

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 3274 / October 30, 2015

ADMINISTRATIVE PROCEEDING

File No. 3-15215

In the Matter of

JAMES S. TAGLIAFERRI

ORDER TO SHOW CAUSE, AMENDING
PROCEDURAL SCHEDULE, AND DIRECTING
SUPPLEMENTAL BRIEFING

The Securities and Exchange Commission instituted this administrative proceeding on February 21, 2013, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 (Exchange Act), Section 203(f) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940. This proceeding was stayed on March 11, 2013, pursuant to Rule of Practice 210(c)(3), and I lifted the stay on June 1, 2015. On September 2, 2015, the Commission granted the Division's motion to amend the Order Instituting Proceedings (OIP).

On September 23, 2015, I ordered a procedural schedule to resolve this proceeding. Respondent James S. Tagliaferri has not filed an Answer to the OIP, which was due October 16, 2015, pursuant to that schedule.

It is ORDERED that on or before November 6, 2015, Tagliaferri shall SHOW CAUSE why he should not be held in default due to his failure to file an Answer. If Tagliaferri fails to respond to this Order, I will construe the Division of Enforcement's motion for summary disposition as a motion for sanctions and deem Tagliaferri in default, and the proceeding may be determined against him. OIP at 7; 17 C.F.R. §§ 201.155(a)(2), .220(f).

It is FURTHER ORDERED that the procedural schedule is amended as follows:

November 20, 2015: The Division shall file a supplemental brief, for the reasons discussed below.

December 11, 2015: Tagliaferri's opposition is due.

December 28, 2015: The Division's reply, if any, is due.

Supplemental briefing is ordered because the Division's motion does not sufficiently establish that the requisite broker nexus is satisfied under Section 15(b)(6) of the Exchange Act, which authorizes the Commission to impose associational and penny stock bars.

The Division asserts that Tagliaferri satisfies the broker nexus because: 1) Tagliaferri regularly bought and sold securities on clients' behalf in discretionary accounts without needing prior permission from them, pursuant to those clients' investment management agreements; and 2) Tagliaferri received kickbacks from companies in which he invested client funds. Division Motion at 7 & n.8; Ex. E (Sentencing Tr.) at 30-31; Ex. G (District Court Order) at 2-3. Standing alone, the first basis is hardly dispositive to the broker determination; if it were, every investment adviser with a discretionary client account could be deemed a broker. As to the second basis, the Division provides no authority for the proposition that the receipt of kickbacks in exchange for investing client money in certain investments constitutes transaction-based compensation. Cf. Order Exempting the Federal Reserve Bank of New York, Maiden Lane LLC and the Maiden Lane Commercial Mortgage Backed Securities Trust 2008-1 from Broker-Dealer Registration, Exchange Act Release No. 61884, 2010 SEC LEXIS 1085, at *7 (Apr. 9, 2010) (transaction-based compensation means "compensation tied to the successful completion of a securities transaction"). As the term is normally used, "transaction-based compensation" is earned for each transaction conducted by the broker. See, e.g., *SEC v. Martino*, 255 F. Supp. 2d 268, 274 (S.D.N.Y. 2003) (defendant earned 20.5% commission for each sale of a security); *Hansen*, No. 83-cv-3692, 1984 WL 2413, at *2 (S.D.N.Y. Apr. 6, 1984) (defendant earned a 15% commission for each sale of a security).

Furthermore, the Division's motion does not discuss any other factors pertinent to the broker issue that courts regularly consider. See, e.g., *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1334-36 (M.D. Fla. 2011); *SEC v. Hansen*, 1984 WL 2413, at *10. The initial decision cited by the Division based its finding that the respondent acted as a broker on a variety of factors, none of which involved kickbacks. See *Stuart E. Rawitt*, Initial Decision Release No. 782, 2015 SEC LEXIS 1602, at *6 (Apr. 28, 2015) (finding that the respondent acted as a broker where he "admitted to soliciting investors for a venture run by his co-defendants in the criminal case; he was recruited to solicit investors based upon previous experience selling securities; he made representations to potential investors about the venture, encouraging them to invest; and he was compensated with a percentage of the funds he raised, i.e., commissions"); Division Motion at 7 n.8. Additionally, to the extent the Division cites the indictment from Tagliaferri's criminal case to support its analysis, I decline to consider the indictment's allegations as substantive evidence without any explanation as to why they should be accorded preclusive effect, in accordance with *Gary L. McDuff*, Exchange Act Release No. 74803, 2015 SEC LEXIS 1657 (Apr. 23, 2015).

The Division is on notice that failure to establish the broker nexus through supplemental briefing or to provide a sufficient evidentiary explanation as to how it could establish the broker nexus at a hearing will result in dismissal of the Section 15(b)(6) claim. See *S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 SEC LEXIS 4691, at *10 (Dec. 5, 2014) ("parties should be provided notice and an opportunity to be heard" prior to a pre-hearing dismissal).

Cameron Elliot
Administrative Law Judge