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UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

In the Matter of

DANIEL BOGAR,

BERNERD E. YOUNG, and

JASON T. GREEN

Respondents.

ADMINISTRATIVE PROCEEDING

File No. 3-15003

RESPONDENT BERNERD E. YOUNG'S

PETITION FOR REVIEW

Respondent Bernerd E. Young (Young) was served with Administrative Law Judge Carol Fox Foelak's (ALJ) Initial Decision on August 2, 2013. Pursuant to Rule 111(h) of the Commission Rules of Practice, 17 C.F.R. 201.111(h), Respondent Young hereby submits his Petition for Review.

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I.
INTRODUCTION

This Petition for Review is made *pro se* by Bernerd E. Young, an individual who, prior to this action, has had a distinguished career having served for more than 19 years as a regulator with the National Association of Securities Dealers, Inc. (nka the Financial Industry Regulatory Authority) where he not only rose to the rank of one of 12 District Directors but he was recognized twice by his superiors for excellence in service; who from September 2004 to June 2010 served as an Independent Distribution Consultant at the request of the Commission in a Fair Funds Distribution for Bridgeway Capital Management; and who has otherwise dedicated his life to and faithfully served the financial services for more than thirty years as a regulator, as a consultant and as a chief compliance officer (or "CCO") without a single blemish on his record. This case stems from Young's position as CCO of Stanford Group Company ("SGC"), where he served from August 2006 to February 17, 2009. Young served *solely* in the position of CCO, and has been found guilty of fraud charges based on theories that have historically been applied by the Commission and the Courts only to salespersons.

Respondent Bernerd E. Young (Young) was served with Administrative Law Judge Carol Fox Foelak's (ALJ) Initial Decision on August 2, 2013. Pursuant to Rule 111(h) of the Commission Rules of Practice, 17 C.F.R. 201.111(h), Respondent Young, hereby submits his Petition for Review.

Young is an individual who, prior to this action, has faithfully served the financial services industry for more than 30 years without a single blemish on his record. Young joined NASD as an Examiner Trainee in the Denver District Office. During the course of Young's career at the NASD, he consistently received regular promotions and commendable evaluations, resulting in his being NASD's Excellence in Service Winner in June 1989; in December, 1991 he was promoted to Supervisor of Examiners and transferred to the New Orleans District Office; In March 1997 he was promoted to Associate Director and in March 1998, he took on the responsibility for on-site management of the [Dallas] District office. In October 2001 he became a second time Winner of the NASD Excellence in Service Award. Young was terminated effective May 12, 2003.

From May 2003 through July 2006, among Young's regulatory appointments he was tapped by the Fort Worth Regional Office to serve as an Independent Distribution Consultant for a $4.9 million, SEC Fair Funds Distribution of Bridgeway Capital Management, Inc. clients. Young served in that capacity for six (6) years until the Matter was closed in May 2010. He also was nominated and approved by the Commission in 2005 to serve as an independent consultant in connection with a SEC Market Timing Settlement involving Southwest Securities. In 2004 NASD asked him serve as a consultant in the First Montauk Securities case (which he accepted), and in 2006 by the Texas State Securities Board for another matter. During this time Young served as an Expert Witness on approximately 25 cases representing both broker/dealers and investors on matters of suitability, due diligence, sales practices, markups / markdowns and supervision.

It is important to note that with respect to his appointment as the Independent Distribution Consultant, Young notified Michael Gunst in the FWRO in 2006 that he had joined Stanford Group Company as its new Chief Compliance Officer. He offered to resign as the Independent Distribution Consultant for Bridgeway clients. Young was informed that Gunst had spoken to several Fort Worth Office managers and senior individuals in the SEC's Washington DC offices and was advised that his affiliation with Stanford Group Company did not present any concerns from the staff's perspective.

NASD's confidence in Young's ability to comply with the federal, state and self-regulatory requirements governing the securities industry was underscored by NASD's Qualification Committee granting him a full waiver of both the Series 7 and Series 24 examinations upon joining Stanford Group Company.

Beginning in August 2006 and through February 2009, Bernerd E. Young (CRD #1109172) served as Managing Director of Compliance and Chief Compliance Officer ("CCO") of Stanford Group Company (SGC), and Stanford Group Holdings (SGH). SGC was a broker-dealer and an investment advisor registered with the Securities Exchange Commission and a member of the Financial Industry Rulemaking Authority ("FINRA"), the later since October 1995. Bernerd E. Young, together with two other Respondents, Daniel Bogar and Jason Green ("Respondents") were charged by the Division with:

(i) wilfully violating Section 17(a) of the Securities Act, which prohibits, directly or indirectly, employing any device, scheme, or artifice to defraud, obtaining money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made not misleading, in the offer or sale of securities, or engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser, in the offer or sale of any securities;

(ii) wilfully violating and/or wilfully aided and abetted and caused SIBL's and SGC's violations of Section 10(b) of the Exchange Act and Rules 10b-5 thereunder, which prohibits, directly or indirectly, employing any device, scheme, or artifice to defraud, the making of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made not misleading, or engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of securities;

(iii) wilfully aided and abetted and caused SGC's violations of 15(c)(1) of the Exchange Act, which prohibits a broker-dealer from using the mails or any means of instrumentality of interstate commerce to induce the purchase or sale of any security by means of any manipulative, deceptive, or other fraudulent device or contrivance; and

(iv) wilfully aided and abetted and caused SGC's violations of Sections 206(1) and (2) of the Advisers Act, which make it unlawful for an adviser to employ any device, scheme, or artifice to defraud any client or to engage in any transaction, practice, or course of business that operates as a fraud or deceit upon any client.

Such charges stem from the Division's position that Young's review of sales and marketing material, as well as training material, from a *compliance* perspective translates into making affirmative misrepresentations to clients in the *sale* of securities. Perhaps even more incredibly, the Division brought these charges even though those very materials were not only in the Division's possession for at least 1 year prior to Young's arrival at SGC but they were prepared, reviewed, and approved by the President and Compliance Department of an affiliate Stanford company with direct responsibility for the product at issue, the Certificate of Deposit ("CD"), as well as the Stanford organization's Legal Department and experienced outside SEC counsel. Young, who is not a lawyer, reasonably relied on the existing work of those professionals, considered absolutely trustworthy at the time. We recognize that Young's former job title and place of employment, by themselves, likely produce an immediate reaction, a rapid forming of beliefs as to his perceived culpability. We do not suggest that the ALJ or the Division has succumbed to that impulse here or to the pressure of the pubic media. The Division's views, however, are necessarily a product of the circumstances of the R. Allen Stanford case, a high-profile, alleged massive fraud. The Division, moreover, has included Young, an individual who never served in a sales or supervisory capacity at SGC, whose compensation was in no way tied to the sale of any security by SGC, within a group of three Respondents as part of this proceeding and has alleged the same theories "across the board for everyone." While the recommended sales and marketing charges may well fit others within that group, as applied to Young and his particular role and responsibilities and experience at SGC, they result in altogether novel, unsupportable, and unfair applications of Commission precedent. Nor do the facts, as applied to Young, evidence the level of culpability that would warrant an enforcement action, much less a fraud conviction against a chief compliance officer, though the facts, as applied to others, may do so. Agency CCO precedent must be applied fairly and evenly to the unadorned facts of each case, from the R. Allen Stanford's to the John Doe's; it must not bend on how the Division may perceive others. In short, Young deserves to be evaluated on his own merits *and under the particular facts of this case as they apply to him individually.* Accordingly, we respectfully request that the Commission look objectively at the law and this factual record afresh, and set aside and reverse the ALJ findings against Young.

II.

OVERVIEW AND SUMMARY OF ARGUMENT

A. SGC was a corporation formed under the laws of the State of Texas on July 21, 1995. SGH was a separate corporation, formed in November 1999 and Stanford International Bank (SIBL) was a private financial institution chartered under the laws of Antigua and Barbuda, originally organized in Monserrat in 1985. SIBL moved to and commenced operations in Antigua in December 1990. SIBL was presided over by a Board of Directors consisting of seven individuals, a Chief Executive Officer, a President, a Chief Financial Officer, a Chief Investment Officer, a Senior Compliance Officer, managers and other officers and employees. As stated in the Disclosure Statement for SIBL, its primary business was to provide private banking and to issue certificates of deposit (SIB CD). [BEY 12042]. No testimony or documentary evidence was ever produced to show that Young was ever an officer, director, control person or even an employee of SIBL. In fact, the Disclosure Statement prepared by SIBL [BEY 12035] set forth the senior officers and directors of SIBL [BEY 12046-12047], none of which included Young or any of the other Respondents for that matter.

B. SGC sold the SIB CD in the United States pursuant to a Regulation D exemption from securities registration. Tr. 3189; 3467-68; Div. Ex. 370, Div. Ex. 569 at 174-81. SGC was not the sole distributor of the SIB CD. Further, the SIB CD was not the only product offered by SGC to its customers. Tr. 485-486, 1175-1176, 2347-2349, 2849, 2919-2920, 2929, 2937.

C. The Division alleged that the Respondents, including Young, mandated the use of <u>misleading and incomplete offering documents, including the Disclosure Statement and Sales Brochures</u> thereby wilfully violating 17(a) and wilfully violating and/or wilfully aiding and abetting and <u>causing</u> SIBL's and SGC's violations of Section 10(b) of the

Exchange Act and Rules 10b-5 thereunder. However, as stated in the ALJ's ID, "Respondents did not provide input into the language of disclosure and marketing materials, and believed that inside and outside counsel had approved the disclosure and marketing materials and the manner in which SGC and SIB were doing business." (Id.; Tr. 2576-81, 2609, 2850-52, 3017-18 (Bogar), 3414 (Young), 3681, 3701-02, 3760, 3979 (Green). In fact, the SIBL Disclosure Statement (Div. 607 and 608 and 611 – Disclosure Statements) and the SIBL Sales Brochures (Id. Page 7) were in use by SIBL and SGC prior to Young joining SGC in August 2006.

The Division's theories, which we discussed individually below, center on a common nucleus of conduct. According to the Division, Young had responsibility for the content of certain marketing and training material that was prepared by an affiliate, SIB, and that was in place and in use when he arrived at SGC. That material, the Division posits, was misleading. The Division has also argued that Young had a level of due-diligence responsibility with respect to the SIB CD, but did not independently confirm the propriety of select statements in the material. On the Division's view, Young thereby misled clients into purchasing the CD, committing securities fraud.

The Division's charges and view of Young's level of culpability appear to be informed by that core argument. But that argument fails to take account of his own affirmative actions and reasonable reliance on multiple sources, including the head of the Antiguan regulatory authority with responsibility for the regulation of SIBL; a chief compliance officer who was in charge of compliance for the CD at SIBL, the affiliate with direct responsibility for the product; the current and former General Counsel for the Stanford organization; outside counsel with many years of SEC experience; and many others whom, at the time, Young trusted and relied upon and had no reason not to. Moreover, Young conducted extensive due diligence on SIB and the CD. He not only specifically asked to see the portfolio investments for which the Division now seeks to hold him responsible, but three lawyers, the Bank's President, the Bank's CCO, the Chairman of the Financial Services Regulatory Commission of the Government of Antigua and Barbuda, each of which were considered at the time among the most responsible and trustworthy advisers available to Young, all denied his requests citing foreign privacy law. Without so much as a whisper of a customer complaint or any other red flag, Young's reasonable reliance on these individuals must be accorded commanding deference.

The Division alleged and the ALJ has ruled that Young violated Section 10(b) of the Securities Exchange Act of 1934, as well as Rule 10b-5 thereunder, and Section 17(a) of the Securities Act of 1933.[1] The Division also alleged and the ALJ also ruled that Young caused or aided and abetted SGC's alleged violations of Section 206 of the Investment Advisers Act of 1940. Premised upon these statutory bases, the Division brought four (4) sales-related fraud theories against Young, the CCO. As applied to Young, these theories are meritless and the ALJ's Initial Decision should be set aside in its entirety as the precedent set for compliance professionals in the securities industry by this decision is untenable and otherwise creates an automatic "put" on every CCO in the securities industry today as well as in the future.

1. One sentence in a 15-page brochure that had been prepared and approved by an affiliate, SIBL, before Young's arrival at SGC states, "The Bank's assets are invested in a

[1] For purposes of this submission and our 10(b) and 17(a) analysis, we assume that the CD is a security.

well-diversified portfolio of highly marketable securities issued by stable governments, strong multinational companies and major international banks." The Division claims that Young, CCO at SGC, had authority and responsibility for the content of this brochure, including this sentence, but that assertion finds no support in fact or in his contemporaneous job descriptions. The Division's argument that SGC had no way to verify the accuracy of that sentence and that Young, with what the Division describes as "a wink and a nod," did not inform clients of that fact in order to mislead them into purchasing the SIB CD is similarly unfounded. Young understood at the time that the Bank's foreign regulator and outside auditors, as well as individuals within the Stanford organization, were able to-and did-verify the accuracy of the actual portfolio investments, and no one brought any concerns to his attention. Young did not have the benefit of hindsight.

2. The SIB brochure states that "Stanford International Bank maintains a comprehensive insurance program with the following coverages: a depository insolvency policy insuring funds held in correspondent financial institutions; a bankers' blanket bond; and a directors' and officers' liability policy." This language is "obviously wrong," The Division postulates, because it represented to potential investors that the CD was covered by an all-inclusive insurance package, including Federal Deposit Insurance Corporation ("FDIC") insurance. The Division asserts that Young did nothing to address this obvious misrepresentation in an effort to increase CD sales. But The Division can reach this conclusion only by plucking out the term "comprehensive insurance" from the other words in the *same sentence*, by ignoring three statements in the *same brochure* emphasizing that the CDs were not FDIC insured, and disregarding at least four additional disclosures in the *same set of materials* that went to potential investors reiterating that "this insurance does not insure customer deposits." It

should come as no surprise that the United States Supreme Court and the Commission have spurned this exact mode of analysis.

3. The Division claims that Young-who was neither responsible for nor had authority over the marketing material in question-did not disclose in the SIB sales and marketing literature certain financial incentives that salespersons received from selling the CD. Nor, according to the Division, did Young disclose certain sales contests or the percentage of SGC's revenue that derived from the CD. The Division argues that Young omitted that information in order to mislead clients or that he acted recklessly or incompetently in failing to disclose it. Putting aside Young's lack of responsibility for the material in question, the fact that incentives were granted *was* disclosed, and the law does not require the level of specificity that the Division and the ALJ's decision now demands.

When Young joined Stanford in August 2006, the broker/dealer had been a member of NASD (nka FINRA) since October 1995. It had been marketing the SIB CDs for approximately 8 years. During that time, SGC had been the subject of five NASD/FINRA cycle examinations, two SEC examinations and at least 2 examinations by the staff of the Texas State Securities Board (TSSB). In each instance, SGC provided copies of the SIB Disclosure Statement and SIB Sales Brochure to the SEC, FINRA and the TSSB. SGC had never been cited or reprimanded for its marketing or sales of the SIB CDs. SGC was found to be in compliance with each Notice to Members, NASD Informational Memorandum, NASD Regulatory & Compliance Alert, NYSE Informational Memos and similar regulatory guidance with respect to its distribution of the SIB CDs.

Although CDs were not widely considered to be a security, the SIB CDs were marketed and sold by SGC since 1998 in accordance with Regulation D upon advice of outside legal counsel. It is important to note that, in accordance with the requirements of Regulation D and regulatory guidance issued on the sale of CDs by NASD to its member firms, SGC Financial Advisors were instructed and trained to distribute the SIBL Sales Brochure only in conjunction with the Disclosure Statement for the SIB CDs. On advice of SGC outside legal counsel, the original SIBL Sales Brochure was not submitted to the NASD or to FINRA prior to late 2007.

Following a review of SGC by FINRA in the fall of 2007, FINRA required SGC to submit the SIB Sales Brochure to FINRA's Advertising Department for review and approval. Div. Ex 795. After submitting the SIB Sales Brochure to FINRA, FINRA requested revisions to a chart in the brochure which contained a comparison between U.S. CDs and the SIB CDs. FINRA requested additional disclosures be added to the brochure. At that time, the chart in question highlighted the disclosures contained in the Disclosure Statement regarding lack of FDIC insurance on the SIB CDs versus FDIC insurance on U.S. CDs. The original SIB Sales Brochure <u>and</u> the revised SIB Sales Brochure contained the same language under "Insurance" which read:

> "**Insurance.** Stanford International Bank maintains a comprehensive program with the following coverages: a depository insolvency policy ensuring funds held in correspondent financial institutions; a bankers blanket bond; a director and officers liability policy (SIBL Private Banking Brochure, Young Ex 80 and 81).

Upon submission of the new chart and new disclosures, FINRA issued a letter of approval to SGC on January 29, 2008, stating that the "brochure appears consistent with the content standards of Rule 2211 0..." Div. Ex 795.. Again, as stated in the ALJ's ID, "Respondents did not provide input into the language of disclosure and marketing materials, and believed that inside and outside counsel had approved the disclosure and marketing materials and the manner in which SGC and SIB were doing business." (Id.; Tr. 2576-81, 2609, 2850-52, 3017-18 (Bogar), 3414 (Young), 3681, 3701-02, 3760, 3979 (Green).

4. The Division alleged that Young aided and abetted violations of Section 206 of the Investment Advisers Act. The Division advised other legal counsel that they included this charge because of the Inspector General's report, but that report discussed *direct* Section 206 charges that could be brought against the *company;* it said nothing about using Section 206 to bring *indirect* aiding-and- abetting charges against an *individual,* such as Young, who has never functioned as an investment adviser. To advance this charge under the Investment Advisers Act makes no sense. In any event, an aiding-and-abetting charge finds no support in this record, which shows that Young pushed for compliance and received no benefit from the alleged fraud. These circumstances hardly are ones in which fraud charges are recommended against CCOs, much less ever authorized by the Commission.

III.

ARGUMENT

A. Young's Actions Were Consistent With Industry Guidance, Were Not Negligent, Nor Did He Act With Scienter.

Upon joining SGC in August 2006, Young worked hard to improve compliance and to establish policies and procedures which provided for a clear separation of responsibilities between compliance and sales supervision, conducting training for both compliance and branch management staff. He instituted regular meetings with his staff to ensure the implementation of the firm's policies and procedures. He worked with company personnel in other departments and outside consultants to ensure that proper controls and business practices were in place for SGC and its Compliance Department. *See In re Hoffman,* 2000 SEC LEXIS 105, at *15 (Initial Dec. Jan. 27, 2002) (crediting a chief compliance officer for trying "to improve the compliance function," and noting that his "initiatives improved, or would have improved, [the broker-dealer's] compliance system"). If, as the Division suggests, Young acted as though compliance was a charade, it is unclear why he would have gone to such lengths.

Chief Compliance Officers ("CCO"s) have always known that they have a target on their backs, by the nature of their position. The ALJ's decision in this case now puts the target on CCOs fronts, as the very agencies that mandated their jobs' existence are prosecuting them for not performing those jobs well enough. Now, not only must a CCO manage his or her employer and company employees, but he or he must do so in a way that avoids civil liability. Executing this maneuver requires substantial legal savvy.

The SEC ordered companies to establish the CCO position in 2003 and 2004, when it adopted rules that required registered funds and investment advisors to:

1. adopt and implement written policies and procedures reasonably designed to prevent violation of the federal securities laws;
2. review at least annually the adequacy of the policies and procedures and the effectiveness of their implementation; and
3. designate a chief compliance officer ("CCO") responsible for administering those policies.

Rule 38a-1, 17 C.F.R. § 38a-1 (funds); Rule 206(4)-7, 17 CFR 275.206(4)-7 (investment advisers).

In promulgating these rules, the SEC stated its expectation that a CCO "be competent and knowledgeable regarding the [applicable laws] and . . . empowered with full responsibility and authority to develop and enforce appropriate policies and procedures for the firm." The SEC further stated that a CCO "should have sufficient seniority and authority to compel others to adhere to the compliance policies and procedures."

In view of this case, the rules' language can be viewed as a red flag to all CCO's as it demonstrates the SEC's increasingly prevalent view, that if an "officer" with the "authority" and "responsibility" could have "compel[led]" employees to "adhere" to corporate policies, but a violation occurred nonetheless, then the Division feels that officer should bear liability for the employee's violations.

The SEC addressed concerns over CCOs' potential supervisory liability in the Rules' adopting release. As the SEC explained:

> Having the title of chief compliance officer does not, in and of itself, carry supervisory responsibilities. Thus, a chief compliance officer appointed in accordance with rule 206(4)-7 (or rule 38a-1) would not necessarily be subject to a sanction by us for failure to supervise other advisory personnel. A compliance officer who does have supervisory responsibilities can continue to rely on the defense provided for in section 203(e)(6) of the Advisers Act [15 USC § 80b-3(e)(6)]. Section 203(e)(6) provides that a person shall not be deemed to have failed to reasonably supervise another person if: (i) the adviser had adopted procedures reasonably designed to prevent and detect violations of the federal securities laws; (ii) the adviser had a system in place for applying the procedures; and (iii) the supervising person had reasonably discharged his supervisory responsibilities

in accordance with the procedures and had no reason to believe the supervised person was not complying with the procedures.

The SEC also addressed this point in its release approving NASD Rule 3013 by noting that "responsibility for discharging compliance policies and written supervisory procedures rests with business line supervisors." The SEC also indicated that a CCO's "consultation on the certification [as Rule 3013 requires] does not, by itself, establish a signatory as having such line supervisory responsibility."

Based on the foregoing language, it would appear that a CCO's potential liability hinges not on his or her designation as CCO, but on whether he or he is a "supervisor." If the CCO is a supervisor, then he or he must exercise that supervisory authority to ensure that employees follow his or her policies and procedures. However, no evidence was presented during trial that Young acted in a supervisory capacity, to the contrary SGC's written supervisory procedures clearly delineated a separation between compliance and supervisory responsibilities, imposing supervisory obligations on the Branch Office Managers, and Sales Supervisors. Young was responsible for compliance for SGC and had approximately 25 employees reporting to him, all of whom worked within the Compliance Department. Young reported directly to Daniel T. Bogar, President of SGC and SGH. He had a lateral reporting responsibility to Lena Stinson, Stanford's Global Director of Compliance (PowerPoint Presentation dated January 22, 2008). As disclosed on the various organizational charts prepared by SGC, Young reported directly to Bogar and, along with others including the Chief Financial Officer, Chief Technology Officer and Chief Operations Officer, was a member of the SGC Operating Committee. Young's supervisory responsibilities were limited to only those employees of SGC's compliance department (Ref. Exhibit ____).

Subsequent enforcement actions confirm that the SEC and NASD pursue CCOs who fail to discharge their supervisory responsibilities pursuant to the firm's policies and procedures, or where the CCOs failed to take action after learning of misconduct or red flags. CCOs also run afoul of the SEC and NASD when they fail to establish, maintain, and enforce written policies and procedures reasonably designed to prevent violations of securities laws. In this regard it is important to note that Young acted swiftly and proactively any time an issue with the SIB Disclosure Document and or SIB Sales Brochure was brought to his attention to wit:

- In fall 2007, following a review of SGC by FINRA, FINRA required SGC to submit the SIB Sales Brochure to FINRA's Advertising Department for review and approval. Young promptly directed that all copies of the SIB Sales Brochures currently in use at the time be recalled from the 911 branch offices of SGC, their receipt recorded by his assistant Suzanna Olivia and the originals destroyed. Upon receipt of FINRA's requested revisions to a chart in the brochure which contained a comparison between U.S. CDs and the SIB CDs, Young advised legal counsel of FINRA's requested changes and did not approve the use of SIBL's Sales Brochures until he was satisfied that all changes, requested by FINRA had in fact been made by SIBL.
- In early February 2009, when advised by Daniel Bogar that there were "problems" with the SIB Disclosure Statement, without knowing what the problems were, Young advised Bogar that SGC should cease all sales of the SIB CD until such time as the SIB Disclosure Statement could be corrected. Young inquired of Bogar and Lena Stinson, Global Compliance for SFG what the problems were with the SIB Disclosure Statement but was told that they could not tell him at that time. Notwithstanding this fact, Young again directed that all copies of the SIB Disclosure Statement which were in use at the

time be returned to his office by all branch offices of SGC. When asked if the branch offices could simply destroy the copies which were not to be used, Young said no, he wanted all copies returned to his office so that he could verify that none were in use any longer. Again, he had his assistant Suzanna Olivia log the receipt of all of the SIB Disclosure Statements to evidence that all copies had been accounted for and that none remained in use.

Young did not take his responsibilities as CCO casually, but instead when it was brought to his attention that a problem existed with either the SIB Sales Brochure (in 2007) or the SIB Disclosure Statement (in 2009), he took prompt action to make sure that no misleading disclosure statements or sales brochures could fall into the hands of any investor.

The ALJ Initial Decision makes an error in fact in that it states that:

> On December 21-22, 2008, <u>all three Respondents</u> agreed on an email sent to all MDs that gave a false reason for Pershing's decision to discontinue wiring funds to SIB so as to conceal the clearly material fact that Pershing's decision was based on its inability to obtain transparency into SIBL's portfolio after a two and a half year effort to do so. Respondents' plan for everyone at SGC to be "all on the same page regarding the Pershing decision not to wire to SIB" was made with at least a reckless degree of scienter. This false explanation was to be given to clients who asked why the payment process for SIB CDs had become so difficult. The false statement and omission were clearly material and made with at least a reckless degree of scienter.

Young had not been a party to Bogar's discussions with Pershing and was unaware of any other reason why Pershing made the decision to discontinue wiring funds to SIB. At no time did Young attempt to conceal a fact which was not part of his knowledge, but instead was known only to Bogar that Pershing's decision was based on its inability to obtain transparency into SIBL's portfolio. Young was further not aware of Green's conversation in December 2008 with R. Allen Stanford regarding the liquidity of SIBL or any discrepancies in the SIBL financial statements. Again, Young was not the author or maker or ultimate authority of the statement which was given to clients who asked why the payment process for SIB CDs had become so difficult.

Another issue raised by the ALJ's Initial Decision which is cause for concern for CCO's throughout the securities industry is the statement that "Similar misstatements appeared in the materials developed and used by Green and Young to train FAs, who were the conduits conveying the misleading representations to clients, and Bogar was aware of and responsible for the contents of these training materials." Testimony was provided during trial that the marketing materials were developed by SIBL Tr. 2147-2150; Young's participation in the training of FA's was limited to a discussion of the regulatory frame work of Antigua and Barbuda as well as the limitations imposed on sales activities under Regulation D of the Securities Act of 1933. Young was not the author of the slides which discussed the financial strength of SIBL or the performance of the SIB CD, nor was he the supervisory principal in charge of conducting sales training. As evidenced by testimony in trial, Jason Green had been conducting the sales training for FA's since 2004. Tr. 3763-3765. The compliance training was provided by various individuals, including but not limited to Jane Bates, Young's predecessor as CCO of SGC and K. Michael Koch, a member of SGC's Compliance Department. Although Young became Chief Compliance Officer of SGC in October 2006, Young did not begin conducting the SIB CD Compliance Training until Jane Bates' departure in the Summer of 2007.

Industry practice has historically been that compliance officers are rarely the ultimate decision makers, but rather they typically provide input on whether or not the risk of corruption has been accurately evaluated and whether or not preventative measures are appropriately adapted to the risk. Young clearly acted within industry practice. When confronted with the SEC Subpoena in December 2006, he sought the advice of outside legal counsel to determine what information, documentation was responsive to the subpoena. When presented with regulatory inquiries from various agencies, Young worked with Global Compliance and SFG General Counsel, Mauricio Alvarado and his designees to ensure the accuracy and completeness of each response. During the course of his due diligence into SIBL, Young did not blindly rely on due diligence efforts of his predecessor(s) CCO(s), but under took his own due diligence going well beyond what any CCO previously in his position had done, he met with the head of the FSRC in Antigua in December 2006 to verify the information provided to him his predecessor, by SFG Global Compliance, by SFG external legal counsel, and by SFG in house counsel regarding Antiguan Secrecy / Privacy Laws. In fact, the Division's own witness, Doug Shaw testified that Stanford's compliance department was as stringent as any compliance effort he had come in contact with. Tr. 412-413.

Industry guidance says that compliance officers who find that their concerns are not heard or respected must bring the subject to the attention of their superiors and detail their concerns so that when a decision is taken it is done so with all the facts available. More than any other employee, the compliance officer *must* report any case of fraud to which he/he has been witness. He/he must immediately inform his/her company's legal director. He/he must also seek to discover the conditions which made the fraud possible and propose improvements to anticorruption procedures in order to preclude future occurrences of fraud. As presented in Young's testimony at trial, Young acted consistent with this guidance, as on the morning of February 17, 2009, upon learning the truth of the problems with the SIB Disclosure Statement from Daniel Bogar, Young promptly advised Daniel Bogar and Jason Green that they collectively needed to contact the SEC staff and advise them of these facts. It was obvious based upon documentary evidence presented at trial, as well as testimony presented during this trial, as well as the criminal trials of R. Allen Stanford, Gil Lopez and Mark Kurt, that Young was not aware of the fraud that was on-going, nor could he have known about it or otherwise uncovered it. . Tr. 2150-2151 (Ref. United States of America v. James M. Davis (Criminal No. H-09-335) Pages 11-15; 17(f), (h), (i), (j), (k), (l), (m), and (n).) Judge Foelak's Initial Decision represents a significant expansion of liability for compliance personnel. This decision not only raises the bar for all chief compliance officers as to what is considered "reasonable" but it punishes the very type of compliance professional whose energy, perseverance and independence the Commission should most wish to protect and foster. Public policy dictates that a compliance professional must maintain independence from the business side of an organization where, with very rare exceptions, the role of supervision appropriately resides. Young discharged his duties professionally and with care, reasonably establishing written supervisory procedures which were designed to address each area of SGC's business, clearly delineating responsibilities between compliance and sales supervision, conducting training for SGC Branch Office Managers and Sales Supervisors which was designed to educate them on the separation between compliance and supervision, as well as carefully training those involved in sales on the prohibitions against public solicitation of an offering sold in reliance on the exemptive provisions of Regulation D of the Securities Act of 1933, all with a view and in an effort to protect investors and the organization for which he was employed as Chief Compliance Officer, on the compliance obligations and legal restrictions of distributing a product in accordance with Regulation D of the Securities Act of 1933.

Young's actions as described above and during Young's trial attest to his efforts.[2] None of this suggests, and is directly contrary to the Division's theory, that Young treated compliance as a farce or that he was a participant in a scheme with others. That evidence cannot be reconciled with the view that Young knowingly participated in a fraud, or allowed fraud to occur with "a wink and a nod."

Further, these facts belie any notion that this is one of those rare instances in which the Commission should bring a fraud action against an individual who served solely in the role of CCO. As the Commission knows, it is rare for the SEC to bring fraud actions against CCOs who also occupy other positions in the company, such as chief executive officer or vice president. Those cases typically involve a measure of egregiousness on the part of the CCO.[3]

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[2] It is important to note that Young requested and was denied access, by the Stanford Receiver, to his files in order to defend the case which was brought by the Division against him. Counsel for Young requested but never received, Young's extensive due diligence files which were in his office and Compliance Department on the day the Stanford Receiver seized the records of SGC. The Division acknowledged the existence of such records but to date have been unable to locate and numerous other documents that are potentially germane to his defense. The Division instead pointed us to roughly 700 boxes of un-indexed, potentially relevant documents in a Houston, Texas warehouse--documents that Young was denied access to in order to authenticate and or to review and analyze as part of his defense. Nonetheless, we believe that, even on this record with the limited documentation we have, the charges brought by the Division are unsupportable.

[3] *See, e.g., SECv. Zwick,* 2007 WL 831812, at *26-27 (S.D.N.Y. Mar. 16, 2007) (Zwick, the CCO, who was also the chief executive officer, the executive vice president, and a supervisor of the firm's salespersons, participated in an "egregious" kickback scheme involving "fraud, deceit, manipulation, and deliberate disregard of regulatory requirements"); *In re Liebau,* 1999 WL 329685, at *2 (Comm'n Op. May 21, 1999) (SEC brought a fraud action against numerous individuals in the company, but only a failure-to-supervise action against Liebau, who was then

But fraud actions against individuals who *solely* occupied the position of CCO, such as Young, are rarer still, and the Commission has historically required a particularly high level of scienter and active participation in the fraud. That showing cannot be made on these facts.

B. The Commission's Reasonable-Reliance Doctrine Forecloses the Division's Action Brought Against Young.

1. The Reasonable-Reliance Doctrine Is Well Established.

Undergirding each of the Division's theories is the allegation that Young misled clients by allowing the use of certain marketing literature. But settled principles of Commission law dictate that Young is not liable for the identified statements or omissions in the materials because he reasonably relied on approvals by a number of attorneys and other individuals. However misplaced that reliance may appear in hindsight (although certainly reasonable at the time), the proposition that an individual may reasonably rely on the work or statements of others-in lieu of conducting an independent verification-is reflected in decisions of the Commission stretching back for more than a quarter century. *See, e.g., In re Carlson,* 1977 SEC LEXIS 162, at *17-21 (Initial Dec. Mar. 28, 1977). Reasonable reliance "support[s] a defense based on due care or good faith," and thus operates to negate a finding of fraudulent intent, recklessness, and even negligence. *See Howard v. SEC,* 376 F.3d 1136, 1147-48 (D.C. Cir. 2004). This is so, even if the individual is a member of the compliance department with due-diligence responsibilities, *see, e.g., In re Huff,* 1991 SEC LEXIS 551, at *4-5, *8, *11-12 (Comm'n Op. Mar. 28, 1991), and even if the representations that the individual relied on were falsehoods, turned out to be wrong, or led to violations of the

the president, and chief supervisor of the individual who orchestrated the Ponzi scheme, even though Liebau allegedly "ignored obvious signs" of the Ponzi scheme).

securities laws, *In re Urban,* 2010 SEC LEXIS 2941, at *138, *148 (Initial Dec. Sept. 8, 2010) ("almost all the business leaders at [the firm] either lied to Urban or kept information from him"; nonetheless, "Urban ha[d] a reasonable basis for relying on [those] representations"); *Howard,* 376 F.3d at 1148 n.21 (holding that an individual who was responsible for marketing reasonably relied on information that "turned out to be wrong").

A quartet of precedents illustrates the force and scope of the reasonable-reliance doctrine. On September 8, 2010, in *Urban,* Chief Judge Brenda Murray dismissed all of the Enforcement Division's claims against Theodore Urban, General Counsel and Executive Vice President at Ferris, Baker Watts, Inc., based largely on this doctrine.[4] According to the court, the "major thrust" of the Division's complaint-much like the Division's tentative view here-was that Urban had failed reasonably to respond to red flags that a broker's conduct was illegal. 2010 SEC LEXIS 2941, at *127. The Division maintained that Urban's response to those red flags was inadequate and ineffective, alleging that Urban "acted recklessly in ignoring repeated red flags and in missing opportunities to detect and prevent [the] fraud and significant investor losses." *Id.* at *129.

But Chief Judge Murray held that-despite these red flags-Urban reasonably discharged his duties, placing particular significance upon his reasonable reliance "on continuous representations by multiple individuals in high level managerial roles." *Id.* at *147.

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[4] The Division withdrew the findings against Theodore Urban while awaiting a decision on a petition for review to the Commission. Chief Judge Murray's opinion remains relevant and persuasive authority as applied here.

Management regularly "told Urban," "represented [to Urban]," and "assured Urban" that these issues had been (or would be) addressed, and he had "no reason to distrust" those statements. *Id.* at *138, *147. The court emphasized that, in fact, "almost all the business leaders at [the firm] either lied to Urban or kept information from him, and people with clear supervisory responsibility over [the broker] did not carry out their supervisory responsibilities." *Id.* at *138. Nonetheless, the Chief Judge concluded, "Urban ha[d] a reasonable basis for relying on [those] representations" at that time. *Id.* at *148.

Similarly, in *Huff,* the Commission held that Arthur James Huff, a vice president and senior registered options principal in PaineWebber's central compliance department, was aware of, and reasonably relied on, the compliance and legal departments' "prior resolution of the issues relating to [a salesperson's activities]," and thus was excused for *"taking no action* with respect to [those] matters." 1991 SEC LEXIS 551, at *2, *8 (emphasis added). Huff had specifically been instructed by his supervisor "to keep on top of [the salesperson's] activities and to follow through if any question arose concerning [him]." *Id.* at *5. Huffs supervisor had even given him "the thick compliance department file on [the salesperson]," further signaling that Huff had an obligation to conduct a certain level of due diligence. *See id.* Despite having this degree of responsibility, the Commission concluded that Huffs reliance was reasonable and found no fault in his inaction. *See id.* at *4-5, *8, *11-12.

In re Dean Witter Reynolds Inc. is also instructive. There, the Enforcement Division argued that a broker-dealer's polices and procedures were unreasonable, in part because they allowed the compliance department to rely on statements made by branch managers, without independently "verify[ing] the information." 2001 SEC LEXIS 99, at *36, *140-41, *146-47 (Initial Dec. Jan. 22, 2001). As in *Huff,* the compliance department in *Dean Witter* had due-diligence functions-the duty "to collect, assess, and transmit information to, and request and evaluate information from, [others]," *id.* at *36 but the court still held that independent verification was unnecessary: "[I]t is reasonable to rely on [the branch manager's] conclusions," the court reasoned, because branch managers "are generally experienced and are subject to specific licensing requirements," and they have "potential liability for failure to perform," *id.* At *140-41.

And in *Howard*, the SEC advanced an argument that is substantially similar to The Division's contention here. The Commission alleged that Nicholas P. Howard, whose job entailed "market[ing] European equity securities to American and Canadian institutional investors," had marketed those securities without independently confirming the accuracy and legality of certain information in offering documents, in contravention of his "ongoing obligation" to "protect investors from illegality." 376 F.3d at 1138, 1147. Those client-facing documents were improper, the Commission argued, because they omitted necessary disclosure language, and Howard had thus facilitated a securities violation by allowing the documents to be filed.

But the D.C. Circuit held that Howard's reasonable reliance on management and counsel showed good faith and negated any plausible inference of scienter. *Id.* at 1148. The court observed that the Commission had "disregarded" "powerful evidence" that Howard did not act with scienter when he allowed the documents to be used with clients, *id.* at 1138, 1148 - specifically, evidence that Howard had reasonably relied on reviews and approvals by: (1) the head of the broker-dealer's finance department, an individual who "had been a lawyer with the SEC's Division of Market Regulation," *id.* at 1139, 1146-47; (2) executives in the Capel Group, of which Howard's broker-dealer was an affiliate, *id.* at 1139, 1146; and

(3) outside counsel, who had "more than 20 years of experience" with securities law, *id.* at 1147. The court noted that Howard was "a non-lawyer," and "a non-lawyer has no real choice but to rely on counsel," *id.* at 1148 n.20 (bracket omitted); thus, the court altogether ignored the fact that Howard had conducted no due diligence-in fact, Howard was "on vacation" during a significant part of the relevant time period and "skimmed" only one of the documents, *id.* at 1139, 1147. Yet the court still concluded that, "[i]n this case, rather than red flags, Howard encountered green ones, as outside and inside counsel approved" the information in question. *Id.* at 1147.

If the above evidence in *Howard* was found by the D.C. Circuit to amount to "powerful evidence" of reasonable reliance-and if the compliance department in *Dean Witter* was held to have reasonably relied on statements made by *a* branch manager, 2001 SEC LEXIS 99, at *140, *146-47, and the employee in *Huff* was found to have reasonably relied on *one* assessment by the company's compliance and legal department, 1991 SEC LEXIS 551, at *4-5, *8, *11-12-then Young's reliance in this matter, based on the magnitude and nature of the sources, is unassailable.

2. Young Reasonably Relied On An Affiliate's Compliance Department, In- House Counsel, Outside Counsel, And Many Others.

Applying the above precedents to the facts of this case, it is clear that Young's reliance was more than reasonable.

First, it is undisputed that SIB-not Young, who was CCO of SGC-drafted, reviewed, and approved the language in the materials; Young "did not provide input into the language of disclosure and marketing materials, and believed that inside and outside counsel had approved the disclosure and marketing materials and the manner in which SGC and SIB were doing business." Id. Tr. 2576-81, 2609, 2850-52, 3017-18 (Bogar), 3414 (Young), 3681, 3701-02, 3760, 3979 (Green). *Howard,* 376 F.3d at 1147. SIB documents plainly state, "We, not SGC, are solely responsible for the contents of this Disclosure Statement and other Offering Documents," which include the SIB brochure. *E.g.,* SIB Disclosure Statement at 17 (dated Oct. 15, 1998, amended Nov. 15, 2007); Young Ex 77, 78, and 79. Indeed, the record is clear that the SIB brochure was in place and in use *before* Young arrived at SGC, and Young was not asked or required to approve the brochure that was then in existence; nor was he asked to sign off on any revisions to later versions of the brochure.

An affiliate of SGC, SIBL had since its inception maintained its own Compliance Department, and Stanford literature lists only SIBL's CCO, Pedro E. Rodriguez, as the compliance officer charged with responsibility for SIBL and the CD SIBL Compliance worked directly with Stanford's central Legal Department to obtain approval for all of its materials, including those that related to the CD. Given this structure and the fact that SIBL Compliance had vetted and approved the materials, "apparently, [to its] satisfaction," *Huff,* 1991 SEC LEXIS 551, at *4, *8, Young cannot be faulted for relying on that department's work product. The fact that SIBL's President, Juan Rodriguez-Tolentino, also reviewed and approved Bank documents as a matter of practice only reinforces the reasonableness of Young's reliance. *See Howard,* 376 F.3d at 1139, 1146 (holding that Howard had reasonably relied on "executives," among others).

Second, SIBL Compliance worked in coordination with Stanford's companywide Legal Department, a centralized office of approximately 20 lawyers with full authority over legal matters for all Stanford affiliates, including SIB and SGC. Led by Mauricio Alvarado, Legal approved and reviewed at close range-before and during Young's tenure at SGC-

"everything" that came out of the Bank, and Legal was required to "make a reasonable, independent investigation to detect and correct false or misleading materials." *Escott v. Barchris Constr. Corp.,* 283 F. Supp. 643 (S.D.N.Y. 1968); This makes sense. Whether the mix of documentation that went to potential investors constituted a legally adequate presentation-whether the collective language fell within lawful bounds or over the edge of misrepresentation-is, of course, a uniquely legal determination best suited to the Legal Department. As the department "in the best position" to make the assessment, Young's reliance on Legal is all the more reasonable. *See Dean Witter,* 2001 SEC LEXIS 99, at *140. And because Legal also has "potential liability" for its determinations, there is even greater cause to find that, as a non-lawyer, Young's reliance was reasonable. *See id.* at *34, **141,** *146. The multiplicity of legal and ethical obligations that governs lawyers is well established, as is the potential liability for their violation. Lawyers in the Legal Department could be sued, disciplined or sanctioned by state bars, and disbarred-no small disincentives. In short, Legal's apparent "resolution of [any] issues" in the materials and ultimate approval were determinations on which Young could reasonably rely. As in *Howard,* Young "rel[ied] on the expertise of ... counsel" and "its work product," and properly believed that the "materials contained all the necessary [information and] disclosures." 376 F.3d at 1140, 1147.[5]

Young's status as a non-lawyer further bolsters the reasonableness of his actions. If the general counsel in *Urban* was found to have reasonably relied on representations by

[5] Legal had also retained outside counsel to review the CD documents. Outside counsel reviewed, suggested modifications to, and approved the documents, further fortifying Young's reliance.

laypersons on matters that were within his competency, then Young's reliance here is on even surer footing. That is because Young, a non-lawyer, had no choice but to rely on representations by in-house and outside counsel on questions that "call[] for an exercise of legal judgment"-e.g., whether the term "comprehensive insurance" may lawfully be used to characterize SIBL's insurance program in certain materials that relate to the CD when accompanied by clarifying language that the CD itself is not insured; whether Antiguan privacy law forbade him from viewing the portfolio investments; or whether SGC was legally required to disclose the percentage of revenue that it received from sales, product-by-product. *Urban,* 2010 SEC LEXIS, at *149. As the D.C. Circuit has explained, "securities laws are complex and often uncertain; the layman *[i.e.,* a non- lawyer] has no real choice but to rely on counsel." *Howard,* 376 F.3d at 1148 n.20 (brackets in original and internal quotation marks omitted). Here, Young relied on such guidance and acted more than reasonably in doing so.

Third, in 2005, outside counsel, Thomas V. Sjoblom, then a partner at Chadbourne & Parke LLP, reviewed the CD for sales-practices issues and reported none to Young when he joined SGC. As in *Howard,* where one of the individuals who had been relied upon "had been a lawyer with the SEC's Division of Market Regulation" and the other had "more than 20 years of experience" with securities law, Sjoblom has Department of Justice experience and spent nearly 20 years at the SEC in Washington, D.C., serving as Assistant Chief Litigation Counsel in the Commission's Division of Enforcement from 1987 to 1999, where he prosecuted unlawful sales practices by brokers, financial and SEC reporting fraud, unregistered securities offerings, and offshore and international securities frauds-areas that were directly relevant to the scope of his CD sales- practices review. *See id.* at 1139, 1146-47; *see also Dean Witter,* 2001 SEC LEXIS 99, at *140 (holding that it is reasonable to rely on branch managers, in part because they are "generally experienced"). As far as Young knew at the time, Sjoblom brought his integrity and decades of regulatory experience and expertise to bear on the issue. Despite conducting hours of interviews with a cross-section of high-producing salespersons on how they marketed and sold the CD, Sjoblom apparently found no sales-practices issues-involving the material in question or any other issue-worthy to be reported to Young. In short, Young "believed that the lawyers had been consulted," and the lawyers communicated a powerful "green [flag]." *Howard,* 376 F.3d at 1142, 1147.

Sjoblom did not work alone. Young also relied on his colleagues at the time, Dennis Dumas and Jennifer Arnold. Dumas spent four years as an attorney-adviser in the Division of Enforcement and was a Special Assistant United States Attorney. He was managing counsel at The Bank ofNew York, where he headed the global Securities and Capital Markets Practice Group. In that capacity, he advised the compliance, internal audit, and global risk management departments. He has also served as a court-appointed receiver upon the recommendation of the SEC. The Division has asserted that Young failed to recognize that the materials were misleading- to the tune of fraud. But as in *Urban,* management and in-house and outside counsel-including Thomas Sjoblom, Dennis Dumas, and Jennifer Arnold at Chadbourne & Parke, a reputable law firm-indisputably "told" Young, "represented" to Young, and "assured" Young that the language in the materials was appropriate, there were no CD sales-practices issues, and Antiguan privacy law prevented hhim from gaining access to the information that he had requested.

Fourth, Commission staff sent questionnaires to certain CD clients in 2005, which included a question about the CD and insurance coverage and did not receive any customer complaints as a result of that survey. In addition, SGC received no complaints in response that related to SIBL or the CD, during the period of time that Young was employed at SGC, until the liquidity crisis of 2008 hit the entire financial industry causing many larger financial institutions which had stood for years to collapse. The Division failed to provide any evidence of any customer complaint prior to the financial meltdown which occurred in 2008, then they were only able to provide two (2) customer inquiries. It is thus unsurprising that Young was only aware of two *(2)* customer inquiries relating to any aspect of the CD, including the materials now at issue, during his employment. *See Urban,* 2010 SEC LEXIS, at *136 (finding that Urban acted reasonably, in part because "not one branch manager in any retail office where [the broker] was located ... came to Urban with concerns about [the broker]," and "[n]ot one customer of[the broker] complained about [him] to Compliance"). The significance of these facts should not be minimized. SGC's policies and procedures state that employees "must" report "any activities that run contrary to the Code of Ethics" to their direct supervisor or the chief compliance officer, and further instruct "[a]ny" person receiving "any" client complaint "to forward the client complaint to Stanford Group Company's Compliance Department." *See, e.g.,* SGC Policies and Procedures 21, 42 (2006). Like all of the critical facts discussed above, these facts and the absence of significant customer complaints are undisputed, and they show that it was "reasonable for [Young] to rely on the truthfulness of [the] representations" communicated to her. *See Dean Witter,* 2001 SEC LEXIS 99, at *173. Had there been a history of customer complaints or other tangible indications of irregularity regarding CD sales practices come to Young's attention, there is every reason to believe that he would have followed up in an aggressive fashion. On this score, the record evidence is uniform: When Young learned of customer complaints in other areas, he promptly and comprehensively addressed them. Indicative of his approach, the Division's materials show at least one instance in which Young directed a member of his staff to engage the services of an outside consultant to perform a systemic review of the controls at issue, seeking to implement long-term, preventative measures, as opposed to an ad hoc quick fix.

3. Young Reasonably Relied On The Bank's President, Current And Former General Counsel, And Outside Counsel During His Due-Diligence Reviews.

The Division's case is rooted in the belief that Young performed inadequate due diligence, but according to the Division, they do not have his extensive due-diligence file-perhaps the best evidence of what Young reviewed and analyzed, whom he spoke with, and the frequency and rigor with which he reviewed the Bank.

In any event, the Division faults Young for not speaking to certain individuals or asking to see select items during the course of his due-diligence reviews. He should have done so, the Division argues, to verify the accuracy of information contained in the materials. But Young relied on the Bank's Compliance Department, Legal, outside counsel, and others, who indicated to him that they did perform that function, and that is precisely the point of the reasonable-reliance doctrine. *See Howard,* 376 F.3d at 1146-48. Absent red flags, Young was able to conduct his review within the reasonable bounds of his discretion. Further, Young *did* ask to speak to most if not all of the individuals identified by the Division and *did* ask to see items considered significant by the Division, but the current and former General Counsel, the Global Compliance Officer (Lena Stinson), the former CCO for SGC, along with the Bank's President and outside counsel, told him that he could not do so. His reliance on their representations at that time was reasonable. That some of those on whom he reasonably relied may have themselves been part of a massive securities fraud does not change that fact. *See id.* at 1148 n.21.

As stated in the SIB brochure, which was in place when Young arrived at SGC, the Bank was viewed as a highly regulated financial institution subject to comprehensive regulation, including the International Business Corporation Act; Statutory Instruments; Antigua banking regulations, which further include licensing criteria, capital adequacy requirements, internal audit and compliance requirements, examination and inspection requirements, and strict anti-money laundering regulations, among others; and the operational procedures of the Financial Services Regulatory Commission ("FSRC"), the Bank's foreign regulator. As a financial institution in Antigua, SIB was understood by Young to be subject to the regulation of the FSRC and the Ministry of Finance of the Government of Antigua. In addition, Young understood that the execution of Antigua banking regulations had been reviewed by a team of specialists from the International Monetary Fund ("IMF") for compliance with Basel Core Principles. And the IMF team said in its published report that the FSRC "is to be commended for reinforcing its supervisory approach in general" and that Antigua's legal framework, which establishes ongoing supervision by regulators and the power to address compliance with banking regulations, was fully compliant. *See* IMF, Antigua and Barbuda: *Detailed Assessment of Compliance with Basel Core Principles for Effective Banking Supervision-Offshore Banking,* at 8-9, 23 (Dec. 2004, revised Feb. 2006). Young had a copy of this report in his due-diligence file.

Against that backdrop, Young conducted numerous on-site due-diligence reviews of SIB. Young maintained a centralized due-diligence file on the Bank. He reviewed and analyzed, and kept records of, Bank formation documents, information on the Bank's auditors, reports by the IMF, SIBL's quarterly and financial reports, anti-money laundering policies, rates, product information, SIBL's certificate of good standing issued by Antigua's FSRC, and other site visit documentation. During his visits, he met with and interviewed a broad-based group of individuals, including (but not limited to) the Bank's President, Juan Rodriguez-Tolentino; Bank CCO, Pedro E. Rodriguez; Chief Investment Officer ("CIO"), Michael Zarich; and Operations personnel, including Beverly Jacobs and Harry Van Bergen. In these interviews, Young, as had his predecessor, went over SIBL's due-diligence procedures, all changes in policies and procedures, SIBL's investment policy, SIBL's regulatory audits, and anti-money laundering procedures. Young then went above and beyond his predecessor and met with Leroy King, the head of the FSRC who not only detailed for Young the extensive reporting requirements under which SIBL operated, but the risk based audit program which the FSRC conducted on SIBL. King further confirmed for Young the representations which had been made to him, personally by Sjoblom, Global Compliance Officer Lena Stinson as well as legal, that due to Antiguan privacy laws Young would be unable to view or otherwise view the SIBL portfolio. Finally, King further stated to Young that SIBL was the safest bank in the island.

While Young did not meet with correspondent banks personally, he knew that his predecessor Jane Bates and SGC's President Daniel Bogar had in fact met with the correspondent banks, including Toronto Dominion, First Republic, and TrustMark, and knew of several money managers and third-party portfolios. He was also aware of information indicating that money was invested. This included knowledge of meetings set up between Laura Pendergest, the CIO at the time, and the money managers to discuss

Bank portfolios, as well as meetings that Bates had attended where money managers were present and in which discussions took place about potential business with SGC and SCM.

Young was told by Leroy King, head of the FSRC that the FSRC performed quarterly reviews of the Bank, analyzing its allocations, and questioning any discrepancies found as a result of its analysis. Young, at the time, had no reason to question King's representations or governmental authority. Although he asked to see the actual portfolio investments and to discuss Bank issues with portfolio managers, King a federal regulator, and at least three senior individuals at Stanford, including Mauricio Alvarado, the General Counsel; Yolanda Suarez, the former General Counsel and Stanford's Chief of Staff; and Juan Rodriguez-Tolentino, SIBL's President.[6] considered at the time among the most responsible and trustworthy professionals in the organization, denied his requests citing Antiguan privacy law, including Mauricio Alvarado, the General Counsel; Yolanda Suarez, the former General Counsel and Stanford's Chief of Staff; and Juan Rodriguez-Tolentino, SIBL's President.[7] Alvarado and Rodriguez-Tolentino also blocked his attempts, as well as his predecessor's, to gain access to the FSRC and other audit reports, again citing foreign privacy law. With no indication of wrongful conduct, and with no one less than the current and former General Counsel and the SIB President informing him that Antiguan law forbade him from doing that which the Division now says he should have done, Young, a non-lawyer cannot be said to have acted

[6] Young also understood that Sjoblom, outside counsel, had met with the FSRC and others. In fact, Young understood that Sjoblom had conducted extensive due diligence on the Bank, yet he never reported any issues to Young. *See id.*

[7] Young also understood that Sjoblom, outside counsel, had met with the FSRC and others. In fact, Young understood that Sjoblom had conducted extensive due diligence on the Bank, yet he never reported any issues to Young. *See id.*

carelessly by crediting that representation. *See, e.g., Dean Witter,* 2001 SEC LEXIS 99, at *165 (compliance department "raised questions" about certain facially questionable trading, and in each case an experienced branch manager provided an explanation; "it was reasonable for the compliance department to rely on these responses").

Not only were the current and former General Counsel and the Bank President saying this, the sovereign regulator for the government of Antigua and outside legal counsel was reinforcing it as well. Citing foreign legal authorities in a September 2005 letter in response to an SEC request, Sjoblom represented that "there are certain provisions under the laws of Antigua and Barbuda (the violations of which can result in harsh consequences) which prohibit SIB from providing you with all the documentary information you currently request." This explanation, given to the SEC, was the same explanation given to Young. *See SEC v. SIB et al.* (09-cv-0298), Second Am. Compl. 91. And just as the Commission's efforts were met with resistance, so too were Young's. *See SEC v. SIB et al.* (09-cv-0298), Second Am. Compl. 91 6, 85, 87-89. Indeed, the fact that the same explanation was given to the SEC lent legitimacy to the perceived validity of the reason. One does not lightly assume that a former Special Assistant United States Attorney and SEC Enforcement Division attorney with 20 years of regulatory experience would not be forthright with the Commission. Nor would it have been reasonable for Young to assume that he could not rely on a federal regulator of a country with sovereign authority over the regulation of SIBL or that such an individual would be any less than forthright with Young.

4. Any Red Flags that Came to Young's attention were adequately addressed.

It is true that red flags may render otherwise reasonable reliance unreasonable. *See Dean Witter,* 2001 SEC LEXIS 99, at*173. But it is also true that an individual may reasonably rely on another person's apparent resolution of a red flag. *See Huff,* 1991 SEC LEXIS 551, at *7-9; *Urban,* 2010 SEC LEXIS 2941, at *127, *148. Thus, even if the items identified by The Division constitute red flags, Young could and did reasonably rely on the apparent resolution of those red flags by the General Counsel, outside counsel, and others, who repeatedly assured him that the content of the materials was appropriate and that the securities laws were being complied with.

In any event, any red flags brought to Young's attention were adequately addressed. Because the Division believes that Young knowingly allowed fraud to occur and actively encouraged it, they must marshal "multiple, obvious red flags"-red flags that must be "sufficiently blatant that fraudulent intent can be inferred." *PR Diamonds, Inc. v. Chandler,* 364 F.3d 671, 686-87 (6th Cir. 2004). Further, because The Division's theories focus on alleged unlawful sales practices, any red flags in this case must concern a specific salesperson's sales practices that came to Young's attention. *See, e.g., Hoffman,* 2000 SEC LEXIS 105, at *82. And of course, an individual's response (or lack thereof) to a perceived red flag, "cannot be judged in hindsight or with information learned long after the events in question occurred." *See, e.g., Dean Witter,* 2001 SEC LEXIS 99, at *164; *Urban,* 2010 SEC LEXIS 2941, at *135 ("In hindsight, [one individual's] suspicions about [the broker] were right on the mark, but, in 2003-04, they were only suspicions"; thus, at that time, Urban did not "know[]" that the broker's conduct was criminal.). The rationale for this rule requires no explanation: Anyone who has had their integrity or actions questioned in hindsight could attest to the unfairness of the approach.

Here, the Division claims that four red flags came to Young's attention. With all due respect, the Division's reliance on these items is misplaced, and the Initial Decision's seemingly blind acceptance of same is disturbing and grossly faulty.

a) Insurance Language In The Bank's Materials

The Division alleged that the insurance language in the materials was "so obviously wrong" that it qualifies as a red flag. Notwithstanding the fact that this language, by itself, has nothing to do with a specific salesperson's sales practices that came to Young's attention, and thus does not qualify as a relevant red flag, we respectfully disagree with the Division's characterization of the insurance language. To be "so obviously wrong," the Division would need to point to language saying, in substance, *the CD is insured.* The Division failed to do so. Instead, the Division could only point to two words ("comprehensive insurance") in the following clause of one sentence- "Stanford International Bank maintains a comprehensive insurance program with the following coverages" (with the brochure specifying just what the Bank's comprehensive insurance program includes)-and then asserts that potential investors would have inferred from that language that the CD was insured by the FDIC or some other entity. But the set of documents on which The Division relies is replete with statements that actually say that the "CDs are not FDIC-Insured" and that the "CD deposits and the CD certificates are not insured," and these clear *statements* would have been understood to rebut any such *inference. See* SIB Disclosure Statement at 1, 4, 12; SIB Marketing Brochure (APP 0533). Given the clear "not insured" language-which is featured prominently throughout the materials-it is the inference that is "obviously wrong," not the language itself.

In fact, the clear "not insured" language operates to bolster Young's reliance. Because Young understood that the clear language always accompanied the language that the Division has pointed to, and was given to each potential investor, there was more reason to believe that the total mix of insurance language was appropriate. Put differently, it was manifestly not unreasonable for Young, a non-lawyer, to rely on counsel's and others' apparent determination that a reasonable investor reading the term "comprehensive insurance" in tandem with "the CD is not insured" or "the CD is not covered by FDIC insurance" would come to the conclusion that the CD was not insured in every respect.

The Division's argument might be that the term, "comprehensive insurance," divorced from the words immediately surrounding it and the total mix of information that went to investors, is obviously wrong because the insurance program was not, as the Division has said, "complete in every respect"-it excluded coverage for the CD. Of course, that a contextual approach to the materials is flatly contrary to controlling United States Supreme Court precedent and related Commission guidance. *See infra* Section III.C.2.a. In any event, this argument rests on assumptions about what "comprehensive insurance" must--or should-mean. But longstanding usage in related industry contexts refute the proposition that the "comprehensive insurance" language was a red flag, blatant or otherwise. In fact, these authorities strengthen the reasonableness of Young's reliance. In the automobile-insurance context, for example, while "comprehensive" insurance covers certain types of damage, it normally does not cover collision damage--one of the most vital kinds of insurance. *See, e.g.,* GEICO, http://www.geico.com/getaquote/auto/coverages-explainedl ("Comprehensive physical damage coverage pays for losses resulting from incidents other than collision."); Progressive, http://www.progressive.com/understandinginsurance/entries/2009/9/1/can_you_have_compre.aspx ("Comprehensive only policies do not offer liability coverage and are often subject to strict rules."). These policies, which are ubiquitous, exclude a core type of insurance yet are still characterized as "comprehensive." The characterization of the SIB insurance program as "comprehensive" is no different. The term "comprehensive insurance" is not a blatant red flag in other insurance contexts, and neither is it here.

b) November 2006 SEC Subpoena

The Division posits that a November 2006 subpoena should have made it clear to Young that there were customer complaints, and thus qualifies as a red flag. Although Young was never provided with a complete copy of the November 2006 subpoena, that subpoena was issued *less that 60 days after* Young was appointed as CCO of SGC and all aspects of that subpoena were handled by Global Compliance in conjunction with Legal. Being new to the organization, Young was directed by Global Compliance and Legal that he was to help collect information for the response but he had no knowledge that the inquiry reflected any suspicions of sales-practices issues. Where, as here, an individual is affirmatively pushed out of the process and excluded from the subpoena response, it cannot be said that the subpoena was a red flag that "came to [the individual's] attention" in any meaningful way. *See Hoffman,* 2000 SEC LEXIS 105, at *82. But even if it had, Young's reasonable reliance on numerous sources could not be overcome by receipt of this one request- not when Commission staff had, around that same time, sent questionnaires to clients yet received no indications of sales-practices violations; Sjoblom had just as recently completed a sales-practices review and assessment and reported no issues to Young; and Young was not aware of a single complaint involving the CD. *See Dean Witter,* 2001 SEC LEXIS 99, at *173 ("receipt of two account inquiries is not a 'red flag' sufficient to render [his] reliance on [his salesman's] representations unreasonable"). This collection of facts reasonably points away from the Division's default conclusion that Young must have known that there were major problems with CD sales practices.

c) Product Sales

The Division suggests that growth in CD sales was a clear red flag. The Division is mistaken. “"[I]ncrease in sales" does not constitute "a red flag warning of illegal sales activities on the part of the Company's employees." *King v. Baldino,* 648 F. Supp. 2d 609, 624-25 (D. Del. 2009); *see also Reiger v. Altris Software, Inc.*, 1999 U.S. Dist. LEXIS 7949, at *18 (S.D. Cal. Apr. 30, 1999) ("The fact that [defendant] did not automatically equate record profits with misconduct cannot be said to be reckless."). In any event, during the time of the alleged increased CD sales, Young had begun working on a plan with Daniel Bogar, President of SGC and others to disincentivize the FA's from the sale of the CD product and instead to diversify client's portfolios. As part of this initiative, Young conducted a compliance training program throughout SGC to teach FAs about the importance of compliance and how best to comply with governmental regulations. Young supplemented the training program which had been implemented by his predecessor to include specific training regarding compliance issues related to Reg D Offerings.

Further, Young discussed his due diligence process with FA's and made numerous trips to Antigua to conduct due diligence, asking questions very similar to the ones that Commission staff had been asking, and receiving the same explanation in response.

d) The size of the auditor

During the trial, the Division made numerous references to the size of the auditing firm responsible for conducting the required audit of SIBL. Young testified, however that the auditor's qualifications and ability to conduct the audit were not only vetted and approved by the Antiguan Regulator on an annual basis, but by the Eastern Caribbean Central Bank, on an annual basis as well. Once again, it is completely acceptable for Young to rely on these institutions to ensure that SIBL was properly monitored and all required financial statements accurately portray SIBL financial condition. In fact, the Division's own expert witness stated during trial that a small accounting firm was not a red flag at the time, as he was aware that Madoff's brokerage firm used a small accounting firm and he accepted Madoff's audits while he was the head of the NASD's New York District Office.

e) Allegations of a Ponzi Scheme by Form SGC Employees

The Division pointed to an allegation made by former employees that SIBL was a Ponzi scheme. Testimony during trial, however, rebutted these allegations and exhibits were introduced that completely showed that one employee made these allegations in a counter-claim against SGC. (The employee left SGC and was sued for failure to repay the unamortized portion of their up-front loan. The allegations were made only in response to the claim made by SCG.) In fact, during trial, it was also shown that the arbitration panel dismissed the employee's claims in their entirety and ordered the employee to re-pay the unamortized portion of the loan, plus interest. The Division's expert witness stated he was unaware of these facts until brought to his attention at trial.

In short, Young's reliance was reasonable, there were no red flags, and the Division's possible charges should not have been brought against Young in light of settled Commission precedent. In fact FBI Special Agent Vanessa Walther's, who lead the FBI's four year investigation into Stanford, testified during Young's trial that "...there was nothing the Respondents could have done to uncover the fraud, or to prevent the fraud..." Tr. __________.

C. The Division's Case Lacks Merit.

As applied to Young, the Division's allegations and the ALJ's findings are entirely novel and unsupportable. We have found no case in which the Commission charged an individual who solely occupied the CCO position with making affirmative misrepresentations or unsuitable recommendations to clients by reviewing or approving marketing literature or training presentations. In fact, our review of hundreds of SEC decisions has revealed not one Section 17(a) case against an individual who was solely a chief compliance officer. This should come as no surprise. As a matter of Commission policy, fraud actions are brought against compliance professionals "only in rare instances of egregious misconduct, usually involving knowing and intentional violations of the law or intentional inaction when confronted with such violations." Linda Chatman Thomsen, Remarks at the Compliance Week Conference: *It's Always Something* (June 4, 2008). Commission precedent simply reflects that fact. Because nothing approaching egregious conduct can be found on these facts as applied to Young, this case would be a wholly inappropriate vehicle through which to bring an unprecedented negligence-based fraud action against a CEO.

We pray upon the Commission to set aside and reverse the ALJ's decision in this case as a decision on these facts clearly threatens to unsettle Commission case law and enforcement guidance to the legal and compliance community, which the SEC has taken evident care to develop. Applying established SEC policy, the Commission should set aside and reverse the ALJ's decision against Young as the Division theories and ALJ's decision are unfounded as a matter of law. To establish a violation of Sections 10(b) and 17(a), the Division was required to prove that Young made a misrepresentation or an omission in connection with the offer, purchase, or sale of securities with the requisite level of intent or actionable negligence, and that the misrepresentation or omission was material. *See Aaron v. SEC,* 446 U.S. 680 (1980); *Geman v. SEC,* 334 F.3d 1183, 1192 (lOth Cir. 2003). To establish their aiding-and-abetting charge for SGC's alleged violations of Section 206 of the Investment Adviser's Act, The Division must prove that Young was generally aware of or recklessly disregarded the fraud and that he substantially assisted it. *In re Blizzard,* 2004 SEC LEXIS 1298, at *24 (Comm'n Op. June 23, 2004).

1. The Division's Marketing And Liquidity Theory Ignores The Record Evidence.

The Division's "marketing and liquidity" theory is based on one sentence in the SIB brochure that states, "The Bank's assets are invested in a well-diversified portfolio of highly marketable securities issued by stable governments, strong multinational companies and major international banks." The Division claimed that Young had both the responsibility for and authority to modify the content of this brochure, though, as explained above and cited in the ALJ's Initial Decision, the Division failed to provide support for that proposition. SIBL, not SGC, had sole authority for the content of the brochure. *See* SIB Disclosure Statement at

17. The Division argued that this sentence was misleading to investors because SGC could not verify its accuracy, and Young acted fraudulently (or incompetently) by not informing clients of this fact. This argument is based on hindsight; it also overlooks the record evidence as it applies to Young, who by virtue of his due diligence and other experiences, reasonably believed that others within the Stanford organization could-and did-verify that information, and they gave him no reason to be concerned.

Young was not responsible for the language of the SIBL sales brochure. The Division asserts that Young's role and responsibilities as CCO included this duty, but there is no basis in fact for that assertion, and that duty is nowhere to be found in his detailed job responsibilities. Young's responsibilities did not include writing or reviewing the text of every marketing document that was created by SGC or any SGC affiliate. Rather, SIBL and the Legal Department-not SGC's CCO-were responsible for the language in the SIB marketing materials, including the SIB CD brochure. As one would expect, CD marketing-related activities were handled by Sales and others at SIBL, the Stanford affiliate with direct responsibility for the product. The Commission surely can appreciate that salespersons, their supervisors, and others who have missold a product often try to "shift responsibility" to Compliance in these types of matters. *See Urban,* 2010 SEC LEXIS, at *59 (rejecting an effort to "shift responsibility" to Compliance). Here, the contemporaneous documents speak for themselves and they show that Young had no such responsibility.

Further, Young could not have been responsible for the liquidity language upon which this theory rests because it indisputably was not his language. As explained above, the SIB brochure was in place *before* Young arrived at SGC and had been approved by the Legal

Department. While the brochure was apparently reproduced each year, the liquidity language in the brochure is boilerplate and did not change during Young's tenure. *See* SIB Brochures for 2003-2007. Others drafted and approved this language, and Young reasonably relied on that work product.[8]

The Division next maintains that Young should have independently verified the Bank's portfolio, was unable to do so, and was required to disclose that fact to investors in the marketing literature. More than eight years have elapsed since the Division was first informed that SGC did not have access to the SIB portfolio. In SGC's November 2, 2004 response to an SEC inquiry, Rep Poppell, the Director of Compliance, wrote, "As we discussed, Stanford Group Company does not have access to the detailed portfolio mix of Stanford International Bank's assets." At that time, the Division did not inform Young's predecessor that this was an issue, nor did the Division inform Young this was an issue prior serving Young with a Wells Notice in June 2010. To recommend a fraud charge against Young, more than six years after the fact, based on that same information, indicates that hindsight is at work.

As explained above, Young did ask to review the Bank's portfolio, but was denied access. Lawyers and SIB executives, including Mauricio Alvarado, Yolanda Suarez, and Juan

[8] The Disclosure Statement clearly advises potential customers that "We [SIB], not SGC, are *solely* responsible for the contents of this Disclosure Statement *and the other Offering documents,"* which includes the brochure. SIB Disclosure Statement at 17 (emphases added) The Division's apparent assumption that if SGC touched the SIB brochure in some way, then Young must have had some responsibility for or involvement in the content of the brochure. Of course, even if Young was responsible for the content of the SIB brochure, that does not alter in the slightest the reasonable-reliance analysis. The Commission and the federal courts of appeals have squarely held that individuals with direct marketing and due-diligence responsibilities may reasonably rely on others for the content of client-facing materials. *Howard*, 376 F.3d at 1148.

Rodriguez, told him that he could not see the Bank's portfolio because Antiguan privacy law prevented the dissemination of that information. Outside counsel verified that characterization of foreign law. Young a non-lawyer and reasonably relied on those many representations.

Young had no reason to believe that the portfolio investments presented a risk and thus did not act fraudulently or incompetently by not disclosing that information. As explained above, Young attended meetings with the soveriegn regulator, and outside legal counsel, at which time they reassured him that they had transparency into the portfolio of investments. He knew that his predecessor had met with of several money managers and third-party portfolios, and attended meetings where money managers indicated that SIB had money with them. And while neither he nor SGC could view the portfolio investments, Young reasonably believed at the time that the FSRC, the Bank's foreign regulator, as well as the Bank's outside auditors and others within the Stanford organization, could-and did-and no one had ever expressed concerns to him about the portfolio. Tr. 3209-3213. Young also believed that outside counsel had met with the FSRC, and he too reported no such concerns to him. Because Young was given no reason to be concerned about the portfolio, there was no risk for him to disclose.

2. The Division's Insurance Theory Fails To Account For Crucial Pieces Of Undisputed Fact.

Based on our discussions with the Division, we understand that their key argument is that the "comprehensive insurance" language in the materials is "incredibly" misleading, and that Young allowed it to remain in the SIB brochure (and other materials) to deceive clients.

The facts, however, are against the Division's theory. So is Supreme Court precedent. On this record, the Division or the ALJ cannot establish either materiality or scienter.[9]

a) **No Materiality**

In the seminal decision of *Basic, Inc. v. Levinson,* the United States Supreme Court held that a statement is "material" only if there is a substantial likelihood that a reasonable investor, taking into consideration the investor's sophistication, would have viewed the statement or omission as "having significantly altered the 'total mix' of information made available." 485 U.S. 224, 231-32 (1988). Commission guidance is in accord. *See* Comm'n Guidance on the Use of Company Web Sites, SEC Release No. 58288 (Aug. 1, 2008) ("In the Rule 10b-5 context, to satisfy the materiality requirement, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."). Thus, a statement or omission "must be considered in context." *Wallace v. Sys. & Computer Tech. Corp.*, 1997 WL 602808, at *9 (B.D. Pa. Sept. 23, 1997).

Shortly after joining SGC in October 2006, Young learned that the Commission was conducting an examination of SGC Tr. 3230-3231. It was however unknown to Young that the Division suspected that SIBL was engaged in a ponzi scheme as early as June 2005 (BEY003971).

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[9] We note that not all SIB sales and marketing literature, or training presentations, included this "comprehensive insurance" language. In fact, a number of materials, including Young's compliance training, do not include that phrase and include only clear "not insured" disclaimers.

It was unknown to Respondent Young until February 17, 2009 that the representations in the marketing material under the heading "Depositor Security" and in training materials prepared by SIBL were false, and those concerning insurance coverage were misleading. It was further unknown to Respondent Young that almost all of SIBL's purported assets consisted of private equity, equity traded over-the-counter or in the "pink heets", wildly overvalued real estate, and a bogus $2 billion loan. In fact, Young, as part of his due diligence on SIBL not only spoke with SIBL's Chief Compliance Officer on numerous occasions, as well as two of the independent board members, but he also reviewed audited financial statements on SIBL issued by an independent accountant as well as legal opinions issued by reputable law firms such as Proskauer Rose and Greenberg Trauarig.

Further, after joining SGC in August 2006, Young reviewed the due diligence files prepared by SGC's prior Chief Compliance Officer and spoke with internal and external legal counsel who confirmed that the Disclosure Statement, which was provided to each investor was prepared by SIBL and reviewed by legal counsel internal to Stanford Financial Group as well as external legal counsel such as Proskauer Rose and Greenberg Trauarig.

However, as stated in Initial Decision, neither Young nor the other Respondents were charged with actually knowing about, much less operating the Ponzi scheme which was run by Allen Stanford and two close associates, Jim Davis and Laura Pendergest-Holt. Rather the OIP alleged that the Respondents were culpable in their actions or inactions related to disclosure concerning SIBL's assets and insurance coverage.

However, in *Janus Capital Group, Inc. v. First Derivate Traders*, (131.S. Ct. 2296(2011) the Supreme Court held that an investment management company that was "significantly involved in preparing prospectuses" was not liable under Rule10b-5 for making an untrue statement of material fact. (I.D. at 2305). As a result, the Supreme Court dismissed the suit, reversing the judgement of the United States Court of Appeals for the Fourth Circuit dismissing the suit against Janus Capital Management. The Court determined that the investment management company did not actually "make" the statements because it did not have "ultimate authority" over the statements. (Id). The Court explained that "for purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." (Id. At 2302).

The Court was faced with the issue of an expanding Rule 10b-5 before in Ernst v. Hochfelder (Ernst & Ernst, 425 U.S. 185 (1976) when the Court ruled that negligence was not enough for a Rule 10b-5 claim because it went beyond the scope of the statute. (Id. At 197-99). In that case, the SEC argued that the purpose of 10(b) was to "protect investors against false and deceptive practices that might injure them" and that "the 'effect' upon investors of given conduct is the same regardless of whether the conduct is negligent or intentional." (Id. At 197-98). Refusing to expand the scope of the statute, the Court did not accept the argument and reiterated that "[t]o let general words draw nourishment from their purposes is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of the words is quite another." (Id., citing Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 617-618(1944)).

The Janus Capital case addressed issues related to language in the JIF prospectuses (Janus Capital Grp., Inc. 131 S. Ct. at 2305 ("There are no allegations that JCM in fact filed the prospectuses and falsely attributed them to Janus Investment Fund. Nor did anything on the fact of the prospectuses indicate that any statements therein came from JCM rather than Janus Investment Fund – a legally independent entity with its own board of trustees."). Similarly, there was no evidence presented by the Division that the language in the SIB private placement memorandum and or sales brochures were prepared by Bernerd E. Young, SGC or SGH, to the contrary evidence was submitted that the offering documents and sales brochures were in fact prepared by Stanford International Bank Tr. 3349-3350. At no time did Bernerd E. Young serve as an officer or employee of Stanford International Bank, nor was he ever involved in preparation of the offering documents and or sales brochures which the Division alleged contained false and misleading statements. As stated in the Initial Decision, as well as testimony introduced at trial, none of the respondents had any knowledge that any of the representations contained in the offering documents were incomplete, false or misleading. Accordingly, in keeping with the Janus Capital case, Young was not a maker of the misleading statements as at no time did he have ultimate authority over the SIB Disclosure Statement or the SIB Sales Brochure (the Offering Documents), nor did his limited "approval of the use of the SIB Disclosure Statement" in accordance with his understanding of Regulation D and or the SIB Sales Brochure by SGC Financial Advisors mean that he in any way caused SGC or SIBL to make false or misleading statements.

Not being an attorney himself, it was Young's experience prior to joining SGC as well as based upon his discussions with internal and external legal counsel that a Disclosure Statement is required by Regulation D of the Securities Act of 1933 to be provided to an investor before a legal entity can offer and sell securities. The SIB Disclosure Statement was issued by SIBL and sought to provide investors with important information regarding the certificates of deposit so that the investors could make informed decisions. The ALJ's ID does not take into consideration the Supreme Court's decision in Janus Capital Group Inc. v. First Derivative Traders wherein the Supreme Court held that "for purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. Without control, a person or entity can merely suggest what to say, not "make" a statement in its own right. (I.d). In Janus Capital, the Court held that it was the fund, JIF that "made" the statements as they were the entity that had the duty to file the prospectus with the SEC and it was the JIF that filed the funds' prospectuses with the SEC. In this case, SIB was the entity which prepared the offering memorandums in conjunction with its legal counsel, not Bernerd E. Young or any of the other Respondents.

Further, in the Janus Capital case, the Court noted that JCM hosted the JIF prospectuses on its website, but that "merely hosting a document on a web site does not indicate that the hosting entity adopts the document as its own statement or exercises control over its content." The Court noted that nothing in the prospectus "indicate[d] that any statements therein came from JCM rather than [the JIF]." (Id. At 2306). In keeping with this, documentary evidence was presented at trial, as well as testimony that the first sentence on Page 3 of the SIB Dislcosure Statement states: "This Disclosure Statement was prepared by and is being furnihed by Stanford International Bank, Ltd., ("we", "us", "our", or "SIBL") a bank chartered in Antigua and Barbuda under the International Business Corporations Act, No. 28, of 1982, solely for use by certain prospective depositors who reside in the United States and are "Accredited Investors" as defined herein..." The Disclosure Statement goes on to state on page 17, last paragraph "We have not authorized any dealer, sales representative or any other person to give any information or to make any representations in connection with this offering other than those contained in this Disclosure Statement." Young Exhibits 77, 78, and 79. In Janus Capital the majority held that JCM could not be liable under Rule 10b-5 because it was not the "entity with ultimate authority over the statement", and therefore was not the "maker of [the] statement." (Id. At 2302 (majority opinion)). Accordingly, Bernerd E. Young, was not the "maker" of the statements contained in the SIB Disclosure Statement and he was not an officer, director or control person over SIB, the entity with ultimate authority over the statements. Therefore Bernerd E. Young should not be held liable or otherwise found to have violated Rule 10b-5 when he had no knowledge that the SIB Disclosure Statement and or the sales literature which were prepared by SIB, contained false or misleading information.

In her decision, the ALJ states "Scienter is not required to establish a violation of Securities Act Section 17(a)(2) or 17(a)(3) or of Advisers Act Section 206(2); a showing of negligence is adequate. See SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963); SEC v. Steadman, 967 F.2d at 643 & n.5; Steadman v. SEC, 603 F.2d 1126, 1132-34 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). Negligence is the failure to exercise reasonable care. IFG Network Sec., Inc., Exchange Act Release No. 54127 (July 11, 2006), 88 SEC Docket 1374, 1389." However, this position by the ALJ completely ignores or otherwise fails to apply the Janus case and the earlier cases cited above.

Neither the ALJ's decision nor the Division's analysis grapples with these authorities. They instead proceed by plucking out snippets from the materials of which Young was not the maker, and isolating them for purposes of its assessment of Young's level of culpability. At the same time, the Division disregards the fact that SIBL was the maker of the statements and held the ultimate authority over the SIB Disclosure Statement and SIB Sales Brochure. Further, the ALJ and the Division choose to disregard other clarifying statements- in the exact same documents-that are indisputably part of the "total mix" of information. This is the antithesis of *Basic,* let alone the Commission's own guidance to the industry.

As explained above, wholly absent from the materials-whether brochures, trainings, or anything else – is language that unequivocally says that the *CD is insured.* If certain salespersons misrepresented the CD as being insured against loss, that is a sales-practices issue, not a compliance issue as to Young. Grasping for a theory, the Division is left to argue that certain language *could be construed* to mean that the CDs were in fact insured. But there *is* language- featured prominently on numerous pages throughout the materials-that plainly says that "the CD deposits and the CD certificates are not insured by the FDIC or any other agency of the United States Government or any state jurisdiction, or by any insurance program of the Government of Antigua and Barbuda." SIB Disclosure Statement at 4. And a reasonable investor would have credited these clear *statements* over any *inference* from the language that the Staff relies on.

Thus, the Division cites language on page 5 of a brochure that states, "Stanford International Bank maintains a comprehensive insurance program with the following coverages" (with the brochure then laying out just what that program includes), but ignores *three different statements in the same document* (on pages 8 and 13) that say, "Stanford International Bank CDs (not FDIC-Insured)," and again, "Stanford International Bank Limited CDs are not FDIC Insured," and then again, SIB's products are not "covered by the investor protection or securities insurance laws." *See* SIB Marketing Brochure (APP 0533). Further, SGC's compliance policies required "[t]he FA and/or Branch Management" to "affix the following disclaimer to the SIB brochure:

"* * * *Stanford International Bank Limited is a private financial institution chartered under the laws of Antigua and Barbuda whose deposits are not covered by deposit insurance protection provided by U.S. Federal Deposit Insurance Corporation."* SGC Compliance Dep't Policies and Procedures 27 (dated June 26, 1997, revised June 6, 2006) (emphasis in original). And a copy of the brochure in the Division's materials in fact has that sticker placed on it. *See* SIBL Brochure

The Division likewise disregards language in the Disclosure Statement that, as far as Young knew and as the Division's own materials attest, always went to potential investors. Once again, the language could not be clearer: "The CD deposits and the CD certificates are not insured by the Federal Deposit Insurance Corporation ('FDIC') or any other agency of the United States government or any state jurisdiction, or by any insurance program of the government of Antigua and Barbuda." *See* SIB Disclosure Statement at 1. This information is featured prominently on the first page, is repeated in all capitals on page 4, and then reiterated once again (in substance) on page 12. *Cf In re Donald J Trump Casino Sec. Litig.*, 7 F.3d 357, 371 (3d Cir. 1993) (in "bespeaks caution" case, court observed that defendant "did not bury the warnings about risks amidst the bulk of the prospectus"). Importantly, the Commission itself has observed that disclosure statements are part of the total mix of information, informing investors that, "before you purchase a CD, make sure you fully understand all of its terms *and carefully read its disclosure statement."* SEC Press Release, High-Yield CDs-Protect Your Money by Checking the Fine Print, *available at* http://www.sec.gov/investor/pubs/certific.htm (emphasis added).

Even the SIBL CD Deposit Rate Card disclosed that the SIBL CD was not covered "by the investor protection or securities insurance laws of any jurisdiction."

The Division's reliance on the SIBL Training and Marketing Manual is similarly misplaced. The Division focuses on language that states, "Stanford International Bank's funds are protected by a comprehensive insurance program which provides various coverages" (with those coverages spelled out). But the two sentences *right above* that isolated clause unambiguously state, "Since Stanford International Bank is not a U.S. bank, it is not covered by FDIC insurance," and that clear language would dispel any inference that might be extrapolated from the language right below it.As the manual documentation states, "This manual and the information contained herein is solely for the use of individuals designated by Stanford International Bank Ltd. and may not be distributed, disclosed or disseminated to any other individual(s) or entity not so designated."[10]

It was the totality of the statements in the materials-the "total mix"-that was to be given to clients and that reasonably could be expected to present, in the final analysis, a fair portrait of the product. The Division now admits that the Disclosure Statement and Young's compliance training are clear on the insurance issue, but proceeds to argue that the clarity of the language in those documents makes the "comprehensive insurance" language in the brochure misleading. That argument is based on a profound misapprehension of the law. Language in the Disclosure Statement that serves to clarify would operate to "neutralize the effect of a[ny] misleading statement" and "negate[] the materiality of an[y] alleged misrepresentation or omission," not the other way around. *See Donald J. Trump Casino Sec. Litig.*, 7 F.3d at 371-72. By now the Commission should

[10] The Division suggests that Young's limited role in disseminating the SIB Training and Marketing Manual, at the request of senior management, is a valid basis for holding him responsible for the content of the manual. It strains credulity to assert that the dissemination of a document-without more-makes an individual responsible for the content of that document, especially on this record. The Division ignores the fact that the manual "was already in place" when Young arrived at SGC; "It was already being used." Tr. 80. In fact, Young believed that it had been drafted by the Head of Training at the Bank or the Bank's President-by all accounts at the time, trustworthy professionals. Tr. 70.

concede that a reasonable investor would understand that "not insured" means just what it says.

b) No Scienter Or Negligence

There is no support for a finding of scienter or negligence. A showing of at least recklessness is required to establish scienter, *Fanelli v. Cypress Capital Corp.*, 1994 WL 725427, at *8 (N.D. Cal. Dec. 29, 1994), but reasonable reliance negates recklessness and negligence, and, as demonstrated above, Young more than reasonably relied on in-house and outside counsel, as well as SIB's Compliance Department and other individuals, *Howard*, 376 F.3d at 1146; *Huff*, 1991 SEC LEXIS 551, at *2, *8.

Further, even putting Young's reasonable reliance to the side, his actions with respect to the insurance language independently negate any inference of recklessness or negligence. Far from being an act of recklessness or incompetence, Young's actions might have *prevented* misrepresentations by salespersons. *See* SEC Cooperation Initiative, 17 C.F.R. § 202.12(c)(3) (steps taken by individual "to prevent the violations from occurring" point away from holding him or her accountable). That is not evidence of carelessness, but prudence. Thus, the Division's possible charges against Young are not only unsupportable, but also unjustly target a former chief compliance officer who acted *most* reasonably.

As opposed to the materials that the Division relies on, which were developed by SIB and others, Young developed his own compliance training, and his training included unmistakably clear language saying **"Important Disclosures,"** the CD is **"Not Insured"** and **"Cannot be compared equally with US CDs-very major differences,"** and **"No FDIC or SIPC Insurance."** (Emphases in original.) Salespersons could not sell CDs unless they completed this compliance training-a rule that Young as CCO enforced. *See Urban,* 2010 SEC LEXIS

2941, at *154 (finding that Urban acted reasonably, in part because "Urban was the only person in [the firm's] management who tried to deal with [the broker]").[11]

The Division has had the benefit of interviewing numerous customers in this case and investigating the registered representatives and their supervisors who sold the CD. To the extent that the Division has found that salespersons affirmatively misrepresented the CDs' insurance coverages despite Young's clear "no insurance" compliance training, that would raise sales- practices issues for the registered representatives who made the false statements and failure-to- supervise scrutiny with respect to their supervisors. Responsibility would lie with them, not Young. Judging Young based on what he was responsible for and had the power to accomplish, he acted more than reasonably, and his efforts negate any inference of malfeasance or carelessness. Young did more than anyone else at Stanford to promote a culture of compliance and to advise SGC management and FA's regarding regulatory and compliance issues involved in the sale of the SIBL CD. An affirmative-misrepresentation finding should therefore be set aside completely.

3. The Division's Economic Incentives Theory Is Implausible.

[11] The Division is wrong to suggest that there is an "incredible" inconsistency between Young's compliance training, which made clear that the CD was "not insured," and the statement in SIB's brochure that "Stanford International Bank maintains a comprehensive insurance program with the following coverages." Young's training refers to the CD's lack of insurance coverage; in contrast, the brochure plainly speaks of the Bank's insurance program, delineates what that program includes, and makes clear that the CD is not included. The total mix of information that went to investors dispels any doubt on those points.

The Division contends that Young committed fraud by not disclosing SGC's internal sales contests and certain financial incentives that salespersons had received. The Division also argues that Young committed fraud by not disclosing the percentage of SGC revenue obtained from CD sales to customers. Authorizing an enforcement action against Young for failing to make these disclosures is clearly precedent setting, and the facts here as applied by the SEC to Young are dangerous new ground. Young testified that CD sales within SGC rose between 2004 and 2006, before he joined SGC. Tr. ____.

Whatever incentives may have existed, Young was never compensated on the basis of sales and he always reminded salespersons that (1) the SIB CD was not comparable to those offered by banks operating within the United States, (2) the CDs were not insured, and (3) they had to be sure that the product was suitable for the client before offering it. Whether to disclose that information in marketing literature was a separate question that fell to Legal, as it typically does in the industry. In any event, the Disclosure Statement, prepared by SIB and reviewed and approved by Legal, and provided to every SGC customer interested in the CD, disclosed that SIB paid a referral fee to SGC and that "[SIB] may also pay additional incentive bonuses to our representatives. You may obtain information regarding any of these fees from us upon a written request." SIB Disclosure Statement at 5, 9. As reflected in Young's compliance training, disclosure was separately included in a "Client Referral Letter," issued directly by Corporate Operations, which provided "Notification [that] FA receives a referral fee" and other compensation, and "Notification of referral fee SGC receives." These disclosures adequately cover the field. Neither 10(b) nor 17(a) "require[s] the seller to state every fact about [securities] offered that a prospective purchaser might like to know or that might, if known, tend to influence his decision." *Trussell v. United Underwriters, Ltd.*, 228

F. Supp. 757, 767 (D. Colo. 1964) (internal quotation marks omitted). More importantly, the question whether this is legally sufficient, or whether the degree of specificity described by The Division should have been included, is a quintessentially legal determination. Young reasonably relied on Legal, and that reliance negates any finding of fraudulent intent or negligence. *Howard,* 376 F.3d at 1148 n.20. Indeed, in order to mislead clients by omitting this information, the Division would have had to prove that Young knew or should have known that it was material, but as a non-lawyer, and without clear red flags that this specific information needed to be disclosed, neither the ALJ or the Division can make that showing. On the above record and based on legal precedent, this theory should not be brought against Young.

4.. Young Did Not Aid And Abet A Violation Of Section 206.

As applied to Young, the Division's aiding-and-abetting claim and the ALJ's finding is meritless. As an initial matter, the Division admitted during the Wells Process to Young's counsel that it included this charge primarily because of the Inspector General's report, which stated that the Enforcement staff could have filed a Section 206 action against SGC. But it is difficult to understand how the Inspector General's views regarding what *direct* Investment Advisers Act charges could have been brought against the *company,* a dual registrant, support an *indirect* aiding-and-abetting charge as to the CCO, who has never functioned as an investment adviser.

The same general aiding-and-abetting test applies in the same way to the same core conduct. *See In re Feeley and Wilcox Asset Mgmt. Corp.,* 2000 SEC LEXIS 980, at *50 (Initial Dec. May 16, 2000). These reasons alone demonstrate that an aiding-and-abetting finding against Young should be vacated, reversed, set aside in its totality.

On the merits, this charge warrants only brief discussion. "Irrespective of the level of proof required to establish the primary violation, the Commission has made clear that the accused aider and abettor must have acted with scienter." *In re Murray,* 2007 SEC LEXIS 1486, at *33 (Initial Dec. July 10, 2007). As explained above, scienter cannot be shown where, as here, there is reasonable reliance, *Howard,* 376 F.3d at 1146, and particularly not where-on the core allegations made by the Division-Young affirmatively instructed salespersons that the CD was not comparable to a U.S. CD and was not insured, and that salespersons needed to conduct a suitability assessment before presenting the CD to any client, *see* SEC Cooperation Initiative, 17 C.P.R. § 202.12(c)(3) (steps taken by individual "to prevent the violations from occurring" counsel against holding individual accountable). Young's "good faith preclude[s] a finding of scienter necessary to hold that [he] aided and abetted the firm's various violations." *In re Kingsley, Jennison, McNulty & Morse, Inc.,* 51 S.E.C. 904, 911 & n.28 (1993) (in a Section 206 case, an executive officer was not liable for aiding and abetting because he believed that the investment firm was within the law regarding its disclosures); *see also In re Seavey,* 2002 SEC LEXIS 398, at *46 (Initial Dec. Feb. 20, 2002) (in a Section 206 case, Commission found that the respondent "reasonably relied" on the firm owner's representation, noting that the respondent was "lulled by assurances from the bank").

Finally, while salespersons who received commissions from the sale of the CD and others may have benefited from the fraud, there was no benefit to Young "beyond that normally obtained in a legal relationship" with an employer-a consideration that the Commission has relied on in the past to reject aiding-and-abetting claims. *See, e.g., In re Carter,* 1981 WL 384414, at *27 (Comm'n Op. Feb. 28, 1981). Young's salary was not tied to the performance of the CD. His bonus was not tied to the CD. He received no incentive payments based on the CD. Nor did he sell the CD or make any commissions based on the sale of the CD. Simply put, Young did not benefit from the alleged fraudulent acts of Stanford. In response to these same facts, the Division determined to forgo their initial aiding-and-abetting theory. This duplicate charge fares no better.

5. The Supreme Court's Decision regarding Statute of Limitations Forecloses the Division's Action Which Was Brought Against Young.

As stated previously, it was unknown to Young that the Division suspected that SIBL was engaged in a ponzi scheme as early as June 2005, however, they chose not to use their power to impose a cease and desist order or institute a temporary restraining order against SGC, SIBL or Stanford Financial Group, instead they took no action to stop the alleged ponzi scheme which they had written to the FSRC about. In November 2006 the Division alleged that the SIB CD was an unregistered mutual fund and that SGC was engaged in the sales of unregistered investment company shares, yet they chose not to issue a cease and desist or temporary restraining order against SGC or Stanford Financial Group at that time. It should additionally be noted that the SIB 2005 and 2006 Disclosure Statements and SIB Sales Brochures presented during Young's trial by the Division, were documents produced by SGC, (responsive to the SEC's November 2006 subpoena), in January 2007. These facts are important to note as Young was not charged by the Division until August 31, 2012, some 5 ½ year months, after these documents were provided to the SEC.

In its opinion issued by the US Supreme Court, in Gabelli Et Al. v. Securities and Exchange Commission, argued January 8, 2013 and decided on February 27, 2013 (more than 2 weeks into the Respondent's trial), the Court held that the five-year statute of limitations, under §2462, for the SEC to bring a civil suit seeking penalties for securities fraud against investment advisors begins to tick when the fraud occurs, not when it is discovered. (Pp. 4-11). In Gabelli v SEC, the SEC sought civil penalties in 2008 from petitioners Alpert and Gabelli. The complaint alleged that they aided and abetted investment adviser fraud from 1999 until 2002. Petitioners moved to dismiss, arguing in part that the civil penalty claim was untimely. Invoking the five-year statute of limitations in 2462, they pointed out that the complaint alleged illegal activity up until August 2002 but was not filed until April 2008. In its Decision, the Court stated:

> *Under the **Investment Advisers Act** of 1940, it is unlawful for an investment adviser "to employ any device, scheme, or artifice to defraud any client or prospective client" or "to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." **54 Stat. 852**, as amended, **15 U.S.C. §§80b-6(1)**, **(2)**. The Securities and Exchange Commission is authorized [***3] to bring enforcement actions against investment advisers who violate the Act, or individuals who aid and abet such violations. **§80b-9(d)**.*
>
> *As part of such enforcement actions, the SEC may seek civil penalties, **§§80b-9(e)**, **(f)** (2006 ed. and Supp. V), in which case a five-year statute of limitations applies: "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon." **28 U.S.C. §2462**.*

*This statute of limitations is not specific to the **Investment Advisers Act**, [**302] or even to securities law; it governs many penalty provisions throughout the U.S. Code. Its origins date back to at least 1839, and it took on its current form in 1948. See Act of Feb. 28, 1839, ch. 36, §4, **5 Stat. 322**.*

*The SEC alleged that Alpert and Gabelli aided and abetted violations of §§80b-6(1) and (2), and it sought civil penalties under §80b-9. Petitioners moved to dismiss, arguing in part that the claim for civil penalties was untimely. They invoked the five-year statute of limitations in §2462, pointing out that the complaint alleged market timing up until August 2002 [***4] but was not filed until April 2008. The District Court agreed and dismissed the SEC's civil penalty claim as time barred.* [1]

The Gabelli case centered around the meaning of **28 U.S.C. §2462** : "an action ... for the enforcement of any civil fine, penalty, or forfeiture ... shall not be entertained unless commenced within five years from the date when the claim first accrued." Petitioners argued that a claim based on fraud accrues-and the five-year clock begins to tick-when a defendant's allegedly fraudulent conduct occurs. The Court stated in its opinion that this

*"...is the most natural reading of the statute. "In common parlance a right accrues when it comes into existence ... ." United States v. Lindsay, 346 U.S. 568, 569 (1954). Thus the "standard rule" is that a claim accrues "when the plaintiff has a complete and present cause of action." Wallace v. Kato, 549 U.S. 384, 388 (2007) (internal quotation marks omitted); see also, e.g., Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., 522 U.S. 192, 201 (1997); Clark v. Iowa City, 20 Wall. 583, 589 ([*1221] 1875). That rule has governed since the 1830s when the predecessor to §2462 was enacted. See, e.g., Bank of United States v. Daniel, 12 Pet. 32, 56 (1838);*

Evans v. Gee, ***11 Pet. 80*** *,* ***84*** *(1837). And that definition appears in dictionaries from the 19th century up until today. See,* e.g., *1 A. Burrill, A Law Dictionary and Glossary 17 (1850) ("an action*accrues *when the plaintiff has a right to commence it"); Black's Law Dictionary 23 (9th ed. 2009) (defining "accrue" as "[t]o come into existence as an enforceable claim or right").*

The Court further stated that:

This reading sets a fixed date when exposure to the specified Government enforcement efforts ends, advancing "the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." Rotella v. Wood, ***528 U.S. 549*** *,* ***555*** *(2000). Statutes of limitations are intended to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Railroad Telegraphers v. Railway Express Agency, Inc.,* ***321 U.S. 342*** *,* ***348-349*** *(1944).* ***[**304]****They provide "security and stability to human affairs." Wood v. Carpenter,* ***101 U.S. 135*** *,* ***139*** *(1879). We have deemed them "vital to the welfare of society,"* ***ibid.*** *, and concluded that "even wrong-doers are entitled to assume that their sins may be forgotten," Wilson v. Garcia,* ***471 U.S. 261*** *,* ***271*** *(1985).*

Notwithstanding these considerations, the Government argued that the discovery rule should apply instead. Under this rule, accrual is delayed "until the plaintiff has 'discovered'" [***5] his cause of action. Merck & Co. v. Reynolds, **559 U.S. ___** , ___ (2010) (slip op., at 8). The doctrine arose in 18th-century fraud cases as an "exception" to the standard rule, based on the recognition that "something different was needed in the case of fraud, where a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or he has been defrauded." ***Ibid.*** This Court has held that "where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered.'" Holmberg v. Armbrecht, **327 U.S. 392** , **397** (1946) (quoting Bailey v. Glover, **21 Wall. 342** , **348** (1875)). And we have explained that "fraud is deemed to be discovered when, in the exercise of reasonable diligence, it could have been discovered." *Merck & Co.*, ***supra*** , at ___ (slip op., at 9) (internal quotation marks and alterations omitted).

In its decision, the Court stated:

"But we have never applied the discovery rule in this context, where the plaintiff is not a defrauded victim seeking recompense, but is instead the Government bringing an enforcement action for civil penalties. Despite the discovery rule's centuries-old roots, the Government cites no lower court case before 2008 employing a fraud-based discovery rule in a Government enforcement action for civil penalties. See Brief for Respondent 23 (citing SEC v. Tambone, ***550 F. 3d 106*** *,* ***148-149*** *(CA1 2008); SEC v. Koenig,* ***557 F. 3d 736*** *,* ***739*** *(CA7 2009)). When pressed at oral argument, the Government conceded that it was aware of no such case. Tr. of Oral Arg. 25. The Government was also unable to point to any example from the first 160 years after enactment of this statute of limitations where it had even asserted that the fraud discovery rule applied in such a [*1222] context.*Id., *at 26-27 (citing only United States v. Maillard,* ***26 F. Cas. 1140*** *,* ***1142*** *(No. 15,709) (SDNY 1871), a "fraudulent concealment" case, see n. 2,* supra*).*

Instead the Government relies heavily on Exploration Co. v. United States, **247 U.S. 435** *(1918), in an attempt to show that the discovery rule should benefit the Government to the same extent as private parties. See,* e.g., *Brief for Respondent 10-11, 16, 17, 33-34, 41-45. In that case, a company had fraudulently procured land from the United States, and the United States sued to undo the transaction. The company raised the statute of limitations as a defense, but this Court allowed the case to proceed, concluding that the rule "that statutes of limitations upon suits to set aside fraudulent transactions shall not begin to run until the discovery of the fraud" applied "in favor of the Government as well as a private individual."* ***[**305]*** Exploration Co., **supra, at 449**. *But in* Exploration Co., *the Government was itself a victim; it had been defrauded and was suing to recover its loss. The Government was not bringing an enforcement action for penalties.* Exploration Co. *cannot save the Government's case here.*

There are good reasons why the fraud discovery rule has not been extended to Government enforcement actions for civil penalties. The discovery rule exists in part to preserve the claims of victims who do not know they are injured and who reasonably do not inquire as to any injury. Usually when a private party is injured, he is immediately aware of that injury and put on notice that his time to sue is running. ***[***6]*** *But when the injury is self-concealing, private parties may be unaware that they have been harmed. Most of us do not live in a state of constant investigation; absent any reason to think we have been injured, we do not typically spend our days looking for evidence that we were lied to or defrauded. And the law does not require that we do so. Instead, courts have developed the discovery rule, providing that the statute of limitations in fraud cases* *should typically begin to run only when the injury is or reasonably could have been discovered.*

The same conclusion does not follow for the Government in the context of enforcement actions for civil penalties. The SEC, for example, is not like an individual victim who relies on apparent injury to learn of a wrong. Rather, a central "mission" of the Commission is to "investigat[e] potential violations of the federal securities laws." SEC, Enforcement Manual 1 (2012). Unlike the private party who has no reason to suspect fraud, the SEC's very purpose is to root it out, and it has many legal tools at hand to aid in that pursuit. It can demand that securities brokers and dealers submit detailed trading information. Id., *at 44. It can require investment advisers to turn over their comprehensive books and records at any time.* ***15 U.S.C. §80b-4*** *(2006 ed. and Supp. V). And even without filing suit, it can subpoena any documents and witnesses it deems relevant or material to an investigation. See* ***§§77s(c)***, ***78u(b)***, ***80a-41(b)***, ***80b-9(b)*** *(2006 ed.).*

The SEC is also authorized to pay monetary awards to whistleblowers, who provide information relating to violations of the securities laws. ***§78u-6*** *(2006 ed., Supp. V). In addition, the SEC may offer "cooperation agreements" to violators to procure information about others in exchange for more lenient treatment. See Enforcement Manual, at 119-137. Charged with this mission and armed with these weapons, the SEC as enforcer is a far cry from the defrauded victim the discovery rule evolved to protect.[*1223]*

In a civil penalty action, the Government is not only a different kind of plaintiff, it seeks a different kind of relief. The discovery rule helps to ensure that the injured receive *recompense. But this case involves penalties, which go beyond compensation, are intended to punish, and label defendants wrongdoers. See Meeker v. Lehigh Valley R. Co.,* ***236 U.S. 412*** *,* ***423*** *(1915) (a penalty covered by the predecessor to* ***§2462*** *is "something imposed in a punitive way for an infraction of a public law"); see also Tull v. United States,* ***481 U.S. 412*** *,* ***422*** *(1987) (penalties are "intended to punish culpable* ***[**306]*** *individuals," not "to extract compensation or restore the status quo").*

Chief Justice Marshall used particularly forceful language in emphasizing the importance of time limits on penalty actions, stating that it "would be utterly repugnant to the genius of our laws" if actions for penalties could "be brought at any distance of time." Adams v. Woods, ***2 Cranch 336*** *,* ***342*** *(1805). Yet grafting the discovery rule onto* ***§2462*** *would raise similar concerns. It would leave defendants exposed to Government enforcement action not only for five years after their misdeeds, but for an additional uncertain period into the future. Repose would hinge* ***[***7]*** *on speculation about what the Government knew, when it knew it, and when it should have known it. See* Rotella, ***528 U.S., at 554*** *(disapproving a rule that would have "extended the limitations period to many decades" because such a rule was "beyond any limit that Congress could have contemplated" and "would have thwarted the basic objective of repose underlying the very notion of a limitations period").*

Determining when the Government, as opposed to an individual, knew or reasonably should have known of a fraud presents particular challenges for the courts. Agencies often have hundreds of employees, dozens of offices, and several levels of leadership. In such a case, when does "the Government" know of a violation? Who is the relevant *actor? Different agencies often have overlapping responsibilities; is the knowledge of one attributed to all?*

In determining what a plaintiff should have known, we ask what facts "a reasonably diligent plaintiff would have discovered." Merck & Co., **559 U.S., at ___** *(slip op., at 8). It is unclear whether and how courts should consider agency priorities and resource constraints in applying that test to Government enforcement actions. See 3M Co. v. Browner,* **17 F. 3d 1453** , **1461** *(CADC 1994) ("An agency may experience problems in detecting statutory violations because its enforcement effort is not sufficiently funded; or because the agency has not devoted an adequate number of trained personnel to the task; or because the agency's enforcement program is ill-designed or inefficient; or because the nature of the statute makes it difficult to uncover violations; or because of some combination of these factors and others"). And in the midst of any inquiry as to what it knew when, the Government can be expected to assert various privileges, such as law enforcement, attorney-client, work product, or deliberative process, further complicating judicial attempts to apply the discovery rule. See,* e.g., *App. in No. 10-3581 (CA2), p. 147 (Government invoking such privileges in this case, in response to a request for documents relating to the SEC's investigation of Headstart); see also* Rotella, **supra, at 559** *(rejecting a rule in part due to "the controversy inherent in divining when a plaintiff should have discovered" a wrong).* ***[*1224]***

To be sure, Congress has expressly required such inquiries in some statutes. But in many of those instances, the Government is itself an injured victim looking for recompense, not a prosecutor seeking penalties. See, e.g., **28 U.S.C. §§2415** , **2416(c)** *(Government suits for money damages founded on contracts or torts). Moreover,* ***[**307]*** *statutes applying a* *discovery rule in the context of Government suits often couple that rule with an absolute provision for repose, which a judicially imposed discovery rule would lack. See, e.g.,* 21 U.S.C. §335b(b)(3) *(limiting certain Government civil penalty actions to "6 years after the date when facts material to the act are known or reasonably should have been known by the Secretary but in no event more than 10 years after the date the act took place"). And several statutes applying a discovery rule to the Government make some effort to identify the official whose knowledge [***8] is relevant. See* 31 U.S.C. §3731(b)(2) *(relevant knowledge is that of "the official of the United States charged with responsibility to act in the circumstances").*

As we held long ago, the cases in which "a statute of limitation may be suspended by causes not mentioned in the statute itself ... are very limited in character, and are to be admitted with great caution; otherwise the court would make the law instead of administering it." Amy v. Watertown (No. 2), 130 U.S. 320, 324 *(1889) (internal quotation marks omitted). Given the lack of textual, historical, or equitable reasons to graft a discovery rule onto the statute of limitations of* §2462 *, we decline to do so.*

The judgment of the United States Court of Appeals for the Second Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion."

Therefore, based upon the Court's decision in Gabelli v SEC, the Division failed to institute proceedings to stop the fraud which it believed was on going inside of SIBL in June 2005, more than 12 months prior to Young joining SGC. Instead allowing the fraud to continue for almost 4 more years until the raid on Stanford Financial Group's operations on February 17, 2009. Further, while the Division's investigation into SIBL and Stanford Financial Group had been ongoing for more than 5 years when the Division issued a Wells Notice to Young and the

Commission further delayed and or failed to issue an Order Instituting Proceedings against Young, and the other two Respondents until August 31, 2012, more than 7 years after the SEC first documented its belief that SIBL was operating a "ponzi" scheme.

As presented at trial, Young did not join SGC until August 2006, and Young was not provided with a complete copy of the SEC Subpoena to SGC in October 2006, rather access was controlled by and through Stanford Financial Group's General Counsel, Mauricio Alvarado and Stanford Group Company's Global Compliance Officer, Lena Stinson. Further, it was presented at trial that Young was never made aware of the existence of an SEC Subpoena against Young which was issued on December 29, 2008, until he discovered an email from Thomas Sjoblum to Mauricio Alvarado in December 29, 2012 which contained the attached Subpeona. Young testified that had he known about the Subpoena in December 2008, or the SEC's concerns that SIBL was engaged in a Ponzi scheme in October 2006, he would have terminated his employment with SGC. Young's career is not only indicative but a testimony of his commitment to upholding the ideals of strong compliance within the securities industry.

In February 2009 after the appointment of Ralph Janvey as Receiver, the State of Alabama issued an order following an investigation which stated in part:

> "Young did not engage in any acts of fraud or was in a position to possess knowledge of the alleged fraudulent acts of any Stanford entity... "

In 2009, FINRA commissioned a special review of Stanford Group Company and in the Special Review Report in a footnote on page 13, the Special Review comments that Young's presence in no way compromised the examiners' ability to conduct <u>any</u> examinations of SGC.

When Young was hired as the Managing Director of Compliance for Stanford Group Holdings, Inc. ("SGH"), it was the holding company for all of Stanford's North American entities, including Stanford Group Company, ("SGC") the FINRA member firm. Young became the Chief Compliance Officer for SGC, shortly thereafter in October 2006. He was responsible for compliance for SGC and had approximately 25 employees reporting to him, all of whom worked within the Compliance Department. Young reported directly to Daniel T. Bogar, President of SGC and SGH. He had a lateral reporting responsibility to Lena Stinson, Stanford's Global Director of Compliance (PowerPoint Presentation dated January 22, 2008).

As disclosed on the various organizational charts prepared by SGC, Young reported directly to Bogar and, along with others including the Chief Financial Officer, Chief Technology Officer and Chief Operations Officer, was a member of the SGC Operating Committee. Young's supervisory responsibilities were limited to only those employees of SGC's compliance department (Ref. Exhibit Young Ex 18.)

With respect to the handling of regulatory inquiries received by SGC and SFG, it was Young's normal practice to inform both Ms. Stinson and the SFG legal department which was headed by Mauricio Alvarado, SFG's General Counsel. This practice of coordinating compliance activities with oversight by Lena Stinson, Global Director of Compliance and SFG's Legal Department, had been established prior to Young joining SFG. Mr. Alvarado made known to Young his expectations of Young's close cooperation among SGC's Compliance Department, SFG's Global Compliance (Lena Stinson) and SFG's Legal Department, which Mr. Alvarado oversaw. As such, whenever a regulatory issue arose or a regulatory inquiry was received, Young would coordinate with both Ms. Stinson on behalf of Global Compliance and Mr.

Alvarado or one of the other attorneys in SFG's legal department to determine whether outside legal counsel should be consulted. Mr. Alvarado would consult with outside legal counsel. The appropriate departments, under the direct supervision of Stinson, would coordinate their efforts to produce documents responsive to the request. Neither Stinson nor Alvarado showed Young the SEC subpoena issued in the fall of 2006 for his review. He was supplied a list of documents to produce which previously had been approved by Alvarado and outside legal counsel. The final authority on document production was that of outside legal counsel (E-mail from Jacqueline Perrell to Rebecca Hamric and Bernerd Young dated March 30, 2007).

IV.

CONCLUSIONS

In Arthur J. Huff, the Commission dismissed failure to supervise charges brought against Arthur James Huff, after Huff had been charged with failing to supervise a retail broker who violated securities laws as well as a branch office manager who failed in his own supervisory duties over the broker. Commissioners Lochner and Shapiro concurred with the Commission's dismissal but wrote separately (Exchange Act Rel. No. 29017, 50 S.E.C. 524, 1991 WL 296561 (Mar. 28, 1991) (concurring opinion of Commissioners Shapiro and Lochner) to express their view that Huff could not be regarded as failing to supervise the broker because, as a factual matter, the broker was not subject to Huff's supervision. They concluded that the most probative factor that would indicate a person is responsible for the actions of another is whether that person has the power to control the other's conduct. This view is supported by the common meaning of the term "supervision" when used in the employment relationship to which the statute refers and by the statutory language "subject to his supervision" which seems to emphasize control." This is important to Young's case, as Young was not senior to Bogar or Green, nor was he senior to SFG General Counsel, Mauricio Alvarado or SFG's Global Compliance Director, Lena Stinson, accordingly Young had no ability to control the actions of these individuals through which he elevated concerns, he sought input and information, and he operated under their supervision and appointment. Further, as Young had spent more than 19 years as a regulatory staff member at FINRA, the last ___ years of which were under the tenure of Schapiro, Young believed at all times that his actions to investigate, question and see direction were "reasonable" in light of his experience as both a regulator and a consultant to the securities industry.

Consistent with the Feuerstein Report which was issued in 1992, Young's compliance department functioned, as did he, in an advisory, monitoring and educational role to support management's supervisory responsibilities and obligations, its efforts being focused on reasonably achieving compliance with government and self-regulatory organization rules and regulations and firm policies. This is consistent with the Commission's regulatory pronouncements which have attempted to maintain compliance as a function distinctly separate from management. For example, in the context of Rule 206(4)-7, under the Investment Advisers Act of 1940 ("Advisers Act"), the rule requires that each adviser registered with the Commission to designate a chief compliance officer to administer its compliance policies and procedures. The Commission further noted in its adopting release that "[h]aving the title of chief compliance officer does not, in and of itself, carry supervisory responsibilities. Thus a chief compliance officer appointed in accordance with Rule 206(4)-7 (or Rule 38a-1 under the Investment Company Act of 1940) would not necessarily be subject to a sanction by us for failure to supervise other advisory personnel." Similarly, NASD Rule of Conduct 3013, as originally proposed by NASD, would have required both the broker-dealer's Chief Executive Officer and the Chief Compliance Officer to certify the firm's compliance system. However, following the initial comment period, NASD abandoned the Chief Compliance Officer certification. The Commission, in its release approving NASD Rule 3013, noted that "responsibility for discharging compliance policies and written supervisory procedures rests with the business line supervisors..."

Extending liability to Young as Chief Compliance Officer to conducting compliance "training" of the SGC FA's is also contrary to public policy and the traditional role of compliance as independent educator, evaluator and guide. Further, extending supervisory liability to Young for the statements contained in the SIB Training Materials as well as Offering Documents, neither of which did he author, nor did he have ultimate authority over their contents, or the ultimate authority over the contents of the training materials (Tr. ___ Jason Green's testimony re overriding Michael Koch's proposed changes to his training slides), is a slippery slope which serves instead to deter compliance professionals from engaging in any training of sales staff, the purpose of which is to educate them on the compliance and legal boundaries within which they must operate. Vigorous compliance and educational training programs are a key aid to management's efforts to combat misconduct and malfeasance. In order for Chief Compliance Officers to maintain the ability to educate and guide an organization with which they are employed, they must have open communication with business personnel and be able to advise freely on rules and regulations governing the organization's business activities. Thus, organizations such as the National Society of Compliance Professionals, in their Amicus Brief in the Urban case, stated "[t]his requires the role of Compliance be clearly defined as one that provides support and advice, but does not involve control over line employees. Compliance programs were never intended to replace business supervisors, but to supplement their supervisory roles by providing independent observation and advice."

As noted in the NSCP's Amicus Brief, in a recent case, Scott G. Monson, although it concerned a counsel to a firm, an in-house attorney was charged with having "caused" his company's violation by providing faulty legal advice concerning mutual fund trading. The Commission dismissed the administrative proceeding against Monson, noting that such a proceeding would interfere with Monson's "ability to provide unbiased, independent legal advice regarding the securities laws." So too for the compliance professional. Fear of repercussions from a failure to supervise or an aiding and abetting charge will have a chilling effect on the compliance professional's sound judgement and ability to objectively assess any given situation. Conversely, a compliance professional who is free to analyze and determine the appropriateness of the activities and systems of a particular firm, including training of registered representatives, will be far more likely to weed out and address those violations that the Commission hopes to prevent.

The fact that the ALJ's Initial Decision imparts liability on Young as a "maker" of statements over which he had no ultimate authority, and finds him guilty of aiding and abetting SGC and SIBL of making false statements which he had no knowledge of being false, and further disregards unrefuted testimony and documentary evidence that Young, when confronted with the knowledge that FINRA had concerns regarding the SIB Sales Brochure or the knowledge that the SIB Disclosure Statement was "inaccurate", took prompt steps to prevent their further use. For these reasons, among others, the Initial Decision should be set aside and the Commission should instead undertake rulemaking designed to enunciate a clear standard that compliance professionals can follow, thus permitting them to make compliance programs more effective in dealing with and or deterring misconduct in the industry. The Commission should further, revisit the Gutfreund and Huff cases, as urged by the NSCP, in order to reaffirm that supervisory liability can only befall a compliance officer where the erring employee is "subject to the supervision" of that compliance officer.

For the foregoing reasons, we pray upon the Commission to should vacate, set reverse and or otherwise set aside the Initial Decision that:

- Bernerd E. Young is BARRED from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent or nationally recognized statistical rating organization, and is PROHIBITED, permanently, 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;
- Bernerd E. Young pay a civil money penalty of $260,000;
- Bernerd E. Young disgorge $591,992.46 plus prejudgement interest at the rate establihed under Section 6621(a)(2) of the Internal Revenue code, 26 U.S.C. SS 6621(a)(2), compounded quarterly, pursuant to 17 C.F.R. ss 201.600(b). Pursuant to 17 C.F.R. 201.600(a), prejudgement interest is due from March 1, 2009, through the last day of the month preceding which payment is made; and
- Bernerd E. Young CEASE and DESIST from committing or causing any violations or future violations of Section 17(a) of the Securities Act, Sections 10(b) and 15(c)(1) of

the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Advisers Act.

Respectfully Submitted, *pro se*

Dated: September 25, 2013

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