

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

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 56577 / September 28, 2007**

**ACCOUNTING AND AUDITING ENFORCEMENT**  
**Release No. 2737 / September 28, 2007**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-12858**

<b>In the Matter of</b>	:	
	:	
<b>Gene S. Foster,</b>	:	<b>ORDER INSTITUTING</b>
	:	<b>ADMINISTRATIVE PROCEEDINGS</b>
<b>Respondent.</b>	:	<b>PURSUANT TO RULE 102(e) OF THE</b>
	:	<b>COMMISSION'S RULES OF PRACTICE,</b>
	:	<b>MAKING FINDINGS, AND IMPOSING</b>
	:	<b>REMEDIAL SANCTIONS</b>
	:	

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against Gene S. Foster ("Foster" or "Respondent") pursuant to Rule 102(e) of the Commission's Rules of Practice.<sup>1</sup>

**II.**

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

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<sup>1</sup> Rule 102(e)(3)(i) provides in relevant part:

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

to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

### III.

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

A. Foster, age 48, is a certified public accountant in the State of Texas. During the relevant time period, Foster was employed as Vice President of Taxation of Dynegy Inc. ("Dynegy"), and substantially participated in a Dynegy financing transaction known as Project Alpha.

B. Dynegy is an Illinois corporation headquartered in Houston, Texas. Dynegy's shares are registered with the Commission under Section 12(b) of the Securities Exchange Act of 1934 and trade on the New York Stock Exchange.

C. On September 24, 2002, the Commission entered an order by consent against Dynegy resulting from the company's improper accounting and misleading disclosures relating to Project Alpha. Dynegy used Project Alpha to enhance cash flow from operations by \$300 million in 2001 and to achieve a related \$79 million tax benefit. Dynegy failed to disclose properly the financing transactions underlying Project Alpha, and failed to clarify that the cash flow reported on its 2001 Statement of Cash Flows derived from financing activities, not operations. *See* Order Instituting Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing a Cease-And-Desist Order, Admin. File 3-10897 (Sept. 24, 2002). Dynegy further consented to pay a \$3 million civil penalty. SEC v. Dynegy Inc., Civil Action H-02-3623 (S.D. Tex. Sept. 30, 2002).

D. On June 11, 2003, the Commission filed a complaint against Foster in SEC v. Foster et al., (Civil Action H-03-2044), in the United States District Court for the Southern District of Texas. The Commission's complaint alleged that Foster willfully disregarded accounting advice from Dynegy's outside auditor on Project Alpha and concealed critical transaction details from the auditor in violation of the federal securities laws.

E. On September 7, 2007, the court entered an order permanently enjoining Foster from future violations of Section 17(a) of the Securities Act of 1933, and Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 and Rules 10b-5 and 13b2-1 thereunder.

**IV.**

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

Accordingly, it is hereby ORDERED, effective immediately, that:

Foster is suspended from appearing or practicing before the Commission as an accountant.

By the Commission.

Nancy M. Morris  
Secretary