

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Securities Exchange Act of 1934
Release No. 36742 / January 19, 1996

Administrative Proceeding
File No. 3-8933

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In the Matter of :
:
WILLIAM V. GIORDANO, : ORDER INSTITUTING PUBLIC
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:
Respondent. : PROCEEDINGS, MAKING
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:
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FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest to institute public administrative proceedings pursuant to Sections 15(b)(6) and 19(h) of the Securities Exchange Act of 1934 ("Exchange Act"), against William V. Giordano ("Giordano" or "Respondent").

In anticipation of the institution of these proceedings, Giordano has submitted an Offer of Settlement ("Offer") to the Commission, 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 in which the Commission is a party, and without admitting or denying the findings contained herein, except as to Paragraph II.A., which is admitted, Giordano has consented to the entry of the findings and remedial sanctions set forth below.

Accordingly, IT IS ORDERED that proceedings pursuant to Sections 15(b)(6) and 19(h) of the Exchange Act be, and hereby are, instituted.

II.

On the basis of this Order Instituting Public Proceedings, Making Findings, and Imposing Remedial Sanctions ("Order") and Respondent's Offer, the Commission makes the following findings:¹

A. RESPONDENT

Giordano was the Chief Operating Officer of Adler, Coleman Clearing Corporation ("Adler"), formerly known as Adler, Coleman & Co., Inc., from May 8, 1991 until in or about February 1995. Adler was registered with the Commission as a broker-dealer pursuant to Section 15(b) of the Exchange Act from December 27, 1984 until in or about February 1995. Giordano was one of two owners of Adler, which had its principal place of business in New York City.

B. ROLE OF "DIRECT ACCESS" BROKERS

This proceeding involves Respondent's failure reasonably to supervise a "direct access" broker, who was an associated person of Adler, with a view to preventing violations of the federal securities laws. "Direct access" brokers work on the floor of a stock exchange, where they receive orders for securities trades directly from institutional customers, rather than through an intermediary trading desk. The New York Stock Exchange ("NYSE") permits these brokers to enter into arrangements with member clearing firms to settle and clear the direct access trades for a clearing fee. Notwithstanding this fact, direct access brokers are not independent of the clearing firms with which they have such arrangements, and are "associated persons" of such firms.

Any person selling securities must either be registered as a broker-dealer or be a "person associated with a broker-dealer" as defined in Section 3(a)(18) of the Exchange Act. Broker-dealers have a responsibility reasonably to supervise their associated persons, including direct access brokers.

C. UNDERLYING VIOLATIONS

From in or about August 1991 through in or about August 1992, Philip Tumminia was a registered representative of Adler and a direct access broker on the floor of the NYSE. During that time, Philip Tumminia's wife, Donna Tumminia, was a Senior Vice President and the head of trading for Shearson Lehman Advisors ("SLA"), then an investment advisory division of Shearson Lehman Brothers Inc. Donna Tumminia placed numerous orders for

¹ Any findings herein are solely for the purpose of these proceedings and are not binding on any other person or any respondent in any other proceedings.

securities trades with her husband on behalf of several registered investment companies and other clients of SLA (the "Funds").

The Tumminias conspired, inter alia, to charge the Funds excessive mark-ups and mark-downs on direct access trades executed by Philip Tumminia as principal. From in or about October 1991 through in or about August 1992, the Tumminias caused the Funds to be overcharged by at least \$570,000.

As a result of his participation in this fraudulent scheme, Philip Tumminia (1) violated Section 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, and Section 37 of the Investment Company Act of 1940 ("Investment Company Act"), and (2) aided and abetted violations of Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 ("Advisers Act"). Without admitting or denying the allegations contained in the Complaint, Donna Tumminia and Philip Tumminia consented to the entry of a Final Judgment dated September 13, 1994 which permanently enjoins them from further violations of the federal securities laws. Securities and Exchange Commission v. Donna Tumminia and Philip Tumminia, 94 Civ. 6286 (CBM) (S.D.N.Y.). Donna Tumminia and Philip Tumminia have also been barred, on consent, from association with any broker, dealer, investment adviser, investment company, or municipal securities dealer. In the Matter of Donna Tumminia and Philip Tumminia, Exchange Act Rel. No. 35241 (January 19, 1995).

D. RELATIONSHIP OF ADLER AND GIORDANO WITH PHILIP TUMMINIA

Giordano was one of Adler's two most senior officers, and was the firm's Chief Operating Officer. He made the decision to permit Philip Tumminia to become associated with Adler, and he decided the terms that would govern that association. Giordano was the only Adler officer to provide any Adler personnel with any direction concerning how to handle Philip Tumminia's business, although that direction was limited to the mechanics of processing transactions. Giordano was the only Adler officer in a position to supervise Philip Tumminia or to direct other personnel to supervise him.

Before becoming associated with Adler, Philip Tumminia told Giordano that "a friend" would send institutional direct access trades to Mr. Tumminia, on which the commissions would be 6¢ per share. Giordano and Adler agreed to make Philip Tumminia a registered representative of Adler, and to clear his direct access trades for 1¢ per share, which would be paid out of the 6¢ per share commissions.

After becoming a registered representative of Adler, Philip Tumminia worked on a daily basis on the floor of the NYSE. He

did not maintain an office or telephone on Adler's premises. Philip Tumminia's direct access business consisted entirely of trades ordered by his wife for SLA. He received the orders on the NYSE floor, executed them through a floor broker, and then submitted the trades to Adler to be settled and cleared. Each month, Philip Tumminia presented a commission bill to Adler for the prior month's business. Adler paid the commissions from the proceeds of the direct access trades, less Adler's 1¢ per share clearing fee.

Giordano personally reviewed Philip Tumminia's first month of activity with Adler. At that point, all of the transactions were agency trades on which Philip Tumminia charged commissions of 6¢ per share. Giordano also observed that Adler had successfully cleared all of the first month's trades through the Depository Trust Corporation Institutional Delivery System ("ID System"), which meant that SLA had affirmed all of the trades as presented by Adler.² After the first month, Giordano did not perform any further review of Philip Tumminia's trading.

Adler had no written compliance procedures regarding the activities of direct access brokers. Giordano instructed Adler's Director of Operations to process Philip Tumminia's monthly commission bills. Giordano did not instruct the Director of Operations, or any other Adler personnel, to make any review of the reasonableness of the amounts of commissions charged. Giordano did not establish any procedure to monitor the reasonableness of commissions charged by Philip Tumminia.

In Philip Tumminia's second month of association with Adler, Philip Tumminia asked to open a "facilitation account," which he stated he would use for riskless principal trading. In such trading, a broker-dealer (i) after receiving a customer's buy order, purchases the security sought by the customer from a third party and then, acting as principal, resells it to the customer, or (ii) after receiving a customer's sell order, agrees to sell the security to a third party, and then purchases the security from the customer as principal in order to deliver the security to the third-party buyer. The broker-dealer does not charge a separately identified commission on such trades. Rather, the broker-dealer receives a mark-up or mark-down of the price paid or received by the broker-dealer as principal in obtaining or reselling the security.

Giordano authorized the opening of the facilitation account without speaking to Philip Tumminia about how the account would

² The ID System is a trade confirmation system utilized by broker-dealers and their institutional customers.

be used.³ Giordano understood that Philip Tumminia intended to use the facilitation account to effect riskless principal trades with his clients. Giordano assumed that Philip Tumminia's mark-ups and mark-downs on riskless principal trades would be 6¢ per share, the same as his commission rate on agency trades.

Neither Giordano nor any other Adler employee reviewed Philip Tumminia's trading in the facilitation account. Giordano did not monitor the reasonableness of Philip Tumminia's mark-ups and mark-downs on trades through the facilitation account, nor did he instruct any other Adler employee to do so.

On the 66 trades executed through the facilitation account, the Tumminias charged the Funds mark-ups and mark-downs averaging 22¢ per share, which caused the Funds to be overcharged by a total of at least \$570,000. Because Donna Tumminia controlled SLA's end of the transactions, SLA accepted all of these trades over the ID System, notwithstanding the excessive mark-ups and mark-downs. Donna Tumminia falsified and altered trading records at SLA to help conceal the scheme.

Philip Tumminia thus engaged in a fraudulent scheme in violation of the federal securities laws over an extended period of time, during which his activities were subject to no meaningful supervision by Respondent. A reasonable review of Philip Tumminia's commission bills (or of other trading records that were in Adler's possession) would have revealed that Philip Tumminia was charging mark-ups and mark-downs far in excess of 6¢ per share. There was no review of the reasonableness of Philip Tumminia's mark-ups and mark-downs because Adler had no such procedures in place for direct access brokers, and because Giordano failed to establish such procedures when he agreed to permit Philip Tumminia to become associated with Adler, or when Giordano authorized the opening of the facilitation account.

E. LEGAL PRINCIPLES

1. Supervision of Direct Access Brokers

Section 15(b)(4)(E) of the Exchange Act authorizes the Commission to impose sanctions against a broker-dealer if the firm has:

failed reasonably to supervise, with a view to preventing violations [of federal securities laws], another person who commits such a violation, if such person is subject to his supervision.

³ None of Adler's other four direct access brokers had facilitation accounts.

Section 15(b)(6) of the Exchange Act incorporates Section 15(b)(4)(E) by reference and authorizes the Commission to impose sanctions for deficient supervision on individuals associated with broker-dealers.

Any person selling securities must either be registered as a broker-dealer or be a "person associated with a broker or dealer" as defined in Section 3(a)(18) of the Exchange Act. "These two categories encompass the universe of persons engaged in the purchase or sale of securities." Letter from SEC Division of Market Regulation to Gordon S. Macklin, NASD; Charles J. Henry, CBOE; Robert J. Birnbaum, AMEX; and John J. Phelan, NYSE, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶77,303 at 78,116 (June 18, 1982) (hereinafter, "Division of Market Regulation Letter"). Because Philip Tumminia was not separately registered as a broker-dealer, his status with Adler was that of an "associated person" within the meaning of Section 3(a)(18) of the Exchange Act. Adler and Giordano accordingly had a responsibility reasonably to supervise Philip Tumminia.

While Giordano may have treated Philip Tumminia as an independent contractor for purposes other than the federal securities laws, such treatment could not alter Philip Tumminia's status or Giordano's supervisory responsibilities under the federal securities laws. The Commission does not recognize the concept of "independent contractors" for purposes of the Exchange Act, even if an arrangement with an associated person satisfies the criteria for "independent contractor" status for other purposes:

To the extent that a firm forms a relationship with an independent contractor, that firm would be responsible for either (1) ensuring that the independent contractor was registered as a broker-dealer or (2) assuming the supervisory responsibilities attendant to a relationship with an associated person.

Division of Market Regulation Letter, supra, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 78,117-18. See Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1574 (9th Cir. 1990) (en banc), cert. denied, 499 U.S. 976 (1991). Accordingly, broker-dealers have a responsibility reasonably to supervise direct access brokers who are not themselves registered broker-dealers.

2. Giordano Failed Reasonably to Supervise Philip Tumminia

Philip Tumminia engaged in repeated violations of the federal securities laws while subject to no meaningful supervision. Where there has been an underlying violation of the federal securities laws, the failure to have or follow compliance

procedures has frequently been found to evidence a failure reasonably to supervise the primary violator.⁴

The responsibility to supervise includes having procedures and conducting reasonable supervision to prevent registered representatives from charging excessive commissions or mark-ups. See, e.g., In the Matter of Steven B. Theys, Exchange Act Release No. 32358, 54 SEC Docket 446 (May 24, 1993). Here, there were no such procedures for direct access brokers, and Giordano failed to conduct such supervision of Philip Tumminia.⁵

As the only Adler officer responsible for the firm's arrangements with Philip Tumminia, Giordano was Philip Tumminia's supervisor. Giordano thus had the responsibility either to supervise Philip Tumminia's activities himself, or reasonably to delegate that supervisory function to other appropriate Adler personnel. He did neither. See In the Matter of John H. Gutfriend, Exchange Act Release No. 31554, 52 SEC Docket 4370, 4392 (Dec. 3, 1992) (whether a particular person has supervisory responsibility depends on whether that person "has a requisite degree of responsibility, ability or authority to affect the conduct of the employee whose behavior is at issue"); In the Matter of Steven C. Pruette, Exchange Act Release No. 14359, 13 SEC Docket 1341 (Jan. 9, 1978).

III.

As a result of the foregoing, in or about August 1991 through in or about August 1992, Respondent failed reasonably to supervise Philip Tumminia, with a view to preventing violations of the Securities Act, the Exchange Act, the Investment Company Act, the Advisers Act, and the rules and regulations promulgated

⁴ While the presence of "red flags" warning of possible irregularities may often be an aggravating factor, the absence of such warning signs is not a defense where the gravamen of the supervisory deficiency is a failure to have reasonable procedures. See In the Matter of Gary W. Chambers, Exchange Act Release No. 27963, 46 SEC Docket 200 (Apr. 30, 1990); In the Matter of Blinder, Robinson & Co., Exchange Act Release No. 19057, 26 SEC Docket 238 (Sept. 17, 1982).

⁵ Giordano asserts that he relied on the ID System to detect any irregularities in Philip Tumminia's trading. He asserts that, so long as SLA accepted the trades as presented by Adler through the ID System, he assumed that the commissions, mark-ups, and mark-downs were acceptable to SLA. The Commission finds that such reliance is not sufficient to fulfill the responsibility reasonably to supervise associated persons of broker-dealers.

thereunder, who committed such violations while subject to Respondent's supervision.

IV.

In view of the foregoing, it is in the public interest to impose the sanctions specified in the Offer of Settlement.

Accordingly, **IT IS HEREBY ORDERED:**

A. that Respondent Giordano be, and hereby is, suspended from acting in a supervisory capacity with any broker, dealer, investment company, investment adviser or municipal securities dealer for a period of six months, such sanction to begin from the second Monday following the date of entry of this Order;

B. that Respondent Giordano shall comply with his undertaking, at the end of the six-month period described in Paragraph IV.A. above, to provide the Commission with an affidavit that he has complied with the sanction described in Paragraph IV.A. above; and

C. that Respondent Giordano pay to the United States Treasury a civil penalty in the amount of \$20,000 pursuant to Section 21B(a)(4) of the Exchange Act. Such payment shall be made to the Treasury as follows: Giordano shall pay \$12,000 within thirty days of the date of entry of this Order, and the remaining \$8,000 within six months of the date of this Order. Such payment shall be: (1) made by United States postal money order, certified check, bank cashier's check or bank money order; (2) made payable to the Securities and Exchange Commission; (3) delivered to the Comptroller, Securities and Exchange Commission, 450 5th Street, N.W., Washington, DC 20549; and (4) submitted under cover letter which identifies Giordano as the Respondent in these proceedings and the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Wayne M. Carlin, Assistant Regional Director, Northeast Regional Office, Securities and Exchange Commission, 7 World Trade Center, 13th Floor, New York, NY 10048.

By the Commission.

Jonathan G. Katz
Secretary