UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	)	
	)	
DENNIS J. MALOUF,	)	ADMINISTRATIVE PROCEEDING
	)	File No. 3-15918
Respondent.	)	
	)	

RESPONDENT DENNIS MALOUF'S RESPONSE TO
DIVISION OF ENFORCEMENT'S POST-HEARING BRIEF

TABLE OF CONTENTS

I. SUMMARY 1

II. FACTS 2

a. The Division Failed to Prove a Secret Oral Agreement 2

b. The Division Erroneously Relies on Alleged Concealment by LaMonde 4

c. The Division Failed to Prove Malouf Directed Trades to LaMonde to Receive Payments Under a Secret Agreement 4

d. The Division Failed to Prove Malouf Attempted to Conceal Any Arrangement 6

e. The Division Failed to Prove Malouf is Responsible for Inadequate Disclosures 7

i. Forms ADV 7

ii. Testimony that Malouf Concealed Information is not credible 9

f The Division Failed to Prove Malouf Caused UASNM to Distribute Advertisements that Included Misleading Representations 10

g. The Division Failed to Prove Malouf Acted as an Unregistered Broker 11

h. The Division Failed to Prove Malouf Did not Seek Best Execution 11

III. CLAIMS 14

a. The Division Failed to Prove Malouf Violated Exchange Act Section 15(a)(1) or 15C(a)(1)(A) 15

b. The Division Failed to Prove Malouf Violated Advisors Act Sections 206(1) or (2) 16

c. The Division Failed to Prove Malouf Violated Securities Act Sections 17(a)(1) or 17(a)(3), Exchange Act Section 10(b), or Rules 10b-5(a) or (c) 16

d. The Division Failed to Prove Malouf Violated Section 207 of the Advisors Act 16

e. The Division Failed to Prove Malouf Aided and Abetted Violations of Advisers Act Sections 206(1),(2) or (4), or Section 207, or Rule 206(4)-1(a)(5) 16

IV. RELIEF REQUESTED 17

a. The Division's Claims are Barred By The Statute of Limitations 17

b. A cease and Desist Order or Collateral Bar Are Not in the Public Interest 18

c. Disgorgement and Prejudgment Interest Are Not in the Public Interest 19

d. Civil Penalties Are Not in the Public Interest 20

TABLE OF AUTHORITIES

Cases

Anderson, Rel. No. 34-48352, 2003
WL 21953883 (Aug. 15, 2003) 13, 14
CSC Holdings, Inc. v. Redisi,
309 F.3d 988, 992 (7th Cir. 2002) 17
KPMG Peat Marwick LLP,
Rel. No. 34-43862, 2001 WL 47245, *26 (Jan. 19, 2001) 18
National RR Passenger Corp. v. Morgan,
536 U.S. 101, 114-15 (2002) 17
S.E.C. v. Bilzerian,
814 F.Supp. 116 (D.D.C. 1993) 19
S.E.C. v. Graham,
2014 WL 1891418 (S.D. Fla. 2014) 17
S.E.C. v. Huff,
758 F.Supp.2d 1288 (S.D.Fla. 2010) 19

Other Authorities

15 U.S.C.A. § 80b-2(11) 14
28 U.S.C.A. § 2462 17

I. SUMMARY[1]

The Division's claims are predicated on a "secret oral agreement" with LaMonde to pass all commissions to Malouf. Evidence shows this agreement is a fiction propagated by Kopczynski to discredit Malouf and absolve himself. The Division's investigation merely adopted as its own the allegations carefully crafted by Kopczynski and Hudson. Contradictory evidence and testimony has exposed the shortcomings of the Division's investigation and its overreliance on Kopczynski and Hudson.

The Division's proof of a secret agreement begins and ends with LaMonde's dubious coerced "admission." Yet the greater weight of the evidence shows the agreement was conspicuous, all the key players knew about it, and it did not contemplate passing all commissions on UASNM bond trades to Malouf. The real legal issue is not a far-fetched "secret agreement." Rather, the Division's contentions are that: (1) LaMonde's payments for the branch created a disclosure obligation on behalf of UASNM; and (2) Malouf's receipt of payments for the branch made him an unregistered broker. The Division's best execution claim – that UASNM customers paid excessive commissions – is a corollary of these other issues.

The Division failed to prove Malouf caused material information to be misrepresented in UASNM's Forms ADV or marketing materials. Responsibility for preparing and ensuring the accuracy of disclosures in Forms ADV and marketing materials was delegated to Kopczynski and Hudson, who in turn relied on ACA. Kopczynski, Hudson, and Ciambor had, or had access to, all information needed to fulfill their duties. Any failure to disclose or breach of duty was the failure of the delegates, who are eager to try to exculpate themselves by blaming Malouf.

The Division also failed to show payments to Malouf constituted transaction-based compensation. The compensation has not been tied to any particular transaction directed by

[1] A timeline summarizing relevant events is attached as Exhibit A.

Malouf, which is the very essence of transaction-based compensation. Instead, the Division relies on the similarity between total bond trade commissions earned by Branch 4GE and the total paid to Malouf at the end of three years.[2] The Division failed to demonstrate any correlation between the commissions earned by Branch 4GE and the payments to Malouf.

The Division claims Malouf ignored best execution but did not prove Malouf failed to seek or achieve best execution on any particular trade he directed, primarily because the Division cannot identify trades he directed. Instead, the Division relies on speculation about trades Malouf "might have" directed. It tried to prove the claim by asserting the commission LaMonde charged on some trades (which were monitored and approved by RJFS) is evidence best execution was not achieved, regardless of other factors prescribed in SEC guidance. The Division then assumes, based on the estimate Malouf directed 60% to 95% of bond trades, that he must be responsible for directing at least some trades with "excessive" commissions. The Division's reliance on these speculative assumptions is insufficient to establish its claim.

II. FACTS

a. The Division Failed to Prove A Secret Oral Agreement

Beyond LaMonde's coerced "admission" there is no evidence Malouf tried to conceal his agreement. In fact, ample evidence shows Hudson, Kopcynski, and Ciambor knew or believed Malouf was being paid over time. Hudson knew about the sale of Branch 4GE and the payments in 2008 (FOF 347). His testimony proves Malouf did not lie about or conceal the agreement. Hudson claims he did not ask about the details because it was "not his business." (FOF 59, PFOF 143). Hudson's claimed lack of knowledge is not credible. As the CFO of UASNM who attested to the accuracy of Form ADV disclosures, he was obligated to know the details.

[2] Analysis by expert DeNigris showed that when the payments are extrapolated over four years it is apparent LaMonde front-loaded payments which would have eventually constituted approximately 46.97% of the revenues earned by Branch 4GE. *See* DeNigris Rebuttal, Tab 4a.

In 2008 Kopczynski knew Malouf sold his RJFS branch to Lamonde (FOF 34). He claims he did not know about the payments until 2010 (FOF 306). His claim is not credible because he sold UAS to Hudson and Malouf via an ongoing payment arrangement, and he admitted suspecting the sale of Branch 4GE was made pursuant to a similar agreement (FOF 51). Incredibly, Kopcynski says he never asked about payments, although as CCO he was responsible for identifying and disclosing conflicts of interest (PFOF 158). He now admits he should have asked (PFOF 159). If true, Kopcynski's failure to inquire comports with other evidence he neglected his CCO duties. There is no evidence Malouf concealed the agreement from Kopcynscki.

COO Matt Keller also assumed Malouf was receiving payments from LaMonde in 2008, and admitted knowing about payments prior to March 2010 (PFOF 57, 60). Keller knew about the payments because Malouf disclosed them (PFOF 57). Ciambor also knew the branch had been sold in 2008 but claims he never asked about payments in 2008 or 2009 (PFOF 83, 149). He now says he believes he was lied to, an unsurprising assertion by a supposed expert consultant who admitted multiple failures in his conduct of the "mock SEC compliance audits." (PFOF 160). Ciambor also admits he found out about the payments because Malouf disclosed them (PFOF 26). The Division cannot explain why Malouf would volunteer that information to Kopczynski, Keller and Ciambor in 2010 after allegedly concealing it in 2008 and 2009.

According to the Division, LaMonde admitted he "passed along all or almost all of the commissions . . . to Malouf." *See* Division's Post-Hearing Brief III.B.1. The Division claims the payments are "generally consistent" with the admission. *Id.* But on a quarterly basis, the payments to Malouf differ significantly from the commissions and are inconsistent with an agreement to "pass all or almost all of the commissions along." (PFOF 124, 125).

The payments were no secret (FOF 347). Everybody who testified said they knew about the payments, assumed they were occurring, or were told about them by Malouf. Nobody testified that Malouf denied the existence of an agreement or the receipt of payments from LaMonde – the best they could do was to admit they never asked. It was also no secret that UASNM was directing bond trades to Branch 4GE from 2004 to 2011 (PFOF 122). Quite simply, there is no evidence to support the secret agreement on which the Division relies so heavily to lay blame with Malouf; and ample evidence the agreement was widely known.

b. The Division Erroneously Relies on Alleged Concealment By LaMonde.

To support its contention that Malouf concealed the agreement, the Division relies almost entirely on alleged concealment by LaMonde. The Division points to evidence LaMonde misled RJFS as to the existence (or not) of the agreement, and his apparent lack of candor with his wife. But the Division failed to show LaMonde concealed the agreement from anyone at UASNM, or ACA, or that Malouf was aware of LaMonde's communications with RJFS or his wife, or that he participated or condoned it in any way. Without linking it in any way to Malouf, evidence suggesting LaMonde may have attempted to conceal the agreement provides no support for the assertion that Malouf tried to conceal it from UASNM or ACA.

c. The Division Failed to Prove Malouf Directed Trades to LaMonde to Receive Payments Under a Secret Agreement

There is insufficient evidence that Malouf directed trades to LaMonde to receive payment under a secret agreement. No evidence establishes which trades Malouf directed at UASNM, only that Malouf, Hudson, Keller, and Kopczynski have roughly estimated Malouf directed somewhere between 60%-95% of UASNM's bond trades (FOF 76).[3] Other than Hudson's self-serving assertion (which lacks evidentiary support) that Malouf did not direct the trades placed

[3] There is no indication these estimates have been adjusted to exclude municipal and corporate bond trades which are not at issue

through brokers other than RJFS, there has been no evidence showing where Malouf directed any particular trade. The evidence shows only that from 2008 to 2011 Malouf directed certain bond trades for UASNM clients to RJFS (FOF 38), but no evidence indicating *which* bond trades he directed there.

The Division relies primarily on Hudson's testimony to try to establish the percentage of trading purportedly directed by Malouf to RJFS. His testimony is not credible because:

(1) Hudson's "estimates" regarding particulars of bond trading are wildly inaccurate. He admits the total volume of bond trading actually done by UASNM was double his estimate (PFOF 161). As co-owner, CFO, and Chairman of the Investment Committee, Hudson was intimately familiar with all aspects of UASNM's bond trading. His inability to approximate the volume of bond trading makes it likely that his estimate of the percentage of trades directed by Malouf is equally faulty;[4]

(2) The first time Hudson attempted to determine which trades Malouf directed was while suing Malouf to remove him from UASNM (PFOF 162). His self-interest in making those determinations, and his current self-interest to avoid regulatory liability, severely cloud their legitimacy; and,

(3) Hudson claims he only occasionally directed bond trades. But Ciambor – who does not share Hudson's self-interest – testified that Hudson did a "significant" amount of bond trading and was the "secondary trader" after Malouf (PFOF 25).

The fact that Malouf took the time to open accounts at UBS, Smith Barney, and Morgan Stanley, and used existing accounts at Griffin Kubiak, Stevens and Thompson, and Crews & Associates to buy bonds and check prices is evidence Malouf did not simply direct trades to LaMonde for payments (FOF 353). Keller testified Malouf obtained multiple bids on transactions they worked together, and Malouf taught Keller to obtain multiple bids (PFOF 61, 62). Keller also contradicted Hudson's testimony that Malouf primarily directed trades to RJFS, when he admitted to directing 50-60% of his own trades through RJFS (PFOF 59).

The Division relies heavily on the assertion that "one of the reasons Malouf chose to

[4] If UASNM's bond trading volume was double Hudson's estimate, his estimate of trades directed by Malouf should be cut in half, or otherwise significantly reduced.

trade through Raymond James was because then he got paid" (FOF 176). This statement, repeatedly taken out of context, is insufficient to support the claims or establish any intent. The Division carefully omits this was just "one of the reasons." What Malouf actually said – in context – was that if he could get the same bond at the same price from RJFS or another broker, he was not obligated to direct a trade to the other broker simply because he might benefit if the trade went through RJFS (PFOF 163). This was true before and after he sold Branch 4GE. The Division also omits Malouf's testimony that he would look at information regarding bonds available at various brokers, and look for whatever bonds were better. (PFOF 163). The Division failed to prove Malouf directed any trade to RJFS in spite of a more favorable price or commission at another broker. The SEC itself issued guidance that an adviser must consider qualitative factors other than commission (PFOF 49), and Malouf considered these factors in directing trades to RJFS (PFOF 164).

d. <u>The Division Failed to Prove Malouf Attempted to Conceal Any Arrangement</u>

Though there is no evidence Malouf concealed the sale agreement, the Division argues the Purchase of Practice Agreement ("**PPA**") was a sham intended to conceal it. The Division asserts Malouf was unable to produce a copy of the PPA from 2008 and cannot produce Exhibit A, which it claims is critical to its validity. Testimony from witnesses (Bell, Ciambor, Hudson, and McGinnis) was not that Malouf was unable to produce a copy of the PPA, but that they never asked for a copy of it or Exhibit A, or inquired about its terms. Though a document titled "Exhibit A" has not been found, it is undisputed RJFS transferred clients from Malouf to LaMonde pursuant to a list existing on December 31, 2007 (FOF 69, 70). That list was either Exhibit A, or contained information from Exhibit A. The transfer of accounts was consistent with usual methods by which branches were sold (PFOF 116).

The Division also argues the PPA is a sham because LaMonde did not precisely adhere to

the terms. But it is neither unusual nor impermissible to modify the terms of agreements orally or through performance. Deviation from the terms of a written agreement does not invalidate it, and is not evidence it did not exist. (PCOL 64, 65). The essential terms memorialized in the PPA were that Malouf would sell his branch, LaMonde would service all transferred accounts, LaMonde would make payments based on branch revenues for a period of time, and LaMonde would eventually no longer be obligated to pay Malouf. All these things occurred beginning in January 2008. Malouf and LaMonde's conduct was consistent with the fundamental provisions and purposes of the PPA from 2008 forward, evidencing a bona fide agreement.

e. The Division Failed to Prove Malouf is Responsible For Inadequate Disclosures

i. Forms ADV

While some Forms ADV did not specifically disclose the sale of Branch 4GE or related payments, the Division has failed to establish which of them were filed with the SEC or distributed to customers. In fact, the only two customers the Division called as witnesses both testified they were customers during periods when Malouf's ownership of Branch 4GE and the potential conflict of interest were disclosed on Forms ADV (PFOF 47, 75). The Division also failed to establish that Malouf is personally responsible for any purported nondisclosures.

Kopczynski was CCO from 2004 to 2010, and was responsible for the firm's compliance and ensuring the policies in the compliance manual were implemented and followed (FOF 16, 110, COL 21). Kopczynski admits his responsibility included reviewing Forms ADV for accuracy and completeness (FOF 55, 58, COL 20). It was permissible for Malouf to delegate these duties to Kopczynski (FOF 108, PFOF 79), and it is undisputed that such delegation took place (FOF 361). Malouf reasonably relied on Kopczynski to satisfy his duties as CCO and ensure that the Forms ADV were accurate (FOF 102).

In 2008 Kopczynski knew Malouf sold Branch 4GE and suspected that payments were

being made (FOF 34, 51). It was his duty as CCO to take corrective action, or advise Malouf of corrective action needed (COL 22), including action related to Form ADV disclosures. Despite his knowledge and beliefs, he never took corrective action or advised Malouf any was necessary. Kopczynski's failures as CCO are evidenced by other inaccurate Form ADV disclosures made under his supervision related to the investment committee (FOF 367), the leasing arrangement between UASNM and Branch 4GE (FOF 368), and Malouf's employment history. None of these were a result of any purported concealment by Malouf.

Hudson signed or authorized someone at ACA to sign his name on every Form ADV (PFOF 88). By doing so he attested that the Forms were true and correct under penalty of perjury (FOF 369). Hudson knew Malouf sold Branch 4GE in 2008 and was receiving ongoing payments (FOF 34, 50). He correctly assumed payments were made in connection with a financing or installment payment schedule (FOF 34). Hudson also knew UASNM was placing trades through RJFS (PFOF 157). He had all information needed to ensure the conflict of interest was disclosed before signing the Forms ADV, and was aware that such a conflict should be disclosed (FOF 127, 349). Hudson signed the forms anyway without raising any concern.

ACA reviewed Forms ADV and recommended necessary updates annually (FOF 384). Ciambor was a principal consultant at ACA, he led examinations of UASNM, and he personally reviewed Forms ADV (FOF 392, 393, PFOF 41). Ciambor knew in 2008 Branch 4GE had been sold (FOF 149) and that from 2007 to 2011 a number of bond trades were being sent to RJFS (FOF 275). Ciambor did not ask about the terms of the sale or if there were ongoing payments, but admits those questions would have been asked during a real SEC examination like ACA was hired to simulate (FOF 104, 105). Ciambor's primary contacts at UASNM – Hudson and Kopczynski – never disclosed the payments to Ciambor despite their knowledge (FOF 385,

PFOF 35). Ciambor's failure to gather sufficient information regarding the sale is likely attributable to the fact that, unknown to Malouf, he was completely unqualified for his role and lacked proper training (PFOF 21, 28). Ciambor's after-the-fact assertions that Malouf misled him are obvious attempts to cover his negligent performance, likely driven by ACA's corner cutting on the examinations because it was charging only 20-30% of its normal fee. (PFOF 36).

Though the Division seeks to single out Malouf for purportedly inadequate disclosures, evidence shows he was more proactive than Hudson or Kopczynski in updating Forms ADV when he discovered issues. For example, when Malouf took over as CCO from Kopczynski, the Form ADV was almost immediately updated to disclose Malouf's sale of Branch 4GE in exchange for a series of payments (FOF 31). Malouf specifically authorized this disclosure (FOF 280). He also advised Kopczynski and Hudson that information regarding his education was incorrect as soon as he discovered it, spurring an appropriate update on the Form ADV (FOF 83). There is no evidence that these disclosures were prompted by anything other than Malouf's own recognition of his responsibility to make appropriate modifications.

ii. Testimony That Malouf Concealed Information is Not Credible

The Division relies on the "secret agreement" theory to assert that Malouf hindered those involved in the preparation of Forms ADV. It tries to justify unfairly singling out Malouf by creating reasons why Kopczynski, Hudson, and Ciambor failed in their duties. But the testimony the Division relies on is not credible and stems from the self-interested attempts of those witnesses to excuse their own regulatory violations and professional shortcomings.

Hudson must accuse Malouf of concealing information despite contrary evidence because he signed off on Forms ADV and attested to their truth and accuracy (FOF 369). Admitting he knew about the arrangement would expose him to potential regulatory liability. Hudson also has

a substantial financial incentive to support Kopczynski's story because he has personally guaranteed a promissory note to Kopcysnki with a balance of approximately $700,000 (FOF 88).[5] Hudson is surely concerned that he would be forced out of UASNM like Malouf if he undermined Kopczynski, resulting in an immediate repayment obligation. Kopczynski obtained this leverage over Hudson when he agreed to briefly forbear on the note on the condition Malouf did not rejoin UASNM (FOF 89). Kopczynski would also expose himself to potential regulatory and civil liability if he admitted Malouf's agreement was not concealed.

Ciambor must also claim Malouf misled him because admitting otherwise exposes him and his employer to significant liability for negligence, and his possible termination from ACA. If he does not say Malouf concealed the agreement, he must explain why he repeatedly failed to conduct basic and routine aspects of the job that he and ACA were specifically hired to do (PFOF 160). Given his admissions that he failed to conduct mock SEC audits in the way a real SEC examiner would (and the way ACA was contractually obligated to (FOF93)), his after-the-fact assertions that Malouf misled him are hardly surprising and entirely incredible.

f. The Division Failed to Prove Malouf Caused UASNM to Distribute Advertisements That Included Misleading Representations

The Division fails to establish Malouf's responsibility for marketing materials containing misleading representations. The Division's claim relates to a disclosure on the UASNM website regarding investment advice "void of conflicts of interest." The accuracy of UASNM's marketing materials was a compliance function delegated to Kopczynski as CCO (COL 19). UASNM's compliance manual required the CCO to approve all marketing materials (FOF 56). Kopcynski himself admitted that this was his obligation (PFOF 153, 166). Kopczynski claims to

[5] Calhoun and Keller are also financially beholden to Kopczynski knowing that, like Malouf, they stand to lose their employment (and Keller his ownership interest in UASNM) if they undermine Kopczynski. Calhoun's friendship with Malouf's ex-wife further clouds the legitimacy of her testimony.

have reviewed the website and believed it to be accurate, despite contrary advice from ACA.

The Division contends Malouf is responsible for inaccuracies associated with this statement because of the payments he received. However, the statement was problematic due to Kopczynski and Hudson's own conflicts of interest long before Malouf sold Branch 4GE. In September 2007, before Branch 4GE was sold, ACA advised Hudson the language on the website was potentially misleading and recommended removing it (FOF 85). It provided the same advice in December 2009 (FOF 86). Neither Hudson nor Kopczynski, who reviewed ACA's annual reports, took any action. (PFOF 167). There is no evidence Hudson or Kopczynski ever advised Malouf of ACA's recommendations. Hudson and Kopczynski did not change the website until after Malouf left UASNM in 2012. They only did so in response to an SEC examination (PFOF 156). Given the evidence of Hudson and Kopczynski's failings, the Division's attempt to single out Malouf for the statement is unsupported and unjustified.

g. The Division Failed to Prove Malouf Acted as an Unregistered Broker

The Division failed to establish Malouf acted as a broker. It relies primarily on the claim that Malouf received transaction-based compensation. But as discussed in section III.a below and in Section III.D.a of Malouf's Post-Hearing Brief, the evidence does not show the payments to Malouf were transaction-based, or that Malouf engaged in any other broker-specific conduct.

h. The Division Failed to Prove Malouf Did Not Seek Best Execution

The Division relies on two arguments for its best-execution claim: (1) Malouf did not obtain multiple bids on every bond trade; and (2) customers were charged "excessive" commissions on bond trades. The Division asserts that obtaining competing bids is "generally" how best execution is sought. However, there is no regulatory requirement – nor any suggestion in the SEC's guidance -- that an investment adviser must obtain multiple bids (PFOF 84). The Division's own expert admitted multiple bids are not necessary on every transaction (FOF 381,

PFOF 61). The SEC does not require a real time, trade-by-trade analysis to ensure best execution (PCOL 86). Rather, SEC guidance dictates that "money managers should periodically and systematically evaluate the execution performance of broker-dealers" (PCOL 50).

As the direct supervisor of compliance, it was Kopczynski's duty to ensure this periodic and systematic evaluation took place. This included reviewing trade tickets as well as any multi-bid process used (PFOF 58 COL 17). Kopczynski was also responsible for supervising Malouf's trading (PFOF 59). Hudson and Kopczynski also relied on ACA to conduct periodic and systematic reviews of best execution (FOF 97, 360). Based on Ciambor's review it appeared UASNM was seeking best execution (FOF 264). Neither Kopczynski nor Ciambor ever advised Malouf of any deficiencies in best execution (FOF 100, 101). Unbeknownst to Malouf, however, Ciambor never actually reviewed bond trades for best execution. (PFOF 168).

The Division failed to prove Malouf did not employ procedures to achieve best execution. He opened and used accounts at other brokers to buy bonds or to check prices (FOF 353). He spot-checked bond market pricing daily, and checked bids at Schwab, Fidelity, and other brokers (PFOF 49, FOF 180). Ciambor saw evidence of bids during his exams (PFOF 23, 24, 42). Keller testified Malouf sought multiple bids on trades they worked together (PFOF 61). Malouf relied on BondDesk as one tool to achieve best execution. The information received from BondDesk included bonds meeting particular parameters, and the five best prices for the bonds from approximately 160 broker-dealers (PFOF 11, 149, FOF 374). The Division's own expert admitted that BondDesk was an appropriate place to find best bond bids (FOF 263).

The Division argues the commission on certain trades is evidence best execution was not sought. Besides not being able to show what the commission was on any trade directed by Malouf, commissions alone are insufficient to show best execution was not achieved. According

to the SEC's guidance (the only existing regulatory guidance), an investment adviser must consider a number of qualitative and quantitative factors, and best execution is not determined by lowest commission (COL 23, PCOL 49). The Division claims commissions were "excessive," but its own expert agreed there are no published commission limits (FOF 378, COL 15). Whether a commission is reasonable is fact and situation specific and, as the Division's expert also agreed, reasonable minds can differ on the range of reasonable commissions (COL 16).

Without any published commission limits, the Division relied on a subjective range created for this case by its expert. This range has never before been endorsed by the SEC, any industry organization, or anyone else (FOF 80). It is not absolute (FOF 112), and is of little use in determining whether commissions were excessive here when the average of the commissions is a mere eleven hundredths of a percent above the upper end of the Division's expert's range (0.818% versus 0.70%) (FOF 41). The Division failed to cite any administrative proceedings where commissions of a similar magnitude have been found excessive. This case would be the first such finding. In fact, after an extensive search commissions averaging 2.73% (over three-times the average in this matter,) were the lowest "excessive commissions" Respondent could find on securities similar to the ones at issue here. *See Anderson*, Rel. No. 34-48352, 2003 WL 21953883 (Aug. 15, 2003).

Neither of Malouf's experts, Mr. Wolper or Mr. DeNigris, opined about a "reasonable range" of commissions here because: (1) the Division bears the burden of proving commissions were unreasonable, Malouf does not have to prove they were reasonable; (2) the Division presented no evidence regarding market conditions existing for the time period at issue, and the usefulness of any opinion on "reasonableness" is minimized by the numerous assumptions that would be required, and (3) the average commissions charged were far below the lowest found to

be excessive or unreasonable in prior similar proceedings. *See Anderson.* Rel. No. 34-48352

Rather than theoretical ranges based on generalizations and assumptions, a more objective indicator of reasonableness is the maximum commission grid maintained by RJFS (FOF 232, 265). RJFS had written policies and procedures regarding best execution (FOF 267, 268) and a commission grid which ensured that customers paid reasonable commissions (PFOF 15). Such commission grids are typical in the securities industry (FOF 42). None of the bond transactions in this matter exceeded RJFS policy (FOF 42). The Division tries to dismiss the RJFS guidelines as irrelevant and applicable only to brokers. But if prices are fair and reasonable for a broker, it defies logic to claim that they would suddenly be "excessive" merely because they were paid by customers of an investment adviser.

III. CLAIMS

a. The Division Failed to Prove Malouf Violated Exchange Act Section 15(a)(1) or 15C(a)(1)(A)

To prove its Section 15(a)(1) and 15C(a)(1)(A) claims the Division must show Malouf acted as a "broker." The conduct the Division relies on to establish Malouf was acting as a broker is entirely consistent with and typical of registered investor adviser conduct, which Malouf was permitted to engage in (PFOF 141). An investment adviser is "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities." 15 U.S.C. 80b-2(11).

Because of the weakness of its "other broker conduct" evidence, the Division must rely primarily on the claim that Malouf received transaction-based compensation. Transaction-based compensation is the hallmark of a broker (PCOL 37). As noted, the payments to Malouf do not

correlate to the transactions and therefore are not indicative of transaction-based compensation.

The Division's contention that various tax forms establish payment of commissions is unavailing. The Division relies on Malouf and LaMonde's tax returns, and Forms 1099 LaMonde provided to Malouf. The fact LaMonde provided 1099s to Malouf and referred to the payments as "commissions" on his returns carries little weight. LaMonde was no tax expert, and his characterization of the payments as deductible business expenses (commission) rather than non-deductible payments for the branch was a self-serving attempt to lower his taxable income.

Don Miller, Malouf's well-credentialed CPA, testified the payments were improperly reported as commissions and that Malouf should not have been issued 1099s. The payments were for the sale of a business and properly treated as capital gains (PFOF 132, 133). The fact that Malouf's draft 2008 and 2009 tax returns identify him as an "investment broker" and claim deductions for expenses related to his brokerage business is not determinative of whether Malouf was a broker under the securities laws. The returns are incomplete drafts, there are a variety of legitimate business expenses which may be deducted after an individual ceases to operate a business, and "investment broker" is a characterization by a CPA, not someone who is familiar with terms of art under the federal securities laws.

The Division argues Malouf's agreement with LaMonde for the sale of Branch 4GE is no "safe haven" from its unregistered broker claims. However, the agreement between Malouf and LaMonde is evidence the payments to Malouf were not transaction-based. They were for the purchase of Branch 4GE and they were based on the revenues of the branch, not any particular transaction. The agreement complied with the written terms of NASD IM 2420-2. Payments made thereunder were permissible and are not evidence Malouf acted as a broker.

b. <u>The Division Failed to Prove Malouf Violated Advisers Act Sections 206(1) or (2)</u>

The Division claims Malouf violated Advisers Act Sections 206(1) and (2) by failing to

disclose the payments he was receiving from LaMonde on Forms ADV and marketing materials, and by failing to seek best execution. As noted, the Division failed to establish the scienter required under 206(1). The Division also failed to establish Malouf is personally liable for any claim under 206(2). Kopczynski, Hudson, and Ciambor were primarily involved in the preparation of Forms ADV and marketing materials, and Kopczynski was ultimately responsible for the accuracy of the disclosures as CCO and Malouf's delegate. They had all the information they needed to ensure such disclosures were accurate. Any failure to disclose is attributable to them, and UASNM has already been assessed a civil penalty which Malouf has personally paid.

c. The Division Failed to Prove Malouf Violated Securities Act Sections 17(a)(1) or 17(a)(3), Exchange Act Section 10(b), or Rules 10b-5(a) or (c)

The Division failed to establish the requisite scienter for its § 17(a)(1) § 10(b), and Rule 10b-5 claims, or negligence for its § 17(a)(3) claim. Malouf delegated duties with respect to Forms ADV and marketing materials, and reasonably relied on the professional advice and oversight of Kopczynski, Hudson, and Ciambor. Such reliance negates a finding of scienter or negligence. As noted, the Division also failed to prove Malouf is responsible for negligently misrepresenting or omitting any information on UASNM's website or in its Forms ADV.

d. The Division Failed to Prove Malouf Violated Section 207 of the Advisers Act

The Division failed to establish the requisite "willfulness" for its section 207 claim. Any inadequate disclosures on any Forms ADV were based on reasonable reliance on an external evaluation by ACA, Ciambor, and Kopczynski. The Division's claims also fail because Hudson signed every Form ADV and attested to its accuracy while in possession of sufficient evidence to ensure the adequacy of all disclosures therein, and Malouf reasonably relied on him to do his job.

e. The Division Failed to Prove Malouf Aided and Abetted Violations of Advisers Act Sections 206(1), (2) or (4), or Section 207, or Rule 206(4)-1(a)(5)

The Division failed to establish the requisite "knowing and substantial assistance" or

"awareness or knowledge" for its aiding and abetting claims. As noted, the evidence establishes that Malouf's conduct was not a "substantial causal factor" in bringing about a primary violation. Whatever failings existed at UASNM were systemic and attributable to failures and breaches of duty by Kopczynski, Hudson, Ciambor, and others.

IV. RELIEF REQUESTED

a. The Division's Claims Are Barred By The Statute of Limitations

The Southern District of Florida recently rejected arguments similar to those asserted here regarding statutes of limitations in *SEC v. Graham*, 21 F.Supp.3d 1300 (S.D. Fla. 2014). The court found injunctive relief is a penalty intended to punish and disgorgement constitutes a forfeiture, both of which are subject to a five-year statute of limitations in 28 U.S.C.A. § 2462. The Division's attempt to recast the relief sought as "equitable and remedial" to avoid the purview of the statute of limitations is exactly why the *Graham* Court reached its decision.[6]

The Division asserts the "continuing violations doctrine" in an attempt to spare its civil penalty claim from the statute of limitations. However, the Supreme Court found the continuing violation doctrine does not apply when the violations relate to separate and discrete acts. *See National RR Passenger Corp. v. Morgan*, 536 U.S. 101, 114-15 (2002) (finding a plaintiff could not recover for discrete violations occurring outside the applicable time period and rejecting application of the continuing violations doctrine); *CSC Holdings, Inc. v. Redisi*, 309 F.3d 988, 992 (7th Cir. 2002) (refusing to apply the continuing violation doctrine to violations arising from sales constituting separate and discrete statutory violations). Repeatedly violating a statute does not convert multiple individual violations into one long continuing wrong. *Redisi*, 309 F.3d at 992. This is exactly what the Division argues in its request for relief, stating "[e]ach of the 74

[6] The Court said that if it held otherwise the door would be open for government plaintiffs to avoid the statute of limitations by coming up with new terms for the relief being sought and claiming that it is not expressly enumerated in § 2462. *Graham*, 21 F.Supp.3d at 1311.

commission payments Malouf received . . . was a separate violation, as was each misleading disclosure on UASNM's Forms ADV and website." *See* Division's Post-Hearing Brief Section IV.E. By the Division's own contention, each alleged violation was separate and discrete, and the continuing violation doctrine should not apply. As a result, claims based on alleged violations occurring prior to June 9, 2009 are barred by the statute of limitations.

b. A Cease and Desist Order or Collateral Bar Are Not in the Public Interest

A cease and desist order or collateral bar are not warranted because there is no reasonable likelihood of future violations. Cease and desist orders are intended to "prevent resumption of unlawful actions." *KPMG Peat Marwick* LLP, Rel. No. 34-43862, 2001 WL 47245, *26 (Jan. 19, 2001). Collateral bars serve a similar purpose.

All of the claims asserted stem from the payments Malouf received from LaMonde for the sale of Branch 4GE. Malouf is no longer receiving payments for the sale, and he will not receive any in the future (FOF 308). Malouf has a much keener appreciation for his disclosure and best execution obligations as a result of this proceeding, and is committed to avoiding future missteps, as demonstrated by his attentiveness to disclosures and other compliance issues during his brief tenure as CCO of UASNM in early 2011. Malouf has a clean record during his 31 years in the securities industry (PFOF 3), and has operated NM Wealth Management as a registered investment adviser since 2011 without any regulatory issues or customer complaints. The conduct at issue is limited to a unique set of circumstances over just three years. His long history of compliance with regulations and his continued compliance since leaving UASNM show that any regulatory issues at UASNM were isolated and are unlikely to occur in the future.

Further, any violative conduct was not solely attributable to Malouf, as Kopczynski, Hudson, and Ciambor all played a role. Malouf is no longer working with any of them. He

never acted deceptively or with ill intent. The extent of harm to investors was relatively small,[7] and all affected customers have been fully reimbursed by Malouf. During his seven years in charge of UASNM there were no formal complaints by any clients about the propriety or quality of any of the investment decisions made, or the performance of any client portfolios (FOF 343). Malouf has also personally shouldered the burden of the civil penalty imposed on UASNM.

c. Disgorgement and Prejudgment Interest Are Not in the Public Interest

The purpose of disgorgement is not to punish but to prevent unjust enrichment by depriving a wrongdoer of ill-gotten gains. *S.E.C. v. Bilzerian*, 814 F. Supp. 116, 120 (D.D.C. 1993), *aff'd*, 29 F.3d 689 (D.C. Cir. 1994); *Huff*, 758 F. Supp. 2d at 1358, *aff'd*, 455 Fed. Appx. 882 (11th Cir. 2012). Disgorgement above amounts Malouf already compensated investors would be improper because it is punitive, and because funds Malouf received for the reasonable value of Branch 4GE are neither ill-gotten nor constitute unjust enrichment.

The Division acknowledges funds Malouf repaid to customers should not be disgorged. Malouf should also receive credit for the $100,000 civil penalty he paid on behalf of UASNM. The remaining $462,000 should not be disgorged because it would punitively deprive Malouf of the reasonable value he received for the sale of Branch 4GE.[8] The Division calculated Malouf should have received $641,290 for the sale under the terms of the PPA. *See* Ex. 208. As it stands, Malouf has effectively received only $462,000 for the sale of Branch 4GE. There is nothing "unjust" about compensation received for the sale of a brokerage office, and the Division has not argued otherwise. Therefore, Malouf should not be ordered to disgorge funds (or pay related prejudgment interest) representing the reasonable value received for Branch 4GE.

---

[7] The average reimbursement check sent to UASNM clients was less than $2,300, with many being less than $1,000.

[8] In his Brief, Respondent mistakenly calculated the amount sought by the Division using the $1,174,048 claimed in the Division's Pre-Hearing brief. As noted in the Division's Post-Hearing Brief, it actually seeks to disgorge only $1,068,084.

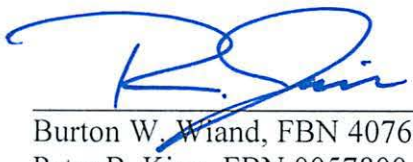
d. Civil Penalties Are Not in the Public Interest

Civil penalties should not be imposed. Evidence shows Malouf's conduct was devoid of ill-will or malice, and he made numerous efforts to ensure UASNM complied with regulations. He operated UASNM from 2004 through 2007 without issue, disclosing his ownership of Branch 4GE throughout. He retained ACA to conduct mock SEC audits and ensure UASNM's regulatory filings and marketing materials complied with SEC regulations. He relied upon Kopczynski as CCO due to his experience. When compliance issues were identified, Malouf quickly took corrective action. There is no evidence Malouf concealed information, or that he engaged in fraud, deceit, manipulation, or a deliberate disregard of regulatory requirements.

Based upon his lengthy, trouble-free career in the securities industry, it is evident that any purported violations from 2008 to 2011 were unintentional and resulted from oversights of several individuals. His conduct was not egregious – the commissions paid were all well below RJFS limits for "fair and reasonable" commissions, and Malouf indisputably instructed LaMonde not to charge over 1%. The alleged "excessiveness" is based on a purely subjective standard the Division's expert admits is imprecise, and no witness was able to attribute higher-commission trades to Malouf. Malouf's conduct did not create substantial losses – the average effect of commissions on bond yields was just 0.14% (See DeNigris Rebuttal Tab 3). Moreover, UASNM customers have been fully compensated by Malouf for purported excessive commissions.

Finally, because of the ruinous effect Malouf's termination from UASNM and this proceeding have had on his financial condition, Malouf is unable to pay any civil penalty that might be assessed. Regardless, the Division's argument for third-tier penalties is unavailing. The evidence does not support the level of conduct warranting a third-tier penalty, and Malouf should not be subjected to such a penalty when UASNM was assessed a first-tier penalty (paid by Malouf) for the misconduct of Kopczynski and Malouf.

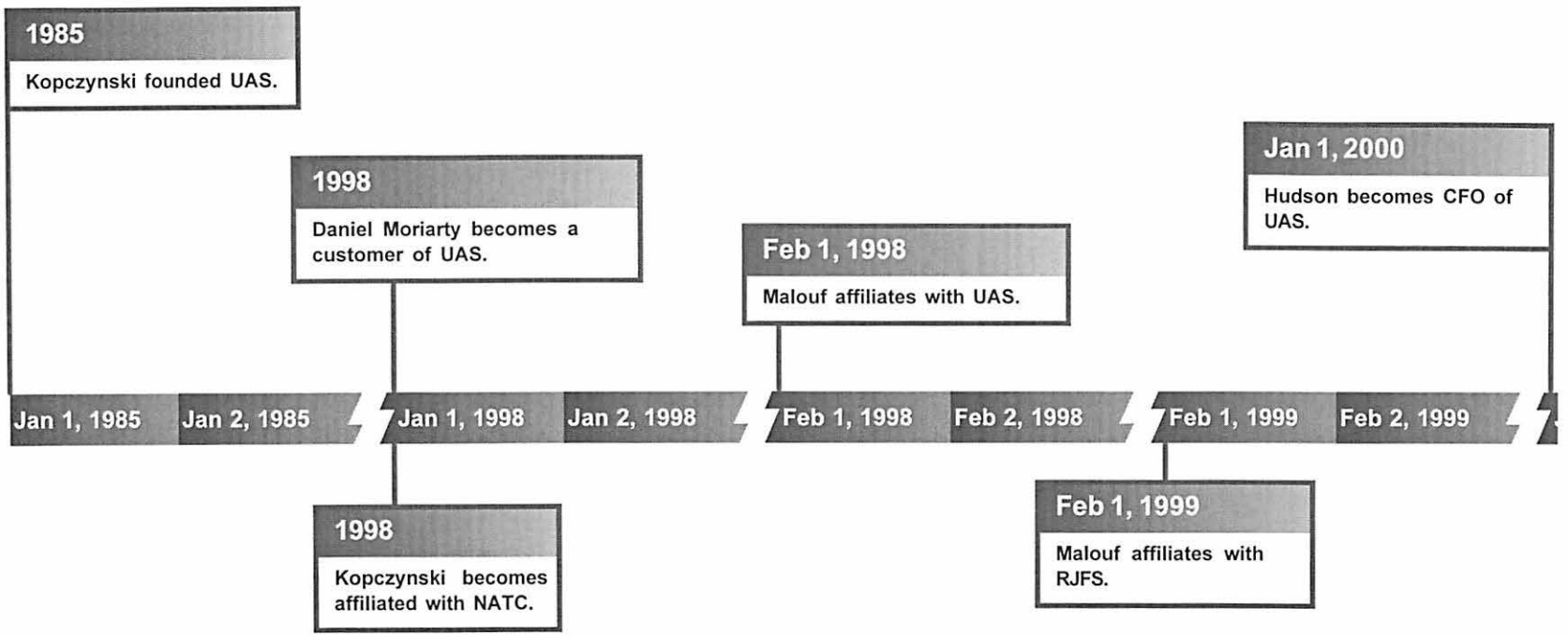
Respectfully submitted,



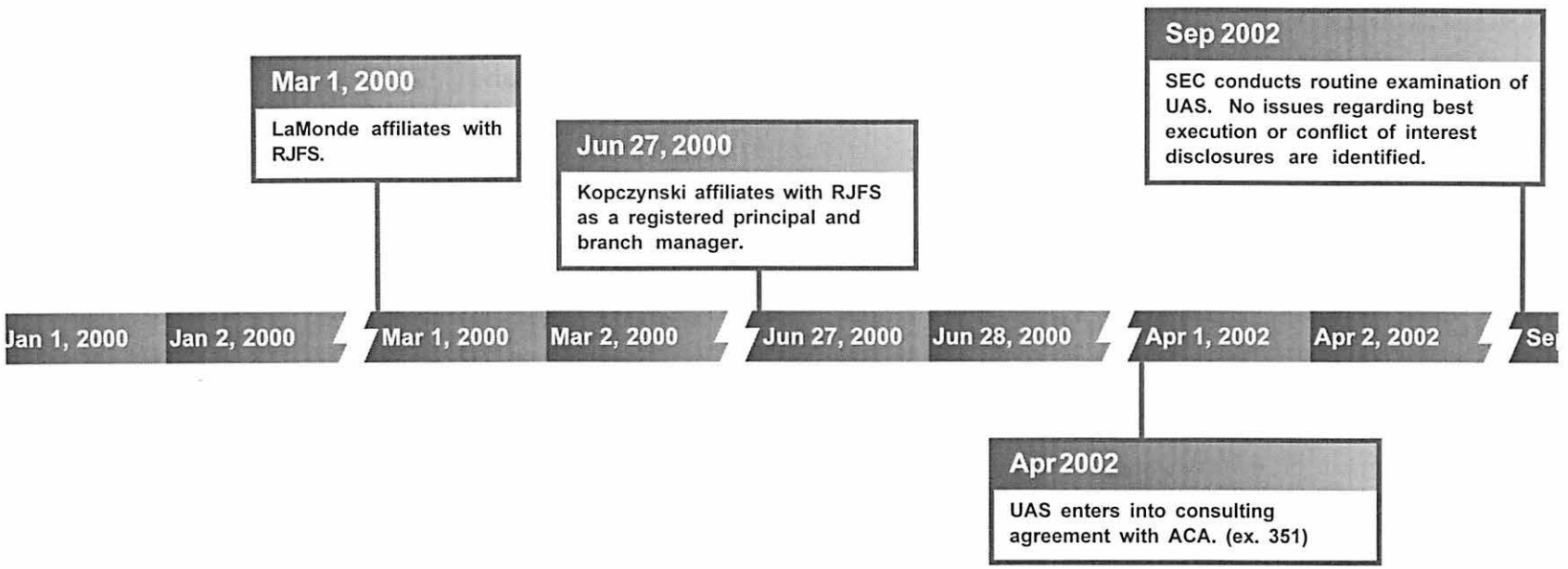
Burton W. Wiand, FBN 407690
Peter B. King, FBN 0057800
Robert K. Jamieson, FBN 0072018
WIAND GUERRA KING P.L.
5505 West Gray St.
Tampa, FL 33609
Telephone: (813) 347-5104
Fax: (813) 347-5198
ATTORNEYS FOR RESPONDENT
DENNIS J. MALOUF

EXHIBIT A

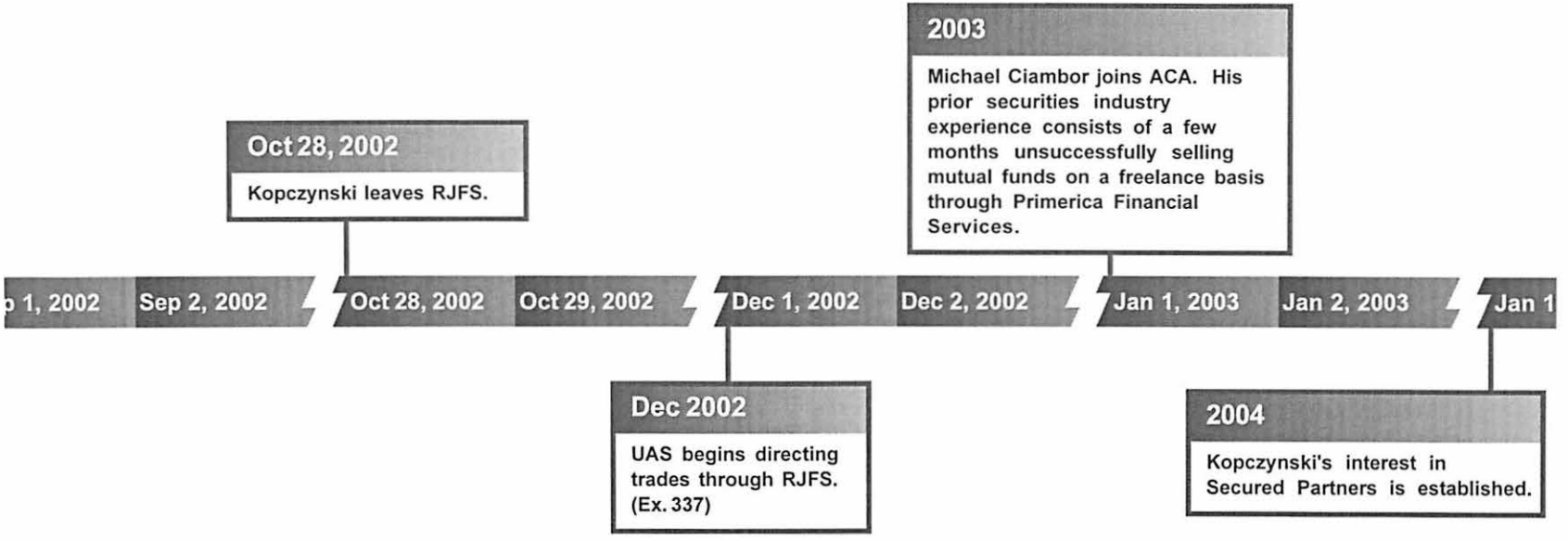
TIMELINE OF EVENTS



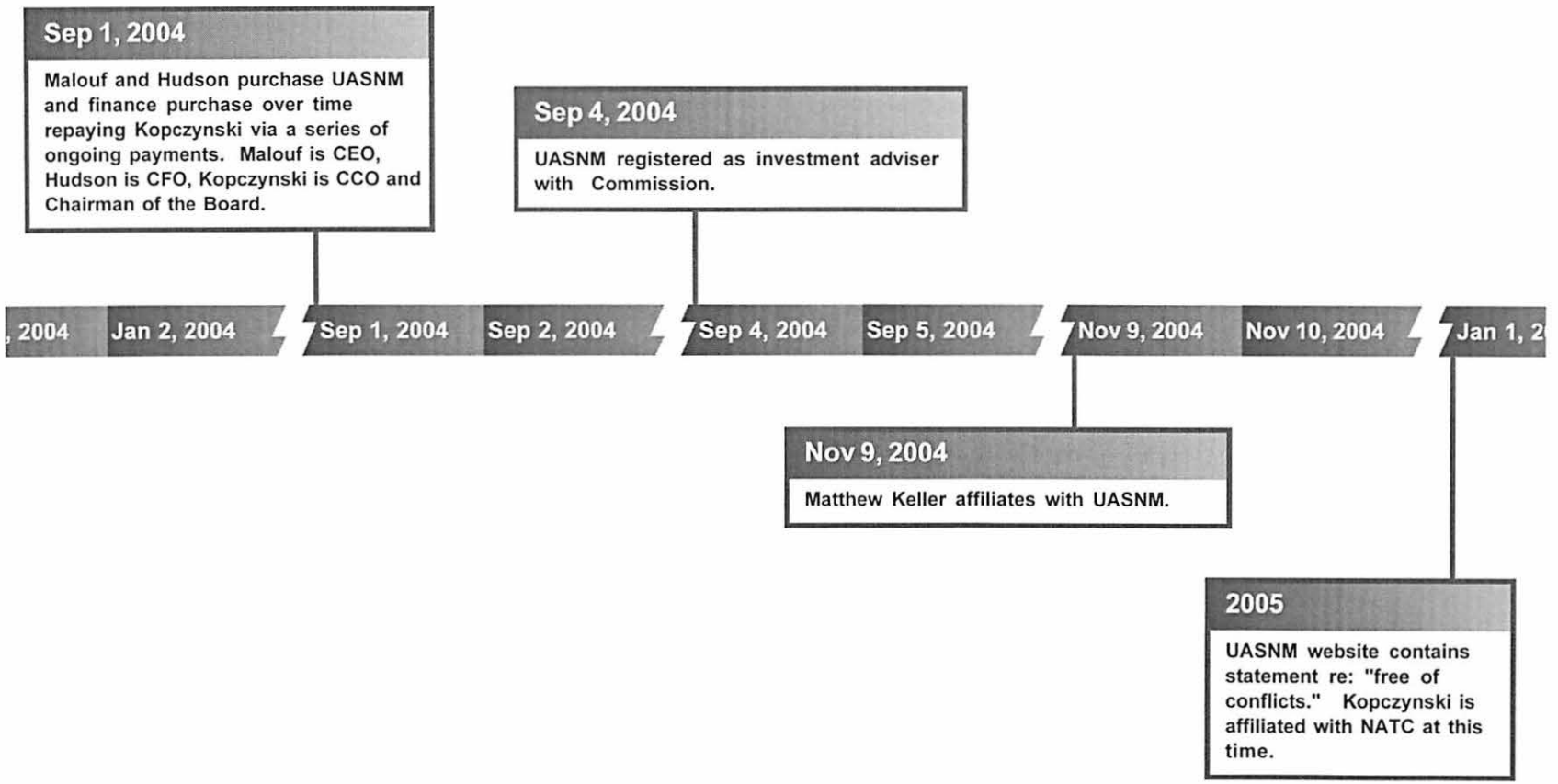
TIMELINE OF EVENTS



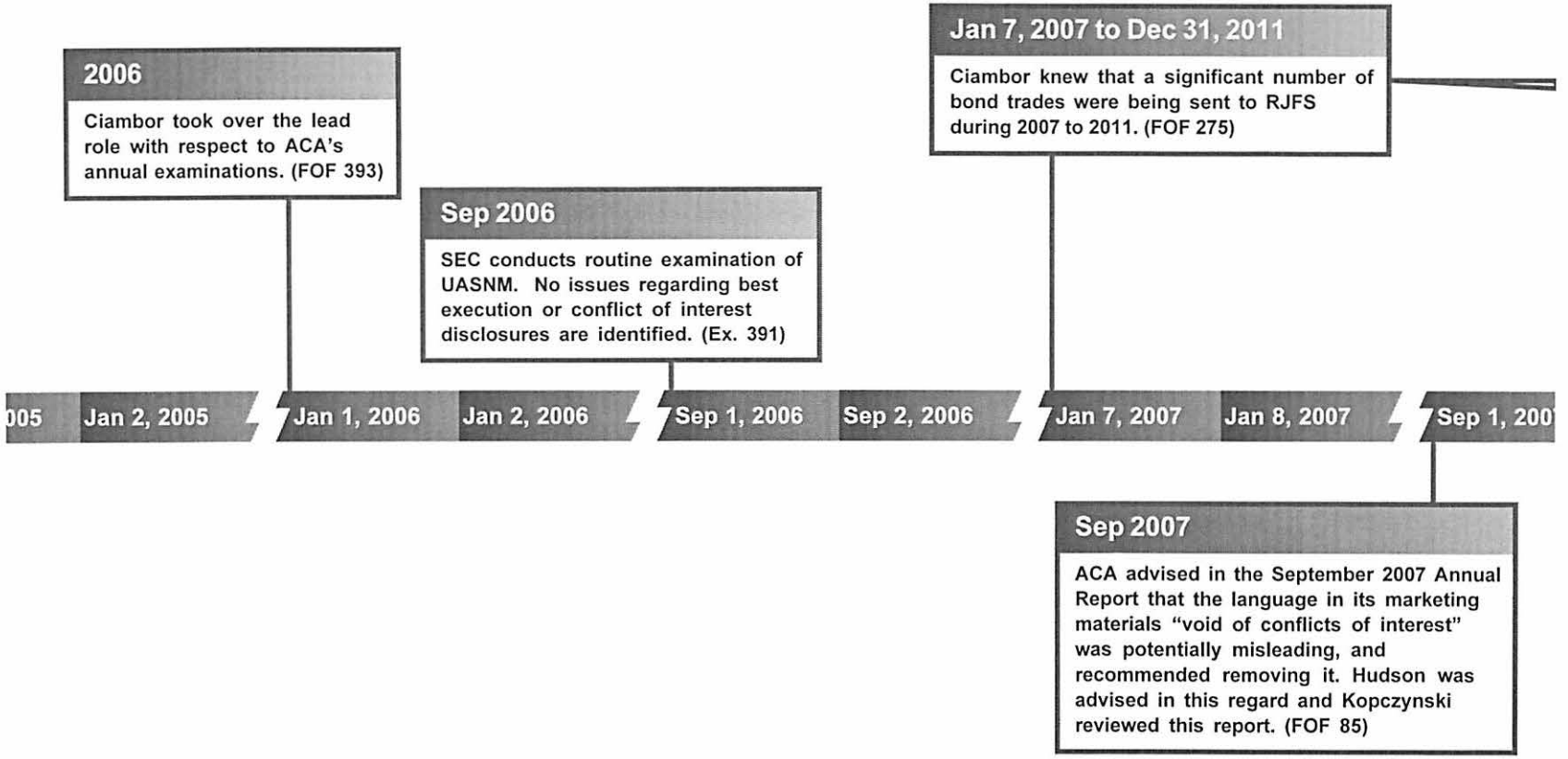
TIMELINE OF EVENTS



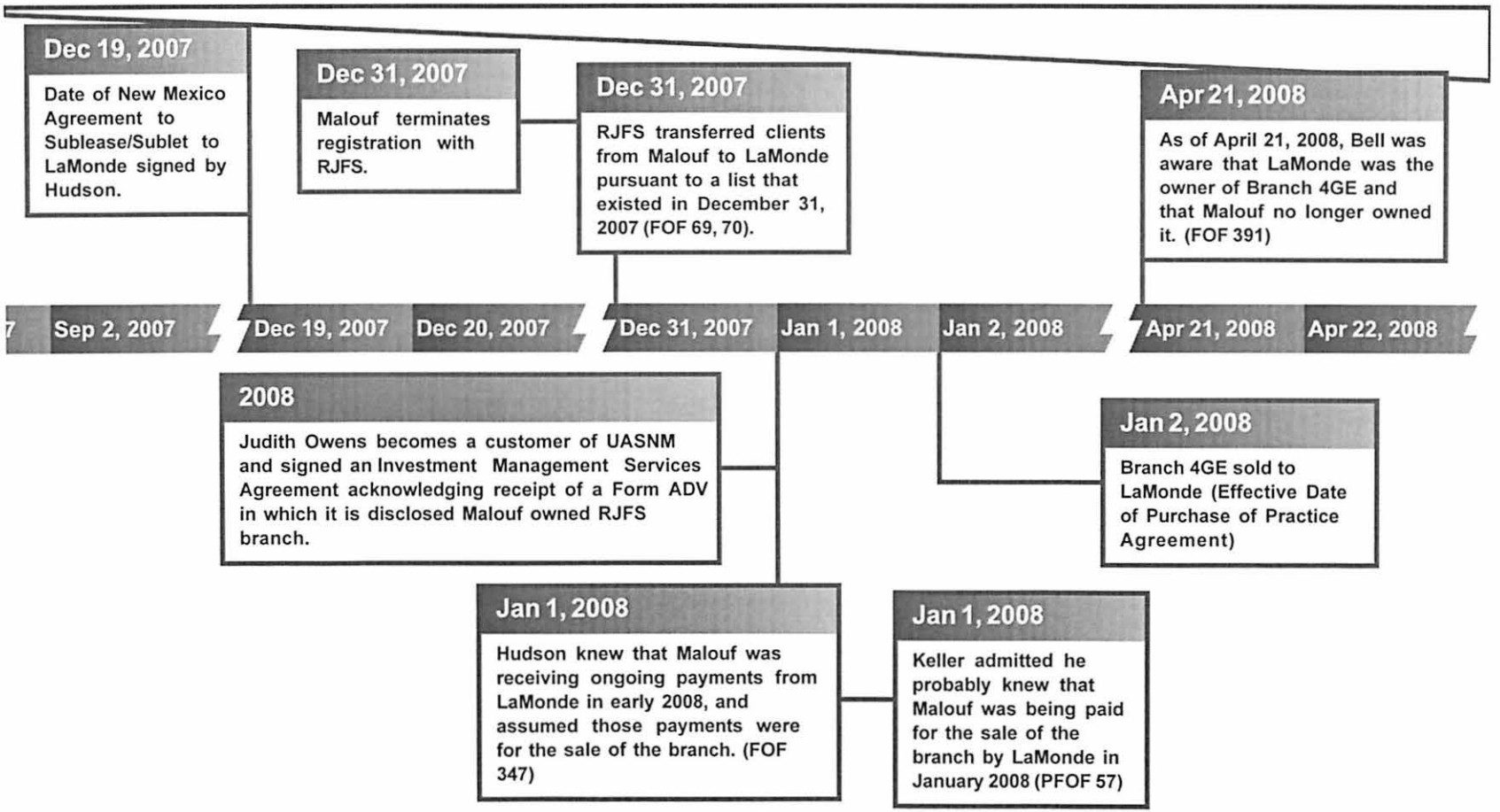
TIMELINE OF EVENTS



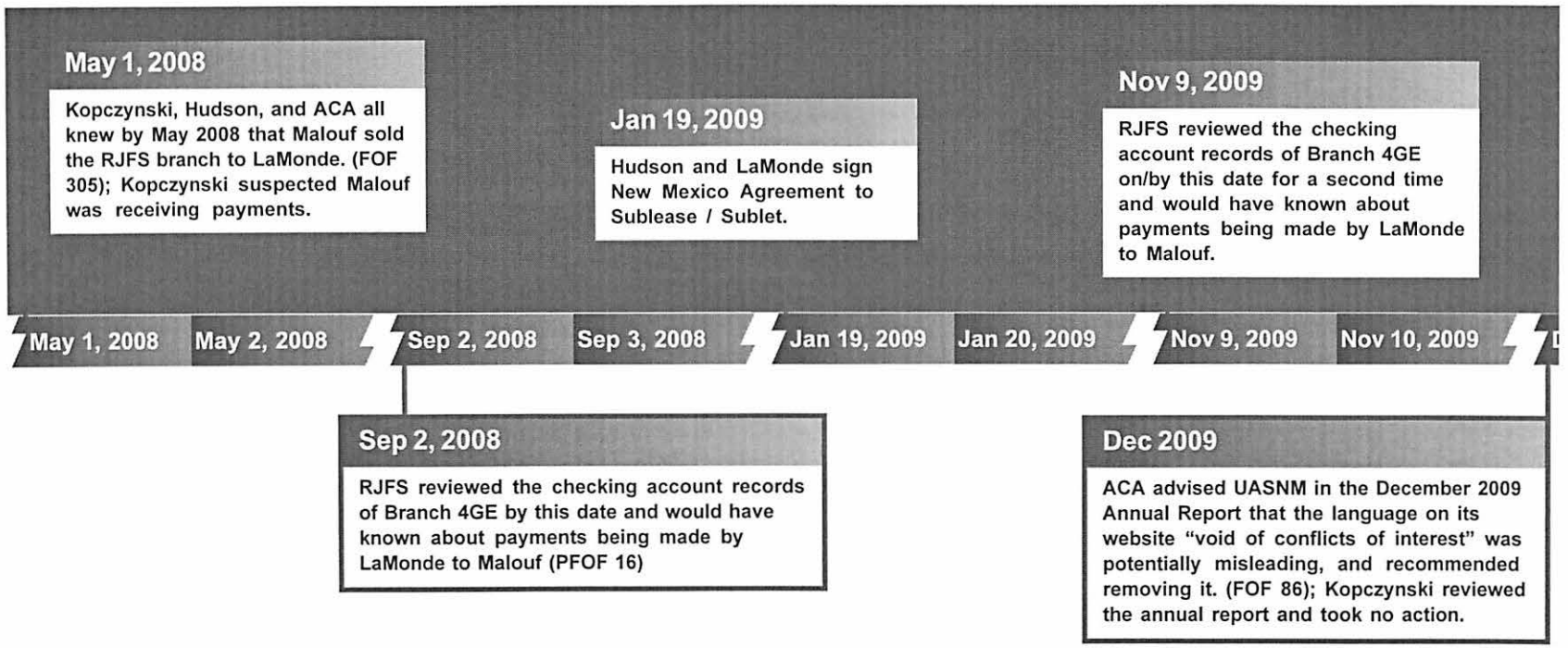
TIMELINE OF EVENTS



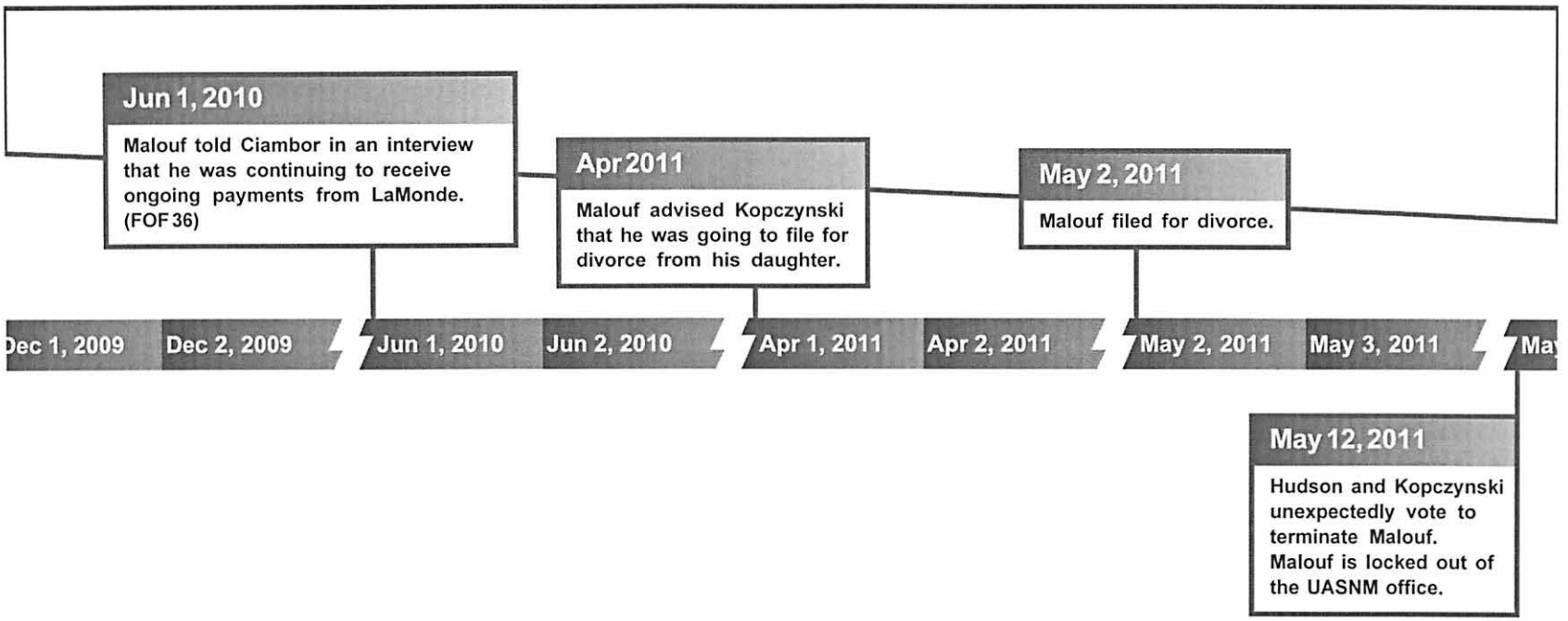
TIMELINE OF EVENTS



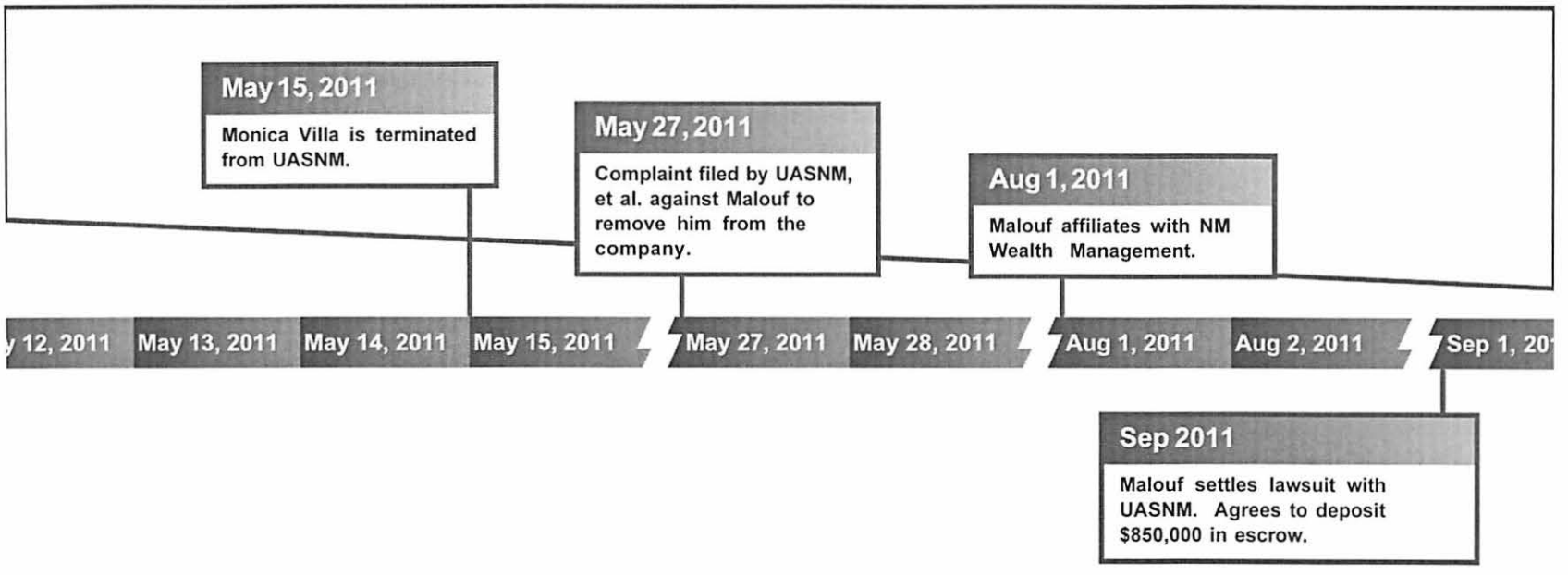
TIMELINE OF EVENTS



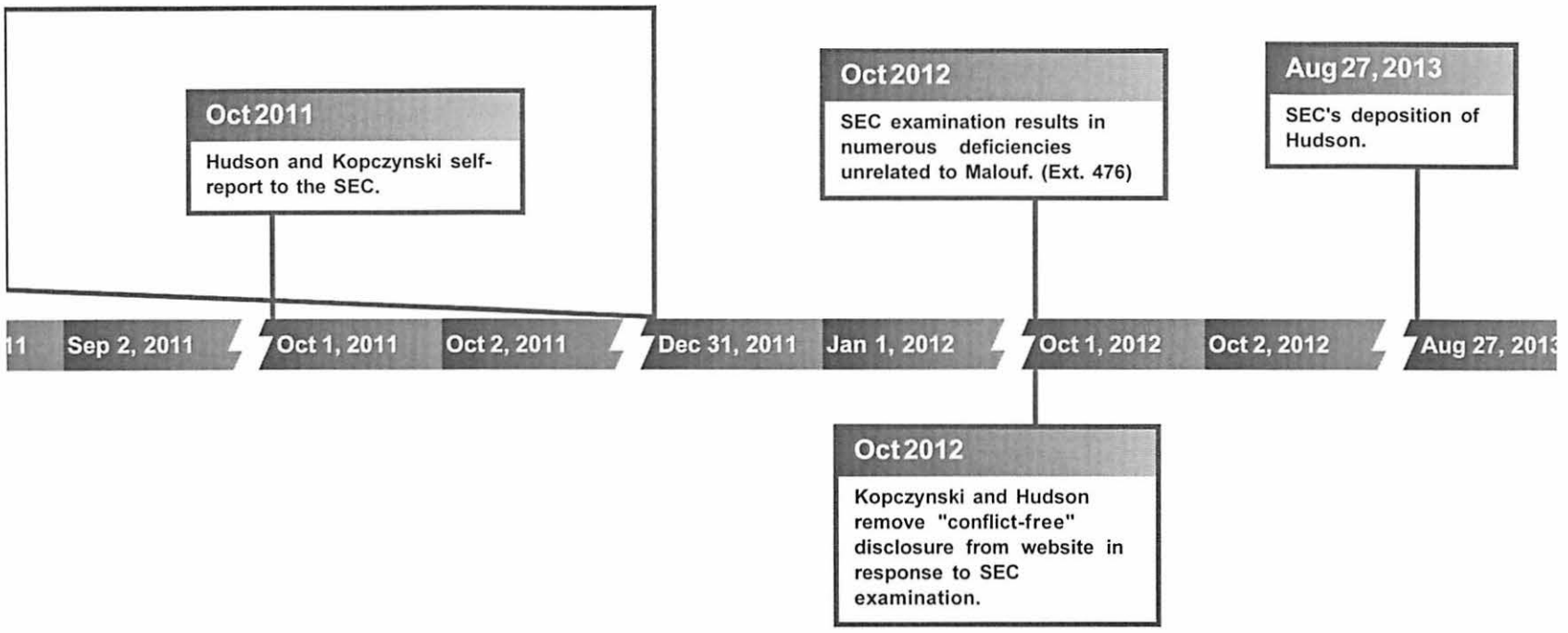
TIMELINE OF EVENTS



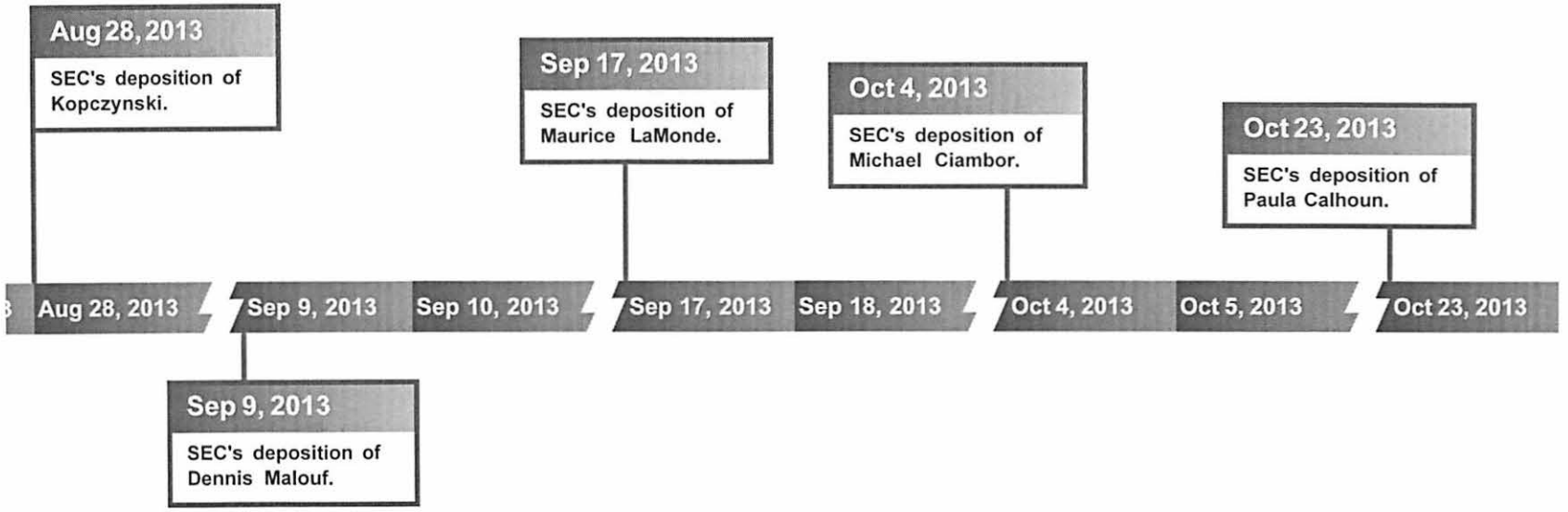
TIMELINE OF EVENTS



TIMELINE OF EVENTS



TIMELINE OF EVENTS



TIMELINE OF EVENTS