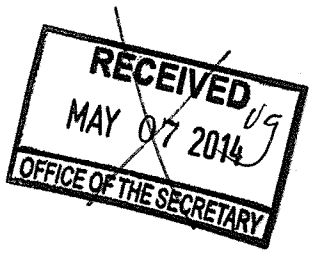
SECURITIES AND EXCHANGE COMMISSION



In the Matter of: DONALD J. ANTHONY, JR., FRANK H. CHIAPPONE, RICHARD D. FELDMAN, WILLIAM P. GAMELLO, ANDREW G. GUZZETTI, WILLIAM F. LEX, THOMAS E. LIVINGSTON, BRIAN T. MAYER, PHILIP S. RABINOVICH, and RYAN C. ROGERS, Respondents.	ADMINISTRATIVE PROCCEDING File No. 3-015514

RESPONDENT ANDREW G. GUZZETTI'S
POST-HEARING BRIEF

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Respondent Andrew G. Guzzetti, by and through his attorneys, Sallah Astarita & Cox, LLC, respectfully submits this Post-Hearing Brief.

INTRODUCTION

Andrew Guzzetti is a veteran of the securities industry with over 30 years of experience. (See, Division Exhibit ("Div. Ex.") 481.) He has been married for 44 years, has two children and four grandchildren. (Tr. 4586:14-4587:2). Since leaving college, Mr. Guzzetti's passion has been teaching and coaching. Following college, Mr. Guzzetti spent 13 years coaching both football and baseball in upstate New York at the high school and college level. (Tr. 4587:3-19).

In 1983, Mr. Guzzetti joined Shearson & Company, and remained employed by that firm, or its successors, for 19 years, before leaving the firm in 2002. (Div. Ex. 481, at 5). While employed with Shearson, Mr. Guzzetti's focus and responsibilities included hiring and training financial consultants, including training nearly 600 financial consultants at one of three Shearson National Training Centers in Chicago. (Tr. 4588:18-4590:2).

In late 2004, Mr. Guzzetti was contacted by McGinn Smith & Co. ("MS & Co.") because the firm was interested in building its retail wealth management business. (Tr. 4593:20-4954:18). Specifically, the goal of MS & Co. was to transition its financial consultants from a commission, or transactional, based structure, to a fee based, or account management, approach. (Tr. 4598:11-4599:6). However, after joining the firm, Mr. Guzzetti, along, with Brian Mayer, spent over a year locating a clearing firm with the appropriate platform to handle the firms new fee based structure. (Tr. 4601:4-4604:9).

Mr. Guzzetti also spent time recruiting and training MS & Co. brokers. (Tr. 4606:11-4607:16). Throughout most of 2006 and 2007, a significant portion of Mr. Guzzetti's time was

spent developing an innovative investment program for baby-boomers nearing retirement, including both post-retirement career and investment planning called the My Way program. (Tr. 4607:17-4612:6).

At no point during his time with MS & Co. was Mr. Guzzetti ever responsible for the supervision of investments in private placements, including those involved in this matter. (Tr. 3227:7-3229:3, 4606:6-10). Mr. Guzzetti was not involved in the creation of what the Division refers to as the Four Funds or Trusts. (Tr. 3227:7-3229:3). Mr. Guzzetti was not responsible for presenting these investments to the Selling Respondents and had no role in selecting the investments in any of the 25 plus offerings involved in this matter. [1] (Tr. 4632:21-4634:12).

As it pertains to the Four Funds and Trusts, Mr. Guzzetti's only role was to act as a conduit, passing information about the offerings from Mr. David Smith and Mr. Timothy McGinn to the brokers at the firm. (Tr. 3227:4-3229:3, 4606:6-10, 4630:16-4631:16, 4632:21-4634:12). In addition, Mr. Guzzetti would also pass on any inquiries he received from the brokers about the Four Funds and Trusts to Mr. Smith and Mr. McGinn, depending on the investment at issue. (Id.) Mr. Guzzetti was not responsible for reviewing or approving subscription agreements in the offerings at issue. (Tr. 3227:7-3229:3).

Although Mr. Guzzetti became the office manager of MS & Co.'s Clifton Park, New York office in October of 2008, supervision of sales in the private placements at issue remained the responsibility of either David Smith or Timothy McGinn, depending on the offering involved. (Tr. 3225:7-10, 3227:7-3229:3)

[1] Selling Respondents include Donald J. Anthony, Frank H. Chiappone, Richard D. Feldmann, William P. Gamello, William F. Lex, Thomas E. Livingston, Brian T. Mayer, Philip S. Rabinovich and Ryan C. Rogers; not Mr. Guzzetti. Division of Enforcement's Prehearing Memorandum ("DOE Opening Statement"), at 2; Division of Enforcement's Post-Hearing Brief, at 1.

The Division alleges that Mr. Guzzetti was aware of a number of "red flags" and failed to "put in place procedures that would have detected and prevented [] unlawful conduct" allegedly committed by the Selling Respondents. Division of Enforcement's Prehearing Memorandum ("DOE Opening Statement"), at 24.[2] However, the implementation of such procedures was well beyond the duties, responsibilities, and authority of Mr. Guzzetti while he was employed by MS & Co. Furthermore, there is no applicable securities rule or regulation requiring an individual in Mr. Guzzetti's position to implement such a procedure. (Tr. 3223:16-3229:3).

Prior to the institution of these proceedings, Mr. Guzzetti had no disciplinary or regulatory history and continues to maintain a stellar reputation in the securities industry. (Tr. 4594:19-4595:2).

For the reasons that follow, the evidence accepted by the Court during the hearing in this matter shows that throughout his time with MS & Co. Mr. Guzzetti was not responsible for supervising sales of the private placements at issue in this matter. As a result, this Court should find in Mr. Guzzetti's favor and deny the Division's requested relief.

ARGUMENT

I. In Its Opening Statement The Division Did Not Request Disbarment, A Cease and Desist Order, or Disgorgement Related to Its Claims Against Mr. Guzzetti.

In its Prehearing Memorandum, i.e. its Opening Statement, the Division of Enforcement limited its request for disbarment, cease-and-desist orders, and disgorgement of all commissions to Selling Respondents only. (DOE Opening Statement, at 20-22). However, the Division requested that all Respondents be required to pay a substantial penalty. (Id.)

[2] Pursuant to Your Honor's ruling, each party was to submit a Prehearing Brief or Memoranda as that parties opening statement in this matter.

As identified by the Division in its Pre and Post-Hearing Briefs, Selling Respondents include Donald J. Anthony, Frank H. Chiappone, Richard D. Feldmann, William P. Gamello, William F. Lex, Thomas E. Livingston, Brian T. Mayer, Philip S. Rabinovich and Ryan C. Rogers; not Mr. Guzzetti. (DOE Opening Statement, at 2; Division of Enforcement's Post-Hearing Brief, at 1.)

As a result, the Division made the conscious choice to specifically exclude Mr. Guzzetti from its requests for disbarment, a cease-and-desist order, or disgorgement in its Opening Statement. The Second Circuit Court of Appeals has held that "the binding effect of an opening statement within the four corners of a single trial, are . . . well established." (*United States v. McKeon,* 738 F.2d 26 (2d Cir. 1984)). As a result, this Court should deny the Division's request in its Post-Hearing brief for disbarment, a cease-and-desist order, or disgorgement related to its allegations against Mr. Guzzetti. Any penalties that may be levied against Mr. Guzzetti as a result of these proceedings must be limited to civil penalties.

II. Statute of Limitations

Given the fact that the Division of Enforcement makes no request for equitable relief as to Mr. Guzzetti in the Order Instituting Proceedings, nor in its Opening Statement, the causes of action against Mr. Guzzetti "shall not be entertained" pursuant to 28 U.S.C. § 2462 as more than five years have passed since those "claims first accrued." (28 U.S.C.S. § 2462).

While the Division completely failed in its burden to prove that Mr. Guzzetti was a supervisor, the only attempted proof of a supervisory failure by Mr. Guzzetti was in November 2006 and December 2007, more than five years prior to the filing of the Order Instituting Proceedings ("OIP"). As a result of the applicable statute of limitations, the claims against Mr.

Guzzetti should be denied in their entirety. The Division has offered no evidence of any supervisory failure by Mr. Guzzetti which occurred after October 2008, and Mr. Guzzetti left MS&Co in late 2009.

According to 28 U.S.C. § 2462, "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." (See, 28 U.S.C.S. § 2462 [emphasis added]).

As opposed to private plaintiffs, the SEC is not provided with the benefit of the discovery rule. (See, *Gabelli v. SEC,* 133 S. Ct. 1216, 1222, (U.S. 2013) ("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.'")). Furthermore, actions are said to "first accrue[]" under § 2462 once the Division "has a complete and present cause of action." (*Id.,* at, 1220-21).

In the matter at hand, the Court held that the Prehearing Memoranda or Briefs of the parties would serve as the parties' opening statements. The Second Circuit Court of Appeals has held that "the binding effect of an opening statement within the four corners of a single trial, are . . . well established." (*United States v. McKeon,* 738 F.2d 26 (2d Cir. 1984)). As a result, the Division is limited to the relief requested in its Opening Statement.

Despite the Division's failure to make any allegations of sales violations against Mr. Guzzetti in the OIP or in its Opening Statement, the Division has decided to discuss Mr. Guzzetti's few sales in its Post-Hearing brief. Any reference in the Post-Hearing brief to any

sales made by Mr. Guzzetti should be denied in its entirety.[3] (See, OIP; DOE Opening Statement).

The Division has admitted that its only request is for "civil penalties" against Mr. Guzzetti. (See, DOE Opening Statement, 22). Therefore, the claims against Mr. Guzzetti are covered by § 2462's 5 year filing period. (See, *SEC v. Jones,* 476 F. Supp. 2d 374, 381 (S.D.N.Y 2007) (civil monetary penalties are "unquestionably a penalty" under § 2462). Since the OIP was filed on September 23, 2013, claims that are based on events before September 23, 2008 are barred. (See, OIP)). More importantly, the Division has conceded that § 2642 applies in cases where the requested relief is limited to civil fines and penalties. (Division of Enforcement's Memorandum of Law in Opposition to Respondents' Motion for a More Definite Statement, at fn. 5).

The Division makes the argument that events that occurred prior to September 23, 2008 may come into evidence against the Respondents to put the transactions in context. This is contortion, designed to prejudice the Respondents. (DOE Post-Hearing Brief, at 38).

In the OIP, the Division is making two separate groups of claims against the Selling Respondents; fraud/misrepresentation claims and registration claims. (See, OIP). According to the Division, all allegations contained within the OIP relate to the offer and sale of interests in what the Division is calling the "Four Funds," and two separate trust conduits (the "Trusts"). (Id.) The Division has integrated 22 separate trust offerings into two conduits in order to make the claim that the offerings were sold without an effective registration statement or applicable

[3] The Division is not basing any of its claims against Mr. Guzzetti on sales practice violations, and have explicitly removed him from this matter as a "Selling Respondent.". Therefore there are no commissions, which raises the question, what is it precisely that the SEC wants Mr. Guzzetti to disgorge . . . his salary? Clearly this would be punitive in nature, not remedial. Therefore, the Division is not actually seeking any disgorgement from him. The only actual relief identified in the request in the OIP is a fine, and this is confirmed in the Division's Prehearing Memorandum.

exemption. (Id.) Piggybacking on this integration argument, the Division alleges that Mr. Guzzetti failed to prevent the Selling Respondents from violating applicable registration requirements. (Id.)

As a result of the Division's decision to integrate the trust offerings and the *Gabelli* definition of accrual discussed above, all claims related to the registration of the offerings first accrued on the date the first offer was made. Therefore, the Division's time to file any claims related to Mr. Guzzetti's alleged failure to prevent Selling Respondents from offering unregistered securities would be five years following the first day that the offering materials were deemed effective.

According to the OIP (an admission by the Division) the dates that the alleged registration violations first accrued are as follows:

1. Four Funds
    a. FIIN – 9/15/2003
    b. FAIN – 10/1/2005
    c. FEIN – 1/16/2004
    d. TAIN – 11/1/2004
2. TDM Cable Funding Conduit – 11/13/2006
3. McGinn Smith Funding Conduit – 5/19/2007

Therefore, it is clear that the Division's claims against Mr. Guzzetti related to registration are all time barred by § 2462. The Division's time to file these claims was exhausted as early as September 15, 2008 and as late as May 19, 2012. Clearly the Division has failed to file before these cut off dates as the OIP was filed on September 23, 2013. As a result, the Division's claims

against Mr. Guzzetti for alleged supervision violations related to the registration of the Four Funds cannot form the basis of liability against him pursuant to § 2462.

In addition, the Division's fraud allegations center on a supposed "redemption policy" that the Division believes was in place at MS & Co. The Division alleges that all of the Respondents in this matter were aware of the alleged "redemption policy" by the end of 2007. (DOE Post-Hearing Brief, at 21-22). As a result, all misrepresentation claims based on the "redemption policy" occurred when the first sale was made by the Selling Respondents following their learning of the "redemption policy."

As a result of the fact that the Division has limited its request for penalties against Mr. Guzzetti to monetary penalties, the Division's claims against him are all covered by § 2462's 5 year filing period. (See. *SEC v. Jones,* 476 F. Supp. 2d 374, 381 (S.D.N.Y 2007) (civil monetary penalties are "unquestionably a penalty" under § 2462)). As a result, no evidence of any transactions occurring prior to September 23, 2008 should be considered when deciding whether Mr. Guzzetti was responsible for supervising the transactions at issue.

III. The Division Of Enforcement Has Failed To Prove That Mr. Guzzetti Was Responsible For Supervising The Transactions at Issue.

The Division of Enforcement has failed to prove by a preponderance of the evidence that Mr. Guzzetti was responsible for supervising sales of the private placements at issue in this case. The Division is correct, "determining if a particular person is a 'supervisor' depends on whether, under the facts and circumstances of a particular case, that person has a requisite degree of responsibility, ability or authority to affect the conduct of the employee whose behavior is at issue." (*In the Matter of Bloomfield, et. al.,* No. 3-3871, 2014 WL 768828 (S.E.C. Feb. 27,

2014)). The Division is also correct that a person's "actual responsibilities and authority" will determine whether an individual is a supervisor. (*Id.)*

For the reasons that follow, it is clear that Mr. Guzzetti was not responsible for supervising the Selling Respondents in the offer or sale of the private placements at issue.

A. The Cases Cited By The Division Of Enforcement Are Distinguishable From The Matter At Hand.

Although the cases cited by the DOE provide a test for determining whether an individual is a supervisor, those decisions do not provide a basis for determining the duties of Mr. Guzzetti. Unlike Mr. Guzzetti, in each case cited by the Division, the individual found to have violated his/her supervisory duties was either explicitly given those supervisory responsibilities through a compliance manual, or was given those responsibilities by a superior. That is not the case in the matter at hand. Therefore, any references to investigations that should have been conducted or actions that should have been taken in response to the facts of those cases are not applicable to Mr. Guzzetti.

In the *Matter of Gutfreund*, Respondent Fuerstein was found to have failed in his duty to supervise certain brokers at Salomon Brothers, Inc. (*In the Matter of Gutfreund, et al.*, No. 3-7930, 1992 SEC LEXIS 2939, 51 S.E.C. 93, 113 (Dec. 3, 1992)). As is the case with Mr. Guzzetti, Respondent Fuerstein did not have direct supervisory responsibility for the misconduct at issue. However, under the facts of that case, which the Division has not proven are present here, Respondent Fuerstein was found to have gained supervisory responsibility for the misconduct at issue once he became "involved in formulating management's response to the problem." *Id.*, at 48-49.

Respondent Fuerstein's involvement in formulating a response for the firm vested him with the responsibility to insure that the misconduct he was tasked with responding to, was addressed and corrected. The uncontroverted evidence shows that Mr. Guzzetti was not aware of the nefarious actions of Messrs. McGinn and Smith until after he had left MS & Co. (Tr. 4634:20-23). Furthermore, there was no evidence presented that showed Mr. Guzzetti was given responsibility by the firm to look into the funds, review the investments of the Four Funds and Trusts, investigate Messrs. Smith or McGinn, nor was he ever told that the two gentlemen, who were running the firm, along with a handful of others, were participating in such a fraudulent scheme. As a result, *Gutfruend* is easily distinguished from the matter at hand.

In the Matter of Bloomfield, Respondent Gorgia failed to supervise other Respondents in the matter because he was their direct supervisor and was involved in formulating the firms response to concerns expressed by the firms clearing firm, Pershing. (*In the Matter of Bloomfield, et. al.,* No. 3-3871, 2011 WL 1591553 (Apr. 26, 2011), *aff'd*,2014 WL 768828 (S.E.C. Feb. 27, 2014)). Therefore, he had an affirmative obligation to follow up on those concerns, and Respondent Gorgia failed to undertake the required follow up. (*In the Matter of Bloomfield, et. al.,* 2014 WL 768828 (S.E.C. Feb. 27, 2014)). In addition, unlike the matter at hand, Mr. Gorgia was expressly given responsibility to supervise the specific misconduct at issue in the firm's Written Supervisory Procedures. (*Id.*)

In *Kolar,* Respondent Kolar was found to have violated his supervisory responsibilities because his supervisor, O'Neil, "entrusted Kolar with the specific responsibility of investigating the serious allegations that had been made against [the broker]." (*In the Matter of Kolar, No. 3-9570*, 2002 SEC LEXIS 3420, 17, 55 S.E.C. 1009, 1018 (S.E.C. June 26, 2002)). O'Neil testified that he "relied on and trusted Kolar's judgment with respect to that investigation." (*Id.*)

Therefore, on appeal the Commission found that "in that instance, Kolar was specifically vested with supervisory authority." *Id.* At no point during the hearing in this matter did the Division present evidence showing that Mr. Guzzetti received explicit instructions to investigate the alleged red flags identified by the Division, as was the case in *Kolar.*

In the Matter of Murphy, Respondent Birkelbach was given express responsibility to supervise the transactions at issue and failed in his duty. (*In the Matter of Murphy, et al.*, 2011 FINRA Discip. LEXIS 42 (Oct. 10, 2011)). The allegations in *Murphy* related to thousands of unapproved option trades made by a broker at Birkelbach Investment Securities, Inc. (*Id.*) Respondent Birkelbach was the "Senior Registered Options Principal ("SROP") and Compliance Registered Options Principal ("CROP"), which carried the [u]ltimate responsibility and authority to supervise customer's options transaction." *Id.* at 5. As such, Respondent Birkelbach was directly "responsible for approving options agreements, including approving customers to engage in various levels of options trading." *Id.,* at 27.

Most importantly, "[a]ll options trades required his approval, and he reviewed the options trades on a daily basis to determine suitability and if the size and frequency were appropriate." (*Id.*) The evidence presented at the hearing in this matter shows that Mr. Guzzetti was not in charge of reviewing subscription agreements, investor questionnaires, or any other documents related to investments in the Four Funds or Trusts, and had no role in approving investments in same. (Tr. 3007:18-3008:8).

Each of these four cases are inapposite to the matter at hand. Mr. Guzzetti was not given supervisory responsibility for the investments at issue. The Written Supervisory Manuals admitted as evidence during the hearing do not identify Mr. Guzzetti as the individual responsible for approving investments in the private placements at issue in this matter.

Furthermore, the Division did not present any evidence that Mr. Guzzetti was assigned or assumed the responsibility of supervising sales of the private placements.

B. Mr. Guzzetti's Responsibilities At MS & Co.

In 2004, Mr. Guzzetti was contacted by MS & Co. because the firm was "interested in building their retail wealth management business and asked [him] to come aboard and try to do that work out of the New York City office" ("NYC office"). (Tr. 4593:20-4594:18). After first arriving in the NYC office, Mr. Guzzetti worked with Mr. Mayer for nearly a year trying to find a new clearing firm with the appropriate platform to support Mr. Guzzetti's main job responsibility, building the firm's wealth management business. (Tr. 4601:4-4604:7).

Although it had been part of his focus prior to the consummation of the deal with a new clearing firm, following that deal Mr. Guzzetti's focus was on "educating the advisors that are with us into moving into this type [managed money] of business." (Tr. 4606:11-20). In addition, Mr. Guzzetti spent time recruiting financial consultants from wire houses to join the firm. (Id).

Mr. Guzzetti also spent a significant portion of his time trying to develop programs or services that would benefit MS & Co.'s existing and future client base. One such program was called the My Way Program. (Tr. 4607:17-25). This program was designed to help baby boomers nearing retirement find a second career during their retirement years, as research showed that the baby boomers were not looking for the traditional retirement. (Tr. 4607:17-4610:9). The My Way Program offered two services to clients: a financial plan and a career plan. (Id.) The program would help those near retirement start their second career, if they knew what it was they wanted to do, or help them determine what their second career would be, based on their experiences. (Id.) The program would also let clients know what licenses and education they

would need to qualify for that career, and the best places in the country to retire for that career. (Id.)

Following the development of the My Way program Mr. Guzzetti spent the next year or two showing the plan to brokers at MS & Co., discussing the possibility of selling the plan to a big firm, and appearing on radio in Florida to discuss the idea. (Tr. 4610:10-4612:6). At this point in time, the day-to-day supervision of brokers at MS & Co. was handled by "Brian in New York. Might have been Carl Nicolosi or David Smith in Clifton Park." (Tr. 4612:11-15).

During his years in the New York office Mr. Guzzetti was also involved in putting together seminars around the New York City and Albany area called "Investment 101" seminars. (Tr. 4615:8-4616:20). The purpose of these seminars was not to talk about specific products, but rather discuss major topics related to investing, such as the fact that "[p]otential of greater returns means potential for greater risks." (Id.) These seminars were directly in line with Mr. Guzzetti's experiences as an educator and coach. Mr. Guzzetti also participated in the formation of the Believe in America program. (Tr. 4617). This program was designed to offer those individuals who believed in the strength of American companies to build a portfolio invested in great American companies as the market was bottoming in March of 2009. (Tr. 4617:6-4618:5).

However, throughout his time at MS & Co., Mr. Guzzetti's main responsibilities or function was to act as a sales manager. Mr. Guzzetti's expert witness, FINRA Board of Governors Member Kevin Carreno, testified that he would classify the responsibilities of Mr. Guzzetti as those belonging to a sales manager. (Ex. AG-71, at 5; Tr. 4808:19-4809:7). Mr. Carreno's expert report states that "[a] sales manager is not a supervisory role in the ordinary use and custom of the retail brokerage industry." (Ex. AG-71, at 5). The main role and function of a sales manager is to "disseminate information about the markets, particular stocks that are being

followed by the firm, and firm products that are available for the sales force." (Id.) This is exactly what Mr. Guzzetti did through his morning emails.

Both the Division and Mr. Guzzetti's expert witnesses agreed that the first place to start when conducting an analysis of supervision is to review the supervisory or compliance manuals in effect during the time period at issue. (Tr. 1154:14-18, 1154:24-1155:4, 4832:13-20). According to the 2007 MS & Co. Supervisory Compliance Manual ("2007 SCM") "[a]ll brokers in the NYC office [were] under Brian Mayer's direct supervision," and Brian Mayer was "under David L. Smith's supervision." (Ex. AG-2, at 46). At the same time, "[a]ll brokers in the Clifton Park office [were] under Carl Nicolosi's direct supervision," who was also under David L. Smith's direct supervision (Id.)

In an effort to avoid the clear language of the SCM described above, the Division incorrectly cites to the section entitled "Supervision of Off-Site Personnel" which states that "Andy Guzzetti, as Managing Director – Private Client Group, is directly responsible for all outside RR's." (Id. at 37). However, the SCM also clearly states that "[a]ll Non-NYC brokers are under David L. Smith's direct supervision," which would include all off-site personnel. (Id. at 46). The Division seems to ignore this fact entirely, despite its own expert witness' testimony that this is the starting point for determining supervision.

Furthermore, this section states that "[i]t is up to the compliance officer to ensure that these RRs are current in their out-of-state registration and that they are kept current with changes in supervisory regulations," and that "it is the responsibility of the compliance office to ensure [a] high level of professionalism." (Id. at 37). The only specific responsibility delegated to Mr. Guzzetti in this section is "for communications and distribution of sales material to all outside RRs." (Id. at 37). Although this section includes language regarding securities transactions made

by outside RRs, it does not delegate that duty to Mr. Guzzetti, and establishes that he is a sales manager, not a supervisor. (Id.)

In addition, throughout the 2007 SCM there is only one person referred to as a compliance officer; David L. Smith. (Id. at 3, 4, 12, 25, 28, 30, 39, 45, 55). If Mr. Guzzetti was responsible for all of the duties described in this section, the SCM would not use the phrase compliance officer throughout, and then mention Mr. Guzzetti by name in the final sentence. The clear language of the manual indicates that the duties not specifically enumerated for Mr. Guzzetti belong to the compliance officer, David L. Smith.

In its Post-Hearing brief, the Division of Enforcement references the MS & Co. written Branch Office Procedures to support its claim that Mr. Guzzetti was responsible for supervising the transactions at issue. (DOE Post-Hearing Brief, at 32). The Division's reliance on an undated branch office manual, for allegations which are time barred, is completely misplaced. Although accepted into evidence at the start of the hearing, this undated document was never authenticated and never identified. (Div. Ex. 328). The record is devoid of any evidence as to what this document was, when it was created, if it was ever used, and if it was used, when it was used.

Assuming for purposes of argument that the document is what the Division claims it is, and that it was properly offered into evidence, Mr. Guzzetti was not a branch office manager until October 2008 and testified that he did not remember ever seeing this document. (Tr. 3005:17-20). Further, although offered into evidence there was no evidence by the Division at the hearing to establish a date of this document or when it was supposedly in effect. (Div. Ex. 328). This document could have been in effect in the years before Mr. Guzzetti arrived at the firm, while he was at the firm, or in 2010 after Mr. Guzzetti left the firm. Any reliance on this

document by the Division should be disregarded entirely as the Court has no information as to when it was in existence, or if it was ever in effect.

From the time he joined the firm in 2004, until his move to the Clifton Park, New York office in 2008, Mr. Guzzetti had no "supervisory responsibility for sales, for approving order tickets, reviewing books . . . [for] any of the brokers at McGinn Smith." (Tr. 4627:5-13). According to Mr. Guzzetti, that was the responsibility of Brian Mayer in the New York City office, and Carl Nicolosi in the Clifton Park office. (Tr. 4612:11-15). In fact, prior to February of 2006 Mr. Guzzetti did not have the proper licenses to take on these responsibilities at MS & Co. (Tr. 4627:15-24).

In October of 2008, Mr. Guzzetti became the branch office manager for the Clifton Park, New York Office. (Tr. 4626:24-4627:4). When asked if he was approving sales in the private placements at issue after becoming the branch office manager at Clifton Park, Mr. Guzzetti testified "[n]o. Actually no one did other than David Smith." (Tr. 4629:5-11). Mr. Guzzetti also testified that sales of the private placements at issue in the New York office and those made by outside RRs, such as Mr. Lex, were approved by Mr. Smith as well. (Tr. 4629:12-21).[4]

Mr. Guzzetti also testified that his morning emails were sent in his role as a sales manager. (Tr. 4630:16-4631:16). Mr. Smith and others would ask Mr. Guzzetti to pass on information to the brokers, or vice versa. (Tr. 4631:4-4631:16). When asked about his involvement in the Four Funds, Mr. Guzzetti testified that he would attend the sales meetings introducing the Four Funds to the brokers, and if the brokers had any questions he "would relay it up to Dave Smith or ask Dave to get on one of our calls . . . because Dave ran the funds." (Tr. 4632:21-4633:18). His involvement was the same as to the Trusts, with the exception that

[4] Lex also testified that Smith was his supervisor. (Tr. 1621:20-25).

questions related to the trust would be directed at Tim McGinn, as he managed the Trusts. (Tr. 4633:11-18).

The duties and responsibilities described above represent the limit of Mr. Guzzetti's role at the firm. This is supported by the SCMs that were in place at the time of his employment and, as will be discussed below, the Division's attempts to discredit the testimony of Mr. Guzzetti are without merit. Mr. Guzzetti was never responsible for supervising the transactions at issue and the Division has failed to meet its burden in this case.

C. The Division Of Enforcement Cites To Numerous "Facts" That Have No Relation To Supervision.

In an attempt to muddy the waters and bolster its extremely weak case against Mr. Guzzetti, the Division of Enforcement cites to numerous proposed facts that have no relation to whether Mr. Guzzetti had the responsibility, ability or authority to affect the conduct of the employees whose behavior is at issue. For example, the fact that Mr. Guzzetti and Mr. Mayer were involved in the process of finding a new clearing firm, is completely unrelated to the Division's supervisory allegations; as are MS & Co.'s implementation of the "Guzzetti ranking system," the fact that he recruited brokers, assigned customers to brokers, and consulted with managers regarding broker evaluations. (DOE Post-Hearing Brief, at 31-32). None of these acts are those of a Series 24 registered supervisor, none require registration as a supervisor, and none point to whether Mr. Guzzetti had the responsibility, ability or authority to affect the conduct of the employees whose behavior is at issue. During its recitation of proposed facts, the Division fails to mention that Mr. Guzzetti could not hire a broker without the approval of someone else at the firm. (Tr. 4624:5-22). More importantly, the Division fails to mention that Mr. Guzzetti did

not have the ability to fire brokers on his own, which would be the strongest evidence of an individual's ability or authority to affect the conduct of the Selling Respondents. (Tr. 4625:2-5).

It is also disingenuous for the Division to claim that Mr. Guzzetti "developed a grid that was used in determining broker compensation." (DOE Post-Hearing Brief, at 32). According to his testimony, the grid was in place already and he "insisted" on single change to the grid. (Tr. 2988:14-23). He was asked for his input and he provided it. (Id.) Furthermore, even if he had developed the compensation grid, this would not support the Division's position that he supervised the transactions at issue, as it does not show that he had the responsibility, ability or authority to affect the conduct at issue, of the Selling Respondents.

In addition, the fact that Mr. Guzzetti "had the training and background for a supervisory position" does not mean that he was actually given the supervisory responsibilities alleged by the Division; or that he exercised such authority. Nor does his experience training financial consultants during the years prior to his joining of MS & Co., or the fact that he is working as a supervisor at another brokerage firm today. (DOE Post-Hearing Brief, at 33). Much as they have done throughout this proceeding, the Division simply states that Mr. Guzzetti is a supervisor with DLG Wealth Management, an event which occurs years after the time frame of this claim, and without providing any discussion of what areas he is actually supervising at his new firm. When it comes to supervision at a brokerage firm, supervisors wear many hats. *Bloomfield*, 2014 WL 7698828, at *11. Being ***A*** supervisor at a brokerage firm does not make you ***THE*** supervisor as to a specific area of business, such as private placements.

As such, this laundry list of facts provided by the Division has no bearing on whether Mr. Guzzetti supervised the transactions outlined in the OIP, during the post October 2008 time period, and discussed at the hearing in this matter.

D. The Division's Attempts to Discredit the Testimony of Mr. Guzzetti Are Without Merit.

In its Post-Hearing brief, the Division on Enforcement points to five separate reasons or facts that they believe show that Mr. Guzzetti's testimony that he was not the supervisor of the transactions at issue lacks credibility. However, upon review of each of these points it becomes clear that they are without merit and should be ignored entirely.

First, the Division alleges that since Mr. Guzzetti never made the distinction between the areas of supervision during his 2011 deposition he must have been the supervisor of the transactions at issue. The only statement that lacks credibility is this argument. The Division of Enforcement never asked Mr. Guzzetti during those depositions what areas he was responsible for. A witness is not required to be a mind reader, nor is he required to answer questions that were not posed. The Division asked if Mr. Guzzetti supervised brokers who sold these notes. Mr. Guzzetti responded "[y]es, I was *A* supervisor, retail." (DOE Post-Hearing Brief, at 33 (emphasis added)). He was a supervisor; he was not asked if he was the supervisor for the sales of the notes.

There is no evidence that Mr. Guzzetti was responsible for supervising the sales of the private placements; as discussed above that responsibility was Mr. Smith's and Mr. McGinn's, depending on which private placement was at issue. As the Division's own expert witness testified, a brokerage firm such as MS & Co. would be expected to have a number of different supervisors. (Tr. 1136:15-21). Being a supervisor of one area of the business, does not mean you are the supervisor of all aspects of the business.

If the Division of Enforcement's goal during the 2011 deposition was to determine supervision of the private placements at issue, the logical follow up question would have been to ask Mr. Guzzetti what areas he was responsible for supervising, or whether he was the supervisor

responsible for approving investments in the private placements at issue. However, the Division did not follow up on this question. As a result, Mr. Guzzetti's answer to this deposition question is completely in accordance with his testimony throughout this hearing.

Next, in an extremely similar argument, the Division alleges that Mr. Guzzetti's testimony is not credible because the Selling Respondents did not make a distinction as to the areas Mr. Guzzetti was responsible for supervising. However, whether at a deposition or a hearing, it is the responsibility of the attorney posing the questions to ask pointed questions, it is not the responsibility of the witness to do anything other than to answer the questions posed.

Although Mr. Mayer did say that Mr. Guzzetti was his supervisor in his 2011 deposition, during the matter at hand he testified that he clarified his position during his grand jury testimony because "[he] didn't think [he] had to be as precise. [He] thought he was coming to help [the SEC]." (Tr. 3258:13-3259:21).

Furthermore, Mr. Mayer's deposition is directly contradicted by both the 2007 and 2008 SCM, where it states that "[a]ll brokers in the NYC office are under Brian Mayer's direct supervision." (Ex. AG-2, at 37; Div. Ex. 329 at 48). As a result, according to the SCMs admitted as evidence in this matter, while Mr. Guzzetti was located in the NYC office, Mr. Mayer was his supervisor, not the other way around. (Id.) In addition, Mr. Mayer also testified at the hearing in this matter that David Smith or Tim McGinn were responsible for reviewing sales of the private placements at issue in this matter. (Tr. 3252:18-22).

In response to the question whether Mr. Guzzetti was a supervisor in his eyes, Mr. Gamello testified: "I really don't know [Guzzetti's] exact role. There was no branch manager. I was in the Clifton Park office and there was no branch manager there when I started. So, Dave

Smith basically was in charge of the firm. Andy Guzzetti was head of retail sales. ***I don't know his exact responsibilities***." (Tr. 1737:13-19 (emphasis added)).

In addition, before FINRA in 2009, Mr. Lex testified "I don't know, technically, who is my direct supervisor. I get guidance from Steven Smith for anything that, you know, involves a compliance issue." (Tr. 1621:20-25). In one of the rare occasions where a follow up question was asked regarding supervision, Mr. Lex was asked who he would "speak to" regarding sales issues. (Tr. 1622:2-4). Mr. Lex responded by naming four separate people: "For sales, I speak to Steven or David Smith, Timothy McGinn, Andy Guzzetti." (Tr. 1622:5-7). This answer is in complete alignment with the testimony of Mr. Guzzetti. For a period of time he was a supervisor for some of the Selling Respondents, including Mr. Lex, and he acted as sales manager, which is not a supervisory function. However, the sales of the private placements at issue were supervised by David Smith. (Tr. 4629:5-11).

Mr. Rogers' testimony is completely supportive of Mr. Guzzetti's position and provides no support for a challenge of Mr. Guzzetti's credibility. Mr. Rogers testified that from 2004-2009 he reported to Brian Mayer. (Tr. 3675:8-11). Mr. Rogers did testify that "[a]t one point, yes; I think [Guzzetti] was a report, as well as Tom Livingston, Dave Smith, and Tim McGinn." (Tr. 3675:12-19). Much like Mr. Lex, Mr. Rogers identified a number of individuals besides Mr. Guzzetti who had a supervisory role at MS & Co. Even after Mr. Rogers identified 5 separate individuals as supervisors, the Division failed to follow up and ask Mr. Rogers who supervised the sale of the private placements at issue in this matter, and Mr. Rogers never testified that Mr. Guzzetti was such a supervisor.

As outlined above, the testimony of these individuals is completely aligned with the testimony of Mr. Guzzetti.[5] Although he did have some supervisory duties while at MS & Co., Mr. Guzzetti was not responsible for supervising sales of the private placements at issue. The fact that the Selling Respondents testified that Mr. Guzzetti was a supervisor, or report in some fashion or another, does not provide the Division support to challenge the credibility of Mr. Guzzetti's testimony.

Third, the Division alleges that the SCMs and Branch Office Procedures do not make a distinction between supervision of sales of more traditional securities and sales of private placements.

This statement is completely contrary to the Division's own evidence.

The SCMs contain an entire section entitled "PRIVATE PLACEMENTS/LIMITED PARTNERSHIPS" which describes the process for reviewing and approving private placements. Ex. AG-2, at 42; Div. Ex. 329, at 44).

It is incomprehensible that the Division would misrepresent its own evidence in such a glaring and flagrant fashion. This section describes the due diligence requirements and subscription procedures when selling private placements at MS & Co. (Id.) Included in this section is a discussion of the approval process for the sale of private placements. (Id.) Mr. Guzzetti's name does not appear at all in this section which states that "[e]ach subscriber must be reviewed and accepted by a principal of the firm, with acceptance indicated by a principal signature on each Subscription Agreement." (Id.) It is telling that despite the fact that the Division has most, if not all, of the subscription agreements for the private placements at issue,

[5] Although Mr. Chiappone testified that Mr. Guzzetti had the authority to tell him what he could and could not do, this testimony is contradicted by both the SCMs admitted as evidence in this matter, and the testimony of every other Respondent. Furthermore, Mr. Chiappone's belief that Guzzetti had the authority to tell him what he could and could not do is not evidence of the actual responsibilities that were given to Mr. Guzzetti through the firms compliance manuals or by Messrs. Smith and McGinn.

not a single subscription agreement was presented during the hearing bearing the signature of Mr. Guzzetti.

Next, the Division makes a rather weak attempt at shifting the burden in this case to Mr. Guzzetti. Realizing it has utterly failed in meeting its burden, the Division of Enforcement has the audacity to allege that Mr. Guzzetti's testimony lacks credibility because he "admitted that nobody ever told him that his area of supervision excluded the Four Funds, Trust Offerings and MSTF, and he could not identify a single document that supported his position on this point." (DOE Post-Hearing Brief, at 34). However, Mr. Guzzetti testified that Mr. Smith established a procedure for the review and approval of the transactions at issue and he followed those procedures (Tr. 3007:18-3008:8) and the Division's own evidence, which includes the SCMs, clearly support his position that he was not a supervisor of the sales of the private placements.

In an administrative proceeding such as this, "[t]he SEC bears the burden of proving its case by a preponderance of the evidence." (*SEC v. Pasternak*, 561 F. Supp. 2d 459, 498 (D.N.J. 2008)). It is not Mr. Guzzetti's responsibility to prove that he was not the supervisor of the transactions at issue. Rather, it is the Division's burden to prove that Mr. Guzzetti was given the supervisory responsibilities it alleges he violated. The Division has not met it burden.

No one ever told Mr. Guzzetti that he was not the President of the United States, the Pope, or the King of England either, but it is highly doubtful the Division would attempt to use this fact in a Court of law to argue that he was. This argument is preposterous, contrary to the law and should be completely disregarded.

Finally, the Division argues that Mr. Guzzetti's conduct, as well as emails that he sent and received during his time with MS & Co., contradict his claim that he was not the supervisor of the transactions at issue. Specifically, the Division alleges that Mr. Guzzetti's morning emails

and emails related to the alleged redemption policy are evidence that he was the supervisor of the transactions at issue.

Morning Note Emails

As Mr. Guzzetti testified, his morning emails were originally started so he could get information to the sales force as a whole. (Tr. 4619:4-14). A majority of the time, the purpose of this email was "to motivate people to get on the phones . . . to get in front of the client." (Tr. 4619:4-4620:6). Mr. Guzzetti also testified that the information in the bottom portions of the email, which contained the deal availability for products offered by the firm, came "from Patty Sicluna or, I guess, David Smith . . . or Tim McGinn." (Tr. 4621:7-14). If Sicluna, Smith or McGinn did not send this information to Mr. Guzzetti, it did not go in the deal availability portion of his emails as he "had no way of knowing" what was available in each offering. (Tr. 4621:15-19). As a perfect example of this, Mr. Guzzetti testified that there were occasions where deals that were no longer available ended up in his morning emails as a result of the fact that he was copyingand pasting the previous day's emails. (Tr. 4621:20-25).

Mr. Guzzetti's morning note emails were not an attempt to push MS & Co. proprietary products, but rather contained quantities of investments the firm had available. (Tr. 4622:10-23). Furthermore, any reference the morning note emails to the amount that clients had currently invested in money markets was also not an attempt to push or solicit brokers. When asked about Division Exhibit 83, an email where Mr. Guzzetti references that clients had $24 million in money market accounts, Mr. Guzzetti testified that the purpose of that email was "to get the folks on a call to start a conversation." (Tr. 3025:3-3026:3). Mr. Guzzetti was telling the brokers "if you have an accredited investor in [a money market account], that does not have to keep the

money liquid" the FAIN investment may appear to be an attractive choice. (Tr. 3029:15-24). Mr. Guzzetti was certainly not telling brokers to make unsuitable recommendations to their clients and his morning note emails certainly do not provide proof that Mr. Guzzetti was responsible for supervising the transactions at issue in this matter.

Emails Related to Alleged Redemption Policy

There was no redemption policy at MS & Co. What the Division refers to as a redemption policy is actually a single email in December 2006 (Div. Ex. 17), followed by a series of emails nearly a year later, sent during an extraordinary economic crisis. The Division alleges that the fraud perpetrated by Messrs. McGinn and Smith had "nearly 900 investors." (DOE Post-Hearing Brief, at 1). However, Division Exhibit 17 relates to ***a single redemption request,*** made by ***a single client, in only one of the 20 plus investments*** at issue in this matter. (See, Div. Ex. 17). A single email is hardly evidence of a firm wide policy.

In all the millions of pages of documents exchanged between the parties in this matter there is not a piece of evidence related to the alleged redemption policy in 2003, 2004, or 2005; and only Division Exhibit 17 in all of 2006. The Division did not produce any other evidence of redemption issues in 2006, because every other redemption request in 2006 was paid in full without the requirement that a replacement be found prior to, or following, the request.

All the remaining evidence of the alleged redemption policy presented in this matter is a series of emails sent during the final few months of 2007[6]. Not surprisingly, the issues with redemptions experienced by MS & Co. coincided with a significant economic downturn. (Ex. AG-71 at 5). The Division moved Division Exhibit 278, and others, in as evidence to support its argument that a redemption policy was in place.

[6] All of this "evidence" of an alleged "policy" is prior to September 2008, and beyond the statute of limitations.

When the Division questioned Kevin Carreno, Mr. Guzzetti's expert and a member of the FINRA Board of Governors, as to whether Division Exhibit 278 should have caused Mr. Guzzetti to question Mr. Smith regarding his request that all redemptions be replaced, he testified that "in 2007, there were a number of managers from public mutual funds to private equity fund managers that were experiencing significant liquidity problems." (Tr. 4813:8-4814:3). Mr. Carreno continued, "[s]o looking at [Div. Ex. 278] and the context at the time, again, I wouldn't expect Mr. Guzzetti or any supervisor to necessarily respond in the manner you suggested." (Tr. 4813:8-4814:3).

In addition, the possibility of the Four Funds not being able to make payments as a result of adverse market performance was disclosed to investors in the private placement memoranda (PPM) for each of the funds prior to their investment. Each PPM contains a section describing the risks factors related to that particular fund which contains the subheading "**We May Be Harmed By Adverse Economic Conditions.**" (Div. Ex. 5, 6, 9B, and 12 at 8 (emphasis in original; section appears on page 8 of each of the Four Funds private placement memoranda)).

> A prolonged downturn in the economy could have a material adverse impact upon us, our results of operations and our ability to implement our business strategy. Similarly, adverse economic conditions or other factors might adversely affect the performance of our Investments, including the level of delinquencies, which could materially and adversely affect our results of operation, financial condition and cash flows and our ability to perform our obligations under the notes. These economic conditions could result in severe reductions in our revenues or the cash flows available to us and adversely affect our ability to make payments on the notes.
>
> (Div. Ex. 5, 6, 9B, 12 at 8)

As everyone later discovered, Messrs. McGinn and Smith perpetrated an enormous fraud. However, considering the market condition at the time that Division Exhibit 278, and all but one

of the emails related to the alleged redemption policy were sent to and from Mr. Guzzetti, these emails would not cause a supervisor conduct an additional inquiry. (Tr. 4813:8-4814:3).

IV. The Testimony And Expert Report Of Robert Lowry Are Fatally Flawed.

The Division of Enforcement retained Robert Lowry as its expert witness, consulting with him even before the OIP was filed. (Tr. 1116:5-7). Mr. Lowry spent over 200 hours reviewing documents and preparing his report. (Tr. 1138:24-1139:8). For the reasons that follow both Mr. Lowry's testimony and expert report are fundamentally flawed.

The weakness of the Division's case against Mr. Guzzetti, and the fundamental flaws of Mr. Lowry's testimony and expert report, are demonstrated by the fact that the Division references his report only once in its proposed findings of facts and conclusions of law relating to Mr. Guzzetti. (See, Division of Enforcement's Proposed Findings of Fact and Conclusions of Law, ¶ 848). Furthermore, this single reference, to the testimony of their own expert, was simply to state that Mr. Lowry concluded that Mr. Guzzetti did not discharge his supervisory duties. (Id.)

The Division's failure to cite to its own expert's testimony is not surprising, as Mr. Lowry's testimony was clearly designed to support the Division's theory of the case, and at times became absurd.

During the hearing, Mr. Lowry testified that the starting point for examining supervision at a firm is the compliance manuals that were available and in effect during the period of the examination. (Tr. 1154:14-18, 1154:24-1155:4). Despite Mr. Lowry's statements regarding the importance of supervisory manuals in determining what areas of supervision are delegated to what individuals, Mr. Lowry testified that he did not review all of the manuals that were in effect

during the relevant time period. (Tr. 1122:17-1124:5, 1125:11-1127:25). Mr. Lowry testified that he only reviewed the 2008 MS & Co. Supervisory Compliance Manual. (Tr. 1122:17-1124:5).

Mr. Lowry testified that he did not review the 2007 MS & Co. Supervisory Compliance Manual prior to preparing his report, despite the fact that his report covered supervision at MS & Co. from 2003-2009 and the 2007 manual was in his possession. (Tr. 1155-5-22). Mr. Lowry also did not review the undated Branch Office Procedure Manual, which no witness in this case ever identified as being in effect during the relevant time period. (Div. Ex. 1, Appendix C).

Amazingly, Mr. Lowry testified that although the 2007 compliance manual was in his possession months prior to the authoring of his report, and compliance manuals provide the starting point for the review of supervision, he was not even aware that there was a 2007 compliance manual until Mr. Astarita, Mr. Guzzetti's attorney, requested that the 2007 manual be admitted into evidence during the first day of the hearing. (Tr. 1154:14-18).

This fact leads one to question how Mr. Lowry can issue an opinion on the supervision at MS & Co. from 2003-2009, a seven year span, when he did not review the 2003, 2004, 2005, 2006, 2007, or 2009 MS & Co. Supervisory Compliance Manuals, despite his testimony that these documents should have been "the first place [he] started." (Tr. 1154:5-23).

As the Division has done since the outset of this case, Mr. Lowry seems to rely on the fact that Mr. Guzzetti was ***A*** supervisor as sufficient evidence that he was ***THE*** supervisor when it comes to the transactions at issue. Mr. Guzzetti has never denied that he had limited supervisory responsibilities while employed at MS & Co. However, any time anyone has directly asked Mr. Guzzetti if he was the supervisor of the transactions at issue he has unequivocally stated that Mr. Smith supervised, reviewed, and approved investments in the offerings at issue.

(Tr. 4627:5-4629:25). Mr. Guzzetti was not responsible for supervising the transactions at issue at any point during his tenure with MS & Co. (Id.) He did not see subscription agreements or investor questionnaires before they were approved and multiple individuals, including Mr. Guzzetti testified that Patricia Sicluna maintained the investor database, which tracked the number of accredited and unaccredited investors in the Four Funds and the Trusts. (Tr. 4646:20-4647:11).

Furthermore, Mr. Lowry relies on emails related to the alleged redemption policy and Mr. Guzzetti's morning note emails to support his opinion that Mr. Guzzetti supervised the transactions at issue. For the reasons discussed in Point III above, these emails are not evidence that Mr. Guzzetti was responsible for supervising the transactions at issue.

Mr. Lowry also made some rather fantastic interpretations of various FINRA Notices to Members ("NTM"). For example, Mr. Lowry was adamant that, in its discussion of who was responsible for conducting due diligence of an offering, the word "member" in FINRA NTM 03-71 includes both the broker-dealer (the firm) and its associated persons (the individual brokers). (Tr. 649:24-650:14). Mr. Lowry bases this opinion on a footnote in NTM 10-22, which was not issued until 2010, after the relevant time period in this matter. (Tr. 649:24-650:14, 652:17-23; Div. Ex. 601). Despite the fact that NTM 10-22 did not even exist at the time, it was Mr. Lowry's testimony that this regulatory notice was retroactive, and should have affected the interpretation of NTM 03-71 7 years earlier, in 2003. (Tr. 652:3-7).

The lack of credibility of this opinion was demonstrated by expert witness Charles Bennett. Mr. Bennett testified that FINRA NTM 12-25 clarified NTM 03-71, by replacing the word "member" with "broker-dealer," removing any doubt as to whether the firm or the individual brokers had the responsibility for conducting a due diligence review of an offering.

(Tr. 4189:9-4192:15, Ex. Lex. 150). Furthermore, according to Mr. Lowry's rather interesting argument regarding the retroactive effect of FINRA NTMs, NTM 12-25, which was not released until 2012, would also retroactively apply in 2003, negating any language contained in the referenced footnote in NTM 10-22. As a result, despite his analytical gymnastics, NTM 03-71 squarely places the burden of conducting due diligence of the investment, as opposed to customer specific suitability, on the firm, not the individual broker.

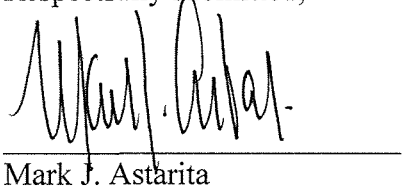
For these reasons, Mr. Lowry's expert report and testimony lack credibility, as acknowledged by the Division through their lack of any meaningful reliance on his expert report in its Post-Hearing Brief. Therefore, Mr. Lowry's testimony regarding Mr. Guzzetti's actual supervisory responsibilities at MS & Co. should be disregarded entirely.

CONCLUSION

For the reasons stated herein, the Division of Enforcement has failed to prove by a preponderance of the evidence that Mr. Guzzetti was responsible for supervising the Selling Respondents sale of the private placements at issue. As a result, Mr. Guzzetti respectfully requests that the proceeding against him be denied in its entirety.

Dated: May 12, 2014

Respectfully submitted,



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