

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2883 / May 27, 2009

INVESTMENT COMPANY ACT OF 1940
Release No. 28747 / May 27, 2009

ADMINISTRATIVE PROCEEDING
File No.3-13487

In The Matter Of

NEW YORK LIFE INVESTMENT
MANAGEMENT LLC

Respondent.

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:
: ORDER INSTITUTING
:
: ADMINISTRATIVE AND CEASE-
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: AND-DESIST PROCEEDINGS,
:
: PURSUANT TO SECTIONS 203(e)
:
: AND 203(k) OF THE INVESTMENT
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: ADVISERS ACT OF 1940 AND
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: SECTIONS 9(b) AND 9(f) OF THE
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: INVESTMENT COMPANY ACT OF
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: 1940, MAKING FINDINGS, AND
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: IMPOSING REMEDIAL SANCTIONS
:
: AND A CEASE-AND-DESIST ORDER
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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 Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) and to Sections 9(b) and 9(f) of the Investment Company Act of 1940 (“Investment Company Act”) against New York Life Investment Management LLC (“Respondent” or “NYLIM”).

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 Respondent 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 203(e) and 203(k) of the Advisers Act and Sections 9(b) and 9(f) of the Investment Company Act, 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 finds¹ that:

Summary

This matter concerns multiple violations of Section 206(2) of the Advisers Act and Sections 15(c) and 34(b) of the Investment Company Act by NYLIM in connection with a mutual fund it advised, the MainStay Equity Index Fund (“Equity Index Fund”), during the period from early 2002 through June 30, 2004 (the “relevant period”). The Equity Index Fund is an open-end investment company that seeks to replicate the movements of the S&P 500 index before expenses.

During the relevant period, the disinterested members of the Board of Trustees and the Board of Trustees of The MainStay Funds, approved the renewal of three investment advisory contracts between NYLIM and the Equity Index Fund. For each contract renewal process, commonly known as the “15(c) process,” the Board of Trustees received information showing that the management fees NYLIM charged to the Equity Index Fund were among the highest of the Equity Index Fund’s peer-group of mutual funds. NYLIM urged the Board of Trustees to consider the “Guarantee” feature of the Equity Index Fund in evaluating the management fees NYLIM proposed, but, in violation of Section 206(2) of the Advisers Act and Section 15(c) of the Investment Company Act, failed to provide the Board of Trustees information reasonably necessary to evaluate the cost of the Guarantee.² Moreover, at the same time that NYLIM was claiming that the Guarantee should be considered to justify the Equity Index Fund’s management fees, it was filing with the Commission, in violation of Section 34(b) of the Investment Company Act, prospectuses, annual reports, and registration statements in which it misrepresented that there was “no charge” to the Equity Index Fund or its shareholders for the Guarantee.

¹ The findings herein are made pursuant to Respondent’s Offer of Settlement. The findings are not binding upon any other person or entity in this or any other proceeding.

² Pursuant to the Guarantee, a NYLIM affiliate, NYLIFE LLC, agreed to make up any shortfall if the value of a shareholder’s investment in the Equity Index Fund on the tenth anniversary of his or her investment was less than his or her original investment, provided the shareholder remained in the Equity Index Fund for the entire period and reinvested all distributions. The only payouts under the Guarantee have occurred recently. As a result of the recent stock market decline, since October 2008, NYLIFE LLC has paid approximately \$8,920,751 to shareholders of the Equity Index Fund under the terms of the Guarantee.

Respondent

1. NYLIM is a registered investment adviser and an indirect wholly-owned subsidiary of New York Life Insurance Company. It is the investment adviser to the Equity Index Fund, which is a series of The MainStay funds, a load family of open-end investment companies, which was, during the relevant period, primarily distributed by registered representatives of NYLIFE Securities, Inc., an affiliate of NYLIM.

Other Relevant Parties

2. New York Life Insurance Company is the largest mutual life-insurance company in the United States and one of the largest life insurers in the world. New York Life affiliates provide an array of securities products and services including institutional and retail mutual funds.

3. The Equity Index Fund is an open-end investment company that seeks to replicate the movements of the S&P 500 index before expenses. The Equity Index Fund was closed to new share purchases and new investors effective January 1, 2002.

4. NYLIFE LLC is a wholly-owned subsidiary of New York Life Insurance Company.

5. The Board of Trustees of The MainStay Funds was comprised of up to eleven members, consisting of four affiliated trustees and at least six independent trustees during the relevant period.

6. Independent Trustees (also referred to as the “disinterested members of the Board of Trustees”) are the members of the Board of Trustees of The MainStay Funds who are not affiliated with NYLIM.

Facts

7. The Equity Index Fund was opened in 1990, when NYLIM proposed to the Board of Trustees of The MainStay Funds (the “Board”) that NYLIM offer an S&P 500 index fund to investors as part of the MainStay family of funds.

8. According to the Equity Index Fund’s initial prospectus, the Equity Index Fund came with an unconditional guarantee (the “Guarantee”) from NYLIFE LLC (originally NYLIFE Inc., until its merger with NYLIFE LLC on September 30, 1999) stating that: “If on the business day immediately after ten years from your date of purchase (the ‘Guarantee Date’), the net asset value of a Fund share, plus the value of all cumulative reinvested dividends and distributions paid on the share during the ten-year period, is less than the price you initially paid for the Fund share, NYLIFE will pay you the difference between the price you paid and the net asset value of a Fund share as of the close of business on the Guarantee Date.”

9. From the Equity Index Fund’s inception through June 30, 2004, every prospectus, registration statement, and annual report NYLIM filed with the Commission included a statement that, “[t]here is no charge to the [Equity Index] Fund or its shareholders for the Guarantee.”

10. Section 15(c) of the Investment Company Act requires the investment adviser to 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 disinterested directors/trustees approve the advisory contract between the investment adviser and the fund.

11. Before the 2000 advisory contract renewal process, NYLIM was the Board’s sole source of information in the 15(c) process concerning the Equity Index Fund’s costs of operation, profitability, and peer-group fee comparisons. For the 15(c) process for the years from 2000 through 2003, however, the Independent Trustees of the Board also engaged a series of outside consultants to provide information about peer-group fee comparisons for The MainStay Funds, including the Equity Index Fund. The Independent Trustees also were advised by their own independent legal counsel at all times relevant to this matter.

12. The Board met on March 13, 2000 to consider the Equity Index Fund’s advisory contract renewal for its 2000 contract period. For the meeting, the Board was provided with an independent consultant’s report, which showed the Equity Index Fund’s management fees were the highest in its peer-group. The Board was also provided with information that showed that NYLIM generated a 91% profit margin from the Equity Index Fund. The Board approved the contract as NYLIM proposed.

13. The Board met on March 12 and 13, 2001, to consider the Equity Index Fund’s advisory contract renewal for the one-year period beginning on May 1, 2001. By then a new independent consultant had been hired to provide a peer-group fee comparison report for the 15(c) process. However, this report was not completed by the March 2001 meeting but was instead provided for a June 11, 2001 Board meeting after the Equity Index Fund’s advisory contract had been renewed for 2001. At the March meeting, NYLIM presented information showing that the Equity Index Fund’s management fees were the highest in its peer-group. NYLIM also provided the Board with information showing that NYLIM generated a 9% profit margin from the Equity Index Fund. At the June 11, 2001 meeting, the new consultant’s report was provided to the Board. That report showed that the Equity Index Fund’s total expense ratio (total expenses for the fund as a percentage of average net assets) was the highest in its peer-group. Again, the contract was approved as proposed.

14. During the spring and summer of 2001, in light of changing market conditions, New York Life Insurance Company for the first time began to analyze the financial exposure of providing the Guarantee.

15. The Board met on September 10, 2001. At the meeting, the Board voted to close the Equity Index Fund on or about January 1, 2002. The Equity Index Fund was then closed to new share purchases and new investors effective January 1, 2002.

16. On January 14, 2002, as a result of the risk analysis done in 2001, NYLIFE LLC established for the first time a reserve of \$2 million related to the Guarantee on its 2001 year-end financial statements.

17. The Board met on March 12, 2002 to consider the Equity Index Fund's advisory contract renewal for the one-year period beginning on May 1, 2002. For the meeting, in addition to an internal NYLIM profitability analysis, which reflected a 7% profit margin, the Board obtained a report from a third independent consultant. The report showed that the Equity Index Fund had the highest management fees in its peer-group. As part of the 15(c) process, NYLIM urged the Board to consider the Guarantee in evaluating the management fees NYLIM proposed to charge the Equity Index Fund, but failed to provide the Board information reasonably necessary to evaluate the proper level of such fees. No information was given to the Board regarding either the estimated financial cost or value of the Guarantee or the fact that NYLIFE LLC had established a reserve for the Guarantee. The Board approved the contract as NYLIM proposed.

18. On June 10 and 11, 2002, the Board met again to consider the renewal of the Equity Index Fund advisory contract (the contract renewal period having been changed to begin August 1 each year). The reports provided to the Board at the June 2002 meeting, including the report of the third independent consultant, were substantially the same as the March 2002 reports. Again, no information was given to the Board regarding the estimated cost or value associated with the Guarantee or the fact that NYLIFE LLC had established a reserve for the Guarantee. The Board again approved the contract as NYLIM proposed.

19. In January 2003, NYLIFE LLC recorded a reserve of \$11.9 million related to the Guarantee in its 2002 year-end financial statements.

20. The Board met on June 9 and 10, 2003 to consider the Equity Index Fund's advisory contract renewal for the one-year period beginning on August 1, 2003. As part of the 15(c) process, NYLIM presented the Equity Index Fund's management fees as being 28 basis points higher than the selected peer-group median and the second most "unfavorable" of its funds. The explanation NYLIM gave to the Board for the unfavorable comparison was the Equity Index Fund's "unique guarantee." As part of the 15(c) materials, the Board was provided an independent consultant's report and a profitability analysis. The independent consultant's report showed the Equity Index Fund's management fees and total fees were both the highest in its peer-group. The independent consultant concluded: (1) "[h]igh expenses are the main reason this fund ranks worst among its index-fund peers for the one-, three-, and five-year periods;" (2) the "main culprit" for the Equity Index Fund's poor peer-group comparison was a management fee "that is more than twice the peer-group average;" and (3) the Guarantee, although "unique," was "of somewhat limited value." The report also questioned if the Guarantee had any cost associated with it at all "given how unusual it would be for the S&P 500 to lose money over such a long period (and the guarantee is good only on one specific day, the 10-year anniversary of the investor's purchase date) . . . and [n]ow that the fund is closed to new investors, it would seem the liability for the guarantee would be shrinking."

21. NYLIM's profitability analysis for the Equity Index Fund included in the 2003 15(c) materials reflected a negative 103% profit margin, due to the inclusion of a \$9.9 million expense for a reserve for the Guarantee. NYLIM however did not explain the expense represented an increase in the estimate of the reserve for the Guarantee, that the reserve for the Guarantee represented the present value of all future payments related to the Guarantee, or that the cost of the Guarantee to NYLIM could have been spread over future years. Moreover, NYLIM did not provide the Board with information concerning the assumptions used to calculate the reserve or

explain why NYLIM believed the full amount of the increase to the reserve should be included in the analysis of the profitability of the Equity Index Fund. The increase to the reserve was simply shown as a line item on the Equity Index Fund's profitability analysis, without which the Equity Index Fund would have shown a profit margin of 31%. The Board approved the contract as NYLIM proposed.

22. The Board met on June 14 and 15, 2004 to consider the Equity Index Fund's advisory contract renewal for the one-year period beginning on August 1, 2004. The independent consultant retained by the Board submitted a report showing that the Equity Index Fund's management fees were 21 basis points higher than the selected peer-group median. NYLIM's profitability analysis for the Equity Index Fund included in the 2004 15(c) materials reflected net income of \$9.8 million, resulting in a 163% profit margin, due to the release of \$8.3 million of the reserve into income. NYLIM explained in the analysis that this income resulted from a significant reversal in the amount of the reserve for the Guarantee on NYLIFE's financial statements. Moreover, the internal reports NYLIM provided for the meetings stated that the Independent Trustees had specifically asked NYLIM to focus on the Equity Index Fund and its "above average Net Management Fees." For the first time, NYLIM provided the Board with information concerning the assumptions used to calculate the reserve and explained why NYLIM believed the reserve should be included in the analysis of the profitability of the Equity Index Fund. Also, in response to written questions on behalf of the disinterested members of the Board of Trustees, NYLIM provided information concerning the estimated cost of the guarantee. Moreover, in providing information to the Board concerning the guarantee, the independent consultant indicated that the cost of protecting an original investment over a set time period could be estimated by pricing a put option and estimated that the cost of a 10-year put option on the S&P 500 would range between 31 and 64 basis points per year.

23. NYLIM continued to assert at the June 14 and 15 meetings that the Guarantee feature of the Equity Index Fund justified the higher fees for the Equity Index Fund. In the materials for these meetings, NYLIM asked the Board to "consider . . . that the MainStay Equity Index Fund's total operating expenses are comparable to the total expenses of other types of principal protected funds."³ Yet during the same meetings, NYLIM provided other materials to the Board stating that the Guarantee was provided to the shareholders at "no cost." The Board did not approve the contract renewal during these meetings.

24. On June 30, 2004, NYLIM amended the prospectus for the Equity Index Fund to inform investors for the first time that the Guarantee was taken into account in setting the management fees for the Equity Index Fund, stating that "For the services that NYLIM and its affiliates provide to the Fund, they receive the fees described in the prospectus. Neither NYLIM nor its affiliates receive a separate fee for providing the Guarantee, although the Guarantee has been considered in connection with the annual renewal of the management fee."

³ Other types of funds had features like the Equity Index Fund's that served to protect investors from losing their principal investment.

25. In July 2004, as part of the contract renewal approval process, the Board voted to lower the management fee of the Equity Index Fund from 50 basis points to 30 basis points and to cap the Equity Index Fund's expense ratio at 80 basis points.

26. During the relevant period, as a result of its conduct, NYLIM received management fees from the Equity Index Fund in excess of the peer median of approximately \$3,950,075.

Violations of Law

A. NYLIM Violated Section 15(c) of the Investment Company Act

27. Section 15(c) of the Investment Company Act requires the investment adviser to 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.

28. By virtue of the foregoing, NYLIM willfully⁴ violated Section 15(c) of the Investment Company Act in 2002 and 2003. During the 2002 and 2003 15(c) processes NYLIM explained the fee being sought by reference to the Guarantee feature of the Equity Index Fund while failing to provide information necessary for the Board to evaluate the Guarantee's true cost or value. Prior to the 2004 Board meeting, NYLIM did not provide the Board with information concerning the assumptions used to calculate the reserve or explain why NYLIM believed the reserve should be included in the analysis of the profitability of the Equity Index Fund.

B. NYLIM Violated Section 206(2) of the Advisers Act

29. Section 206(2) of the Advisers Act prohibits an investment adviser from engaging "in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client" and imposes on investment advisers a fiduciary duty to their clients to act in "utmost good faith," fully and fairly disclose all material facts, and use reasonable care to avoid misleading clients. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191, 194 (1963). Proof of scienter is not required to establish a violation of Section 206(2). SEC v. Steadman, 967 F.2d 636, 643 n.5 (D.C. Cir. 1992); Steadman v. SEC, 603 F.2d 1126, 1134-35 (5th Cir. 1979), aff'd, 450 U.S. 91 (1981).

30. NYLIM willfully violated Section 206(2) of the Advisers Act in 2002 and 2003 by not disclosing all material facts to the Board during the 15(c) processes for the Equity Index Fund. NYLIFE LLC established a reserve for the Guarantee in its financial statements on January 14, 2002, but in the 2002 15(c) process, NYLIM provided no information to the Board regarding either the estimated cost or value of the Guarantee or the fact that NYLIFE LLC had even

⁴ 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 Gearheart & Otis, Inc. v. SEC, 348 F.2d 798, 803 (D.C. Cir. 1965)).

established a reserve for the Guarantee in its financial statements. For the 2003 15(c) meeting, NYLIM provided a profitability report to the Board that reflected a \$9.9 million expense for the reserve for the Guarantee. NYLIM however did not explain that the expense represented an increase in the estimate of the reserve for the Guarantee, that the reserve for the Guarantee represented the present value of all future payments related to the Guarantee, or that the cost of the Guarantee to NYLIM could have been spread over future years. Moreover, NYLIM did not provide the Board with information concerning the assumptions used to calculate the reserve or explain why NYLIM believed the full amount of the increase to the reserve should have been included in the analysis of the profitability of the Equity Index Fund.

C. NYLIM Violated Section 34(b) of the Investment Company Act

31. Section 34(b) of the Investment Company Act makes it unlawful for any person “to make any untrue statement of a material fact in any registration statement, application, report, account, record, or other document filed” with the Commission pursuant to the Investment Company Act. Section 34(b) also makes it unlawful for any person to “omit to state ... any fact necessary in order to prevent the statements made [in the documents filed with the Commission] . . . from being materially misleading.”

32. From March 2002 through June 30, 2004, NYLIM willfully violated Section 34(b) of the Investment Company Act by filing annual reports to shareholders, registration statements, and prospectuses with the Commission in which it stated that there was no charge to the Equity Index Fund or its shareholders for the Guarantee. Those statements were false or misleading as evidenced by NYLIM’s repeated assertions during the Section 15(c) meetings in 2002, 2003, and 2004 that its higher management fees were justified by the Guarantee.

Undertakings

33. With respect to distribution of disgorgement, prejudgment interest, and civil penalty, Respondent has agreed to the following undertakings:

a. NYLIM shall be responsible for self administering the distribution of sums ordered as disgorgement, prejudgment interest and civil penalty in Paragraph IV.C. (“Settlement Funds”). Within 180 days of the date of this Order, NYLIM shall cause the distribution to be made by crediting accounts or mailing checks to shareholders and former shareholders (“the affected shareholders”) of the Equity Index Fund in proportion to the amount and length of time each shareholder invested in the Equity Index Fund between March 12, 2002 and June 30, 2004; plus interest through the date of the distribution calculated at a risk-free rate not to exceed the Federal Reserve’s Federal Funds Rate. All checks shall bear a stale date of 90 days and shall be voided thereafter. NYLIM shall not be required to make any disbursement to any affected shareholder if that shareholder is due less than \$20 pursuant to the method outlined above. Furthermore, NYLIM shall not pay any affected shareholder any amount that would exceed the affected shareholder’s proportionate share of disgorgement plus interest on the disgorgement through the date of distribution (calculated at a risk free rate not to exceed the federal funds rate as established by the Federal Reserve of the United States (*see* <http://www.federalreserve.gov/fomc/fundsrate.htm>)).

b. Any excess amounts, and any amounts NYLIM is unable, due to factors beyond its control, to pay to any affected shareholder, and any sums that are not paid to any affected shareholder who is due less than \$20, shall be transferred to the Securities and Exchange Commission. Such payment shall be made when the final accounting is submitted and shall be: (i) made by United States postal money order, certified check, bank cashier's check or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (iv) submitted under cover letter that identifies NYLIM as the 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 Christopher R. Conte, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street N.E., Washington, DC 20549.

c. NYLIM agrees to be responsible for all tax compliance responsibilities associated with the Settlement Funds and may retain any professional services necessary. The costs and expenses of any such professional services shall be borne by NYLIM and shall not be paid out of the Settlement Funds. NYLIM shall also retain the services of and be exclusively responsible for the compensation and expenses of an independent third party not unacceptable to the Commission's staff. The independent third party shall, at least 15 business days prior to the date NYLIM makes the first distribution by crediting an account or mailing a check to the affected shareholders who are due \$20 or more, submit for the Commission staff's review an initial accounting and certification of the disposition of the monies to be paid to shareholders pursuant to this Order. The initial accounting and certification shall be in a form not unacceptable to the Commission's staff, and shall include: (i) each payee's broker identification number (NYLIM will, however, upon request by Commission staff, for purposes of the Commission's internal review of the distribution, provide the name and address of any payee); (ii) the amount paid to each payee; (iii) the date of each payment; and (iv) the check number or other identifier of money to be transferred.

d. Within 180 days after the date NYLIM makes the first distribution by crediting an account or mailing a check, NYLIM shall submit to the Commission staff for the Commission's approval a final accounting and certification of the disposition of the monies paid pursuant to this Order. The final accounting and certification shall be in a form provided by the Commission's staff, and shall include but not be limited to: (i) each payee's broker identification number (NYLIM will, however, upon request by Commission staff, for purposes of the Commission's internal review of the distribution, provide the name and address of any payee); (ii) the amount paid to each payee; (iii) the date of each payment; (iv) the check number or other identifier of money transferred; (v) the date and amount of any returned payment; (vi) a description of any effort to locate a prospective payee whose payment was returned, or to whom payment was not made due to factors beyond NYLIM's control; (vii) any amounts to be paid to the Commission pursuant to Section 33.a. above with respect to any prospective payee who NYLIM was unable to pay due to factors beyond its control, or who would be entitled to less than \$20 under the method set forth in Paragraph 33.a., above; and (viii) a final statement totaling all payments and anticipated payment to the Commission, which shall reconcile with the amounts ordered under Section IV.C. below.

Any and all supporting documentation for the accounting and certification shall be provided to the Commission's staff upon request. NYLIM shall cooperate with reasonable requests for information in connection with the accounting and certification.

e. After NYLIM has submitted the final accounting to the Commission staff, the staff shall submit the final accounting to the Commission for approval and shall request Commission approval to send the remaining residual amount to the United States Treasury.

f. NYLIM shall preserve for a period not less than six years from the end of the fiscal year last used, the first two years in an easily accessible place, any record of Respondent's compliance with the undertakings set forth herein.

g. For good cause shown, the Commission staff may extend any of the procedural dates 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 Respondent NYLIM's Offer.

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

A. Respondent shall cease and desist from committing or causing any violations and any future violations of Section 206(2) of the Investment Advisers Act and Sections 15(c) and 34(b) of the Investment Company Act.

B. Respondent is censured.

C. IT IS FURTHER ORDERED that Respondent shall, within five business days of date of this Order, pay disgorgement of \$3,950,075, prejudgment interest of \$1,350,709, and a civil penalty of \$800,000, for a total payment of \$6,100,784, into an account opened in the name of the MainStay Equity Index Fund Qualified Settlement Fund consistent with the provisions of Paragraph III 33.a. above.

D. There shall be, pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, a Fair Fund established for the funds described in Section IV.C. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as a civil money penalty pursuant to this Order shall be treated as a penalty paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that it shall not, after offset or reduction in any Related Investor Action based on Respondent's payment of disgorgement in this action, argue that it is entitled to, nor shall it further benefit from any offset or reduction of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such an offset or reduction, Respondent agrees that it shall, within 30 days after entry of a final order granting the offset or reduction, 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 against Respondents in this proceeding. For purposes of this paragraph, a “Related Investor Action” means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order in this proceeding.

E. Respondent shall comply with the undertakings enumerated in Section III paragraph 33 above. NYLIM’s obligation to pay prejudgment interest, disgorgement, and penalty is not fully satisfied until the funds are disbursed and the final accounting is approved by the Commission and any residual has been transferred to the Commission for disbursement to the United States Treasury.

By the Commission.

Elizabeth M. Murphy
Secretary