

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72185 / May 19, 2014

INVESTMENT COMPANY ACT OF 1940
Release No. 31048 / May 19, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15873

In the Matter of

**Thomas R. Delaney II and
Charles W. Yancey**

Respondents.

**ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS PURSUANT
TO SECTIONS 15(b) AND 21C OF THE
SECURITIES EXCHANGE ACT OF
1934, AND SECTION 9(b) OF THE
INVESTMENT COMPANY ACT OF
1940 AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to 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 Thomas R. Delaney II (“Delaney”) and Charles W. Yancey (“Yancey”).

II.

After an investigation, the Division of Enforcement alleges that:

A. SUMMARY

1. Penson Financial Services, Inc. (“Penson”) was one of the largest independent clearing firms in the United States. As a participant of a registered clearing agency, Penson had strict obligations under Rules 204T and 204 of Regulation SHO, 17 C.F.R. 242.204 (“Rule 204T/204”) to purchase or borrow sufficient shares to close out failures to deliver to a registered clearing agency for all sales of equity securities that it cleared. Generally, this required Penson to close out fails to deliver in the Continuous Net Settlement (“CNS”) System resulting from long or short sales within certain timeframes.

For short sales, Penson was required to close out the CNS failure to deliver no later than the beginning of regular trading hours, i.e., market open, on the fourth day after the transaction (T+4). For long sales, Penson was required to close out the CNS failure to deliver no later than the beginning of regular trading hours on the sixth day after the transaction (T+6).

2. When Penson's customers caused a CNS failure to deliver, Penson purchased or borrowed shares to fulfill its close-out obligations and passed along the costs of those transactions to its customers. In some circumstances, Penson profited from those transactions.

3. In thousands of occasions, however, Penson was not able to pass along the cost of compliance with Rule 204T/204 because the CNS failure to deliver was not caused by a customer, but rather by Penson itself. Penson's Stock Loan ("Stock Loan") generated revenue and financed Penson's operations by loaning out shares held in customer margin accounts. When the customers sold those shares, Penson had a CNS delivery obligation arising from the sale but, due to the open stock loan, did not have shares on hand with which to fulfill that obligation. Such transactions are hereinafter referred to as "long sales of loaned securities." As a result of its stock lending activities, Penson frequently failed to deliver to CNS on long sales of loaned securities.

4. Two departments within Penson had primary responsibility for complying with Penson's Rule 204T/204 obligations for long sales: Stock Loan and Buy Ins ("Buy Ins"). The two departments worked together closely to fulfill those obligations. Buy Ins reviewed a report of all long sale CNS level fails and determined whether the failure to deliver resulted from the customer failing to provide the security to Penson, or from Penson's securities lending activities. Buy Ins retained responsibility for closing out CNS failures to deliver caused by the customer's account-level failure to deliver. For the CNS failures to deliver resulting from long sales of loaned securities, Buy Ins informed Stock Loan of the CNS failure to deliver and passed the Rule 204T/204 close-out obligation on to Stock Loan.

5. Senior officers in Stock Loan knew Rule 204T(a)/204(a) required Penson to close out those CNS failures to deliver resulting from long sales no later than market-open on T+6. Instead of directing that Stock Loan be bought in to fulfill Penson's delivery obligations, or take some other action to comply with the rule, those senior officers willfully ignored the rule's requirements. They did so because they did not want the costs of compliance with Rule 204T/204(a) to negatively affect Stock Loan's net revenues. As a result, they caused Penson to violate the rule thousands of times from October 2008 until November 2011.

6. Penson's Written Supervisory Policies and Procedures ("WSPs") delegated responsibility for supervision at Penson, including responsibility for designating supervisors and allocation of supervisory responsibilities, to Penson's Chief Compliance Officer ("CCO"), Delaney. Delaney knew Rule 204T(a)/204(a) required market-open, T+6 close-outs for CNS fails resulting from long sales, including long sales of loaned securities. Delaney also knew, from 2008 through 2011, that Stock Loan's procedures did not comply with that rule.

7. Motivated by financial considerations, Delaney affirmatively assisted the violations resulting from the Stock Loan procedures. Delaney agreed with Stock Loan officers that Stock Loan would continue implementing the non-compliant procedures and he agreed to reject certain procedures that would have brought Penson into Rule 204T/204(a) compliance because he did not want Penson to incur the associated costs. This financial motivation pervaded Delaney's approach to Rule 204T(a)/204(a) compliance. Where Penson was able to pass along costs or even profit from Rule 204(a) compliance – such as with Buy Ins's Rule 204T(a)/204(a) responsibilities – Delaney worked to bring Penson into compliance. But, where Penson was required to absorb the costs of compliance – as was the case with closing out CNS fails resulting from long sales of loaned securities – Delaney supported Stock Loan in implementing the intentionally non-compliant procedures.

8. Delaney further aided and abetted and caused Penson's violations by intentionally concealing the violations from regulators; authorizing WSPs that he knew concealed the actual, non-compliant procedures; establishing and maintaining a Supervisory System that he knew allowed the Senior Vice President of Stock Loan to remain effectively unsupervised; and attempting to conceal the violations from Penson's President / CEO, Yancey.

9. Penson's WSPs designated Yancey, Penson's President / Chief Executive Officer, as the direct supervisor of the Senior Vice President of Stock Loan and Delaney. Yancey exercised no supervision over the Senior Vice President of Stock Loan and, operating in that supervisory vacuum, the Senior Vice President of Stock Loan willfully aided and abetted Penson's Rule 204T/204(a) violations relating to long sales of loaned securities. Yancey also failed to supervise Delaney with a view towards preventing and detecting Delaney's aiding and abetting of Penson's Rule 204T/204(a) violations relating to long sales of loaned securities. Yancey failed to supervise Delaney by turning a blind eye to red flags indicating that Delaney was aware of and substantially assisted Stock Loan's Rule 204T/204(a) violations relating to long sales of loaned securities.

10. As a result of Delaney's misconduct, Penson systematically violated Rule 204T(a)/204(a)'s market-open CNS close-out requirement for long sales of loaned securities from October 2008 until November 2011. Additionally, because Yancey did not fulfill his supervisory responsibilities, Yancey failed to prevent and detect the aiding and abetting violations by the Senior Vice President of Stock Loan and Delaney.

B. RESPONDENTS

11. Delaney, 42, of Colleyville, Texas, was the CCO at Penson from at least October 2008 through April 2011. Delaney currently works in compliance at a registered broker-dealer. He holds Series 4, 7, 24, 27, 53, and 63 licenses.

12. Yancey, 56, of Colleyville, Texas, was the President/CEO of Penson from at least October 2008 through February 2012. Yancey is currently the Managing Director of clearing and execution services at a registered broker-dealer. Yancey holds Series 7, 24, 55, and 63 licenses.

C. OTHER RELEVANT ENTITY

13. Penson was a North Carolina corporation with a principal place of business in Dallas, Texas. It was a broker-dealer registered with the Commission, which, from at least 2010 to 2012, was one of the largest clearing firms in the United States as measured by the number of correspondent brokers for which it cleared. Penson was a wholly-owned subsidiary of SAI Holdings, Inc., which in turn was a wholly-owned subsidiary of Penson Worldwide, Inc. (“PWI”). Penson filed a Form BDW, which was effective in October 2012, and then declared bankruptcy in January 2013. A bankruptcy plan implementing Penson’s liquidation was approved in July 2013.

D. ALLEGATIONS

Background

14. Rule 204T/204 was adopted to, among other things, address prolonged failures to deliver. Rule 204T became effective on September 18, 2008 and Rule 204 became effective on July 31, 2009.

15. Rule 204T/204 requires participants of a registered clearing agency to deliver equity securities to a registered clearing agency when delivery is due; that is, by settlement date. As relevant here, settlement date is generally three days after the trade date (“T+3”). For short sales, if the participant does not deliver securities by T+3 and has a failure-to-deliver position at the clearing agency (also referred to as CNS fails/failures to deliver), it must take affirmative action to close-out the failure-to-deliver position by purchasing or borrowing securities of like kind and quantity by no later than the beginning of regular trading hours on the settlement day following the settlement date (“T+4”). For long sales, if the participant has a failure-to-deliver position at the clearing agency (also referred to as CNS fails/failures to deliver), it must take affirmative action to close-out the failure-to-deliver position by purchasing or borrowing securities of like kind and quantity by no later than the beginning of regular trading hours on the third day following the settlement date (“T+6”).

16. The Depository Trust and Clearing Corporation (“DTCC”) operates the National Securities Clearing Corporation (“NSCC”), a clearing agency registered with the Commission that clears and settles the majority of United States transactions in equities. When NSCC members purchase or sell securities on the exchanges, the exchanges send the trade information to the NSCC. NSCC operates the Continuous Net Settlement (“CNS”) system. NSCC member clearing firms receive reports that, as of at least close of business T+1, notify the firms of transactions scheduled to clear and settle by close of business T+3. CNS also sends reports to the firms listing net fails to deliver in each security as of T+3.

Penson Violates Rule 204 of Regulation SHO

17. At all relevant times, Penson was a clearing firm, i.e., a participant of a registered clearing agency and a member of NSCC. As a clearing firm, Penson had

obligations under Rule 204(a) to close out CNS failures to deliver resulting from long sales no later than market open T+6.

18. From October 2008 until November 2011, Penson systematically failed to close out CNS failures to deliver resulting from long sales of loaned securities by market open T+6. The relevant long sales originated with securities held in customer margin accounts. Under the Commission's customer protection rule, Penson is permitted, subject to certain conditions and limitations, to re-hypothecate margin securities to third parties. Penson re-hypothecated margin securities according to the terms of the Master Securities Lending Agreement ("MSLA") developed by the Securities Industry and Financial Markets Association ("SIFMA").

19. When a margin customer sold the hypothecated securities that were out on loan, Penson issued account-level recalls to the borrowers on T+3, i.e., three business days after execution of the margin customer's sale order. When the borrowers did not return the shares by the close of business T+3, and Penson did not otherwise have enough shares of the relevant security to meet its CNS delivery obligations, Penson incurred a CNS failure to deliver. When the open stock loan continued to cause a CNS failure to deliver as of market open T+6, Penson did not purchase or borrow shares sufficient to close out its CNS failure to deliver position. Instead, Penson allowed its CNS failure to deliver position to persist beyond market open T+6.

Stock Loan Adopts Procedures That Cause Penson to Violate Rule 204T/204 For Long Sales of Loaned Securities

20. Stock Loan was included on the organizational charts of PWI, the parent company, rather than within Penson, which was then a registered broker-dealer. However, the policies and procedures of Penson treated Stock Loan as part of the broker-dealer and the employees of Stock Loan as associated persons of the broker-dealer. Stock Loan personnel had direct access to Penson's account with NSCC and conducted all securities lending activity on behalf of Penson. Stock Loan had primary responsibility at Penson for effecting Rule 204(a) close-outs of Penson's CNS failures to deliver resulting from long sales of loaned securities.

21. Stock Loan initially attempted to comply with Rule 204T for long sales of loaned securities by recalling loans at the account level on T+3 and buying in the borrowers at market open T+6. However, because the MSLA gave the borrowers three full days (until close-of-business T+6) to return the shares, the borrowing counterparties pushed back against Penson's attempted market-open T+6 buy ins.

22. In response to this push back, Stock Loan stopped trying to buy in the borrowing counterparties by market open T+6. Instead, Stock Loan allowed CNS failures to deliver resulting from long sales of loaned securities to persist beyond market open T+6. In certain circumstances, Stock Loan allowed the CNS fail to persist for days beyond T+6. Stock Loan personnel did not take any affirmative steps, such as purchasing or borrowing securities, in order to close out Penson's CNS failure to deliver position. Additionally,

Stock Loan personnel did not recall securities earlier than T+3 so that Penson would be able to buy in the borrowing counterparties before market-open T+6.

23. These actions resulted in direct financial benefit to Stock Loan and, by extension, Penson. Stock Loan avoided the costs and market risks associated with buy ins and/or borrows. It also profited by keeping stock out on loan rather than recalling it so that it could be delivered in a timely fashion.

24. Stock Loan's non-compliant Rule 204T(a)/204(a) procedures relating to long sales of loaned securities were in place from at least October 2008 until November 2011.

Delaney's Misconduct

25. Delaney was Penson's CCO when Rule 204T was implemented in September 2008. He continued in that position at Penson until April 2011.

26. As Penson's CCO, if Delaney learned that associated personnel were not following the securities laws, he was required to investigate and report his findings to members of senior management where those persons reported.

27. Delaney participated in Penson's efforts to implement procedures in response to Rule 204T in October 2008 and to Rule 204 in July 2009. Delaney knew at all relevant times that Rule 204T/204 required Penson to close out CNS failures to deliver resulting from long sales by market open T+6.

28. Delaney also knew at all relevant times that Stock Loan was not complying with the T+6 market-open close-out requirement for CNS fails resulting from long sales, including long sales of loaned securities. In or around October 2008, in the context of Penson's efforts to respond to Rule 204T, Delaney met with Stock Loan supervisors and discussed the fact that Stock Loan was not complying with that requirement. Stock Loan supervisors informed Delaney that they were not closing out CNS failures to deliver on long sales of loaned securities until approximately close of business T+6, when they were able to effect buy ins against borrowers under the MSLA.

29. Delaney next discussed Stock Loan's non-compliant procedures for CNS failures to deliver resulting from long sales of loaned securities with Stock Loan supervisors in or around July 2009, when Rule 204T became permanent Rule 204. In this context, he had several discussions with Stock Loan supervisors about the intentionally non-compliant Rule 204(a) procedures for long sales of loaned securities. Based on these discussions, Stock Loan understood that Delaney supported their non-compliant approach.

30. In December 2009, Penson's Compliance Department conducted an NASD Rule 3012 internal audit of the Rule 204T/204 close-out procedures for Buy Ins, which had been in place at Penson from October 2008 forward. The audit uncovered severe compliance deficiencies – Penson's compliance personnel sampled 113 CNS failures to deliver resulting from both long sales and short sales and found that Buy Ins' procedures resulted in Rule 204(a) violations for 112 out of the 113 securities sampled (99% failure

rate). Delaney understood this NASD Rule 3012 audit had revealed massive and profound failures relating to Buy Ins's Rule 204T(a)/204(a) procedures that were anomalous during his tenure as CCO.

31. The relevant Buy Ins Rule 204T(a)/204(a) procedures were intertwined with Stock Loan's Rule 204T(a)/204(a) procedures for long sales of loaned securities. Due to this nexus between the Buy Ins and Stock Loans' Rule 204T(a)/204(a) procedures, when one of the supervisors in Buy Ins reviewed Buy Ins Rule 204T(a)/204(a) procedures in response to the audit he learned that Stock Loan was not complying with Rule 204(a) for long sales of loaned securities. The Buy Ins supervisor then met with Stock Loan supervisors and Delaney. At this meeting, which occurred in late 2009 or early 2010, Stock Loan Supervisors explained that Penson was not complying with Rule 204(a) for long sales of loaned securities, and erroneously claimed Penson was following contrary industry practice. At this meeting, Delaney agreed with Stock Loan Supervisors that Penson would not implement options such as T+2 account level recalls or purchases into inventory that would have brought Penson into compliance because those options imposed costs on Penson.

32. In July 2010, Delaney reviewed e-mail discussions between compliance and operational personnel about Stock Loan's non-compliant procedures for close outs of CNS failures to deliver resulting from long sales of loaned securities.

33. In late 2010 to early 2011, Delaney again discussed the violations with compliance and operational personnel.

34. As a result, Delaney knew Penson was violating Rule 204T(a)/204(a) in connection with long sales of loaned securities. And, when Stock Loan erroneously claimed in discussions with Delaney that it was industry practice not to follow Rule 204T(a)/204(a), Delaney understood that industry practice was no excuse for failing to follow the securities laws.

35. But, even though he knew about the violations relating to long sales of loaned securities for nearly two-and-one-half years, Delaney took no steps to ensure that Stock Loan changed its procedures to comply with Rule 204T(a)/204(a). Additionally, Delaney did not investigate the violations or report his findings to members of senior management where Stock Loan supervisors reported. Indeed, Delaney never escalated his knowledge about Stock Loan's Rule 204T(a)/204(a) violations to Yancey, even though Delaney participated in numerous meetings with Yancey in 2010 to discuss the closely-related Rule 204(a) procedures for Buy Ins.

36. Delaney's conduct relating to Penson's Rule 204T(a)/204(a) violations in connection with Stock Loan's procedures is in stark contrast to his actions relating to Buy Ins. After reviewing all long sale CNS fails to determine the reason for the fail, Penson's Buy Ins handled close outs of CNS failures to deliver resulting from transactions initiated by customers who sold short or customers who sold long but failed to provide the shares to Penson by settlement date. In those circumstances, Penson could pass along the cost of Rule 204T/204 compliance (i.e., borrowing or buying before market open) to the customer.

In many circumstances, Penson was able to pass along the cost of compliance at a mark-up. Upon learning of systematic Rule 204T/204 deficiencies in Buy Ins through the December 2009 audit, Delaney oversaw extensive remediation efforts.

37. However, Buy Ins informed Stock Loan of long sales resulting in CNS fails due to open stock loans, and Stock Loan was responsible for closing out those CNS fails. Because those CNS failures to deliver were not caused by the action of any customers, there was no one other than Penson to absorb the cost of the close outs. When Penson would have been forced to pay for its Rule 204T(a)/204(a) compliance, Delaney affirmatively caused Penson to violate the rule. Indeed, in 2009 or early 2010 – about the same time Delaney began overseeing Rule 204 remedial efforts for Buy Ins’s procedures – Delaney and Stock Loan rejected procedures that would have brought Penson into compliance because they did not want Penson to incur the costs of those procedures.

38. Instead of taking steps to bring the Stock Loan Rule 204T(a)/204(a) procedures into compliance at any point during his tenure as CCO of Penson, Delaney agreed with Stock Loan Supervisors that Penson would continue implementing non-compliant Rule 204T(a)/204(a) procedures.

39. Thus, Delaney consciously chose profits over compliance. This was only the starting point for Delaney’s misconduct. Delaney also repeatedly, and knowingly, concealed the violations from regulators.

40. In January 2010, at about the same time he agreed with Stock Loan to continue implementing non-compliant Rule 204(a) procedures, Delaney compiled Penson’s WSPs for delivery to FINRA as part of a FINRA Rule 1017 application. FINRA had been very clear with Delaney that they were going to be “poring over the WSPs with a fine-tooth comb.” On January 25, 2010, Delaney forwarded a set of Stock Loan WSPs to one of his junior Compliance Specialists for comment before delivering the WSPs to FINRA. The junior Compliance Specialist responded that the Stock Loan WSPs Delaney sent him did not include Stock Loan’s Rule 204 procedures. The officer attached the missing section of the Stock Loan WSPs, noted several deficiencies in them, and specifically recommended that Penson “include close-out requirement procedures in the WSPs.” Not surprisingly, the Stock Loan WSPs were silent on that front, as Stock Loan and Delaney had not detailed the willfully non-compliant procedures in Stock Loan’s WSPs.

41. Delaney was then copied on two emails from Penson’s Compliance Department delivering the Stock Loan WSPs to FINRA as part of Penson’s Rule 1017 application. Those WSPs omitted all discussion of Stock Loan’s actual, non-compliant close-out procedures relating to long sales of loaned securities. Instead, those WSPs were intentionally designed to conceal the relevant procedures. The relevant WSP section had two parts: one titled “Close-Out Requirements for Fail [sic] to Deliver (SEC Rule 10b-21; Regulation SHO Rule 204),” and a subsequent part titled “Procedures Adopted in Accordance With Rule 204.” The first part correctly articulated the regulatory requirement that CNS failures to deliver resulting from long sales had to be closed out by market open T+6. But the subsequent part contained no discussion of any procedures Penson had adopted in accordance with that Rule 204(a) requirement. Instead, the section detailed

Stock Loan's procedures for maintaining an easy-to-borrow list and providing locates – procedures that were relevant to Penson's compliance with Rule 203, not Rule 204. The second part finished with a brief description of procedures designed to ensure close outs of CNS failures to deliver resulting from short sales by T+4. Thus, the WSPs for Stock Loan's compliance with Rule 204 relating to long sales of loaned securities went beyond silence about the actual practices and procedures to an affirmative effort to mislead by including a confusing discussion about locate and easy-to-borrow procedures instead of discussing Rule 204 close-out procedures.

42. Delaney knew that, due to the significant nexus between the Buy Ins and Stock Loans' Rule 204(a) procedures, any significant inquiry into the December 2009 NASD Rule 3012 audit showing the 99% Rule 204(a) violation rate for Buy Ins risked leading to Stock Loan's Rule 204(a) violations and his own related misconduct. Indeed, Delaney knew that an inquiry by the Buy Ins supervisor in response to the December 2009 audit had led directly to that supervisor's discovery of the intentional Stock Loan Rule 204(a) violations and Delaney's role in them. Therefore, Delaney intentionally, and repeatedly, concealed both the Buy Ins Rule 204(a) deficiencies and intentional Stock Loan Rule 204(a) violations from regulators.

43. On March 31, 2010, Delaney met with Yancey to discuss Yancey's annual certification of Penson's compliance testing procedures. As part of that certification, Delaney prepared an Annual Report that, per Penson's WSPs, was to discuss Penson's "key compliance problems" for the period April 1, 2009 through March 31, 2010. Delaney understood the report was also supposed to detail the significant results of Penson's NASD Rule 3012 testing for that same period. At the March 31, 2010 meeting, the principal item of discussion was the results of the December 2009 audit showing the 99% Rule 204(a) violation rate resulting from Buy Ins' procedures – a compliance failure that Delaney characterized as "massive," "profound" and "anomalous."

44. Delaney's March 31, 2010 Annual Report appended to Yancey's certification omitted two critical facts relating to Penson's Rule 204 compliance: (1) the results of the December 2009 NASD Rule 3012 audit revealing Buy Ins's Rule 204T(a)/204(a) compliance failures; and (2) the ongoing, willful Rule 204(a) violations relating to long sales of loaned securities by Stock Loan.

45. On March 31, 2010, Delaney personally emailed the certification and Annual Report to FINRA in response to its specific request for the documents. That same day, Penson's compliance personnel uploaded the documents to Penson's FINRA gateway and separately emailed the Annual Report to other FINRA personnel. On April 1, 2010, compliance personnel sent the Annual Report to the Chicago Board Options Exchange ("CBOE"). In September 2010, compliance personnel sent the Annual Report to the National Stock Exchange, Inc. ("NSX") in response to an information request.

46. On April 8, 2010, the Commission's Office of Compliance, Inspections and Examinations ("OCIE") informed Penson it had learned Penson was having problems executing close outs at market open and asked for an explanation. On April 14, 2010, a junior Penson compliance officer asked OCIE to clarify how it had learned about the

potential close-out problems. That same day, OCIE sent the junior compliance officer, and Delaney the following clarification and request for information: “During staff’s review of fails to deliver and conversations with the firm regarding 204T compliance, Penson represented and in documents produced evidenced that the firm did not always buy-in to close-out a fail to deliver position at the market open. The reason the firm provided for not buying-in at the open was because of manual processes and system limitations. Q. What is the system limitations that prevent the firm from executing buy-ins at the market open? Has the firm fixed the system limitations and manual processes to now execute buy-ins at the market open? If so, please provide the date the firm corrected this issue.”

47. Delaney knew the information OCIE had received as of April 14, 2010 – that the reason “for not buying-in at the open was because of manual processes and system limitations” – was false and misleading. Delaney knew that, for long sales of loaned securities, the reason for “not buying-in at the open” was a conscious decision to systematically violate Rule 204T/204.

48. On April 22, 2010, the junior compliance officer sent Penson’s response to OCIE. The response stated: “[Penson] I would like to note that the majority of any Regulation SHO buy-ins are and have been covered by stock borrow or executing closing trades prior to the market open.” This response was false in light of information known to Delaney. Delaney knew the December 2009 audit showed that 99% of Buy Ins’ Rule 204(a) close outs in fact occurred after market open. The statement was also directly contrary to Delaney’s agreement with Stock Loan, affirmed just months earlier, that Penson would not close out CNS failures to deliver resulting from long sales of loaned securities at market open.

49. Penson’s April 22, 2010 response continued: “For instances where we were unable to complete buy-ins prior to market open, buy ins were typically executed within 15 minutes of market open.” This also was directly contrary to the findings of the December 2009 audit. The December 2009 audit memorandum reported that Buy Ins’ Rule 204(a) close outs of short sales occurred “anywhere from 30 minutes to a 1 hour and 15 minutes after the market open” and that Buy Ins’ Rule 204(a) close outs of long sales occurred “anywhere from 4 hours from the market open to up until 11 minutes of the market close.” Additionally, Delaney knew the representation to OCIE was directly contrary to the intentionally non-compliant Stock Loan’s Rule 204T(a)/204(a) procedures, under which Stock Loan did not close out the CNS fails resulting from long sales of loaned securities – if at all – until it bought in the borrowing counterparties at close-of-business on T+6.

50. On May 10, 2010, a compliance officer forwarded the April 22, 2010 response to Delaney, stating “Tom, Attached is a copy of the most recent response, as well as a link to the examination folder.” In October 2010, the junior compliance officer who signed the April 22, 2010 response forwarded the response to Delaney as part of Delaney’s efforts to respond to the OCIE exam deficiency finding.

51. Delaney took no steps to correct the numerous misrepresentations to OCIE in those April 2010 communications from the Compliance Department.

52. In June and July 2010, Delaney coordinated with his staff to formally approve an updated version of Penson's WSPs. In so doing, Delaney reviewed certain updates to the WSPs that were provided to FINRA in January 2010 as part of the Rule 1017 application discussed above. Delaney knew that Penson's WSPs, which included the Stock Loan WSPs, did not reflect Stock Loan's actual business practices. In fact, as discussed above, Penson's WSPs went beyond silence about the actual, intentionally non-compliant practices and procedures to an affirmative effort to mislead by focusing primarily on confusing references to procedures relating to Rule 203 requirements. Delaney knew, or absent recklessness must have known, that the Stock Loan WSPs update he approved would have the effect of concealing the ongoing violations from regulators. The misleading Stock Loan WSP provisions relating to Rule 204 close-outs for long sales remained in Penson's WSPs through the remainder of Delaney's tenure at Penson, and, with Delaney's knowledge, were sent to regulators on numerous occasions.

53. Delaney's final act of concealing Buy Ins's Rule 204(a) deficiencies and the closely-related Stock Loan misconduct from regulators was his most significant. Beginning in 2009, OCIE conducted a review of Penson's Rule 204T procedures. In October 2010, OCIE issued Penson a deficiency letter reporting that OCIE had found Rule 204T(a) violations. The findings reported to Penson in the deficiency letter included findings that Penson had violated Rule 204T in connection with short sales along with specific instances of Stock Loan's intentional Rule 204T(a) violations relating to long sales of loaned securities.

54. In its November 24, 2010 response to OCIE's deficiency findings, Penson stated the following: "Penson feels that the reasonable processes employed to close out positions that were allegedly in violation of rule [sic] 204T were effective and performed as designed."

55. This statement was false and misleading in light of facts known to Delaney in November 2010, specifically: (1) the results of the December 2009 internal compliance audit showing fundamental deficiencies in Penson's Rule 204T/204 processes for Buy Ins; and (2) Stock Loan's willfully non-compliant Rule 204T/204 processes for closing out CNS failures to deliver resulting from long sales of loaned securities.

56. Delaney was directly responsible for this misrepresentation to OCIE. As CCO of Penson, Delaney had final responsibility for the contents of the letter to OCIE. Furthermore, Delaney directly participated in drafting the misrepresentation. On November 8, 2010, a supervisor in Buy Ins emailed Delaney a short, 1.5 page draft of selected responses to OCIE's findings. That draft contained the first version of the misrepresentation: "Penson feels that the processes and procedures employed to close out positions that were in violation of rule 204T were effective and performed as designed."

57. On November 15, 2010, a junior compliance officer shepherding the drafting process emailed Delaney a full draft of Penson's responses to OCIE. That draft contained the language from the November 8, 2010 draft collection of selected responses regarding Penson's Rule 204T processes and procedures.

58. On November 19, 2010, Delaney emailed the junior compliance officer stating “Attached is my re-draft with a couple of additional notes.” Delaney’s November 19, 2010 re-draft edited the key language from the November 15, 2010 draft as follows: “Penson feels that the reasonable processes ~~and procedures~~ employed to close out positions that were allegedly in violation of rule 204T were effective and performed as designed.”

59. On November 24, 2010, Delaney was copied on an email seeking final review of the letter before delivery to OCIE. That draft, and the final draft delivered to OCIE on November 24, 2010, contained the exact language from Delaney’s November 19, 2010 draft.

60. In addition to concealing the intentional violations relating to long sales of loaned securities from regulators, Delaney substantially assisted those violations by exploiting a fundamental flaw in Penson’s Supervisory System that allowed Stock Loan to operate without supervision. Delaney also substantially assisted the intentional Rule 204(a) violations relating to long sales of loaned securities by attempting to conceal them from Yancey.

61. Penson’s WSPs assigned Delaney specific responsibility for “establishing and maintaining Penson’s Supervisory System.” This included responsibility for designating supervisors, allocating responsibilities, and assigning personnel to appropriate supervisors. Per this responsibility, Delaney was personally involved in preparing a Supervisory Matrix, incorporated into Penson’s WSPs, which established the chain of regulatory supervision at Penson. From 2009 to 2011, the Supervisory Matrix designated Yancey as supervisor for the Senior Vice President of Stock Loan, the individual with primary responsibility within Stock Loan for the non-compliant Rule 204(a) procedures.

62. But Delaney knew that Yancey in fact was not supervising the Senior Vice President of Stock Loan because the Senior Vice President of Stock Loan and Yancey informed him of that fact. Additionally, in early-to-mid 2010, Yancey expressed serious concerns to Delaney about Yancey’s lack of supervision over the Senior Vice President of Stock Loan. Yancey told Delaney that Yancey did not trust the Senior Vice President of Stock Loan, that Yancey lacked adequate visibility into and control over the Senior Vice President of Stock Loan’s actions, and that Yancey was concerned the Senior Vice President of Stock Loan was exposing Penson and Yancey to liability.

63. Delaney knew these concerns were well-founded. He knew that, from 2008 forward, the Senior Vice President of Stock Loan had been intentionally causing Penson to violate Rule 204T(a)/204(a) relating to long sales of loaned securities. He also knew that, just months earlier, he and the Senior Vice President of Stock Loan had considered and rejected procedures that would have brought Penson into compliance with Rule 204(a). But, even after Yancey expressed his concerns, Delaney withheld this critical information from Yancey.

64. Delaney withheld this critical information about the Rule 204T(a)/204(a) violations relating to long sales of loaned securities, along with his and the Senior Vice President of Stock Loan’s misconduct, in other key interactions with Yancey. As

discussed, Delaney met with Yancey on March 31, 2010 to discuss Yancey's CEO Certification and Delaney's Annual Report. The meeting focused primarily on Penson's Rule 204T(a)/204(a) deficiencies in Buy Ins, but Delaney did not inform Yancey of the closely-related Rule 204T(a)/204(a) violations relating to Stock Loan and long sales of loaned securities. Nor did Delaney inform Yancey of his agreement just months earlier with the Senior Vice President of Stock Loan not to implement compliant procedures and to reject procedures that would have brought Penson into compliance with Rule 204(a) for long sales of loaned securities. Instead, Delaney focused solely on remediation efforts relating to Buy Ins.

65. A few months later, in July 2010, Delaney was copied on a series of emails between Buy Ins, Stock Loan and compliance personnel confirming Stock Loan was continuing to cause Rule 204(a) violations relating to long sales of loaned securities. In the final email of the chain, one of Penson's junior Compliance Specialists stated the failure to deliver positions "should be flat by the end of the day" and "[p]referably this should be completed prior to or at market open."

66. Delaney reviewed the July 2010 email chain and knew, or absent recklessness should have known, the advice in the July 2010 email was incorrect because Rule 204(a) requires close-out of CNS fails no later than market open; this is not an option. Yet Delaney took no steps to address the ongoing violations, and took no steps to address the improper advice.

67. To the contrary, one week later, on August 2, 2010, Delaney met with Yancey to discuss the status of the efforts to remediate Buy Ins's Rule 204(a) deficiencies. Consistent with his actions during the March 31, 2010 meeting and the discussions in which Yancey expressed significant concerns about the Senior Vice President of Stock Loan, Delaney did not inform Yancey of the closely-related, ongoing Rule 204(a) violations relating to long sales of loaned securities.

68. By directing Yancey away from Stock Loan's Rule 204T(a)/204(a) compliance and repeatedly withholding the critical information about the Senior Vice President of Stock Loan's and Delaney's own misconduct from Yancey, Delaney subverted Penson's Supervisory System instead of establishing and maintaining it. And even though he knew Yancey was not in fact supervising the Senior Vice President of Stock Loan, Delaney continued to designate Yancey as the Senior Vice President of Stock Loan's supervisor in the Supervisory Matrix up until Delaney left Penson in April 2011. These actions allowed Stock Loan to avoid supervision and continue violating Rule 204T(a)/204(a) relating to long sales of loaned securities.

Yancey Fails to Supervise the Senior Vice President of Stock Loan

69. The Senior Vice President of Stock Loan was controlled by Penson and was an associated person of Penson. He had primary authority and responsibility within Stock Loan for its operational practices and for the Department's WSPs, which WSPs were incorporated into Penson's WSPs. The Senior Vice President of Stock Loan knew that Rule 204T(a)/204(a) required Penson to close out CNS failures to deliver for long sales,

including long sales of loaned securities, by market open T+6. From October 2008 through November 2011, the Senior Vice President of Stock Loan willfully implemented and enforced procedures that he knew were systematically causing Penson to violate Rule 204T(a)/204(a) in connection with long sales of loaned securities.

70. Penson's WSPs designated Yancey as the direct supervisor for the Senior Vice President of Stock Loan. Yancey was aware of that fact. However, from at least October 2008 through November 2011, Yancey did not exercise any supervision over the Senior Vice President of Stock Loan.

71. Yancey knew he lacked adequate insight into, and control over, the Senior Vice President of Stock Loan's securities lending activities. Yancey also knew there was a substantial risk that the Senior Vice President of Stock Loan was exposing Penson to potential liability. However, Yancey took no steps to acquire the requisite insight into, and control over, the Senior Vice President of Stock Loan's securities lending activities.

72. Yancey thus failed to detect and prevent the intentional misconduct by the Senior Vice President of Stock Loan.

Yancey Fails to Supervise Delaney

73. Penson's WSPs designated Yancey as Delaney's supervisor.

74. Yancey failed to fulfill his supervisory obligations by failing to follow up on red flags of Delaney's misconduct relating to his aiding and abetting Penson's violations of Rule 204T(a)/204(a). The 99% violation rate for Buy Ins' Rule 204T(a)/204(a) procedures uncovered by the December 2009 audit was a significant red flag to Yancey that Penson had systemic Rule 204 deficiencies and that Delaney, whom he supervised, might bear responsibility for those deficiencies. Paramount among these deficiencies was the willful violations originating with Stock Loan. As discussed, there was a direct nexus between the Buy Ins and Stock Loans' Rule 204T(a)/204(a) procedures such that a meaningful inquiry into the December 2009 audit results would have led directly to knowledge of the intentional Stock Loan violations. If Yancey had been at least as diligent as the Buy Ins supervisor in response to the December 2009 audit, he too would have discovered the intentional Stock Loan violations and Delaney's role in them.

75. The Senior Vice President of Stock Loan's conspicuous absence from the March 2010 meeting regarding the December 2009 audit was another fact that should have prompted vigorous follow up from Yancey. Yancey's initial instinct in response to the December 2009 audit was correct – Yancey's immediate response to the audit results was serious concerns about Stock Loan's Rule 204T(a)/204(a) procedures. Yancey requested that the Senior Vice President of Stock Loan attend the March 31, 2010 meeting to discuss the audit. But the Senior Vice President of Stock Loan refused to attend. At about the same time, Yancey informed Delaney he was concerned the Senior Vice President of Stock Loan was not trustworthy, that he presented significant risks to Penson's liability as well as Yancey's individual liability, and that Yancey lacked the insight he needed as CEO of Penson into Stock Loan's actions. Notwithstanding his understanding of the December

2009 audit's potential implications regarding Stock Loan procedures, the Senior Vice President of Stock Loan's refusal to meet with him regarding that audit, and Yancey's significant concerns about the Senior Vice President of Stock Loan and Stock Loan, Yancey took no steps to follow up regarding how Stock Loan's Rule 204 procedures may have been contributing to Penson's Rule 204 deficiencies.

76. Penson's WSPs, effective as of March 31, 2010, contained a section titled "Annual CEO Certification (RULE 3130): CEO and CCO Mandated Meeting." Those procedures identified Yancey, as CEO/President, and Delaney, as CCO, to be the relevant Designated Supervisory Principals. The procedures required as follows: "The CCO will prepare and provide the CEO (or equivalent officer) with an Annual Report that includes a review of [Penson]'s Supervisory System and Procedures and key compliance issues. The CCO will meet with the CEO to discuss and review the report and will meet at other times, as needed, to discuss other compliance matters." [Emphasis added.] The procedures further required Yancey to certify, among other things, that "[c]ompliance processes are evidenced in a written report reviewed by the CEO, CCO, and other appropriate officers and submitted to the Board of Directors and Audit Committee, if any." [Emphasis added.]

77. Per those procedures, on March 31, 2010, Yancey met with Delaney to review Delaney's Annual Report of Penson's key compliance issues. The primary topic at the meeting was the results of the December 2009 NASD Rule 3012 audit showing Penson's 99% failure rate for Buy Ins' Rule 204(a) procedures and Penson's efforts to amend its processes to remediate these compliance deficiencies.

78. At the conclusion of that meeting, Yancey signed CEO Certifications per FINRA Rule 3130 and NYSE Rule 342.30. Those certifications included copies of Delaney's Annual Report. Consistent with the WSPs' requirement that the report discuss "key compliance issues," the March 31, 2010 Annual Report contained a section titled "identification of significant compliance problems." But that section of the report was silent about Penson's Rule 204 deficiencies as identified in the December 2009 audit or any of the compliance processes that Penson enacted to correct the deficiencies. In fact, there was not one word anywhere in the Annual Report about these issues.

79. Thus, in violation of Penson's WSPs, Yancey falsely certified that Penson's "[c]ompliance processes [were] evidenced in a written report reviewed by the CEO, CCO and other appropriate officers." Contrary to the WSPs, Yancey also failed to ensure that the report discussed Penson's "key compliance issues."

80. Delaney's role in Yancey's March 31, 2010 CEO Certification and attendant Annual Report discussed above elevated the red flag presented by the December 2009 audit to an emergency flare. The Annual Report's omission of any discussion relating to the December 2009 audit was glaring in light of the facts known to Yancey about the audit and Penson's response. As of March 31, 2010, therefore, Yancey was aware that his CCO was omitting significant information about Penson's Rule 204T/204 deficiencies in a critical report prepared in accordance with Penson's WSPs and regulatory requirements.

81. This was a significant red flag of Delaney's misconduct relating to Rule 204T/204, and, if Yancey had followed up on that red flag he would have discovered the intentional Rule 204T(a)/204(a) violations relating to long sales of loaned securities and Delaney's role in them. But Yancey took no steps to follow up. Instead, Yancey failed to prevent and detect Delaney's misconduct by failing to address the red flags reflected in the materially misleading Annual Report.

82. Yancey was aware of another significant red flag regarding Delaney's misconduct, specifically the misrepresentations to OCIE in November 2010. As discussed above, Delaney participated in drafting and delivering a response to a Rule 204T exam by OCIE that materially misrepresented Penson's Rule 204T processes. Yancey knew the statement in the November 24, 2010 letter to OCIE that Penson's Rule 204T processes were "reasonable" "effective" and "performed as designed" was false in light of the December 2009 audit results. He also knew Delaney was responsible for the misrepresentation, because Yancey participated with him in the drafting process from start to finish – Yancey and Delaney were recipients on the email distributing the initial draft of the misrepresentation on November 8, 2010, and then, on November 24, 2010, Delaney and Yancey received the draft for their final review before delivery to OCIE.

83. Coming on the heels of the red flags presented by the December 2009 audit and Delaney's omissions in the March 31, 2010 Annual Report, these overt misrepresentations to OCIE were an emergency beacon. Yet Yancey did nothing. Instead, he allowed the November 24, 2010 letter to be delivered to OCIE without any comment or correction to the misrepresentation, and without taking any steps to follow up on Delaney's misconduct.

E. VIOLATIONS

84. As stated above, Penson violated Rule 204T(a)/204(a) of Regulation SHO.

85. As a result of the conduct described above, Delaney willfully aided and abetted and caused Penson's violations of Exchange Act Rule 204T(a)/204(a), which requires registered participants of a clearing agency to close out CNS failures to deliver resulting from short sales no later than market open T+4 and CNS failures to deliver resulting from long sales no later than market open T+6.

86. The Senior Vice President of Securities Lending willfully aided and abetted and caused Penson's violations of Rule 204T(a)/204(a) of Regulation SHO, which requires registered participants in a clearing agency to close out CNS failures to deliver resulting from short sales no later than market open T+4 and CNS failures to deliver resulting from long sales no later than market open T+6.

87. As a result of the conduct described above, Yancey failed reasonably to supervise the Senior Vice President of Stock Loan and Delaney within the meaning of Section 15(b)(4)(E) of the Exchange Act with a view to preventing and detecting their willful aiding and abetting Penson's violations of Rule 204T(a)/204(a) of Regulation SHO.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative and cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Delaney and Yancey (“Respondents”) an opportunity to establish any defenses to such allegations;

B. What, if any, remedial actions are appropriate in the public interest against Respondents pursuant to Section 15(b)(6) of the Exchange Act including, but not limited to, disgorgement and civil penalties pursuant to Section 21B of the Exchange Act;

D. What, if any, remedial actions are appropriate in the public interest against Respondents pursuant to Section 9(b) of the Investment Company Act; and

E. Whether, pursuant to Section 21C of the Exchange Act, Delaney should be ordered to cease and desist from committing or causing violations of and any future violations of Rule 204T(a)/204(a) of Regulation SHO, whether Respondents should be ordered to pay civil penalties pursuant to Section 21B(a) of the Exchange Act, and whether Respondents should be ordered to pay disgorgement pursuant to Sections 21B(e) and 21C(e) of the Exchange Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that each Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If any Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, that Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondents personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Lynn M. Powalski
Deputy Secretary