents took sufficient action to stop the conduct. On the contrary, notwithstanding the red flags, Hold Brothers, through Steve Hold, Vallone, and Tobias, continued to provide certain of the Demostrate traders with access to trading platforms

and the ability to access the U.S. capital markets. Steve Hold continued to fund Demostrate, and Demostrate continued to provide trading capital to Demostrate traders. Tobias, as managing member of Demostrate, assisted in establishing the Demostrate account and continued to provide buying power to the traders, approve traders for trading, and manage the flow of funds to the traders. Vallone failed to take sufficient corrective action despite receiving emails directed to him asking him to weigh in on the appropriateness of the activity and telling him that he needed to address the significant red flags raised by the trading.

### G. HOLD BROTHERS FAILED REASONABLY TO SUPERVISE THE DEMOSTRATE TRADERS

36. While Hold Brothers did have systems in place to monitor Demostrate traders' trading, these systems were used primarily to monitor for risk of loss. Hold Brothers lacked adequate surveillance systems and lacked reasonable procedures to prevent or detect the manipulative layering trading by certain of the Demostrate traders who were associated persons of Hold Brothers. Until the latter part of 2010, Hold Brothers did not have systems that reviewed excessive order cancellations, and did not have the capability to fully review order and execution data for most trades.

37. Hold Brothers had few, if any, exception reports adequately designed to catch manipulative trading. Further, when Hold Brothers personnel did identify potential red flags, Hold Brothers staff failed to implement the procedures that did exist – as is evidenced by the failure of Steve Hold, Vallone, and Tobias to sufficiently address the numerous red flags. If Hold Brothers had established and implemented reasonable policies and procedures with respect to surveiling for manipulative trading activity, it is likely that they would have prevented and detected the Demostrate traders' violations of Section 9(a)(2).

### H. STEVE HOLD FAILED REASONABLY TO SUPERVISE VALLONE

38. Steve Hold was Vallone's supervisor. Steve Hold received the emails indicating possible manipulative trading by the overseas traders, knew that Vallone had been asked to review this trading to determine whether it was manipulative, and that inaction by Vallone could aid any manipulative trading by the Demostrate traders. Steve Hold failed to ensure that Vallone took steps to determine if the manipulative trading occurred, and failed to sufficiently review Vallone's response to the red flags to ensure that Vallone was not aiding manipulative trading by the Demostrate traders. If Steve Hold had reasonably supervised Vallone, it is likely that he would have prevented and detected Vallone's aiding and abetting violations of Section 9(a)(2).

## I. HOLD BROTHERS FAILED TO FILE SUSPICIOUS ACTIVITY REPORTS FOR SUSPICIOUS TRADING

39. During the Relevant Period, Hold Brothers failed to file a single Suspicious Activity Report ("SAR"). Hold Brothers failed to file a single SAR despite numerous instances in which traders described their trading strategy to Hold Brothers personnel, which should have raised red flags that the trading was manipulative, and despite the firm detecting wash trading and other suspicious trading involving transactions that totaled over $5,000.

40. Hold Brothers' failure to file SARs in any of these instances is contrary to its own compliance policies and procedures. Hold Brothers' policies and procedures relating to its anti-money laundering program instruct firm personnel to file SARs for any suspicious activity conducted or attempted through Hold Brothers and involving or aggregating $5,000 or more of funds or assets if the activity, among other things, "has no business or apparent lawful purpose."

## J. HOLD BROTHERS FAILED TO PRESERVE AND FURNISH ORDER INFORMATION

41. In December 2010, Hold Brothers received a subpoena from the staff asking the firm to produce order and execution data for certain Demostrate trading groups on various dates in 2009 and 2010. Hold Brothers did not produce order and execution data until July 2011, and subsequently informed the staff that the production was incomplete because records covering a two-month period in 2009 were missing.

42. In May 2011, Hold Brothers informed the manufacturer of the trading system used by the majority of the Demostrate traders of "data gaps" in its records, and requested assistance. On July 1, 2011, Hold Brothers made yet another production of order and execution data to the staff. This production, while containing some of the previously unproduced data for 2009, was still not complete, as it lacked data for August and September of 2009. Ultimately, Hold Brothers informed the staff that it could not produce the data for any trading day during those two months.

## K. VIOLATIONS

43. As a result of the conduct described above, Demostrate and Trade Alpha violated Section 9(a)(2) of the Exchange Act, which prohibits any person from "effect[ing], alone or with one or more other persons, a series of transactions in any security . . . creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others."

44. As a result of the conduct described above, Hold Brothers willfully violated Section 9(a)(2) of the Exchange Act, which prohibits any person from "effect[ing], alone or with one or more other persons, a series of transactions in any security . . . creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others."

45. As a result of the conduct described above, Hold Brothers willfully violated Section 17(a) of the Exchange Act, which requires, in pertinent part, that registered brokers or dealers make and keep for prescribed periods records that the Commission deems necessary or appropriate in the public interest for the protection of investors, and certain rules adopted under Section 17(a), including (i) Rule 17a-4(b)(1), which requires that registered brokers and dealers preserve for a period of not less than three years, the first two years in an easily accessible place, among other things, "a memorandum of each brokerage order, and of any other instruction, given or received for the purchase or sale of securities, whether executed or unexecuted," (ii) Rule 17a-4(j), which requires that registered brokers and dealers "furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records" that are required to be preserved under Section 17(a), and (iii) Rule 17a-8, which requires that brokers and dealers comply with the reporting, recordkeeping, and record retention requirements of the rules promulgated under the Currency and Financial Transactions Reporting Act of 1970 (commonly known as the Bank Secrecy Act), 12 U.S.C. §1829b, 12 U.S.C. §§1951-1959, and 31 U.S.C. §§5311-5330.

46. As a result of the conduct described above, Hold Brothers failed reasonably to supervise their associated persons, the Demostrate traders, within the meaning of Section 15(b)(4)(E) of the Exchange Act with a view to preventing and detecting their violations of Section 9(a)(2) of the Exchange Act.

47. As a result of the conduct described above, Steve Hold, Vallone, and Tobias willfully aided and abetted and caused Demostrate's, Trade Alpha's, and Hold Brothers' violations of Section 9(a)(2) of the Exchange Act, which prohibits any person from "effect[ing], alone or with one or more other persons, a series of transactions in any security . . . creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others."

48. As a result of the conduct described above, Steve Hold failed reasonably to supervise Vallone within the meaning of Section 15(b)(4)(E) of the Exchange Act, as incorporated by reference in Section 15(b)(6) of the Exchange Act, with a view toward preventing and detecting Vallone's violation of the federal securities laws.

## IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondents Demostrate and Trade Alpha shall cease and desist from committing or causing any violations and any future violations of Section 9(a)(2) of the Exchange Act.

B. Pursuant to Section 21C of the Exchange Act, Respondent Hold Brothers shall cease and desist from committing or causing any violations and any future violations of (i) Section 9(a)(2) of the Exchange Act, and (ii) Section 17(a) of the Exchange Act and Rules 17a-4 and 17a-8 thereunder.

C. Pursuant to Section 21C of the Exchange Act, Respondents Steve Hold, Vallone, and Tobias shall cease and desist from committing or causing any violations and any future violations of Section 9(a)(2) of the Exchange Act.

D. Pursuant to Section 15(b) of the Exchange Act and Section 9(b) of the Investment Company Act, Respondents Vallone and Tobias be, and hereby are:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization;
>
> prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and
>
> barred from participating in any offering of penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock

with the right to apply for reentry after three (3) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

E. Pursuant to Section 15(b) of the Exchange Act and Section 9(b) of the Investment Company Act, Respondent Steve Hold be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization;
>
> prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and
>
> barred from participating in any offering of penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock

with the right to apply for reentry after two (2) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

F. Pursuant to Section 15(b) of the Exchange Act, Respondent Steve Hold be, and hereby is, barred from association in a supervisory capacity with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, with the right to apply for reentry after three (3) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

G. Pursuant to Section 15(b) of the Exchange Act, Respondent Hold Brothers is censured.

H. Any reapplication for association by Respondents Steve Hold, Vallone, and Tobias will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against Respondents Steve Hold, Vallone and Tobias, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

I. Respondent Hold Brothers shall pay disgorgement of $629,167 plus agreed upon post-Order interest of $9,285.22 pursuant to SEC Rule of Practice 600, for a total of $638,452.22, to the United States Treasury. Payment of disgorgement and interest shall be made in five (5) installments according to the following schedule:

- Payment 1, in the amount of $125,833.40, due within ten (10) days of the entry of this Order.
- Payment 2, in the amount of $129,546.52, due within ninety (90) days of the entry of this Order.
- Payment 3, in the amount of $128,618.24, due within one hundred eighty (180) days of the entry of this Order.
- Payment 4, in the amount of $127,689.96, due within two hundred seventy (270) days of the entry of this Order.
- Payment 5, in the amount of $126,764.10, due within three hundred sixty (360) days of the entry of this Order.

If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of disgorgement, plus any additional interest accrued pursuant to SEC Rule of Practice 600, shall be due and payable immediately, without further application. Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Respondent may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the file number of these proceedings; Hold Brothers as a respondent in these proceedings; and specifying that payment is made pursuant to this Order. A copy of the cover letter and money order or check shall be sent to Sanjay Wadhwa, Associate Director and Deputy Chief, Market Abuse Unit, Division of Enforcement, U.S. Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, NY 10281-1022.

J. Respondent Hold Brothers shall pay a civil money penalty in the amount of $1,887,500 plus agreed upon post-Order interest of $9,285.22 pursuant to 31 U.S.C. 3717, for a total of $1,896,785.22, to the United States Treasury. Payment of penalty and interest shall be made in five (5) installments according to the following schedule:

- Payment 1, in the amount of $377,500, due within ten (10) days of the entry of this Order.
- Payment 2, in the amount of $381,213.11, due within ninety (90) days of the entry of this Order.
- Payment 3, in the amount of $380,284.84, due within one hundred eighty (180) days of the entry of this Order.
- Payment 4, in the amount of $379,356.56, due within two hundred seventy (270) days of the entry of this Order.
- Payment 5, in the amount of $378,430.71, due within three hundred sixty (360) days of the entry of this Order.

If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of penalty, plus any additional interest accrued pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Respondent may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

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and shall be accompanied by a letter identifying the file number of these proceedings; Hold Brothers as a respondent in these proceedings; and specifying that payment is made pursuant to this Order. A copy of the cover letter and money order or check shall be sent to Sanjay Wadhwa, Associate Director and Deputy Chief, Market Abuse Unit, Division of Enforcement, U.S. Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, NY 10281-1022.

K. Respondent Demostrate shall, within ten (10) days of the entry of this Order, pay disgorgement in the amount of $1,258,333 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Respondent may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

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Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the file number of these proceedings; Demostrate as a respondent in these proceedings; and specifying that payment is made pursuant to this Order. A copy of the cover letter and money order or check shall be sent to Sanjay Wadhwa, Associate Director and Deputy Chief, Market Abuse Unit, Division of Enforcement, U.S. Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, NY 10281-1022.

L. Respondents Steve Hold, Vallone, and Tobias each shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of $75,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Each Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Each Respondent may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

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Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the file number of these proceedings; Steve Hold's, Vallone's, or Tobias' name as a respondent in these proceedings; and specifying that payment is made pursuant to this Order. A copy of the cover letter and money order or check shall be sent to Sanjay Wadhwa, Associate Director and Deputy Chief, Market Abuse Unit, Division of Enforcement, U.S. Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, NY 10281-1022.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-67921; File No. SR-OCC-2012-17)

September 25, 2012

Self-Regulatory Organizations; The Options Clearing Corporation; Advance Notice Relating to the Margining of Segregated Futures Customer Accounts on a Gross Basis

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4(n)(1)(i),[2] notice is hereby given that on September 14, 2012, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the advance notice described in Items I and II below, which Items have been prepared primarily by OCC. The Commission is publishing this notice to solicit comments on the advance notice from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

The proposed rule change would allow OCC to become compliant with Commodity Futures Trading Commission ("CFTC") Rule 39.13(g)(8)(i), which requires the margining of segregated futures customer accounts on a gross basis.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the proposed rule change and advance notice and discussed any comments it received on the proposed rule change and advance notice. The text of these statements may be examined at the places specified in Item IV below. The clearing agency

1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4(n)(i).

has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.[3]

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

The purpose of this proposed rule change is to provide for the margining of OCC segregated futures customer accounts on a gross basis, as required by CFTC Rule 39.13(g)(8)(i).[4]

**The CFTC's Customer Gross Margin Rule**

On October 18, 2011, the CFTC issued final regulations implementing many of the new statutory core principles for CFTC-registered derivatives clearing organizations ("DCOs") enacted under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). As a registered DCO (as well as a registered securities clearing agency), OCC has previously implemented rule changes designed to bring OCC into compliance with CFTC rules applicable to DCOs that went into effect on January 9, 2012[5] and May 7, 2012.[6] OCC believes it is necessary to amend its Rules in order to ensure compliance with the gross margin rule, which requires a DCO to "collect initial margin on a gross basis for each clearing member's customer account(s) equal to the sum of the initial margin amounts that would be required by the derivatives clearing organization for each individual customer within that account if each individual customer were a clearing member."[7] The CFTC gross margin rule goes into effect on

3 The Commission has modified the text of the summaries prepared by OCC.

4 17 CFR § 39.13(g)(8)(i).

5 See SR-OCC-2011-18.

6 See SR-OCC-2012-06.

7 Derivatives Clearing Organization General Provisions and Core Principles, 76 FR 69334, 69439 (November 8, 2011).

November 8, 2012; however, OCC intends to begin complying with the gross margin rule on Monday November 5, 2012 as described herein.

**OCC's System for Calculating Margin**

OCC currently calculates margin requirements for each clearing member's segregated futures customer account held at OCC on a net basis by applying OCC's System for Theoretical Analysis and Numerical Simulations ("STANS"). STANS calculates margin with respect to each account of a clearing member, including each clearing member's futures customer account(s), on a net basis, i.e., considering the positions of a clearing member, including positions held in each clearing member's futures customer account(s), as if they are part of one portfolio and margining accordingly. STANS includes both a net asset value ("NAV") component and a risk component. The NAV component marks all positions to market and nets long and short positions to determine the NAV of each clearing member's portfolio of customer positions. The NAV component represents the cost to liquidate the portfolio at current prices by selling the net long positions and buying in the net short positions. The risk component is estimated by means of an expected shortfall risk measure obtained from "Monte Carlo" simulations designed to measure the additional asset value required in any portfolio to eliminate an unacceptable level of risk that the portfolio would liquidate to a deficit.

OCC presently lacks sufficient information about individual customer positions to calculate margin at the level of each individual customer. However, OCC has been coordinating with other DCOs to establish an industry-wide mechanism for complying with the customer gross margin rule as applied to futures customer accounts. Pursuant to this new system, each DCO's clearing members will submit data files to the DCO identifying positions by numerical customer identifiers.[8] OCC will use this information to calculate margins, using STANS, for each customer identifier of a clearing member and to aggregate those margin calculations to determine the total futures customer margin requirement for the clearing member's segregated futures customer account(s) held at OCC.[9] OCC will then compare the aggregate positions reported by each clearing member with its own records and make any needed adjustments to the margin calculation to ensure all positions on OCC's books are properly margined.

**Proposed By-Law and Rule Changes**

The proposed changes to OCC's Rules provide for the calculation of margin for segregated futures customer accounts on a gross basis and mandate submission of the clearing member data files necessary to allow OCC to calculate margin at the level of each futures customer. In the event that the data included in these data files is incomplete (for example, if OCC shows positions held in a clearing member's segregated futures accounts, but those positions are not reflected in the data file), OCC will create a separate sub-account to be used for margin calculation purposes only. Positions recorded on OCC's books and records, but not reflected in the data file, will be attributed to this sub-account and a margin amount will be

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8 The position data provided to OCC by clearing members will not include (a) information with respect to the allocation of margin assets to particular customers, nor (b) information respect to settlement obligations arising from the exercise, assignment or maturity of cleared contracts. For this reason, OCC will treat all margin assets and settlement obligations for each account to which the gross margin rule applies as being in sub-accounts of the Clearing Member. OCC will calculate margin, using STANS, separately for each sub-account and will aggregate the calculated margin requirements at the level of the clearing member's segregated futures customer account to which the sub-accounts relate.

9 OCC currently carries the following account types that are segregated pursuant to Section 4d of the Commodity Exchange Act: Segregated Futures Accounts, Segregated Futures Professional Accounts, non-Proprietary X-M accounts, and internal non-proprietary cross-margining accounts. All such accounts would be margined on a gross basis under the proposed amendments to Rule 601.

calculated for the sub-account. This margin amount will be added to a clearing member's margin requirement. OCC has determined to adopt this conservative approach to dealing with discrepancies between its own records and clearing member data files in order to ensure that OCC does not collect an inadequate amount of margin from clearing members.

* * *

The proposed changes to OCC's By-Laws are consistent with the purposes and requirements of Section 17A of the Exchange Act because they are designed to permit OCC to perform clearing services for products that are subject to the jurisdiction of the CFTC without adversely affecting OCC's obligations with respect to the prompt and accurate clearance and settlement of securities transactions or the protection of securities investors and the public interest. The proposed rule change is not inconsistent with any rules of OCC.

(B) Clearing Agency's Statement on Burden on Competition

OCC does not believe that the proposed changes contained in the advance notice would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

(C) Clearing Agency's Statement on Comments on the Advance Notice Received from Members, Participants, or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change and none have been received.

## III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

The proposed changes contained in the advance notice may be implemented pursuant to Section 806(e)(1)(G) of Clearing Supervision Act[10] if the Commission does not object to the proposed changes within 60 days of the later of (i) the date that the advance notice was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. The clearing agency shall not implement the proposed changes contained in the advance notice if the Commission objects to the proposed changes.

The Commission may extend the period for review by an additional 60 days if the proposed changes raise novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. Proposed changes may be implemented in fewer than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies the clearing agency in writing that it does not object to the proposed changes and authorizes the clearing agency to implement the proposed changes on an earlier date, subject to any conditions imposed by the Commission.

OCC has also filed the advance notice as a proposed rule change pursuant to Section 19(b)(1) of the Act[11] and Rule 19b-4 thereunder.[12] Pursuant to those provisions, within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to

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10 12 U.S.C. 5465(e)(1)(G).

11 15 U.S.C. 78s(b)(1).

12 17 CFR 240.19b-4.

90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove the proposed rule change or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

The clearing agency shall post notice on its web site of proposed changes that are implemented.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-OCC-2012-17 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549-1090.

All submissions should refer to File Number SR-OCC-2012-17. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the advance notice that are filed with the Commission, and all written communications relating to the advance notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, N.E., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings also will be available for inspection and copying at the principal office of OCC and on OCC's website at http://www.optionsclearing.com/components/docs/legal/rules_and_bylaws/sr_occ_12_17.pdf.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-OCC-2012-17 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 67930 / September 26, 2012

Admin. Proc. File No. 3-14945

| In the Matter of<br><br>MITCHELL SEGAL, ESQ. | ORDER DENYING MOTION TO LIFT TEMPORARY SUSPENSION AND DIRECTING HEARING |
|---|---|

On July 11, 2012, we issued an order instituting proceedings ("OIP") against Mitchell Segal, Esq., an attorney licensed to practice in New York, pursuant to Commission Rule of Practice 102(e)(3)(i).[1] The OIP temporarily suspended Segal from appearing or practicing before the Commission.[2] Segal has filed a petition, pursuant to Rule 102(e)(3)(ii),[3] requesting that his temporary suspension be lifted.

Segal has been the president and chief executive officer of Alternative Green Technologies, Inc. ("AGTI"), a company whose stock traded on the Pink Sheets. On December 12, 2011, the Commission filed a civil action against Segal, AGTI, and others in the U.S. District

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1 17 C.F.R. ' 201.102(e)(3)(i). This Rule states that:

(i) The Commission, with due regard to the public interest and without preliminary hearing, may, by order, temporarily suspend from appearing or practicing before it any attorney, accountant, engineer, or other professional or expert who has been by name:

> (A) Permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder; or
>
> (B) Found by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party or found by the Commission in any administrative proceeding to which he or she is a party to have violated (unless the violation was found not to have been willful) or aided and abetted the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

2 *Mitchell Segal, Esq.*, Securities Exchange Act Rel. No. 67393 (July 11, 2012), 2012 WL 2789437.

3 17 C.F.R. ' 201.102(e)(3)(ii).

Court for the Southern District of New York alleging, among other things, that from September 2008 through September 2009, Segal violated Section 5 of the Securities Act of 1933[4] by "offering and selling securities [of AGTI] when no registration statement had been filed or was in effect as to such securities and when no exemption from registration was available." The complaint further alleged that Segal violated, and aided and abetted in the violation of, Section 10(b) of the Securities Exchange Act of 1934[5] and Exchange Act Rule10b-5[6] by "obtaining and furnishing false documents . . . to support a legal opinion letter that was provided to Alternative Green Technologies, Inc.'s transfer agent so that the transfer agent would issue millions of shares of purportedly unrestricted AGTI stock in an unregistered offering."

On April 11, 2012, the district court entered a final judgment by consent against Segal, permanently enjoining him from future violations of Securities Act Section 5, Exchange Act Section 10(b), and Exchange Act Rule 10b-5.[7] The final judgment also prohibited Segal from acting as an officer or director of a public company; barred Segal from participating in penny stock offerings; and required Segal to pay disgorgement, plus prejudgment interest, and a civil penalty.[8]

In issuing the OIP, we found it "appropriate and in the public interest" that Segal be temporarily suspended from appearing or practicing before the Commission based on the district court's final judgment. We stated that the temporary suspension would become permanent unless Segal filed a petition seeking to lift it within thirty days after service of the OIP pursuant to Rule 102(e)(3)(ii). We further advised that, pursuant to Rule 102(e)(3)(iii), upon receipt of such petition, we would "either lift the temporary suspension, or set the matter down for hearing . . . , or both."[9]

In his petition, Segal states that the temporary suspension is unwarranted and should be lifted. He notes that he "has been an attorney in good standing for over 27 years," "has never been convicted of a crime," and, "other than this case, has never been charged with a regulatory violation." Segal also states that if the Commission determines a suspension to be warranted, the length of the suspension should be no more than three years. In his view, a suspension of more than three years would "create substantial and unwarranted disparities" between his case and the cases of five other attorneys that the Commission has suspended within the past two years. Segal further requests that he be given leave to apply for reinstatement to practice after any period of suspension ordered by the Commission is completed. The Office of the General Counsel opposes Segal's petition.

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[4] 15 U.S.C. § 77e.

[5] 15 U.S.C. § 78j(b).

[6] 17 C.F.R. § 240.10b-5.

[7] *SEC v. Alternative Green Technologies, Inc., et al.*, Civil Action No. 11-9056 (S.D.N.Y. Apr. 11, 2012).

[8] *Id.*

[9] 17 C.F.R. § 201.102(e)(3)(iii).

Rule 102(e)(3)(i) permits the Commission to temporarily suspend from appearing or practicing before it an attorney who has been permanently enjoined from violating or aiding and abetting the violation of the federal securities laws or found to have violated or aided and abetted the violation of the federal securities laws. The district court's findings, which Segal is precluded from contesting in this proceeding, and the permanent injunction issued against him justify the continuation of his suspension until it can be determined what, if any, action may be appropriate to protect the Commission's processes.[10]

Under the circumstances, we find it appropriate that the suspension remain in effect pending the holding of a public hearing and decision by an administrative law judge. As provided in Rule 102(e)(3)(iii), we will set the matter down for public hearing. We express no opinion as to the merits of Segal's claims.

Accordingly, IT IS ORDERED that this proceeding be set down for public hearing before an administrative law judge in accordance with Rule of Practice 110. As specified in Rule of Practice 102(e)(3)(iii), the hearing in this matter shall be expedited in accordance with Rule of Practice 500; it is further

ORDERED that the administrative law judge shall issue an initial decision no later than 210 days from the date of service of this order; and it is further

ORDERED that the temporary suspension of Mitchell Segal, entered on July 11, 2012, remain in effect pending a hearing and decision in this matter.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

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[10] *See* 17 C.F.R. § 201.102(e)(3)(iv) (stating that, in any hearing held on a petition filed in accordance with Rule 102(e)(3)(ii), the petitioner may not contest any findings made against him in the underlying proceeding).

Commissioner Aguilar
Commissioner Gallagher
not participating
Commissioner Paredes
Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67934 / September 27, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15048**

| | |
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| **In the Matter of**<br><br>**GOLDMAN, SACHS & CO.**<br><br>**Respondent.** | **ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 15(b), 15B(c)(2) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER** |

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b), 15B(c)(2) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Goldman, Sachs & Co. ("Goldman Sachs" or "Respondent").

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b), 15B(c)(2) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

**III.**

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

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[1] The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

## A. SUMMARY

1. These proceedings involve "pay-to play" violations by Goldman, Sachs & Co. ("Goldman Sachs"), a broker-dealer and registered municipal securities dealer, arising from the conduct of Neil M.M. Morrison ("Morrison"), a former vice president in the investment banking division of Goldman Sachs. Starting in July 2008, Morrison was employed by Goldman Sachs to solicit municipal underwriting business from, among others, the Commonwealth of Massachusetts Treasurer's Office. During the period November 2008 to October 2010, however, Morrison was also substantially engaged in the political campaigns, including the November 2010 Massachusetts gubernatorial campaign, for Timothy P. Cahill ("Cahill"), the then-Treasurer of Massachusetts.[2] Morrison participated extensively in Cahill's gubernatorial campaign and did so at times from his Goldman Sachs office, during his Goldman Sachs work hours and using Goldman Sachs resources, such as phones, e-mail and office space. Morrison's campaign work gave him complete access to Cahill and his staff, who often provided him with information about the office's internal deliberations involving underwriter selection.

2. Morrison's campaign activities during his Goldman Sachs work hours and use of Goldman Sachs resources constituted valuable undisclosed "in-kind" campaign contributions to Cahill attributable to Goldman Sachs. In addition, during the same period, Morrison made a secret, undisclosed cash campaign contribution to Cahill.

3. Within two years of these cash and attributed "in-kind" campaign contributions, Goldman Sachs engaged in municipal securities business with issuers associated with Cahill as Treasurer of Massachusetts and as a candidate for Governor of Massachusetts. Goldman Sachs' engagement in municipal securities business with these issuers violated Section 15B(c)(1) of the Exchange Act and the Municipal Securities Rulemaking Board's ("MSRB") Rule G-37(b).[3] Goldman Sachs did not disclose any of the contributions on MSRB Forms G-37, and did not make or keep records of the contributions in violation of MSRB Rules G-37(e), G-8 and G-9. In addition, Goldman Sachs did not take steps to ensure that the attributed contributions, or campaign work or the conflicts of interest raised by them were disclosed in the bond offering documents, in violation of MSRB Rule G-17, which requires broker-dealers to deal fairly and not

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2 In addition to Cahill's gubernatorial campaign, between November 2008 and September 2009, Morrison worked on Cahill's re-election campaign for Treasurer of Massachusetts.

3 Rule G-37(b) is a broad prophylactic measure. It provides that no broker, dealer or municipal securities dealer shall engage in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by: (A) the broker, dealer or municipal securities dealer; (B) any municipal finance professional associated with such broker, dealer or municipal securities dealer; or (C) any political action committee controlled by the broker, dealer or municipal securities dealer or by any municipal finance professional. A violation of Rule G-37(b) does not require a showing of "quid pro quo" (i.e. that municipal securities business was actually given in exchange for the contribution.).

engage in any deceptive, dishonest, or unfair practice. In addition, Goldman Sachs failed to effectively supervise Morrison in violation of MSRB Rule G-27.

## B. RESPONDENT

4. Goldman Sachs, a New York limited partnership with its principal offices in New York, New York, is a registered broker-dealer pursuant to Section 15(b) of the Exchange Act and a municipal securities dealer as defined in Sections 3(a)(30) and 3(a)(31) of the Exchange Act. Goldman Sachs, a limited partnership, is a subsidiary of The Goldman Sachs Group, Inc., a Delaware corporation with common stock that is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is listed on the New York Stock Exchange. In 2010, Goldman Sachs was the fifth largest underwriter of negotiated municipal securities offerings in the country.

## C. OTHER RELEVANT INDIVIDUAL

5. Morrison, age 38, resides in Taunton, Massachusetts. Between July 14, 2008 and December 19, 2010, Morrison was a vice president in Goldman Sachs' investment banking division in one of the firm's Boston, Massachusetts offices. On December 19, 2010, as a result of his conduct, Goldman Sachs terminated Morrison. Between January 2003 and June 2007, Morrison was employed by the Massachusetts Treasurer's Office, which included positions as the first deputy treasurer, chief of staff and assistant treasurer, reporting directly to Cahill.

## D. FACTS

### Background

6. Between July 2008 and October 2010, Morrison engaged in activities that constituted solicitation of municipal securities business from certain issuers on behalf of Goldman Sachs. In addition, Morrison was listed on Goldman Sachs' list of municipal finance professionals ("MFP") during his employment with the firm. As a result, Morrison was an MFP associated with Goldman Sachs within the meaning of MSRB Rule G-37.[4]

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4 Rule G-37(g)(iv)(B) provides that "the term 'municipal finance professional' [includes] . . . any associated person [of a broker, dealer or municipal securities dealer] who solicits municipal securities business." Morrison solicited municipal securities business by attending meetings with issuer staff, which were intended to obtain municipal securities business with the issuer and by communicating with issuer staff about Goldman Sachs' underwriting capabilities. In addition, Morrison engaged in municipal securities solicitation activities by, among other things, signing cover letters attached to responses to requests for qualifications ("RFQ") for underwriting business and by having his name appear in the responses to the RFQs as a member of Goldman Sachs' underwriting team. Either one of these solicitation activities by itself was sufficient to make him an MFP. See John F. Kendrick, Exchange Act Release No. 62500 (July 14, 2010).

7. As the Treasurer of Massachusetts and candidate for Governor of Massachusetts, Cahill was an "official" of various municipal securities issuers in Massachusetts within the meaning of Rule G-37.[5] Specifically, as Treasurer of Massachusetts, Cahill was an incumbent who was responsible for, or had the authority to appoint persons who were responsible for, the hiring of brokers, dealers, or municipal securities dealers for municipal securities business by the Commonwealth of Massachusetts and certain related state issuers, including the Massachusetts Water Pollution Abatement Trust and Massachusetts School Building Authority. As candidate for Governor of Massachusetts, Cahill was a candidate for elective office which has authority to appoint persons who are directly or indirectly responsible for, or can influence the outcome of, the hiring of a municipal securities dealer for municipal securities business of certain issuers, including the Massachusetts Housing Finance Authority, Massachusetts Bay Transportation Authority, Massachusetts Health and Education Facilities Authority, and Massachusetts Water Resources Authority. The issuers listed in this paragraph are hereafter referred to collectively as "Issuers."

**Morrison Worked Extensively on Cahill's Campaigns Using Goldman Sachs Resources**

8. Starting at least as early as November 2008, Morrison began actively assisting with Cahill's re-election campaign for Treasurer of Massachusetts by soliciting contributions for fundraisers and arranging for others to solicit contributions for Cahill. Thereafter, between July 2009 and September 2009, Morrison's campaign work focused on assisting the campaign to prepare for Cahill's eventual bid for Governor of Massachusetts. This assistance included interviewing campaign consultants, preparing and reviewing campaign documents, participating on campaign conference calls, and attending campaign meetings during Goldman Sachs work hours.

9. On September 9, 2009, Cahill officially announced his candidacy for Governor of Massachusetts. Thereafter, Morrison's campaign work increased dramatically, including the number of campaign telephone calls made during work hours and the number of e-mails that he sent using his Goldman Sachs' e-mail account. Starting in September 2009, Morrison became one of Cahill's most trusted campaign advisers. As described below, he was involved in, and used Goldman Sachs resources for, numerous significant aspects of the campaign, including interviewing at least one possible running mate in his Goldman Sachs office, negotiating campaign contracts and accepting contract terms on behalf of the campaign during Goldman Sachs' work hours and/or using Goldman Sachs' telephones and e-mail.

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5 Rule G-37(g)(vi) defines an "official of such issuer" as any person who was, at the time of the contribution, an incumbent, candidate or successful candidate: (A) for elective office of the issuer which office is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business by the issuer; or (B) for any elective office of a state or of any political subdivision, which office has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business by an issuer.

10. Morrison's work for Cahill's campaign during his Goldman Sachs' work hours was remarkable in its breadth. Between September 2009 and October 4, 2010, Morrison engaged in (a) fundraising; (b) drafting speeches and fundraising solicitations; (c) reviewing, approving and writing campaign memos, contracts, letters, talking points, campaign position papers, and responses to campaign issues; (d) attending and preparing for press conferences; (e) approving campaign invoices and expenditures; (f) approving personnel decisions, such as salaries and hiring; (g) negotiating with campaign personnel; (h) arranging advertisements and commercials; (i) communicating with reporters on behalf of the campaign; (j) reviewing the campaign's budget; (k) recruiting supporters; (l) reviewing campaign leases for office space; (m) selecting county representatives; (n) interviewing consultants; (o) drafting campaign plans and quotations; (p) providing legal advice; and (q) assisting with debates. In engaging in these actions, Morrison at times used his Goldman Sachs e-mail account, phone and other resources and did so during ordinary work hours. During the thirteen-month period, September 9, 2009 to October 4, 2010, Morrison sent at least 364 campaign-related e-mails using his Goldman Sachs e-mail account.

**Morrison Actively Solicited Underwriting Business and Attempted to Exert Influence on the Underwriter Selection Process**

11. At the same time Morrison was working on Cahill's campaign, he was actively soliciting municipal securities business from the Cahill Treasurer's Office. At times, Morrison referenced his campaign work in those solicitations in an apparent attempt to curry favor with the Treasurer's Office in the underwriting selection process.

12. For example, on September 29, 2009, Morrison sent an e-mail using his Goldman Sachs e-mail account to a Deputy Treasurer discussing the selection of underwriters. In this e-mail Morrison stated:

> The boss [Cahill] mentioned to me this morning that he spoke to [the Assistant Treasurer] and that it is looking good for us [Goldman Sachs] on the build America bond deal. He then said that you would probably split it up with 2 joint bookrunners. I am ok with that if that's what you want. I actually think it will be good because it enables the boss [Cahill] to handsomely reward someone else.

13. In the same e-mail exchange, apparently referencing the upcoming election, Morrison went on to say:

> From my standpoint as an advisor/consultant/friend I am saying, PLEASE don't give these [underwriter] slots away willy-nilly. You are in the fight of your lives and need to reward loyalty and encourage friendship. If people aren't willing to be creative with their support then they shouldn't expect business. This has to be a political decision.

14. In another e-mail dated September 28, 2009, to the Deputy Treasurer, Morrison again linked his campaign work and his solicitation for underwriting business:

> I have a couple of items that I want to put out there in the interest of leaving nothing unsaid.
>
> 1. We have discussed the Build American Bond transaction and how important it is to me. You have been great keeping me up to speed. This is my number 1 priority and most important ask. Having Goldman as the lead and getting 50% of the economics would be such a home run for me.
>
> 2. There is a Taunton/Southeastern Mass function for the boss [Cahill] coming up. It looks like it will be on Oct. 26.
>
> 3. In the event that [a local municipal securities dealer] were going to have a role in the Build American Bond deal, it might be beneficial to tell me that before the local banker there. She might be more interested in being more supportive. HAVING SAID THAT, I am only pushing for number 1 above. This would help number 2, (and certainly help that banker) but I am not so aggressive as to push for more than myself at this point.

15. Morrison was able to engage in the campaign work using Goldman Sachs resources over an extended period of time without detection in part because he worked in a one-person office and was supervised by a Goldman Sachs employee who was located in New York. Although Morrison had certified to the firm that he had disclosed all of his political contributions and activities and although his e-mail was subject to Goldman Sachs' general compliance screening, Goldman Sachs failed to adopt, maintain, and enforce written supervisory procedures reasonably designed to ensure his compliance with MSRB rules. Goldman Sachs should have taken additional steps to ensure Morrison's compliance in light of the fact that the firm knew that he had a political background, had a personal relationship with Cahill, and that he had a close relationship with other issuer employees. For example, in a September 5, 2008 e-mail to his supervisors about the reasons that Goldman Sachs received certain underwriting business from the Massachusetts Housing Finance Authority, Morrison bragged "realistically, if you really want to know, I got [the Vice Chair of the issuer's] son several job interviews and one of them panned out. [The Vice Chair of the issuer] has now turned up the heat with the staff and [a senior staff member of the issuer] has responded." In addition, during an October 2009 compliance review of Morrison's branch office in Boston, Goldman Sachs compliance personnel did not detect Morrison's use of e-mails for his campaign activities or conduct any specific review of Morrison's compliance with MSRB rules. In October 2010, in light of Morrison's conduct, Goldman Sachs suspended solicitations of negotiated municipal finance offerings by Massachusetts issuers, and in December 2010, Goldman Sachs terminated Morrison's employment.

## Morrison's Conduct Disqualified Goldman Sachs from Underwritings

16. From November 25, 2008 to October 4, 2010, each instance of Morrison's extensive campaign work during work hours or using firm resources constituted valuable "in-kind" campaign contributions to Cahill attributable to Goldman Sachs.

17. In addition to his direct campaign work on behalf of Cahill, on October 26, 2009, Morrison made an indirect $400 cash contribution to Cahill by providing a friend with $400 in cash and asking the friend to write a check in the friend's name to the Cahill campaign for $500. Morrison's indirect contribution of $400 was above the $250 *de minimis* exception provided in Rule G-37.[6]

18. Under Rule G-37, Morrison's indirect contribution and each "in-kind" contribution attributable to Goldman Sachs, starting on November 25, 2008 and ending on October 4, 2010, triggered a two-year ban on municipal securities business with the Issuers.

19. Despite the prohibitions contained in Rule G-37, within two years after the above contributions, Goldman Sachs participated as senior manager, co-senior manager, or co-manager for a total of thirty negotiated underwritings by the Issuers totaling approximately $9 billion. For its roles in the thirty underwritings, Goldman Sachs received fees in the amount of $7,558,942.

20. The "in-kind" contributions attributable to Goldman Sachs and the indirect cash contribution by Morrison were not disclosed as required in Goldman Sachs' quarterly reports to the MSRB on Form G-37. In addition, Goldman Sachs did not make and keep books and records of the contributions.

21. The indirect contribution by Morrison and the undisclosed "in-kind" contributions attributable to Goldman Sachs also created a conflict of interest which was not disclosed in the relevant municipal securities offerings, in violation of MSRB Rule G-17. In a July 29, 2009 e-mail to a campaign official, Morrison acknowledged the existence of this conflict, stating:

> I am staying in banking and don't want a story that says that I am helping Cahill, who is giving me banking business. If that came out, I'm sure I wouldn't get any more business.

[6] A *de minimis* exception to Rule G-37(b) allows an MFP to contribute up to $250 per candidate per election if the MFP is entitled to vote for the candidate. Cahill's gubernatorial election was held on November 2, 2010.

## VIOLATIONS

22. Section 15B(b) of the Exchange Act established the MSRB and empowered it to propose and adopt rules with respect to transactions in municipal securities by brokers, dealers, and municipal securities dealers. Section 15B(c)(1) of the Exchange Act prohibits a broker, dealer or municipal securities dealer from using the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in contravention of any rule of the MSRB. As a municipal securities dealer, Goldman Sachs was subject to Section 15B(c)(1) of the Exchange Act and the MSRB rules.

23. As a result of the conduct described above, Goldman Sachs willfully[7] violated MSRB Rule G-8(a)(xvi), which requires brokers, dealers and municipal securities dealers to make and keep current records reflecting all direct and indirect contributions to officials of issuers made by the broker, dealer, municipal securities dealer and each municipal finance professional.

24. As a result of the conduct described above, Goldman Sachs willfully violated MSRB Rule G-9, which requires brokers, dealers and municipal securities dealers to preserve records reflecting all direct and indirect contributions to officials of issuers made by the broker, dealer, municipal securities dealer and each municipal finance professional for six years.

25. As a result of the conduct described above, Goldman Sachs willfully violated MSRB Rule G-17, which states that in the conduct of its municipal securities business, every broker, dealer and municipal securities dealer shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice.

26. As a result of the conduct described above, Goldman Sachs willfully violated MSRB Rule G-27, which requires, among other things, that (a) each broker, dealer and municipal securities dealer supervise the conduct of its municipal securities business and the municipal securities activities of its associated persons to ensure compliance with MSRB rules as well as the applicable provisions of the Exchange Act and the rules promulgated thereunder; and (b) each broker, dealer and municipal securities dealer to adopt, maintain, and enforce written supervisory procedures reasonably designed to ensure compliance with the same rules and Exchange Act provisions.

27. As a result of the conduct described above, Goldman Sachs willfully violated MSRB Rule G-37(b), which prohibits brokers, dealers or municipal securities dealers from

[7] A willful violation of the securities laws means merely "'that the person charged with the duty knows what he is doing.'" Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "'also be aware that he is violating one of the Rules or Acts.'" Id. (quoting Gearhart & Otis, Inc. v. SEC, 348 F.2d 798, 803 (D.C. Cir. 1965)).

engaging in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by (i) the broker, dealer or municipal securities dealer; (ii) any municipal finance professional associated with such broker, dealer or municipal securities dealer; or (iii) any political action committee controlled by the broker, dealer or municipal securities dealer or by any municipal finance professional, unless the contribution is exempt.

28. As a result of the conduct described above, Goldman Sachs willfully violated MSRB Rule G-37(e), which requires brokers, dealers, or municipal securities dealers to file quarterly reports with the MSRB disclosing all direct and indirect contributions, exceeding the *de minimis* amount, to any official of a municipal securities issuer made by, among others, the broker, dealer, municipal securities dealer and each municipal finance professional associated with such broker, dealer, or municipal securities dealer.

29. As a result of Goldman Sachs' willful violations of MSRB Rules G-37(b), G-17 and G-37(e), Goldman Sachs willfully violated Section 15B(c)(1) of the Exchange Act.

## REMEDIAL EFFORTS

In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded the Commission staff.

## IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Goldman Sachs' Offer.

Accordingly, pursuant to Sections 15(b), 15B(c)(2), 21B and 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondent Goldman Sachs shall cease and desist from committing or causing any violations and any future violations of Section 15B(c)(1) of the Exchange Act, MSRB Rule G-8, MSRB Rule G-9, MSRB Rule G-17, MSRB Rule G-27, MSRB Rule G-37(b) and MSRB Rule G-37(e).

B. Respondent Goldman Sachs is censured.

C. Respondent Goldman Sachs shall, within 10 days of the entry of this Order, pay disgorgement of $7,558,942 and prejudgment interest of $670,033. Of the $7,558,942 in disgorgement, $2,120,547 shall be deemed satisfied by Respondent's payment of $1,512,902 to the Commonwealth of Massachusetts and $607,645 to the Massachusetts Water Pollution Abatement Trust in a related action by the Commonwealth of Massachusetts, by and through Martha Coakley, Attorney General. The remaining $5,438,395 and prejudgment interest of $670,033 shall be paid to the Securities and Exchange Commission for remittance to the United

States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Goldman, Sachs & Co. as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Elaine C. Greenberg, Chief, Municipal Securities and Public Pensions Unit, Securities and Exchange Commission, Philadelphia Regional Office, The Mellon Independence Center, 701 Market Street Philadelphia, PA 19106-1532.

D. Respondent Goldman Sachs shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of $3,750,000 to the Securities and Exchange Commission, of which $1,875,000 shall be transferred to the Municipal Securities Rulemaking Board in accordance with Section 15B(c)(9)(A) of the Exchange Act, and of which the remaining $1,875,000 shall be transferred to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Goldman, Sachs & Co. as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Elaine C. Greenberg, Chief, Municipal Securities and Public Pensions Unit, Securities and Exchange Commission, Philadelphia Regional Office, The Mellon Independence Center, 701 Market Street Philadelphia, PA 19106-1532.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Commissioner Gallagher
not participating

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67935 / September 27, 2012**

**INVESTMENT COMPANY ACT OF 1940**
**Release No. 30223 / September 27, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15049**

| | |
|---|---|
| **In the Matter of**<br><br>**NEIL M.M. MORRISON**<br><br>**Respondent.** | **ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 15(b), 15B(c)(4) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940 AND NOTICE OF HEARING** |

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b), 15B(c)(4) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Neil M.M. Morrison ("Morrison" or "Respondent").

**II.**

After an investigation, the Division of Enforcement alleges that:

A. SUMMARY

1. These proceedings involve a "pay-to-play" scheme conducted by Neil M.M. Morrison ("Morrison"), a former vice president in the investment banking division of Goldman, Sachs & Co. ("Goldman Sachs"), a broker-dealer and registered municipal securities dealer. The scheme, which lasted from November 2008 to October 2010, resulted in violations of the Municipal Securities Rulemaking Board's ("MSRB") rules by both Morrison and Goldman Sachs. Starting in July 2008, Morrison was employed by Goldman Sachs to solicit municipal underwriting business from, among others, the Massachusetts Treasurer's Office. During the period November 2008 to October 2010, however, Morrison was also substantially engaged in the political campaigns, including the November 2010 Massachusetts gubernatorial campaign,

for Timothy P. Cahill ("Cahill"), the then-Treasurer of Massachusetts.[1] Morrison participated extensively in Cahill's gubernatorial campaign and did so at times from his Goldman Sachs office, during his Goldman Sachs work hours and using Goldman Sachs resources, such as phones, e-mail and office space. Morrison's campaign work gave him complete access to Cahill and his staff, who often provided him with information about the office's internal deliberations involving underwriter selection.

2. Morrison's campaign activities during his Goldman Sachs work hours and use of Goldman Sachs resources constituted valuable undisclosed "in-kind" campaign contributions to Cahill attributable to Goldman Sachs. In addition, during the same period, Morrison made a secret, undisclosed cash campaign contribution to Cahill in willful violation of MSRB Rule G-37(d). Moreover, Morrison solicited campaign contributions for Cahill when Goldman Sachs was engaged in or seeking to engage in municipal underwriting business with the Treasurer's Office in willful violation of MSRB Rule G-37(c).

3. Within two years of these cash and attributed "in-kind" campaign contributions, Goldman Sachs engaged in municipal securities business with issuers associated with Cahill as Treasurer of Massachusetts and as a candidate for Governor of Massachusetts. Goldman Sachs' engagement in municipal securities business with these issuers violated Section 15B(c)(1) of the Exchange Act and MSRB Rule G-37(b).[2] Morrison caused Goldman Sachs to violate Rule G-37(b). The contributions were not disclosed on MSRB Forms G-37, and no records of the contributions were made and kept in violation of MSRB Rules G-37(e), G-8 and G-9. Morrison caused Goldman Sachs to violate MSRB Rules G-37(e), G-8 and G-9. In addition, Morrison did not disclose the attributed contributions, or campaign work or the conflicts of interest raised by this conduct in the bond offering documents. By failing to disclose the campaign work, cash and in-kind contributions and the resulting conflict of interest to the purchasers of municipal securities, Morrison willfully violated MSRB Rule G-17, which requires broker-dealers to deal fairly and not engage in any deceptive, dishonest, or unfair practice.

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[1] In addition to Cahill's gubernatorial campaign, between November 2008 and September 2009, Morrison worked on Cahill's re-election campaign for Treasurer of Massachusetts.

[2] Rule G-37(b) is a broad prophylactic measure. It provides that no broker, dealer or municipal securities dealer shall engage in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by: (A) the broker, dealer or municipal securities dealer; (B) any municipal finance professional associated with such broker, dealer or municipal securities dealer; or (C) any political action committee controlled by the broker, dealer or municipal securities dealer or by any municipal finance professional. A violation of Rule G-37(b) does not require a showing of "quid pro quo" (i.e. that municipal securities business was actually given in exchange for the contribution.).

B. RESPONDENT

4. Morrison, age 38, resides in Taunton, Massachusetts. Between July 14, 2008 and December 19, 2010, Morrison was a vice president in Goldman Sachs' investment banking division in one of the firm's Boston, Massachusetts offices. On December 19, 2010, as a result of his conduct, Goldman Sachs terminated Morrison. Between January 2003 and June 2007, Morrison was employed by the Massachusetts Treasurer's Office, which included positions as the first deputy treasurer, chief of staff and assistant treasurer, reporting directly to Cahill.

C. OTHER RELEVANT ENTITY

5. Goldman Sachs, a New York limited partnership with its principal offices in New York, New York, is a registered broker-dealer pursuant to Section 15(b) of the Exchange Act and a municipal securities dealer as defined in Sections 3(a)(30) and 3(a)(31) of the Exchange Act. Goldman Sachs, a limited partnership, is a subsidiary of The Goldman Sachs Group, Inc., a Delaware corporation with common stock that is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is listed on the New York Stock Exchange. In 2010, Goldman Sachs was the fifth largest underwriter of negotiated municipal securities offerings in the country.

D. ALLEGATIONS

**Background**

6. Between July 2008 and October 2010, Morrison engaged in activities that constituted solicitation of municipal securities business from certain issuers on behalf of Goldman Sachs. In addition, Morrison was listed on Goldman Sachs' list of municipal finance professionals ("MFP") during his employment with the firm. As a result, Morrison was an MFP associated with Goldman Sachs within the meaning of MSRB Rule G-37.[3]

7. As the Treasurer of Massachusetts and candidate for Governor of Massachusetts, Cahill was an "official" of various municipal securities issuers in Massachusetts within the

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3 Rule G-37(g)(iv)(B) provides that "the term 'municipal finance professional' [includes] . . . any associated person [of a broker, dealer or municipal securities dealer] who solicits municipal securities business." Morrison solicited municipal securities business by attending meetings with issuer staff, which were intended to obtain municipal securities business with the issuer and by communicating with issuer staff about Goldman Sachs' underwriting capabilities. In addition, Morrison engaged in municipal securities solicitation activities by, among other things, signing cover letters attached to responses to requests for qualifications ("RFQ") for underwriting business and by having his name appear in the responses to the RFQs as a member of Goldman Sachs' underwriting team. Either one of these solicitation activities by itself was sufficient to make him an MFP. See John F. Kendrick, Exchange Act Release No. 62500 (July 14, 2010).

meaning of Rule G-37.[4] Specifically, as Treasurer of Massachusetts, Cahill was an incumbent who was responsible for, or had the authority to appoint persons who were responsible for, the hiring of brokers, dealers, or municipal securities dealers for municipal securities business by the Commonwealth of Massachusetts and certain related state issuers, including the Massachusetts Water Pollution Abatement Trust and Massachusetts School Building Authority. As candidate for Governor of Massachusetts, Cahill was a candidate for elective office which has authority to appoint persons who are directly or indirectly responsible for, or can influence the outcome of, the hiring of a municipal securities dealer for municipal securities business of certain issuers, including the Massachusetts Housing Finance Authority, Massachusetts Bay Transportation Authority, Massachusetts Health and Education Facilities Authority, and Massachusetts Water Resources Authority. The issuers listed in this paragraph are hereafter referred to collectively as "Issuers."

**Morrison Worked Extensively on Cahill's Campaigns Using Goldman Sachs Resources**

8. Starting at least as early as November 2008, Morrison began actively assisting with Cahill's re-election campaign for Treasurer of Massachusetts by soliciting contributions for fundraisers and arranging for others to solicit contributions for Cahill. Thereafter, between July 2009 and September 2009, Morrison's campaign work focused on assisting the campaign to prepare for Cahill's eventual bid for Governor of Massachusetts. This assistance included interviewing campaign consultants, preparing and reviewing campaign documents, participating on campaign conference calls, and attending campaign meetings during Goldman Sachs work hours.

9. On September 9, 2009, Cahill officially announced his candidacy for Governor of Massachusetts. Thereafter, Morrison's campaign work increased dramatically, including the number of campaign telephone calls made during work hours and the number of e-mails that he sent using his Goldman Sachs' e-mail account. Starting in September 2009, Morrison became one of Cahill's most trusted campaign advisers. As described below, he was involved in, and used Goldman Sachs resources for, numerous significant aspects of the campaign, including interviewing at least one possible running mate in his Goldman Sachs office, negotiating campaign contracts and accepting contract terms on behalf of the campaign during Goldman Sachs' work hours and/or using Goldman Sachs' telephones and e-mail.

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[4] Rule G-37(g)(vi) defines an "official of such issuer" as any person who was, at the time of the contribution, an incumbent, candidate or successful candidate: (A) for elective office of the issuer which office is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business by the issuer; or (B) for any elective office of a state or of any political subdivision, which office has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business by an issuer.

10. Morrison's work for Cahill's campaign during his Goldman Sachs' work hours was remarkable in its breadth. Between September 2009 and October 4, 2010, Morrison engaged in (a) fundraising; (b) drafting speeches and fundraising solicitations; (c) reviewing, approving and writing campaign memos, contracts, letters, talking points, campaign position papers, and responses to campaign issues; (d) attending and preparing for press conferences; (e) approving campaign invoices and expenditures; (f) approving personnel decisions, such as salaries and hiring; (g) negotiating with campaign personnel; (h) arranging advertisements and commercials; (i) communicating with reporters on behalf of the campaign; (j) reviewing the campaign's budget; (k) recruiting supporters; (l) reviewing campaign leases for office space; (m) selecting county representatives; (n) interviewing consultants; (o) drafting campaign plans and quotations; (p) providing legal advice; and (q) assisting with debates. In engaging in these actions, Morrison at times used his Goldman Sachs e-mail account, phone and other resources and did so during ordinary work hours. During the thirteen-month period, September 9, 2009 to October 4, 2010, Morrison sent at least 364 campaign-related e-mails using his Goldman Sachs e-mail account.

**Morrison Actively Solicited Underwriting Business and Attempted to Exert Influence on the Underwriter Selection Process**

11. At the same time Morrison was working on Cahill's campaign, he was actively soliciting municipal securities business from the Cahill Treasurer's Office. At times, Morrison referenced his campaign work in those solicitations in an apparent attempt to curry favor with the Treasurer's Office in the underwriting selection process.

12. For example, on September 29, 2009, Morrison sent an e-mail using his Goldman Sachs e-mail account to a Deputy Treasurer discussing the selection of underwriters. In this e-mail Morrison stated:

> The boss [Cahill] mentioned to me this morning that he spoke to [the Assistant Treasurer] and that it is looking good for us [Goldman Sachs] on the build America bond deal. He then said that you would probably split it up with 2 joint bookrunners. I am ok with that if that's what you want. I actually think it will be good because it enables the boss [Cahill] to handsomely reward someone else.

13. In the same e-mail exchange, apparently referencing the upcoming election, Morrison went on to say:

> From my standpoint as an advisor/consultant/friend I am saying, PLEASE don't give these [underwriter] slots away willy-nilly. You are in the fight of your lives and need to reward loyalty and encourage friendship. If people aren't willing to be creative with their support then they shouldn't expect business. This has to be a political decision.

14. In another e-mail dated September 28, 2009, to the Deputy Treasurer, Morrison again linked his campaign work and his solicitation for underwriting business:

> I have a couple of items that I want to put out there in the interest of leaving nothing unsaid.
>
> 1. We have discussed the Build American Bond transaction and how important it is to me. You have been great keeping me up to speed. This is my number 1 priority and most important ask. Having Goldman as the lead and getting 50% of the economics would be such a home run for me.
>
> 2. There is a Taunton/Southeastern Mass function for the boss [Cahill] coming up. It looks like it will be on Oct. 26.
>
> 3. In the event that [a local municipal securities dealer] were going to have a role in the Build American Bond deal, it might be beneficial to tell me that before the local banker there. She might be more interested in being more supportive. HAVING SAID THAT, I am only pushing for number 1 above. This would help number 2, (and certainly help that banker) but I am not so aggressive as to push for more than myself at this point.

15. Morrison knew about the restrictions in Rule G-37 and that his conduct was inappropriate. Specifically, Morrison was trained about the restrictions in Rule G-37 by Goldman Sachs and received numerous notices about compliance with the MSRB's rules. For example, on December 18, 2008 and October 20, 2009, Goldman Sachs' compliance office sent e-mails to Morrison containing the firm's policies and procedures relating to campaign contributions, which included, among other things, a prohibition on using firm resources, such as e-mail and office space, for political activities. In addition, the policies and procedures provided that a violation of this policy can result in the firm being disqualified from municipal securities business for two years. Moreover, the policies and procedures explained that MSRB Rule G-37 prohibits MFPs from using conduits to contribute indirectly to issuers and that a violation of this policy can lead to a two-year prohibition on municipal securities business. On September 21, 2010, Morrison certified to Goldman Sachs that he reviewed the firm's policies and procedures relating to Political Contributions and Activities and that he had disclosed to the firm all political contributions and political activities since January 1, 2009. Morrison also admitted in two e-mails on May 29, 2009 and April 2, 2010 that he had familiarity with Rule G-37.

16. In addition, during an interview with Morrison, he admitted to Goldman Sachs' compliance officials that he sent campaign-related e-mails and helped the Cahill campaign using firm resources and during work hours. In addition, Morrison admitted to Goldman Sachs' compliance officials that he spent approximately 10 hours per week working on campaign issues. Moreover, Morrison admitted to the compliance officials that he was uncomfortable helping Cahill because of the negative impact on Goldman Sachs.

## Morrison's Conduct Disqualified Goldman Sachs from Underwritings

17. From November 25, 2008 to October 4, 2010, each instance of Morrison's extensive campaign work during work hours or using firm resources constituted valuable "in-kind" campaign contributions to Cahill attributable to Goldman Sachs.

18. In addition to his direct campaign work on behalf of Cahill, on October 26, 2009, Morrison made an indirect $400 cash contribution to Cahill by providing a friend with $400 in cash and asking the friend to write a check in the friend's name to the Cahill campaign for $500. Morrison's indirect contribution of $400 was above the $250 *de minimis* exception provided in Rule G-37. Morrison's indirect contribution was prohibited by Rule G-37(d), which prohibits a municipal securities dealer or any MFP from doing any act indirectly which would result in a violation of the rule if done directly by the dealer or MFP.[5]

19. Under Rule G-37, Morrison's indirect contribution and each "in-kind" contribution attributable to Goldman Sachs, starting on November 25, 2008 and ending on October 4, 2010, triggered a two-year ban on municipal securities business with the Issuers.

20. Despite the prohibitions contained in Rule G-37, within two years after the above contributions, Goldman Sachs, with Morrison's knowledge, participated as senior manager, co-senior manager, or co-manager for a total of thirty negotiated underwritings by the Issuers totaling approximately $9 billion. For its roles in the thirty underwritings, Goldman Sachs received fees in the amount of $7,558,942.

21. The "in-kind" contributions attributable to Goldman Sachs and the indirect cash contribution by Morrison were not disclosed as required in Goldman Sachs' quarterly reports to the MSRB on Form G-37. In addition, Goldman Sachs did not make and keep books and records of the contributions.

22. The indirect contribution by Morrison and the undisclosed "in-kind" contributions attributable to Goldman Sachs also created a conflict of interest which was not disclosed in the relevant municipal securities offerings, in violation of MSRB Rule G-17. In a July 29, 2009 e-mail to a campaign official, Morrison acknowledged the existence of this conflict, stating:

> I am staying in banking and don't want a story that says that I am helping Cahill, who is giving me banking business. If that came out, I'm sure I wouldn't get any more business.

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[5] A *de minimis* exception to Rule G-37(b) allows an MFP to contribute up to $250 per candidate per election if the MFP is entitled to vote for the candidate. Cahill's gubernatorial election was held on November 2, 2010.

## Morrison Solicited Campaign Contributions for Cahill

23. Between November 25, 2008 and October 5, 2010, Morrison also solicited campaign contributions for Cahill by engaging in fundraising activities, including asking or telling others to make contributions, asking others to coordinate the collection of contributions, sending e-mails with fundraising information, and providing fundraiser tickets to potential contributors for self-use or to re-distribute to others.

24. Specifically, on November 25, 2008, Morrison solicited contributions by asking a friend to contribute to a Cahill fundraising event using Goldman Sachs' e-mail system. In this e-mail, Morrison told his friend to make a contribution for a December 1, 2008, fundraiser. In addition, Morrison engaged in coordinating contributions by instructing at least three others to find contributors or to sell tickets for fundraisers. For example, in November 2008 and September 2009, Morrison asked a friend to help find contributors for two Cahill fundraisers. In another example, on October 8, 2009, Morrison sent an e-mail using Goldman Sachs' e-mail system to a state treasury employee regarding an October 2009 fundraiser for Cahill. In this e-mail, Morrison stated:

> Very regretfully, I have to reach out to you again regarding the Treasurer's event...If you could do anything by way of tickets it would be very helpful and would probably be a good idea for you. The tickets have a face value of ...$100 but you can sell them for $50 each. I really dislike relaying this type of information and I know its not easy for anyone.

25. In addition, Morrison solicited contributions by sending fundraising literature and information, in the form of e-mails, to others. The e-mail solicitations, some of which were sent using Goldman Sachs' e-mail system, referenced, among other things, the fundraiser date, time, location and suggested contribution amounts. Moreover, Morrison solicited or coordinated contributions by providing fundraising tickets to others for self-use or to re-distribute to others. For example, around October 2009, Morrison told a friend that Cahill would be having a local fundraiser and that a campaign representative would contact him. Shortly thereafter, Morrison provided the friend with an envelope containing 10 tickets to an October 2009, fundraiser. The friend used one of the tickets himself and provided another to a friend (both contributed $100).

26. During each of Morrison's solicitations, Goldman Sachs was engaged in municipal securities business with the Massachusetts Treasurer's Office and could have been selected to underwrite specific offerings by the Massachusetts Treasurer's office based upon two responses to Requests for Qualifications submitted by Goldman Sachs, which were valid or active for two year periods. Therefore, Goldman Sachs was engaged in or seeking to engage in municipal securities business with the Massachusetts treasurer's office during Morrison's solicitation activities.

27. Morrison admitted in e-mails that he was devoting a significant amount of time to fundraising for the Cahill campaign. For example, in an October 15, 2009, e-mail to a friend,

Morrison stated "I am pushing hard on fundraising and recruiting supporters." In addition, in an October 19, 2009, e-mail to a family member, Morrison stated:

> I am starting to feel better but I will be happy when this fundraiser is over, as it is adding stress and combined with work and home, is wearing me out.

28. By soliciting or coordinating campaign contributions for Cahill when Goldman Sachs was seeking to engage in municipal securities business with the Treasurer's Office, Morrison violated Rule G-37(c).

E. VIOLATIONS

29. As a result of the conduct described above, Morrison willfully aided and abetted and caused Goldman Sachs' violations of MSRB Rule G-8(a)(xvi), which requires brokers, dealers and municipal securities dealers to make and keep current records reflecting all direct and indirect contributions to officials of issuers made by the broker, dealer, municipal securities dealer and each municipal finance professional.

30. As a result of the conduct described above, Morrison willfully aided and abetted and caused Goldman Sachs' violations of MSRB Rule G-9, which requires brokers, dealers and municipal securities dealers to preserve records reflecting all direct and indirect contributions to officials of issuers made by the broker, dealer, municipal securities dealer and each municipal finance professional for six years.

31. As a result of the conduct described above, Morrison willfully violated MSRB Rule G-17, which states that in the conduct of its municipal securities business, every broker, dealer and municipal securities dealer shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice.

32. As a result of the conduct described above, Morrison willfully aided and abetted and caused Goldman Sachs' violations of MSRB Rule G-37(b), which prohibits brokers, dealers or municipal securities dealers from engaging in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by (i) the broker, dealer or municipal securities dealer; (ii) any municipal finance professional associated with such broker, dealer or municipal securities dealer; or (iii) any political action committee controlled by the broker, dealer or municipal securities dealer or by any municipal finance professional, unless the contribution is exempt.

33. As a result of the conduct described above, Morrison willfully violated MSRB Rule G-37(c), which prohibits, among other things, brokers, dealers, municipal securities dealers or any municipal finance professional of the broker, dealer or municipal securities dealer from soliciting any person to make any contributions or coordinating any contributions to an official of an issuer with which the broker, dealer or municipal securities dealer is engaging or is seeking to engage in municipal securities business.

34. As a result of the conduct described above, Morrison willfully violated MSRB Rule G-37(d), which prohibits, brokers, dealers or municipal securities dealers or any municipal finance professional from, directly or indirectly, through or by any other person or means, doing any act which would result in a violation of sections (b) or (c) of Rule G-37.

35. As a result of the conduct described above, Morrison willfully aided and abetted and caused Goldman Sachs' violations of MSRB Rule G-37(e), which requires brokers, dealers, or municipal securities dealers to file quarterly reports with the MSRB disclosing all direct and indirect contributions, exceeding the *de minimis* amount, to any official of a municipal securities issuer made by, among others, the broker, dealer, municipal securities dealer and each municipal finance professional associated with such broker, dealer, or municipal securities dealer.

36. As a result of the conduct described above, Morrison willfully aided and abetted and caused Goldman Sachs' violations of Section 15B(c)(1) of the Exchange Act, which prohibits a broker, dealer or municipal securities dealer from using the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in contravention of any rule of the MSRB.

**III.**

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative and cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations;

B. Whether, pursuant to Section 21C of the Exchange Act, Respondent should be ordered to cease and desist from committing or causing violations of and any future violations of Section 15B(c)(1) of the Exchange Act, MSRB Rule G-8, MSRB Rule G-9, MSRB Rule G-17, MSRB Rule G-37(b), MSRB Rule G-37(c), MSRB Rule G-37(d), and MSRB Rule G-37(e), whether Respondent should be ordered to pay civil penalties pursuant to Section 21B(a) of the Exchange Act, and whether Respondent should be ordered to pay disgorgement pursuant to Sections 21B(e) and 21C(e) of the Exchange Act;

C. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act including, but not limited to, disgorgement, prejudgment interest and civil penalties pursuant to Section 21B of the Exchange Act;

D. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15B(c) of the Exchange Act; and

E. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 9(b) of the Investment Company Act.

## IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

COMMODITY FUTURES TRADING COMMISSION

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-67927; File No. S7-32-11]

**Acceptance of Public Submissions Regarding the Study of Stable Value Contracts**

**AGENCY:** Commodity Futures Trading Commission; Securities and Exchange Commission.

**ACTION:** Request for comment; reopening of comment period.

**SUMMARY:** The Commodity Futures Trading Commission (the "CFTC") and the Securities and Exchange Commission (the "SEC" and, together with the CFTC, the "Commissions") are reopening the comment period for a study to determine whether stable value contracts ("SVCs") fall within the definition of a swap. The study is required by Section 719(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). The original comment period for the study closed on September 26, 2011. The Commissions did not complete the study pending adoption of final rules further defining the terms "swap" and "security-based swap." The Commissions are considering the study in light of the recent adoption of these final rules. Accordingly, the Commissions are reopening for 30 days the time period in which to provide the Commissions with comments.

**DATES:** Comments should be received on or before **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Comments may be submitted by any of the following methods:

**CFTC:**

- Agency website, via its Comments Online process: http://comments.cftc.gov. Follow the instructions for submitting comments through the website.

- Mail: Sauntia S. Warfield, Assistant Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

- Hand Delivery/Courier: Same as mail above.

- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Please submit your comments using only one method. "Stable Value Contract Study" must be in the subject field of responses submitted via e-mail, and clearly indicated on written submissions. All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to www.cftc.gov. You should submit only information that you wish to make available publicly. If you wish the CFTC to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in section 145.9 of the CFTC's regulations.[1]

The CFTC reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse, or remove any or all of your submission from www.cftc.gov that it may deem to be inappropriate for publication, including obscene language. All submissions that have been

[1] 17 CFR 145.9.

redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under applicable laws, and may be accessible under the Freedom of Information Act.

**SEC:**

Electronic comments:

- Use the SEC's Internet comment form (http://www.sec.gov/rules/other);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-32-11 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments:

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

All submissions should refer to File Number S7-32-11. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The SEC will post all comments on the SEC's Internet web site (http://www.sec.gov/rules/other). Comments will also be available for website viewing and printing in the SEC's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; the SEC does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** CFTC: Stephen A. Kane, Research Economist, Office of the Chief Economist, (202) 418-5911, skane@cftc.gov; or David E. Aron, Counsel, Office of the General Counsel, (202) 418-6621, daron@cftc.gov, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581; SEC: Donna Chambers, Senior Special Counsel, (202) 551-5870, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-8010.

**SUPPLEMENTARY INFORMATION:** Pursuant to section 719(d)(1)(A) of the Dodd-Frank Act, the Commissions jointly must conduct a study to determine whether SVCs fall within the definition of a swap.[2] Section 719(d)(1)(A) of the Dodd-Frank Act also requires the Commissions, in making such determination, jointly to consult with the Department of Labor, the Department of the Treasury, and the State entities that regulate the issuers of SVCs.

If the Commissions determine that SVCs fall within the definition of a swap, they jointly must determine if an exemption for SVCs from the definition of a swap is appropriate and in the public interest and issue regulations implementing such determination.[3] Until the effective date of any such regulations, and notwithstanding any other provision of Title VII of

[2] The term "swap" is defined in Commodity Exchange Act ("CEA") section 1a(47), 7 U.S.C. 1a(47). The term "security-based swap" is defined as an agreement, contract, or transaction that is a "swap" (without regard to the exclusion from that definition for security-based swaps) and that also has certain characteristics specified in the Dodd-Frank Act. See section 3(a)(68) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(68). Thus, a determination regarding whether SVCs fall within the definition of a swap also is relevant to a determination of whether SVCs fall within the definition of the term "security-based swap."

[3] See section 719(d)(1)(B) of the Dodd-Frank Act.

the Dodd-Frank Act, the Title VII requirements will not apply to SVCs.[4]

On August 18, 2011, the Commissions requested comment regarding the study of SVCs required by Section 719(d) of the Dodd-Frank Act.[5] Specifically, the request for comment included 29 questions and encouraged commenters to provide additional relevant information beyond that specified in the questions. The Commissions originally requested that comments be received by September 26, 2011.[6]

Given the regulatory developments since the initial request for comment was issued, specifically the adoption of final rules further defining the terms "swap" and "security-based swap,"[7] the Commissions believe that it would be appropriate to solicit additional public comments on the study of SVCs required by Section 719(d) of the Dodd-Frank Act. Accordingly, the Commissions are reopening the public comment period for 30 days. The Commissions are reopening the comment period for the limited purpose of soliciting additional or updated comments regarding the impact of the final rules further defining the terms "swap" and "security-based swap" on the SVC study.[8] The Commissions have received and reviewed the comments

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[4] See section 719(d)(1)(C) of the Dodd-Frank Act.

[5] See Acceptance of Public Submissions Regarding the Study of Stable Value, 76 FR 53162 (Aug. 25, 2011).

[6] Id.

[7] The Commission and the CFTC have approved the final rules further defining the terms "swap" and "security-based swap" but did not address therein whether SVCs are swaps or SBSs. See 77 FR 48208 (Aug. 13, 2012).

[8] Question 4 in the request for comment related to the applicability and usefulness of the proposed rules further defining the terms "swap" and "security-based swap" ("Proposed Definitions"):

> Are the proposed rules and the interpretive guidance set forth in the [Proposed Definitions] useful, appropriate, and sufficient for persons to consider when evaluating whether SVCs fall within the definition of a swap? If not, why not? Would SVCs satisfy the test for insurance provided in the [Proposed Definitions]? Why or why not? Is additional guidance necessary with regard to SVCs in this context? If so, what further guidance would be appropriate? Please explain.

previously submitted in response to the initial request for comment. Commenters do not need to resubmit comments that have already been provided.

By the Commodity Futures Trading Commission.

Sauntia S. Warfield

Sauntia S. Warfield
Assistant Secretary

Date: September 26, 2012

By the Securities and Exchange Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Date: September 26, 2012

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See Acceptance of Public Submissions Regarding the Study of Stable Value Contracts, supra note 5, at 53163.

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**
**September 27, 2012**

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| **In the Matter of**<br><br>**Diomed Holdings, Inc.,**<br>**Dominion Minerals Corp.,**<br>**EnerLume Energy Management Corp.,**<br>**EPIX Pharmaceuticals, Inc.,**<br>**Familymeds Group, Inc.,**<br>**GlycoGenesys, Inc., and**<br>**Greater Atlantic Financial Corp.,**<br><br>**File No. 500-1** | **ORDER OF SUSPENSION OF TRADING** |

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Diomed Holdings, Inc. because it has not filed any periodic reports since the period ended September 30, 2007.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Dominion Minerals Corp. because it has not filed any periodic reports since the period ended March 31, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of EnerLume Energy Management Corp. because it has not filed any periodic reports since the period ended March 31, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of EPIX Pharmaceuticals, Inc. because it has not filed any periodic reports since the period ended March 31, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Familymeds Group, Inc. because it has not filed any periodic reports since the period ended June 30, 2007.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of GlycoGenesys, Inc. because it has not filed any periodic reports since the period ended September 30, 2005.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Greater Atlantic Financial Corp. because it has not filed any periodic reports since the period ended June 30, 2009.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on September 27, 2012, through 11:59 p.m. EDT on October 10, 2012.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67932A / September 27, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15047**

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| **In the Matter of**<br><br>**Diomed Holdings, Inc.,**<br>**Dominion Minerals Corp.,**<br>**EnerLume Energy Management Corp.,**<br>**EPIX Pharmaceuticals, Inc.,**<br>**Familymeds Group, Inc.,**<br>**GlycoGenesys, Inc., and**<br>**Greater Atlantic Financial Corp.,**<br><br>**Respondents.** | **CORRECTED ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934** |

**I.**

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the Respondents named in the caption.

**II.**

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Diomed Holdings, Inc. ("DIOMQ") [1] (CIK No. 1074874) is a void Delaware corporation located in Andover, Massachusetts with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DIOMQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2007, which reported a net loss of $11,955,157 for the prior nine months. On March 14, 2008, DIOMQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Massachusetts, which was closed on October 27, 2011. As of September 25, 2012, the common stock of DIOMQ was quoted on OTC Link (formerly "Pink

[1] The short form of each issuer's name is also its stock symbol.

Sheets") operated by OTC Markets Inc. ("OTC Link"), had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Dominion Minerals Corp. ("DMNM") (CIK No. 1402747) is a void Delaware corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DMNM is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2009, which reported a net loss of $1,266,924 for the prior three months. As of September 25, 2012, the common stock of DMNM was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. EnerLume Energy Management Corp. ("ENLU") (CIK No. 809012) is a delinquent Colorado corporation located in Hamden, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ENLU is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2009, which reported a net loss of $6,454,839 for the prior nine months. As of September 25, 2012, the common stock of ENLU was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. EPIX Pharmaceuticals, Inc. ("EPIX") (CIK No. 1027702) is a void Delaware corporation located in Wellesley Hills, Massachusetts with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). EPIX is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2009, which reported a net loss of $9,741,956 for the prior three months. As of September 25, 2012, the common stock of EPIX was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Familymeds Group, Inc. ("FMRX") (CIK No. 921878) is a dissolved Nevada corporation located in Farmington, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). FMRX is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2007, which reported a net loss of $11,873,000 for the prior three months. As of September 25, 2012, the common stock of FMRX was quoted on OTC Link, had nine market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. GlycoGenesys, Inc. ("GLGSQ") (CIK No. 946661) is a permanently revoked Nevada corporation located in Boston, Massachusetts with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). GLGSQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2005, which reported a net loss of $7,268,970 for the prior nine months. On February 2, 2006, GLGSQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Massachusetts, which was converted to a Chapter 7 petition on June 1, 2006, and was closed on December 30, 2009. As of September 25, 2012, the common stock of

GLGSQ was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

7. Greater Atlantic Financial Corp. ("GAFC") (CIK No. 1082735) is a void Delaware corporation located in Reston, Virginia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). GAFC is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2009, which reported a net loss of $6,261,000 for the prior nine months. As of September 25, 2012, the common stock of GAFC was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

8. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

9. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

10. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

**III.**

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

## IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67932 / September 27, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15047**

| | |
|---|---|
| **In the Matter of**<br><br>**Diomed Holdings, Inc.,**<br>**Dominion Minerals Corp.,**<br>**EnerLume Energy Management Corp.,**<br>**EPIX Pharmaceuticals, Inc.,**<br>**Familymeds Group, Inc.,**<br>**GlycoGenesys, Inc., and**<br>**Greater Atlantic Financial Corp.,**<br><br>**Respondents.** | **ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934** |

**I.**

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the Respondents named in the caption.

**II.**

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Diomed Holdings, Inc. ("DIOMQ") [1] (CIK No. 1074874) is a void Delaware corporation located in Andover, Massachusetts with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DIOMQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2007, which reported a net loss of $11,955,157 for the prior nine months. On March 14, 2008, DIOMQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Massachusetts, which was closed on October 27, 2011. As of September 25, 2012, the common stock of DIOMQ was quoted on OTC Link (formerly "Pink

[1] The short form of each issuer's name is also its stock symbol.

Sheets") operated by OTC Markets Inc. ("OTC Link"), had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Dominion Minerals Corp. ("DMNM") (CIK No. 1402747) is a void Delaware corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DMNM is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2009, which reported a net loss of $1,266,924 for the prior three months. As of September 25, 2012, the common stock of DMNM was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. EnerLume Energy Management Corp. ("ENLU") (CIK No. 809012) is a delinquent Colorado corporation located in Hamden, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ENLU is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2009, which reported a net loss of $6,454,839 for the prior nine months. As of September 25, 2012, the common stock of ENLU was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. EPIX Pharmaceuticals, Inc. ("EPIX") (CIK No. 1027702) is a void Delaware corporation located in Lexington, Massachusetts with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). EPIX is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2009, which reported a net loss of $9,741,956 for the prior three months. As of September 25, 2012, the common stock of EPIX was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Familymeds Group, Inc. ("FMRX") (CIK No. 921878) is a dissolved Nevada corporation located in Farmington, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). FMRX is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2007, which reported a net loss of $11,873,000 for the prior three months. As of September 25, 2012, the common stock of FMRX was quoted on OTC Link, had nine market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. GlycoGenesys, Inc. ("GLGSQ") (CIK No. 946661) is a permanently revoked Nevada corporation located in Boston, Massachusetts with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). GLGSQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2005, which reported a net loss of $7,268,970 for the prior nine months. On February 2, 2006, GLGSQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Massachusetts, which was converted to a Chapter 7 petition on June 1, 2006, and was closed on December 30, 2009. As of September 25, 2012, the common stock of

GLGSQ was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

7. Greater Atlantic Financial Corp. ("GAFC") (CIK No. 1082735) is a void Delaware corporation located in Reston, Virginia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). GAFC is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2009, which reported a net loss of $6,261,000 for the prior nine months. As of September 25, 2012, the common stock of GAFC was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

## III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

## IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67940 / September 27, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-12341

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|---|---|
| In the Matter of<br><br>WEISS RESEARCH, INC., MARTIN WEISS, AND LAWRENCE EDELSON<br><br>RESPONDENTS. | ORDER AUTHORIZING PAYMENT OF FINAL INVOICES FOR THE TAX ADMINISTRATOR AND PLAN ADMINISTRATOR, TRANSFERRING REMAINING FUNDS AND ANY FUTURE FUNDS RETURNED TO THE FAIR FUND TO THE U.S. TREASURY, TERMINATING THE FAIR FUND, AND DISCHARGING THE PLAN ADMINISTRATOR |

On June 22, 2006, the Commission issued an Order Instituting Public Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 (Release No. IA- 2525) against Weiss Research, Inc., Martin Weiss, and Lawrence Edelson (collectively, "Respondents") for violations of the Investment Advisers Act of 1940 in connection with their operation of an unregistered investment adviser and the production and distribution of materially false and misleading marketing materials. Among other things, the Commission ordered that Respondents pay a total of $2,166,143 in disgorgement, prejudgment interest, and civil penalties, and authorized the creation of a Fair Fund pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002.

On August 23, 2007, the Commission issued an Order Approving Distribution Plan, (Release No. 34-56310). On April 22, 2009, the Commission issued an Order Directing Disbursement of Fair Fund (Release No. 34-59813), authorizing the distribution of $1,462,208.00 to claimants who: (1) subscribed to a Weiss Research premium service publication at any point between September 1, 2001, through December 31, 2004; and (2) had during that same period an auto-trading arrangement with a broker-dealer to execute automatically all trading recommendations contained in the Weiss Research publication ("subscribers"). On May 11, 2010, the Commission issued an Order Approving Application of Distribution Administrator for Fees and Expenses and Directing Disbursement of Fair Fund (Release No. 34-62075), ordering that the Plan Administrator's fees and expenses in the amount of $13,013.50 be paid from the Fair Fund and that the Plan Administrator distribute $4,315.50 to an additional payee.

The $2,166,143 Fair Fund earned $176,312.63 in interest, paid $205,370.12 in Plan Administration Expenses, and disbursed $33,727.56 to the U.S. Treasury for federal tax payments and investment expenses and $750 in District of Columbia and state tax payments. Ultimately, $1,466,523 of the Fair Fund was distributed to 245 subscribers, who were compensated for their payment of subscription fees to Weiss Research. The average payment was in the amount of $5,993. The lowest payment was in the amount of $295, and the highest payment was in the amount of $24,564. All but two payments went to individuals. The two non-individual payees were limited liability companies based in the United States.

The Plan Administrator submitted a Final Accounting of the Fair Fund pursuant to Rule 1105(f) of the Commission's Rules on Fair Fund and Disgorgement Plans. The Commission approved the Final Accounting. According to the Final Accounting, all liabilities, with the exception of payments of Tax Administrator and Plan Administrator final invoices, have been satisfied, and $636,084.22 remains in the Fair Fund after distributions to all the 245 eligible investors.

Accordingly, IT IS ORDERED that:

1. Payments of the final invoices in the amount of $1,982.48 to the Tax Administrator and $1,215 to the Plan Administrator are authorized;
2. The remaining balance in the Fair Fund and any future funds returned to the Fair Fund shall be sent to the U.S. Treasury;
3. The Fair Fund is terminated; and
4. The Plan Administrator is discharged.

By the Commission.

Elizabeth M. Murphy
Secretary

Lynn M. Powalski

**By: Lynn M. Powalski**
**Deputy Secretary**

Commissioner Walter,
Commissioner Paredes,
Commissioner Gallagher
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3476 / September 27, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-15051

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|---|---|
| In the Matter of<br><br>DOUGLAS ALAN GOLDBERG,<br><br>Respondent. | ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS |

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Douglas Alan Goldberg ("Goldberg" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Goldberg from 1994 through 2006 was employed by Rubin/Chambers Dunhill Insurance Services, Inc., dba CDR Financial Products, Inc. ("CDR"), a registered investment adviser with the Commission from 2001 until February 14, 2011. CDR marketed

financial products and services, including services as a bidding agent to various municipalities throughout the United States. More specifically, public entities hired CDR, among other things, to act as their agent for the purpose of conducting what was supposed to be a competitive bidding process for contracts for the investment of the proceeds from the sales of municipal bonds. Goldberg worked for CDR in the firm's then principal place of business, Beverly Hills, California. Goldberg, age 40, is a resident of Chatsworth, California.

2. On March 25, 2010, Goldberg pled guilty to two counts of conspiracy in violation of 15 U.S.C. § 1 and 18 U.S.C. § 371, respectively, and to one count of wire fraud in violation of 18 U.S.C. § 1343 before the United States District Court for the Southern District of New York, in United States v. Douglas Alan Goldberg, Criminal No. 10-cr-209. Goldberg's sentencing is currently scheduled for December 10, 2012.

3. The criminal information to which Goldberg pled guilty charged, among other things, that Goldberg engaged in fraudulent misconduct in connection with the competitive bidding process for the selection of the firms to provide instruments in which municipal issuers, in accordance with federal tax laws and regulations, temporarily invested the proceeds of tax-exempt municipal bonds. More specifically, the information charged that, from at least as early as 1998 until at least November 2006, Goldberg conspired to allocate and rig bids for investment agreements or other municipal finance contracts, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. According to the information, Goldberg and his co-conspirators, among other things, discussed and agreed on the prices or price levels that co-conspirator providers would bid for certain investment agreements or other municipal finance contracts. The information further charged that, from at least as early as August 2001 until at least November 2006, Goldberg, in violation of 18 U.S.C. § 371, conspired to defraud the United States and an agency thereof, the Internal Revenue Service of the United States Department of Treasury ("IRS"), by impeding, impairing, obstructing, and defeating the lawful government functions of the IRS in the ascertainment, computation, assessment, and collection of revenue due and owing from municipal issuers and in the exercise of its responsibilities to monitor compliance with Treasury regulations related to tax-exempt municipal bonds. In addition, the information charged that Goldberg and other persons known and unknown devised a scheme and artifice to defraud municipal issuers and to obtain money and property from these municipal issuers by means of false and fraudulent pretenses, representations and promises and for the purposes of executing such scheme and artifice, in violation of 18 U.S.C. § 1343, caused a provider to transmit on or about March 15, 2005, via interstate wire transfer from New York, New York to Florida, an interest payment of approximately $13,142.93 to a port authority, which payment was artificially determined and suppressed because at the time that the marketer for the winning provider determined the price of the winning bid, Goldberg gave the marketer information about the bid submitted by another provider and suggested that the marketer lower the interest rate that he was otherwise prepared to bid.

## IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Goldberg's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Goldberg be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter,
Commissioner Paredes,
Commissioner Gallagher
not participating

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**INVESTMENT ADVISERS ACT OF 1940**
**Release No. 3480 / September 27, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15055**

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| **In the Matter of**<br><br>**DAVID RUBIN**<br><br>**Respondent.** | **ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS** |

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against David Rubin ("Rubin" or"Respondent").

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

**III.**

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Rubin is the founder, president, and chief executive officer of Rubin/Chambers Dunhill Insurance Services, Inc., dba CDR Financial Products, Inc. ("CDR"), a registered investment adviser with the Commission from 2001 to February 14, 2011. Rubin is also the sole shareholder of CDR Holdings, Inc., CDR's parent corporation. CDR marketed financial

products and services, including services as a bidding agent to various municipalities throughout the United States. More specifically, public entities hired CDR, among other things, to act as their agent for the purpose of conducting what was supposed to be a competitive bidding process for contracts for the investment of the proceeds from the sales of municipal bonds. CDR is a California corporation with its principal place of business in Los Angeles, California. Rubin, age 50, is a resident of Los Angeles, California.

2. On December 30, 2011, Rubin pled guilty to two counts of conspiracy in violation of 15 U.S.C. § 1 and 18 U.S.C. § 371, respectively, and to one count of wire fraud and honest services fraud in violation of 18 U.S.C. §§ 1343 and 1346 before the United States District Court for the Southern District of New York, in United States v. Rubin/Chambers, Dunhill Insurance Services, Inc., et al., Criminal No. 09-cr-1058 (VM). Rubin's sentencing is currently scheduled for December 14, 2012.

3. The superseding indictment to which Rubin pled guilty charged, among other things, that Rubin engaged in fraudulent misconduct in connection with the competitive bidding process for the selection of the firms to provide instruments in which municipal issuers, in accordance with federal tax laws and regulations, temporarily invested the proceeds of tax-exempt municipal bonds. More specifically, the superseding indictment charged that, from at least as early as 1998 until at least November 2006, Rubin and his co-conspirators conspired to allocate and rig bids for investment agreements or other municipal finance contracts, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. According to the superseding indictment, Rubin and his co-conspirators, among other things, designated in advance of the submission of bids to CDR which provider among the co-conspirator providers would be the winning bidder for a certain investment agreement and submitted or caused to be submitted to CDR intentionally losing bids. Certain co-conspirator providers paid kickbacks to CDR in the form of fees that were inflated, relative to services performed, or unearned in exchange for assistance from Rubin and other CDR co-conspirators in controlling the bidding process and ensuring that certain co-conspirator providers won the bids they were allocated. The superseding indictment further charged that, from at least as early as August 2001 until at least November 2006, Rubin, in violation of 18 U.S.C. § 371, conspired to defraud the United States and an agency thereof, the Internal Revenue Service of the United States Department of Treasury ("IRS"), by impeding, impairing, obstructing, and defeating the lawful government functions of the IRS in the ascertainment, computation, assessment, and collection of revenue due and owing from municipal issuers and in the exercise of its responsibilities to monitor compliance with Treasury regulations related to tax-exempt municipal bonds. In addition, the superseding indictment charged that Rubin and other persons known and unknown devised a scheme and artifice to defraud municipal issuers and to obtain money and property from these municipal issuers by means of false and fraudulent pretenses, representations, and promises, namely a scheme to deceive municipal issuers by manipulating the bidding process for multiple investment agreements, and further to deprive municipal issuers of the intangible right to the honest and faithful services of CDR, Rubin, and others through kickbacks and the concealment of material information, and for the purposes of executing such scheme and artifice, in violation of 18 U.S.C. §§ 1343 and 1346, caused to be transmitted on or about May 31, 2006, via interstate wire transfer from New York, New York to Missouri, an interest payment of approximately

$442,341.39 to a state health and educational facilities authority, which payment was artificially suppressed because at the time that the marketer for the winning provider determined the price of the winning bid, he was asked to pay and agreed to pay a kickback to CDR that amounted to $475,000.

## IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Rubin's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Rubin be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
Commissioner Paredes
Commissioner Gallagher
not participating

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**INVESTMENT ADVISERS ACT OF 1940**
**Release No. 3479 / September 27, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15054**

**In the Matter of**

**EVAN ANDREW ZAREFSKY**

**Respondent.**

**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Evan Andrew Zarefsky ("Zarefsky" or "Respondent").

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

**III.**

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Zarefsky, since April 2000, has been employed by Rubin/Chambers Dunhill Insurance Services, Inc., dba CDR Financial Products, Inc. ("CDR"), a registered investment adviser with the Commission from 2001 until February 14, 2011. CDR marketed financial products and services, including services as a bidding agent to various municipalities throughout

the United States. More specifically, public entities hired CDR, among other things, to act as their agent for the purpose of conducting what was supposed to be a competitive bidding process for contracts for the investment of the proceeds from the sales of municipal bonds. Zarefsky worked for CDR most recently in the firm's principal place of business, Los Angeles, California. Zarefsky, age 38, is a resident of Redondo Beach, California.

2. On January 9, 2012, Zarefsky pled guilty to two counts of conspiracy in violation of 15 U.S.C. § 1 and 18 U.S.C. § 371, respectively, and to one count of wire fraud and honest services fraud in violation of 18 U.S.C. §§ 1343 and 1346 before the United States District Court for the Southern District of New York, in United States v. Rubin/Chambers, Dunhill Insurance Services, Inc., et al., Criminal No. 09-cr-1058 (VM). Zarefsky's sentencing is currently scheduled for December 14, 2012.

3. The superseding indictment to which Zarefsky pled guilty charged, among other things, that Zarefsky engaged in fraudulent misconduct in connection with the competitive bidding process for the selection of the firms to provide instruments in which municipal issuers, in accordance with federal tax laws and regulations, temporarily invested the proceeds of tax-exempt municipal bonds. More specifically, the superseding indictment charged that, from at least as early as 1998 until at least November 2006, Zarefsky and his co-conspirators conspired to allocate and rig bids for investment agreements or other municipal finance contracts, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. According to the superseding indictment, Zarefsky and his co-conspirators, among other things, discussed and agreed on the prices or price levels that co-conspirator providers would bid for certain investment agreements or other municipal finance contracts. The superseding indictment further charged that, from at least as early as August 2001 until at least November 2006, Zarefsky, in violation of 18 U.S.C. § 371, conspired to defraud the United States and an agency thereof, the Internal Revenue Service of the United States Department of Treasury ("IRS"), by impeding, impairing, obstructing, and defeating the lawful government functions of the IRS in the ascertainment, computation, assessment, and collection of revenue due and owing from municipal issuers and in the exercise of its responsibilities to monitor compliance with Treasury regulations related to tax-exempt municipal bonds. In addition, the superseding indictment charged that Zarefsky and other persons known and unknown devised a scheme and artifice to defraud municipal issuers and to obtain money and property from these municipal issuers by means of false and fraudulent pretenses, representations, and promises, namely a scheme to deceive municipal issuers by manipulating the bidding process for multiple investment agreements, and further to deprive municipal issuers of the intangible right to the honest and faithful services of CDR, Zarefsky, and others through kickbacks and the concealment of material information, and for the purposes of executing such scheme and artifice, in violation of 18 U.S.C. §§ 1343 and 1346, caused to be transmitted on or about June 30, 2005, via interstate wire transfer from New York, New York to Minneapolis, Minnesota, an interest payment of approximately $264,977.20 to a state housing corporation, which payment was artificially suppressed because at the time that the marketer for the winning provider determined the price of the winning bid, Zarefsky gave the marketer information about the bids submitted by other providers on the basis of which the marketer lowered the rates that he was otherwise prepared to submit.

## IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Zarefsky's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Zarefsky be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
Commissioner Paredes
Commissioner Gallagher
not participating

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**INVESTMENT ADVISERS ACT OF 1940**
**Release No. 3478 / September 27, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15053**

**In the Matter of**

**ZEVI WOLMARK,**
**aka Stewart Wolmark,**

**Respondent.**

**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Zevi Wolmark, also known as Stewart Wolmark ("Wolmark" or "Respondent").

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

**III.**

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Wolmark, from 1986 through 2010, was the chief financial officer and a managing director of Rubin/Chambers Dunhill Insurance Services, Inc., dba CDR Financial Products, Inc. ("CDR"), a registered investment adviser with the Commission from 2001 until

February 14, 2011. CDR marketed financial products and services, including services as a bidding agent to various municipalities throughout the United States. More specifically, public entities hired CDR, among other things, to act as their agent for the purpose of conducting what was supposed to be a competitive bidding process for contracts for the investment of the proceeds from the sales of municipal bonds. CDR is a California corporation with its then principal place of business in Beverly Hills, California. Wolmark, age 56, is a resident of Los Angeles, California.

2. On January 9, 2012, Wolmark pled guilty to two counts of conspiracy in violation of 15 U.S.C. § 1 and 18 U.S.C. § 371, respectively, and to one count of wire fraud and honest services fraud in violation of 18 U.S.C. §§ 1343 and 1346 before the United States District Court for the Southern District of New York, in United States v. Rubin/Chambers, Dunhill Insurance Services, Inc., et al., Criminal No. 09-cr-1058 (VM). Wolmark's sentencing is currently scheduled for December 14, 2012.

3. The superseding indictment to which Wolmark pled guilty charged, among other things, that Wolmark engaged in fraudulent misconduct in connection with the competitive bidding process for the selection of the firms to provide instruments in which municipal issuers, in accordance with federal tax laws and regulations, temporarily invested the proceeds of tax-exempt municipal bonds. More specifically, the superseding indictment charged that, from at least as early as 1998 until at least November 2006, Wolmark and his co-conspirators conspired to allocate and rig bids for investment agreements or other municipal finance contracts, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. According to the superseding indictment, Wolmark and his co-conspirators, among other things, designated in advance of the submission of bids to CDR which provider among the co-conspirator providers would be the winning bidder for a certain investment agreement and submitted or caused to be submitted to CDR intentionally losing bids. Certain co-conspirator providers paid kickbacks to CDR in the form of fees that were inflated, relative to services performed, or unearned in exchange for assistance from Wolmark and other CDR co-conspirators in controlling the bidding process and ensuring that certain co-conspirator providers won the bids they were allocated. The superseding indictment further charged that, from at least as early as August 2001 until at least November 2006, Wolmark, in violation of 18 U.S.C. § 371, conspired to defraud the United States and an agency thereof, the Internal Revenue Service of the United States Department of Treasury ("IRS"), by impeding, impairing, obstructing, and defeating the lawful government functions of the IRS in the ascertainment, computation, assessment, and collection of revenue due and owing from municipal issuers and in the exercise of its responsibilities to monitor compliance with Treasury regulations related to tax-exempt municipal bonds. In addition, the superseding indictment charged that Wolmark and other persons known and unknown devised a scheme and artifice to defraud municipal issuers and to obtain money and property from these municipal issuers by means of false and fraudulent pretenses, representations, and promises, namely a scheme to deceive municipal issuers by manipulating the bidding process for multiple investment agreements, and further to deprive municipal issuers of the intangible right to the honest and faithful services of CDR, Wolmark, and others through kickbacks and the concealment of material information, and for the purposes of executing such scheme and artifice, in violation of 18 U.S.C. §§ 1343 and 1346, caused to be transmitted on or about May 31, 2006, via interstate wire transfer from New York, New York to Missouri, an interest payment of

approximately $442,341.39 to a state health and educational facilities authority, which payment was artificially suppressed because at the time that the marketer for the winning provider determined the price of the winning bid, he was asked to pay and agreed to pay a kickback to CDR that amounted to $475,000.

**IV.**

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Wolmark's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Wolmark be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
Commissioner Paredes
Commissioner Gallagher
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

**INVESTMENT ADVISERS ACT OF 1940**
**Release No. 3477 / September 27, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15052**

**In the Matter of**

**DANIEL MOSHE NAEH,**

**Respondent.**

**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Daniel Moshe Naeh ("Naeh" or "Respondent").

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

**III.**

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Naeh from 1991 through 2004 was an employee of Rubin/Chambers Dunhill Insurance Services, Inc., dba CDR Financial Products, Inc. ("CDR"), a registered investment adviser with the Commission from 2001 until February 14, 2011. CDR marketed financial products and services, including services as a bidding agent to various municipalities throughout the United

States. More specifically, public entities hired CDR, among other things, to act as their agent for the purpose of conducting what was supposed to be a competitive bidding process for contracts for the investment of the proceeds from the sales of municipal bonds. From approximately 1991 until approximately August 2002, Naeh worked for CDR in the firm's then principal place of business in Beverly Hills, California. In August 2002, Naeh moved to Israel and continued working for CDR until approximately 2004. Naeh, who is 45 years old and an American citizen, currently resides in Israel.

2. On February 23, 2010, Naeh pled guilty to two counts of conspiracy in violation of 15 U.S.C. § 1 and 18 U.S.C. § 371, respectively, and to one count of wire fraud in violation of 18 U.S.C. § 1343 before the United States District Court for the Southern District of New York, in United States v. Daniel Moshe Naeh, Criminal No. 10-cr-139. Naeh's sentencing is currently scheduled for May 17, 2013.

3. The criminal information to which Naeh pled guilty charged, among other things, that Naeh engaged in fraudulent misconduct in connection with the competitive bidding process for the selection of the firms to provide instruments in which municipal issuers, in accordance with federal tax laws and regulations, temporarily invested the proceeds of tax-exempt municipal bonds. More specifically, the information charged that, from at least as early as 1998 until at least November 2006, Naeh and others conspired to allocate and rig bids for investment agreements or other municipal finance contracts, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. According to the information, Naeh and his co-conspirators, among other things, designated in advance of the submission of bids to CDR which provider among the co-conspirator providers would be the winning bidder for a certain investment agreement and submitted, or caused to be submitted, to CDR intentionally losing bids. Certain co-conspirator providers paid kickbacks to CDR in the form of fees that were inflated, relative to services performed, or unearned in exchange for assistance from Naeh and other CDR co-conspirators in controlling the bidding process and ensuring that certain co-conspirator providers won the bids they were allocated. The information further charged that, from at least as early as August 2001 until at least November 2006, Naeh and others, in violation of 18 U.S.C. § 371, conspired to defraud the United States and an agency thereof, the Internal Revenue Service of the United States Department of Treasury ("IRS"), by impeding, impairing, obstructing, and defeating the lawful government functions of the IRS in the ascertainment, computation, assessment, and collection of revenue due and owing from municipal issuers and in the exercise of its responsibilities to monitor compliance with Treasury regulations related to tax-exempt municipal bonds. In addition, the information charged that Naeh and other persons known and unknown devised a scheme and artifice to defraud municipal issuers and to obtain money and property from these municipal issuers by means of false and fraudulent pretenses, representations and promises and for the purposes of executing such scheme and artifice, in violation of 18 U.S.C. § 1343, caused to be transmitted on or about May 31, 2006, via interstate wire transfer from New York, New York to Missouri, an interest payment of approximately $442,341.39 to a state health and educational facilities authority, which payment was artificially suppressed because at the time that the marketer for the winning provider determined the price of the winning bid, he was asked to pay and agreed to pay a kickback to CDR that amounted to $475,000.

## IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Naeh's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Naeh be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
Commissioner Paredes
Commissioner Gallagher
not participating

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 67943 / September 27, 2012**

**INVESTMENT ADVISERS ACT OF 1940**
**Release No. 3475 / September 27, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15050**

**In the Matter of**

**MATTHEW ADAM ROTHMAN,**

**Respondent.**

**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Matthew Adam Rothman ("Rothman" or "Respondent").

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

## III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Rothman from 1997 through 2007 was an employee of Rubin/Chambers Dunhill Insurance Services, Inc., dba CDR Financial Products, Inc. ("CDR"), a registered investment adviser with the Commission from 2001 until February 14, 2011. CDR marketed financial products and services, including services as a bidding agent to various municipalities throughout the United States. More specifically, public entities hired CDR, among other things, to act as their agent for the purpose of conducting what was supposed to be a competitive bidding process for contracts for the investment of the proceeds from the sales of municipal bonds. Rothman worked for CDR in the firm's then principal place of business, Beverly Hills, California. From June 15, 1998 through February 22, 2001, January 17, 2002 through May 24, 2004, and September 15, 2004 through July 11, 2005, Rothman was also a registered representative associated with broker-dealers registered with the Commission. Rothman, age 45, is a resident of Los Angeles, California.

2. On March 11, 2010, Rothman pled guilty to two counts of conspiracy in violation of 15 U.S.C. § 1 and 18 U.S.C. § 371, respectively, and to one count of wire fraud in violation of 18 U.S.C. § 1343 before the United States District Court for the Southern District of New York, in United States v. Matthew Adam Rothman, Criminal No. 10-cr-200. No date has been scheduled for Rothman's sentencing.

3. The criminal information to which Rothman pled guilty charged, among other things, that Rothman engaged in fraudulent misconduct in connection with the competitive bidding process for the selection of the firms to provide instruments in which municipal issuers, in accordance with federal tax laws and regulations, temporarily invested the proceeds of tax-exempt municipal bonds. More specifically, the information charged that, from at least as early as 2001 until at least November 2006, Rothman conspired to allocate and rig bids for investment agreements or other municipal finance contracts, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. According to the information, Rothman and his co-conspirators, among other things, designated in advance of the submission of bids to CDR which provider among the co-conspirator providers would be the winning bidder for a certain investment agreement and submitted, or caused to be submitted, to CDR intentionally losing bids. Certain co-conspirator providers paid kickbacks to CDR in the form of fees that were inflated, relative to the services performed, or unearned in exchange for Rothman's assistance and certain of the CDR co-conspirators' assistance in controlling the bidding process and ensuring that certain co-conspirator providers won the bids they were allocated. The information further alleged that, from at least as early as August 2001 until at least November 2006, Rothman, in violation of 18 U.S.C. § 371, conspired to defraud the United States and an agency thereof, the Internal Revenue Service of the United States Department of Treasury ("IRS"), by impeding, impairing, obstructing, and defeating the lawful government functions of the IRS in the ascertainment, computation, assessment, and collection of revenue due and owing from municipal issuers and in the exercise of its responsibilities to monitor compliance with Treasury regulations related to tax-exempt municipal bonds. In addition, the information alleged that Rothman and other persons

known and unknown devised a scheme and artifice to defraud municipal issuers and to obtain money and property from these municipal issuers by means of false and fraudulent pretenses, representations and promises and for the purposes of executing such scheme and artifice, in violation of 18 U.S.C. § 1343, caused to be transmitted on or about June 28, 2006, via interstate wire transfer from New York, New York to West Virginia, an artificially determined payment of approximately $1,630,681.30 to a state school building authority, pursuant to an investment agreement that Rothman helped the provider obtain by arranging for the provider to pay a kickback of $55,000 to CDR in exchange for the investment agreement.

**IV.**

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Rothman's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act that Respondent Rothman be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and
>
> barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67945 / September 28, 2012

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3411 / September 28, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-12468

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| In the Matter of<br><br>Douglas W. Marcille,<br>CPA | : ORDER GRANTING APPLICATION FOR<br>: REINSTATEMENT TO APPEAR AND PRACTICE<br>: BEFORE THE COMMISSION AS AN ACCOUNTANT<br>: RESPONSIBLE FOR THE PREPARATION OR<br>: REVIEW OF FINANCIAL STATEMENTS REQUIRED<br>: TO BE FILED WITH THE COMMISSION |

On October 31, 2006 Douglas W. Marcille, CPA ("Marcille") was suspended from appearing or practicing before the Commission as an accountant as a result of settled public administrative proceedings instituted by the Commission against Marcille pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1] This order is issued in response to Marcille's application for reinstatement to appear and practice before the Commission as an accountant responsible for the preparation or review of financial statements required to be filed with the Commission.

The Commission found that Marcille had been permanently enjoined by the United States District Court for the Southern District of Florida from future violations of Sections 5(a), 5(c), 17(a)(2) and 17(a)(3) of the Securities Act of 1933. The Commission's complaint alleged that between March 2002 and August 2003 U.S. Gas & Electric, Inc., acting through executives of the company, including Marcille, its then-chief financial officer, and others, raised more than $6.8 million from investors in a series of unregistered offerings of securities. The defendants used a boiler room of telemarketers to offer and sell securities to approximately 180 investors throughout the United States, many of whom were senior citizens. The complaint further alleged that, U.S. Gas, through Marcille and others, failed to disclose to investors that excessive commissions were being paid to the boiler room telemarketers out of the offering proceeds, and

[1] *See* Accounting and Auditing Enforcement Release No. 2506 dated October 31, 2006. Marcille was permitted, pursuant to the order, to apply for reinstatement after three years upon making certain showings.

made misrepresentations to investors in one of the offerings regarding the amount of management fees that would be paid out.

The Commission's complaint also alleged that U.S. Gas, Marcille, and another executive violated the registration provisions of the federal securities laws by failing to file registration statements in connection with the offerings. The complaint further alleged that U.S. Gas committed issuer reporting violations by failing to make required periodic filings with the Commission.

In his capacity as a preparer or reviewer, or as a person responsible for the preparation or review, of financial statements of a public company to be filed with the Commission, Marcille attests that he will undertake to have his work reviewed by the independent audit committee of any company for which he works, or in some other manner acceptable to the Commission, while practicing before the Commission in this capacity. Marcille is not, at this time, seeking to appear or practice before the Commission as an independent accountant. If he should wish to resume appearing and practicing before the Commission as an independent accountant, he will be required to submit an application to the Commission showing that he has complied and will comply with the terms of the original suspension order in this regard. Therefore, Marcille's suspension from practice before the Commission as an independent accountant continues in effect until the Commission determines that a sufficient showing has been made in this regard in accordance with the terms of the original suspension order.

Rule 102(e)(5) of the Commission's Rules of Practice governs applications for reinstatement, and provides that the Commission may reinstate the privilege to appear and practice before the Commission "for good cause shown."[2] This "good cause" determination is necessarily highly fact specific.

On the basis of information supplied, representations made, and undertakings agreed to by Marcille, it appears that he has complied with the terms of the October 31, 2006 order suspending him from appearing or practicing before the Commission as an accountant, that no information has come to the attention of the Commission relating to his character, integrity, professional conduct, or qualifications to practice before the Commission that would be a basis for adverse action against him pursuant to Rule 102(e) of the Commission's Rules of Practice, and that Marcille, by undertaking to have his work reviewed by the independent audit committee of any company for which he works, or in some other manner acceptable to the Commission, in his practice before the Commission as a preparer or reviewer of financial statements required to be filed with the Commission, has shown good cause for reinstatement. Therefore, it is accordingly,

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[2] Rule 102(e)(5)(i) provides:

"An application for reinstatement of a person permanently suspended or disqualified under paragraph (e)(1) or (e)(3) of this section may be made at any time, and the applicant may, in the Commission's discretion, be afforded a hearing; however, the suspension or disqualification shall continue unless and until the applicant has been reinstated by the Commission for good cause shown." 17 C.F.R. § 201.102(e)(5)(i).

ORDERED pursuant to Rule 102(e)(5)(i) of the Commission's Rules of Practice that Douglas W. Marcille, CPA is hereby reinstated to appear and practice before the Commission as an accountant responsible for the preparation or review of financial statements required to be filed with the Commission.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary