

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9571 / April 3, 2014

SECURITIES EXCHANGE ACT OF 1934
Release No. 71864 / April 3, 2014

INVESTMENT COMPANY ACT OF 1940
Release No. 31005 / April 3, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15514

In the Matter of
DONALD J. ANTHONY, JR.,
FRANK H. CHIAPPONE,
RICHARD D. FELDMANN,
WILLIAM P. GAMELLO,
ANDREW G. GUZZETTI,
WILLIAM F. LEX,
THOMAS E. LIVINGSTON,
BRIAN T. MAYER,
PHILIP S. RABINOVICH, and
RYAN C. ROGERS,

Respondents.

**ORDER MAKING FINDINGS AND
IMPOSING REMEDIAL SANCTIONS AND A
CEASE-AND-DESIST ORDER PURSUANT
TO SECTION 8A OF THE SECURITIES ACT
OF 1933, SECTIONS 15(b) AND 21C OF THE
SECURITIES EXCHANGE ACT OF 1934
AND SECTION 9(b) OF THE INVESTMENT
COMPANY ACT OF 1940 AS TO RICHARD
D. FELDMANN**

I.

On September 23, 2013, the Securities and Exchange Commission (“Commission”) deeming it appropriate and in the public interest, instituted these public administrative and cease and desist proceedings pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”), Sections 15(b) and 21C of the Securities Exchange Act of 1934 (“Exchange Act”) and Section 9(b) of the Investment Company Act of 1940 (“Investment Company Act”) against Richard D. Feldmann (“Feldmann” or “Respondent”).

II.

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, which are admitted, Respondent consents to the entry of this Order, as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Respondent

1. **Richard D. Feldmann**, 74 years old, is a resident of Delmar, NY. He was registered with MS & Co. from July 1987 to December 2009.

Other Relevant Entities and Individuals

2. **McGinn, Smith & Co., Inc. ("MS & Co.")**, a New York corporation founded in 1980 by David Smith and Timothy McGinn, had its principal place of business at 99 Pine Street, Albany, NY, and maintained branch offices at Clifton Park, NY, New York, NY, and King of Prussia, PA. MS & Co. was registered with the Commission as a broker-dealer beginning in 1980 and as an investment adviser in April 2009. It was owned by David Smith (50%), Timothy McGinn (50%; 30% after 2004), and Thomas Livingston (20% after 2004). From 2003 to 2009, MS & Co. had about 55 employees, including about 35 registered representatives. On December 24, 2009, MS & Co. filed a partial BD-W. On March 9, 2010, MS & Co. also withdrew its investment adviser registration. FINRA terminated MS & Co.'s FINRA membership on August 4, 2010.

3. The **Four Funds** were New York limited liability companies, whose sole managing member was MS Advisors, an investment adviser owned by Smith (50%), McGinn (30%) and Livingston (20%) that was registered with the Commission from January 3, 2006 to April 24, 2009. MS & Co. served as the placement agent for the Four Funds offerings, and McGinn, Smith Capital Holdings Corp. ("MS Capital") acted as the Trustee. The Four Funds shared offices with MS & Co. and the other McGinn Smith entities at 99 Pine Street, Albany, NY. The Four Funds offerings are listed below, along with the promised rate of return, the maximum amount of the offering, and the date of the PPM:

- (a) First Independent Income Notes, LLC ("FIIN"), 5%/7.5%/10.25% (\$20 million) (9/15/03);
- (b) First Excelsior Income Notes LLC ("FEIN"), 5%/7.5%/10.25% (\$20 million) (1/16/04);
- (c) Third Albany Income Notes, LLC ("TAIN"), 5.75%/7.75%/10.25% (\$30 million) (11/1/04); and

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

- (d) First Advisory Income Notes, LLC (“FAIN”), 6%/7.75%/10.25% (\$20 million) (10/1/05).

4. The **Trust Offerings** were offerings by special purpose entities, purportedly to invest in contracts for burglar alarm service, “triple play” (broadband, cable and telephone) service or luxury cruises. MS & Co. acted as a placement agent and MS Capital acted as Trustee for the Trust Offerings. The Trust Offerings are listed below, along with the promised rate of return, the maximum amount of the offering, and the date of the PPM:

- (a) TDM Cable Trust 06, 7.75%/9.25% (\$3,550,000) (11/13/06)
- (b) TDM Verifier Trust 07, 8.25%/9% (\$3,475,000) (2/23/07)
- (c) Firstline Senior Trust 07, 9.25% (\$1,850,000) (5/19/07)
- (d) Firstline Trust 07, 11% (\$1,867,000) (5/19/07)
- (e) Firstline Senior Trust 07 Series B, 9.5% (\$1,435,000) (10/19/07)
- (f) TDM Luxury Cruise Trust 07, 10% (\$3,630,000) (7/16/07)
- (g) Firstline Trust 07 Series B, 11% (\$2,115,000) (10/19/07)
- (h) TDM Verifier Trust 08, 8.50%/10% (\$3,850,000) (12/17/07)
- (i) Cruise Charter Ventures Trust 08, 13% (\$3,250,000) (2/14/08)
- (j) Integrated Excellence Sr. Trust 08, 9% (\$900,000) (5/30/08)
- (k) Integrated Excellence Jr. Trust 08, 10% (\$580,000) (5/30/08)
- (l) Fortress Trust 08, 13% (\$3,060,000) (9/24/08)
- (m) TDM Cable Trust 06, 10% (\$1,380,000) (11/17/08)
- (n) TDM Verifier Trust 09, 10% (\$1,300,000) (12/15/08)
- (o) TDMM Cable Jr Trust 09, 11% (\$1,325,000) (1/19/09)
- (p) TDMM Cable Sr. Trust 09, 9% (\$1,550,000) (1/19/09)
- (q) TDM Verifier Trust 07R, 9% (\$2,100,000) (2/2/09)
- (r) TDM Verifier Trust 08R, 9% (\$2,005,000) (7/6/09)
- (s) TDMM Benchmark Trust 09, 8%, 9%, 10%, 11%, 12% (\$3,000,000) (8/20/09)
- (t) TDM Verifier Trust 11, 9% (\$1,550,000) (9/3/09)
- (u) Cruise Charter Ventures, LLC, 12% (\$400,000) (9/25/09)

5. **McGinn Smith Transaction Funding (“MSTF”)** was a New York corporation formed in 2008. Like the Four Funds and Trust offerings, the \$10 million MSTF offering on April 22, 2008 was underwritten by MS & Co.

6. **Timothy M. McGinn**, 64 years old, was the chairman, secretary and co-owner of MS & Co. From July 2003 through May 2006, McGinn served as CEO of Integrated Alarm Services Group, Inc. (“IASG”), which went public in July 2003. In September 2011, FINRA permanently barred McGinn from associating with any FINRA member. On February 6, 2013, following a four-week trial, a jury in the Northern District of New York found McGinn guilty of multiple counts of mail and wire fraud, securities fraud, and filing false tax returns. *United States v. Timothy M. McGinn & David L. Smith*, 12-CR-28 (DNH) (N.D.N.Y.). On August 7, 2013, McGinn was sentenced to 15 years in prison and ordered to pay restitution of \$5,992,800.

7. **David L. Smith**, 67 years old, was the president and chief executive officer of MS & Co. and the manager of the Four Funds. Until 2007, Smith was also the chief compliance officer of MS & Co. In September 2011, FINRA permanently barred Smith from associating with any FINRA member. On February 6, 2013, following a four-week trial, a jury in the Northern District

of New York found Smith guilty of multiple counts of mail and wire fraud, securities fraud, and filing false tax returns. *United States v. Timothy M. McGinn & David L. Smith*, 12-CR-28 (DNH) (N.D.N.Y.). On August 7, 2013, Smith was sentenced to 10 years in prison and ordered to pay restitution of \$5,989,736.

Summary

8. From late 2003 through 2009, David Smith and Timothy McGinn, using issuers that they created, owned and controlled, orchestrated two dozen fraudulent offerings in which hundreds of notes were marketed, offered, and sold by brokers associated with their registered broker-dealer, MS & Co. The offerings raised more than \$125 million from more than 800 investors; investor losses exceed \$80 million.

9. Feldmann was among the top selling brokers during the relevant time period, and Feldmann's customers suffered significant losses. Feldmann offered and sold notes to accredited and unaccredited investors alike for which no registration statements were in effect, and no exemptions applied.

10. In addition, Feldmann knowingly or recklessly: (a) failed to perform adequate due diligence to form a reasonable basis for his recommendations to customers and ignored a number of red flags concerning the offerings; and (b) made misrepresentations and omissions in selling the fraudulent note offerings to investors from 2003 to 2009.

Background

11. The Four Funds offerings raised at least \$85 million. Although the Four Funds PPMs labeled each tranche as "secured," there were no secured assets subject to forfeiture in the event that a particular Fund failed.

12. According to the PPMs, MS & Co., as the placement agent, was to receive a commission of 2% of the offering proceeds. In addition, according to the PPMs, the brokers were entitled to (and did receive) "incentive commissions . . . [paid] to our managing member's salesmen at the rate of 2% of the aggregate principal amount of the notes per year over the term of the notes."

13. Smith had no experience in making investment decisions and managing investments for entities like the Four Funds, and Smith had broad flexibility in making investment decisions.

14. The PPMs stated that the notes would be offered only to accredited investors, as defined in Rule 501(a) of Regulation D. Despite these representations, each of the Four Funds offerings had more than 35 unaccredited investors. Feldmann sold each of the Four Funds to unaccredited investors.

15. In September 2003, just weeks after the launch of the FIIN offering, Smith began diverting millions of dollars to pay investors in pre-2003 MS & Co. offerings. Overall, Smith used

at least \$12.8 million of the Four Funds offering proceeds to pay investors in pre-2003 MS & Co. offerings.

16. Smith invested a majority of the Four Funds' proceeds in entities that were affiliated with MS & Co., even though the PPM did not disclose this, and in risky and highly speculative venture capital investments. The Four Funds' investments did not generate sufficient returns required to meet the issuers' obligations to investors.

17. In 2006, McGinn returned to MS & Co. on a full-time basis after nearly three years as CEO of IASG. McGinn created the twenty-one Trust Offerings, plus MSTF, that raised over \$41 million. The Trust Offerings ostensibly were created to fund entities engaged in specific areas, such as burglar alarm service, triple play service, or luxury cruises. These entities, however, were not funded directly by the issuer; instead, in most cases, the offering proceeds were first transferred to various conduit entities, primarily McGinn Smith Funding LLC (the "MSF Conduit") or TDM Cable Funding LLC (the "TDM Conduit"). The proceeds of the Trust Offerings were commingled and then used as needed by MS & Co., including infusing cash into the faltering Four Funds.

18. The Trust PPMs stated that they would "generally be offered only to accredited investors," but also provided for 35 or fewer unaccredited investors, supposedly under Rule 506. When integrated according to their Conduit entity, Rule 506's limitation on unaccredited investors was breached: more than 35 investors in the Trusts tied to the TDM Conduit were unaccredited, and more than 35 investors in the Trusts linked to the MSF Conduit were unaccredited.

19. The Trust Offerings continued the egregious misuse of investor funds. Smith and McGinn, for example, took for personal use millions of dollars in offering proceeds from the TDM Cable 06, TDMM Cable, Integrated Excellence, MSTF and Fortress offerings, used investor funds to pay earlier noteholders, and used the Trust Offering proceeds to satisfy liquidity needs for other MS & Co. entities.

Feldmann's Unlawful Conduct

20. Feldmann sold approximately \$5.4 million of the Four Funds offerings and approximately \$595,000 of the Trust Offerings, through which Feldmann earned approximately \$299,000 in commissions.

21. Feldmann failed to conduct adequate due diligence. In addition, numerous red flags should have alerted Feldmann to the need for further investigation, but he continued to sell the private placements Smith and McGinn told him to sell.

22. Feldmann also made material misrepresentations and omissions when recommending the Four Funds and Trust Offerings to his customers.

Respondent Failed to Have a Reasonable Basis to Recommend the Four Funds Offerings.

23. Feldmann performed inadequate due diligence prior to recommending the Four Funds to his customers. The PPMs for the Four Funds, which he read or was reckless in not

reading, made disclosures that should have caused Respondent, as an associated person of a broker-dealer, to conduct a searching inquiry prior to recommending the products to his customers. This heightened duty arose from the following factors:

- a. The PPMs made clear that Smith owned and controlled each of the issuers – which were new, single-purpose entities with no operating history – as well as the placement agent (MS & Co.) and the trustee. Smith also had total control over the disposition of investor funds, with absolutely no oversight or control. As a result, Respondent should have made specific inquiries as to how customer money would be invested before recommending the Four Funds to his customers.
- b. Respondent knew or should have known that Smith had never before managed offerings of the size and scope of the Four Funds. The debt offerings that MS & Co. had done before 2003 were small-scale note offerings tied to the income streams from home alarm contracts, far different from the broad and non-specific investment mandate of Four Funds offerings. Given Smith’s lack of experience in this area, and Feldmann’s knowledge of this lack of experience, he should have made specific inquiries as to how Smith planned to invest the offering proceeds. This is particularly true given fact that the issuers’ ability to make the relatively high interest payments, and to return the investors’ principal, depended on the nature of the investments;
- c. The PPMs stated that the Four Funds could acquire investments “from our managing member [MS Advisors] or any affiliate,” could “purchase securities from issuers in offerings for which [MS & Co.] is acting as underwriter or placement agent,” and that “[a]ffiliates of the placement agent may purchase a portion of the notes offered hereby.” As a result, Respondent should have inquired whether Smith—who controlled without oversight the issuers, the placement agent and the disposition of investor funds—did engage in any transactions with affiliates. If he had, Respondent would have discovered that nearly half of the offering proceeds had been invested in affiliates; and
- d. The Four Funds PPMs prohibited sales to any unaccredited investors. Nevertheless, Respondent knew that sales were being made to unaccredited investors and knew, or should have known, therefore, that the PPMs’ prohibition on sales to unaccredited investors was disregarded.

24. These factors should have prompted Feldmann to conduct a searching inquiry into the offerings. Instead, Respondent sold the Four Funds offerings without taking adequate steps to obtain information about how investor funds were being used.

Smith's Refusal to Disclose to the Brokers How He Had Invested Four Funds Offering Proceeds Was a Red Flag.

25. From the commencement of the FIIN offering in September 2003 until January 2008, Smith provided his brokers with no specific information about how he had invested the offering proceeds. Any questions by the brokers were deflected with the claim that Smith had made loans to local Albany businesses with Four Funds proceeds, and those businesses desired anonymity. Indeed, Smith steadfastly refused to give the brokers any meaningful information about how he had invested the Four Funds offering proceeds. This refusal should have prompted Feldmann to further question the propriety of the Four Funds.

26. The information blackout that Smith imposed was contrary to the PPMs, which stated that an "annual statement of the operations consisting of a balance sheet and income statement" would be provided to investors upon request. These reports, however, were never made available and it appears that Respondent never requested this information before January 2008, when Smith disclosed that the Four Funds would be restructured.

27. MS & Co.'s compliance manual, moreover, stated that "it will make a reasonable investigation . . . [and] Paperwork recording the due diligence will be kept in the legal files." Nevertheless, Feldmann never asked to see the due diligence files.

Respondent Continued to Recommend MS & Co. Offerings Despite Knowledge of the Redemption Policy – Another Major Red Flag.

28. By 2006, the Funds began having significant difficulty in meeting the redemption requests. Smith therefore instituted a policy that required brokers to "replace" customers seeking to redeem Four Funds notes, including maturing notes, with new customers (the "Redemption Policy"). The PPMs, however, did not state that a customer's right to redemption depended on finding a "replacement."

29. Feldmann learned of the Redemption Policy by November 2007. The Redemption Policy was another red flag, but Respondent nevertheless failed to disclose the Redemption Policy to his customers.

Respondent Continued to Sell the Trust Offerings Despite Learning in January 2008 that the Four Funds Had Been Mismanaged.

30. On January 8, 2008, Smith and McGinn held an all-day meeting to inform the brokers, including Respondent, that the Four Funds were in default, that payments to investors would be curtailed, and that the offerings would be restructured. Smith revealed that the Four Funds investment portfolios consisted of loans to small, local businesses, some of which had already filed for bankruptcy; risky venture capital investments; investments with sub-prime exposure; and other nonperforming investments. By contrast, the Four Funds each had made only one investment in a publicly-traded security: Exchange Boulevard.com, a risky venture capital company that was quoted on OTC Link, formerly known as the Pink Sheets.

31. Respondent, despite the significant disclosures in this meeting, did not request or conduct any kind of probing investigation into what happened to the Four Funds or the ongoing Trust Offerings. After the January 2008 meeting, there were thirteen offerings by MSTF and the Trusts, which raised at least \$20 million. As a result of the accumulation of red flags since the launch of the Four Funds in September 2003, Respondent should have conducted a searching inquiry regarding any MS & Co. private placement. Instead, he recommended the Trust Offerings to his customers based on insufficient due diligence and failed to disclose to investors the risky nature of the Trust Offerings or the facts that should have led Feldmann to that conclusion.

32. During the three years of the Trust and MSTF Offerings, investor funds were being used in ways contrary to the uses described in the PPMs; for example, Smith and McGinn took at least \$4 million in offering proceeds for themselves and another MS & Co. officer. Offering proceeds also were used to pay investors in earlier offerings and MS & Co.'s payroll. And the amount actually invested pursuant to particular Trust Offering PPMs was far less than that PPM disclosed. None of these facts led Feldmann to engage in the kind of searching inquiry the circumstances demanded.

Violations

33. As a result of the conduct described above, Feldmann willfully violated Sections 5(a) and (c) of the Securities Act, which prohibit the sale of unregistered securities absent exemptions not present here.

34. As a result of the conduct described above, Feldmann willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in the offer and sale of securities, and in connection with the purchase or sale of securities.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act, Sections 15(b) and 21C of the Exchange Act and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent Feldmann cease and desist from committing or causing any violations and any future violations of Sections 5(a), 5(c) and 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder

B. Respondent Feldmann be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization;

prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

C. Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

D. Respondent shall, within 14 days of the entry of this Order, pay disgorgement of \$299,000 and prejudgment interest of \$55,384.87 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Respondent shall, within 14 days of the entry of this Order, also pay a civil money penalty in the amount of \$130,000 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

- (1) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (2) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Feldmann as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to David Stoelting, Esq., Division of Enforcement,

Securities and Exchange Commission, 200 Vesey Street, Suite 400, Brookfield Place, New York, NY 10281.

E. Such civil money penalty may be distributed pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended (“Fair Fund distribution”). Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, he shall not argue that he is entitled to, nor shall he benefit by, offset or reduction of any award of compensatory damages by the amount 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 a Penalty Offset, Respondent agrees that he shall, within 30 days after entry of a final order granting the Penalty Offset, 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 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 instituted by the Commission in this proceeding.

By the Commission.

Jill M. Peterson
Assistant Secretary