

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8601 / August 4, 2005

ADMINISTRATIVE PROCEEDING
File No. 3-12004

In the Matter of

**UTAH EDUCATIONAL
SAVINGS PLAN TRUST,**

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER PURSUANT TO
SECTION 8A OF THE SECURITIES ACT
OF 1933**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”), against the Utah Educational Savings Plan Trust (“UESP” or “Respondent”).

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 it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 (“Order”), as set forth below.

III.

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

A. The UESP is an agency of the State of Utah organized to provide residents of Utah and other states the ability to participate in an educational savings plan pursuant to Section 529 of the Internal Revenue Code ("529 Plan"). The UESP is administered by the Utah State Board of Regents, acting in its capacity as the Utah Higher Education Assistance Authority. The UESP is not registered with the Commission and provides 529 Plan services under exemptions from registration pursuant to Section 3(a)(2) of the Securities Act, Section 202(b) of the Investment Advisers Act of 1940 and Section 2(b) of the Investment Company Act of 1940.

B. The UESP provides 529 Plan services to persons who enter into participation agreements with it ("participants"). Those services include establishing and maintaining participant accounts, taking receipt of participant funds, and investing and making distributions of participant funds at the direction of participants.

C. The UESP charges participants administrative fees for the services it provides. The maximum fees the UESP may charge participants are established by Utah law.

D. The UESP's 529 Plan offers participants the ability to select among several investment options for the investment of their participant funds. Participants select the investment options according to personal preference, and the UESP effects investments on behalf of the participants in accordance with their selections.

E. The UESP invests participant funds by pooling those funds in omnibus accounts the UESP has established with outside fund managers ("Fund Managers"). The UESP invests pooled participant funds in various investment funds provided by the Fund Managers, according to the direction of the participants.

F. The UESP developed and maintains a separate, in-house database to record and account for individual participant account activity within the UESP system ("UESP System"). The UESP issues account statements to participants reflecting transactions and events in their individual accounts through the UESP System.

G. The UESP System which records activity in individual participant accounts is separate from the system which tracks the underlying investments made in the omnibus accounts established with the Fund Managers. Since at least 2002, when changes were made to the UESP System, additions to or withdrawals from the individual participant accounts have been recorded in

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.

the UESP System at least one day, and frequently more than one day, prior to the date funds were actually added to or withdrawn from the omnibus accounts. This timing difference resulted in gains and losses from month to month which, due to favorable market conditions, resulted in a net accumulation of \$505,976 in gains in the omnibus accounts which were not allocated to specific participant accounts (the “Unallocated Gains”).

H. At least by 2002, Dale C. Hatch (“Hatch”), the former director of the UESP, became aware of the existence of the Unallocated Gains. Hatch concealed this information from others at UESP. From in or about 2002 through July 2004, Hatch transferred the \$505,976 in Unallocated Gains from the omnibus accounts into approximately 49 UESP participant accounts which he owned or controlled. Between December 2002 and May 2004, Hatch caused \$85,500 to be disbursed to him from those accounts. When the UESP discovered Hatch’s activity, his employment with the UESP was terminated and the Utah State Auditor conducted an investigation into Hatch’s misappropriation, which was completed on September 24, 2004.

I. Hatch’s misappropriation was made possible by weaknesses in UESP’s system of internal controls, which he had implemented. Those weaknesses included: (1) providing certain UESP personnel unrestricted access to most functions on the UESP System; (2) inadequate separation of duties among personnel with access to the UESP System; (3) inadequate review of entries in the UESP System; and (4) flaws in the UESP System that allowed UESP personnel to alter prior transactions in the UESP System without an audit trail and to characterize transactions in the UESP System in a manner inconsistent with their actual nature.

J. Neither the timing discrepancies nor the existence of unallocated funds in the omnibus accounts was disclosed to participants or potential participants in UESP’s marketing materials until February 1, 2005. The UESP “Fact Book”, the 529 Plan’s primary disclosure document, stated that “One-hundred percent of the earnings earned by the pool will be credited to individual participant accounts.” The Unallocated Gains should thus be considered “earnings earned by the pool.”

K. The UESP did not notify participants and prospective participants in the 529 Plan that the Fact Book should not be relied upon until January 4, 2005. The Fact Book remained on the UESP’s Internet website until that date, when the UESP announced it was in the process of revising the Fact Book.

L. On July 7, 2004, the UESP issued a press release announcing Hatch’s dismissal. That release stated “... an internal audit has uncovered some ‘questionable transactions’ by the Director of the Utah Educational Savings Plan Trust (UESP) involving administrative funds of the agency.” In fact, the funds involved in Hatch’s misappropriation were the Unallocated Gains contained in the omnibus accounts, and therefore, were funds of participants.

M. On September 24, 2004, another press release was issued, this time regarding the Utah State Auditor’s report of investigation. Among other statements, that release stated: “As we announced on July 7, none of the money deposited by individual investors was misappropriated – no investors were harmed.” In fact, based upon representations in the UESP’s Fact Book, all of the

funds Hatch had misappropriated were “earnings earned by the pool,” and were therefore funds that should have been allocated to participant accounts. That press release also announced changes to UESP’s internal controls designed to prevent a recurrence of Hatch’s conduct by other UESP employees.

UESP’s Misstatements and Omissions

N. In the offer and sale of interests in its 529 Plan, and to provide information to participants in its 529 Plan, the UESP has made statements of material fact to participants and prospective participants in the 529 Plan. These representations were made through offering materials, on its Internet website and in press releases.

O. While making statements described above, the UESP made untrue statements of material fact and omitted to state material facts. Those untrue statements and omissions include:

1. A representation that one hundred percent of the earnings earned by the UESP’s investment pools would be credited to individual participant accounts;
2. A failure to disclose that participants could be liable for losses resulting from the manner by which the UESP transacts participant funds and accounts for participant transactions (or resulting from trades in the omnibus accounts);
3. A failure to disclose the manner by which participant transactions are effected and accounted for;
4. A failure to disclose the known and ongoing internal control weaknesses discovered when Hatch's conduct was investigated; and
5. A representation that the funds misappropriated by Hatch were “administrative funds” when in fact those funds should have been allocated to participant accounts.

P. As a result of the conduct described above, the UESP violated Section 17(a)(2) of the Securities Act, which makes it unlawful for any person in the offer or sale of any securities to: make untrue statements of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

UESP’s Remedial Efforts

In determining to accept the Offer, the Commission considered remedial acts undertaken by Respondent and cooperation afforded the Commission staff.

IV.

Undertakings

Respondent has undertaken to:

- A. Restore to the UESP omnibus accounts an amount equal to all funds known to have been misappropriated by Hatch;
- B. Ensure that all unallocated funds will be distributed on a pro rata basis to participant account owners of record as of March 31, 2005;
- C. Make changes to the UESP's disclosure documents to accurately and fully state the manner in which the UESP effects and accounts for participant transactions;
- D. Retain an Independent Consultant who will assist the UESP in establishing internal controls that will address the weaknesses in the UESP System, the UESP's accounting and other procedures discussed above, and the UESP's disclosure; and
- E. Provide written certification to the Commission that it has complied with the undertakings set forth above within fifteen (15) days after the issuance of this Order.

V.

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

Accordingly, it is hereby ORDERED that:

- A. Respondent UESP cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) of the Securities Act
- B. Respondent shall comply with the undertakings enumerated in Section IV above.

By the Commission.

Jonathan G. Katz
Secretary