UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	)	
	)	
DENNIS J. MALOUF,	)	ADMINISTRATIVE PROCEEDING
	)	File No. 3-15918
Respondent.	)	
	)	

RESPONDENT DENNIS MALOUF'S PRE-HEARING BRIEF

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INTRODUCTION

This proceeding is born from the spite of an angry ex-father-in-law and misplaced assertions of wrongdoing. Joseph Kopczynski, the chairman and chief compliance officer of UASNM, Inc., and father to Dennis Malouf's ex-wife, Aubrey, has made it his goal to punish and ostracize Malouf in any way possible since he filed to divorce Aubrey on May 2, 2011. Making good on his promise that things would not go well for Malouf if he divorced Aubrey, Kopczynski embarked on his personal vendetta immediately after Malouf filed for divorce. He called an improper board meeting to obtain a resolution to terminate Malouf that Kopczynski himself believed was legally strained, in spite of Malouf's status as chief executive officer and majority shareholder of UASNM. Then he filed suit to formally remove Malouf from UASNM. That suit laid the groundwork for the Division of Enforcement's claims in this proceeding.

Not satisfied with simply removing Malouf from UASNM, Kopczynski self-reported UASNM's supposed transgressions to the Commission and attempted to single out Malouf as the sole person responsible, hoping – correctly, as it turned out – that he could deflect his own personal culpability as CCO. The self-reporting also gave him the opportunity to carefully frame the issues in the light most favorable to himself and most detrimental to Malouf. As a key part of his carefully orchestrated scheme, Kopczynski and his team of lawyers have spoon-fed information to the Division while at every turn obstructing Malouf's efforts to defend himself.

The claims are based on three specific events or activities: (1) Malouf's receipt of payments for the sale of a Raymond James Financial Services ("**RJFS**") branch office pursuant to a bona fide agreement with Maurice LaMonde; (2) Malouf's participation in UASNM's bond trading activities; and (3) disclosures UASNM made in its regulatory filings and on its website. Despite Kopczynski's self-serving efforts to ruin Malouf, and the Division's seemingly unwitting

participation in his scheme, the facts and evidence do not support a finding that Malouf is personally culpable for the claims asserted.

The Division claims that the funds Malouf was paid were "trading commissions" received pursuant to a purported "secret oral agreement." The evidence shows, in fact, that the agreement was not "secret" and that Malouf did not receive trading commissions, but rather a portion of the revenues generated by the RJFS branch office as consideration for the purchase of the branch office he sold. These payments were made pursuant to a bona fide agreement that was recommended and provided to him by RJFS.

Kopczynski's scheme to offload his own personal responsibility has thus far been successful. The Division has never charged Kopczynski with any violation of the securities laws despite the fact that, as CCO, he was directly responsible for developing and implementing UASNM's compliance policies and procedures, including those relating to best execution, conflicts of interest, and disclosures on Forms ADV, and for supervising all those activities. Instead, taking its cue from Kopczynski, the Division claims that Malouf is the *only* person responsible for *every* purported failure of UASNM to meet its best execution obligations. Malouf certainly directed some bond trades for UASNM, a fact he has always freely admitted. There were, however, at last two other advisers at UASNM who also directed bond trades and there is scant evidence identifying which trades were directed by which adviser. There is, in fact, no evidence that Malouf directed the offending trades. Therefore, even if the Division could establish that best execution was not achieved, the evidence establishes only an institutional failure, for which Malouf - at Kopczynski's urging - is being unfairly singled out despite the lack of evidentiary support. Inexplicably, Kopczynski has never been charged for his failure to supervise UASNM's activities.

UASNM's bond trading was reviewed and audited for best execution by an independent compliance consultant at least annually from 2002 through 2011. Neither Kopczynski nor the independent compliance consultant, ACA Compliance Group ("**ACA**"), ever found a problem with UASNM's execution. UASNM also underwent two SEC field examinations in 2002 and 2006 without any negative findings as to best execution. While Malouf does not presume to know why the Division did not charge Kopczynski personally for his failure as CCO to identify violations of best execution, he likewise doesn't know why he would be charged. For ten years, he and Kopczynski relied on the same annual reports of ACA finding no best execution violations, yet Malouf is now charged while Kopczynski has avoided prosecution.

The Division alleges the commissions on bond trades paid by UASNM customers were "excessive." However, there are no laws, rules, regulations, precedent or published guidelines from which it can be established that the commissions were excessive. This is clear from the report of the Division's expert witness, Gary Gibbons. Gibbons fails to point to a single study or analysis regarding standards for reasonable or unreasonable commissions on bond trades. Instead, he relies on his own convoluted and irrelevant analyses of bid/ask spreads to prop up his own personal opinion regarding "ranges" of commissions that he believes are reasonable based on random "bands" of various size bond transactions. And the random bands he cites are likewise not supported by citation to any rules, regulations, precedential court decisions, reports, or analyses – they are based on nothing more than Gibbons's own limited "experience." Strikingly, Gibbons's "experience" leads to a vastly different range of "reasonable" commissions than the experience of the expert witness (Steven McGinnis) UASNM engaged in the state court litigation against Malouf. In fact, Gibbons's range of "reasonable" commissions is up to 50% higher than the other expert's range – and yet they are both opining on the same data (and are on

the same team). This randomness and the lack of empirical support for either of the opinions is clearly evident in their reports and testimony.

Again following Kopczynski's lead, the Division alleges that Malouf is primarily liable for violative disclosures UASNM made in its regulatory filings and on its website that purportedly omitted or misrepresented material facts, or that he aided and abetted UASNM's violations. In reality, the disclosures were sufficient to place a reasonable investor on notice of potential conflicts of interest with respect to UASNM's relationship with the RJFS branch. Further, the substance of UASNM's regulatory filings and website were prepared and approved by Kopczynski, as CCO, with the help of ACA, and attested to by Kirk Hudson, UASNM's chief financial officer. Malouf relied upon their experience and knowledge to guide UASNM, just the same way Kopczynski and Hudson say they relied. And yet, despite their identical testimony regarding their reliance on ACA for guidance on the Forms ADV, Kopczynski and Hudson avoided being charged individually with any violations. The Division charged only Malouf.

Even if the Division had sufficient evidence to establish its claims, which it does not, appropriate and complete remedial measures have already been taken against UASNM and resolved in another proceeding, with Malouf funding 100% of the payments to customers. As a result, UASNM customers who purportedly paid excessive commissions on bond trades have, rightly or wrongly, been fully compensated using Malouf's funds, albeit based on improper and inflated calculations made by UASNM and approved by the Division. These issues have already been resolved, and this proceeding improperly and unfairly singles out one individual for cumulative punishment based on allegations of securities law violations that equally encompass the personal conduct of Kopczyinski and Hudson, neither of whom were charged, and both of whom enjoyed significant personal financial gain upon their ouster of Malouf.

I. SUMMARY OF FACTS

Dennis Malouf. Malouf has over thirty years experience in the securities industry. He was registered as a licensed securities broker for twenty-four years and has been registered as an investment adviser representative since 2003. The only disclosable events (i.e. customer complaints, regulatory issues, terminations, etc.) currently on Malouf's otherwise clean securities industry record over the last three decades relate to the spurious allegations asserted here.

Malouf first registered as a securities broker in 1983. He began working with Kopczynski at Universal Advisory Services, Inc. ("UAS") in 1998. He became associated with a broker/dealer, RJFS, and opened a branch office ("Branch 4GE") in 1999. Malouf married Kopczynski's daughter, Aubrey, that same year. Malouf founded UASNM with Kirk Hudson in 2004. Malouf was CEO and president, Hudson was chief financial officer, and Kopczynski was chairman of the board. Malouf sold Branch 4GE to Maurice LaMonde at the end of 2007, voluntarily terminated his relationship with RJFS, and surrendered his securities broker license. Malouf, Kopczynski, and Hudson operated UASNM without issue until May 2011.

Joseph Kopczynski. Kopczynski founded UAS in 1985 and joined RJFS in 2000. He was a registered principal[1] and served as the manager of Branch 4GE for a short time. UAS started placing trades for its customers through Branch 4GE under Kopczynski's direction long before UASNM did. In fact, Kopczynski passed a corporate resolution in December 2002 specifically authorizing UAS to establish brokerage accounts at RJFS to place trades for its customers. Kopczynski was chief compliance officer of UAS, and held the same position at UASNM from its inception through January 2011. As CCO, Kopczynski was responsible for all aspects of compliance and supervision, and was the primary point of contact between UASNM

[1] A registered principal holds a securities license entitling him to supervise and manage the activities of other registered representatives and branch offices.

and its compliance consulting firm, ACA. Neither Kopczynski nor ACA nor the Commission, which conducted examinations of UAS in 2002 and UASNM in 2006, ever raised any issue regarding trades placed through Branch 4GE. Kopczynski resigned as CCO in January 2011 claiming he could not devote sufficient time to effectively carry out the position, despite the fact that he devoted only one hour per week to his CCO duties up until that time.

Kirk Hudson. Kirk Hudson served as chief financial officer of UAS beginning in 2000. When he and Malouf formed UASNM in 2004, he became vice president and chief financial officer of UASNM, and served as chairman of its investment committee. As CFO, Hudson participated in UASNM's trading activities, the allocation of aggregate bond purchases to UASNM customer accounts, drafting and revising Forms ADV, the creation of its website, and periodic audits and mock SEC compliance examinations conducted by ACA. Hudson also signed all UASNM Forms ADV and certified that the information contained therein was true and correct under penalty of perjury. At the time of Kopczynski's machinations to remove Malouf from UASNM, Hudson owed money to Kopczynski under a promissory note and loan agreement in connection with the 2004 purchase of UAS. Kopczynski agreed to forebear on collection against Hudson during their ouster of Malouf. Hudson's testimony, which sides with Kopczynski in every material respect, should be viewed in light of his personal exposure during the Commission's investigation and his financial obligation to Kopczynski.

UASNM, Inc. Malouf and Hudson formed UASNM, Inc. in 2004 to purchase the assets of UAS and take over the business from Kopczynski. It has been registered with the SEC as an investment adviser since September 2004. Malouf owned a majority interest in UASNM, Hudson owned a minority interest, and Kopczynski owned a 1% interest. UASNM was the subject of its own Administrative Proceeding brought by the Division (IA-3846) based upon the

same purported conduct at issue here. That proceeding was resolved by an offer of settlement that was accepted by the Division before the proceeding was even instituted. The offer of settlement was negotiated by Kopczynski and Hudson, who predictably but unbelievably disclaimed any and all knowledge or involvement in the purported conduct at issue. Malouf has been ousted from UASNM, and Kopczynski and Hudson are now the primary owners. They both enjoyed significant personal financial gains upon Malouf's forced termination. Despite the central role Kopczynski played as CCO of UASNM – the principal officer charged with compliance with the securities laws – he was not charged personally and escaped unscathed from the proceeding brought against UASNM.

ACA Compliance Group. Kopczynski retained ACA in 2002 to provide professional compliance consulting services to UAS. ACA provided the same services to UASNM from its inception through the time period at issue, and beyond. Kopczynski, Malouf, and others at UASNM relied upon ACA's purported expert advice, guidance, and monitoring to ensure that UAS and UASNM were at all times compliant with all securities laws and regulations.

The services ACA provided included conducting annual mock SEC compliance examinations of UASNM and periodic audits, which Malouf understandably believed would identify substantially all material issues the SEC would identify during one of its examinations. ACA assisted in the development, maintenance, adaptation, and execution of UASNM's internal policies, practices, and procedures, and provided advice regarding UASNM's compliance with securities laws and regulations, specifically to avoid material deficiencies and negative findings during actual SEC audits.

ACA's auditing was supposed to cover all aspects of UASNM's business, including: (1) UASNM's regulatory filings, such as its Forms ADV; (2) UASNM's marketing materials,

such as the contents of its website; (3) UASNM employees' business dealings with entities other than UASNM; (4) UASNM's policies and procedures, including those related to best execution, and payment of commissions and fees; and (5) all trades placed by UASNM. In the course of providing these services ACA reviewed countless UASNM business records, visited UASNM's office on numerous occasions, and conducted multiple interviews with UASNM employees. ACA's involvement in UASNM's business during this ten year period should have given it pervasive knowledge of UASNM's business practices and activities.

Although UASNM paid ACA between $10,000 and $15,000 annually to conduct its mock SEC compliance audits and advise it on shoring up deficiencies, it was a highly unprofitable account for ACA. The now-apparent oversights and shortcuts by ACA during its audits resulted in it failing to identify numerous issues the SEC identified during its audit in 2012, and which led to the proceedings against UASNM and Malouf.

Mike Ciambor, ACA's lead auditor for UASNM. Ciambor was ACA's lead auditor for UASNM during the relevant period. Ciambor had virtually no experience in the securities industry. Before ACA, Ciambor's work experience was limited to "fulfillment" centers at warehouse clubs like Costco, fundraising for a trade association, event marketing for sporting events, and a server at Olive Garden. He also worked briefly attempting to sell mutual funds through Primerica Financial Services on a "freelance" basis out of his home, but confessed he was not very good at it. He has never been an investment adviser or a securities registered principal. Within just a few years at ACA, however, Ciambor was tapped to be the lead auditor for UASNM, and was principally responsible in that role for advising UASNM on how to stay out of trouble with the SEC. It appears now Ciambor had no experience auditing for best execution on bond trades. Whether due to the economics of the account, Ciambor's

inexperience, lack of supervision of his work, or some combination, it now appears ACA was simply going through the motions, overlooked numerous compliance issues, and failed in its obligations to UASNM. Not surprisingly, Ciambor now says that Malouf failed to disclose information to him, clearly trying to cover for his negligent performance of his duties.

LaMonde and the Sale of Branch 4GE. Maurice "Moe" LaMonde was the manager of Branch 4GE after Kopczynski. He served in that position until late 2011. Malouf chose to sell Branch 4GE to LaMonde at the end of 2007 after RJFS advised that its supervisory policies prohibited him from operating a RJFS branch while working for UASNM, because not all UASNM customers custodied their accounts at RJFS. The sale of Branch 4GE was suggested by RJFS and was carried out with RJFS's assistance, including a RJFS transition team. Malouf and LaMonde agreed to a purchase price of approximately $1.1 million, based upon a multiple of historical revenues, and a series of ongoing payments based upon 40% of gross revenues of the entire Branch 4GE over the next four years, or until the purchase amount was paid.

The agreement was substantially memorialized in a written Purchase of Practice Agreement ("PPA") provided to Malouf and LaMonde by RJFS. It was originally signed on January 2, 2008, and later notarized in June 2010. The PPA did not provide for any prepayment penalties, and Malouf and LaMonde had an informal understanding that LaMonde could pay periodic amounts exceeding what was set forth in the PPA if he desired to pay off the total amount owed for Branch 4GE early. Payments made by LaMonde to Malouf from 2008 to 2011 were all made pursuant to the PPA and their informal understanding.

Kopczynski, Hudson, and ACA were fully aware of Malouf's relationship with RJFS prior to the sale of Branch 4GE, that Malouf sold Branch 4GE at the end of 2007, and that UASNM placed bond trades through Branch 4GE before and after the sale. They were also

aware (although they now deny it) or were willfully blind to the fact that Malouf was receiving ongoing payments from LaMonde for the sale of Branch 4GE.

LaMonde passed away in April 2014 from an apparent self-inflicted gunshot wound.

Kopczynski's Threats and Malouf's Termination From UASNM. Malouf informed Kopczynski in or about May 2011 that he intended to divorce his daughter Aubrey. Kopczynski threatened that things would not go well for Malouf if he divorced Aubrey. On May 2, 2011, Malouf filed for divorce from Aubrey. On May 13, 2011, Kopczynski called an improper director's meeting and held an improper vote to terminate Malouf from UASNM. When Malouf left to speak with his attorney, Kopczynski locked him out of the office and has denied him access to personal and UASNM files and records at the UASNM office ever since. On May 27, 2011, Kopczynski, Hudson, and UASNM filed suit to remove Malouf from UASNM.

UASNM's Self-Report to the SEC. Faced with significant expense, litigation risk, and business disruption by fighting the suit against him, Malouf decided to settle with Kopczynski *et al.* on September 13, 2011. Malouf agreed to resign and surrender his UASNM stock in exchange for $1.15 million. By removing Malouf from UASNM, Kopczynski tripled his annual compensation from 2010 to 2012, and his ownership interest in UASNM grew from 1% to 47%. Hudson's compensation and ownership interest in UASNM also increased substantially.

UASNM insisted that the settlement agreement include a provision to self-report to the Commission and that a substantial portion of the compensation due to Malouf be held in escrow to be used for any remedial measures resulting from the self-report. UASNM made these demands after ACA advised it would receive more favorable treatment from the Commission for its cooperation. Not believing he had engaged in any misconduct, and wanting to resolve the

matter so he could move on with his life, Malouf agreed to the terms demanded by Kopczynski and UASNM. The self-report led to the institution of this proceeding.

Kopczynski's Personal Animus Toward Malouf is on Full Display in This Proceeding.

The Division has received a helping hand from Kopczynski and those beholden to him -- Hudson, ACA, and Capital Forensics. They continue to try to derail Malouf's defense in this proceeding. What little discovery Malouf has been entitled to under the Rules has been obstructed by Kopczynski and those in league with him. As part of Kopczynski's continued vendetta against Malouf, UASNM has gone to extreme lengths to avoid producing documents responsive to a subpoena that was issued to it on August 28, 2014. Several motions and eleven weeks later, and under threat of enforcement by federal court, UASNM finally produced this week many thousands of pages of documents that are purportedly responsive to the subpoena -- just fourteen days before trial. UASNM's expert witness, Capital Forensics, likewise obstructed Malouf's attempts to obtain subpoenaed documents, refusing to produce them until ordered to do so by the hearing officer. UASNM's consulting firm, ACA, also filed a motion to quash, further delaying Malouf's discovery efforts. The delays have been highly prejudicial to Malouf. Additionally, just thirteen days before trial ACA has discovered that it has three boxes full of documents related to its compliance consulting work for UASNM, that are potentially responsive to the subpoena but have not yet been produced.

II. LEGAL STANDARDS AND DEFINITIONS APPLICABLE TO CLAIMS ASSERTED BY THE DIVISION

The Division bears the burden of proving each and every element of its claims by a preponderance of the evidence. Each of the claims asserted requires proof of essential elements that have specific definitions and meanings in the context of the securities laws.

A. Securities Act - Section 17(a)(1) - (15 U.S.C. § 77q(a)(1))

Section 17(a)(1) makes it unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly to employ any device, scheme, or artifice to defraud. *See* Exh. A. To establish a violation of § 17(a)(1), the Division must prove (1) a material misrepresentation or materially misleading omission, (2) in the offer or sale of a security, (3) made with scienter. S.E.C. v. Morgan Keegan & Co., Inc., 678 F.3d 1233, 1244 (11th Cir. 2012); S.E.C. v. Radius Capital Corp., 2012 WL 695668, *4 n.5 (M.D. Fla. 2012) (noting that the Supreme Court has interpreted the terms "device," "scheme," and "artifice" to mean "knowing or intentional misconduct," thus requiring the SEC to prove that defendants acted with scienter).

Materiality: To prove its claim under § 17(a)(1), and most other claims it has asserted, the Division must establish that the misrepresentations or omissions were "material." S.E.C. v. Huff, 758 F.Supp.2d 1288, 1351-1352 (S.D.Fla. 2010). For a misrepresentation or omission to be "material," a substantial likelihood must exist that the true, disclosed fact would have been viewed by a reasonable investor as having significantly altered the total mix of information made available. See Basic Inc. v. Levinson, 485 U.S. 224, 239-40 (1988). The test for materiality is whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action. Huff, 758 F.Supp.2d at 1351-1352.

Scienter: To establish a violation of § 17(a)(1), and other fraud claims, the Division must prove that Malouf acted with "scienter," which is "an intent to deceive." Scienter can be found where a defendant acted with an "intent to deceive, manipulate, or defraud." S.E.C. v. Steadman, 967 F.2d 636, 641 (D.C. Cir. 1992), quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976). Scienter may include "severe recklessness" or "extreme recklessness," which is

limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it. Huff, 758 F.Supp.2d at 1351-1352; Steadman, 967 F.2d at 641. The kind of recklessness required is an "extreme departure from the standards of ordinary care . . . ." Id., quoting Sundstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1045 (7th Cir. 1977).

B. Securities Act – Section 17(a)(3) - (15 U.S.C. § 77q(a)(3))

Section 17(a)(3) makes it unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. See Exh. A.

To establish a violation of § 17(a)(3), the Division must show (1) a material misrepresentation or materially misleading omission, (2) in the offer or sale of a security, (3) made with negligence." Morgan Keegan & Co., 678 F.3d at 1244. While the misrepresentation or omission must be "material," the Division need not show that Malouf acted with scienter to establish a violation of § 17(a)(3). Aaron v. S.E.C., 446 U.S. 680, 702 (1980). Section 17(a)(3) focuses on the "effect of particular conduct on members of the investing public, rather than upon the culpability of the person responsible." Id. at 697.

C. Exchange Act – Section 10(b) and Rule 10b-5 - (15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5(a), (c))

Section 10(b) makes it unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange to use or employ, in connection with the purchase or sale of any security

registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. See Exh. B.

Rules 10b-5(a) and 10b-5(c), promulgated under § 10(b), make it unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) to employ any device, scheme, or artifice to defraud, or (c) to engage 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 any security. See Exh. C.

As with Securities Act § 17(a)(1), to prove a violation of § 10(b) and Rule 10b-5, the Division must show (1) a material misrepresentation or materially misleading omission, (2) in connection with the purchase or sale of a security, (3) made with scienter." Morgan Keegan & Co., 678 F.3d at 1244; S.E.C. v. Penthouse Int'l, Inc., 390 F. Supp. 2d 344, 352 (S.D.N.Y. 2005).

D. Investment Advisers Act of 1940 – Sections 206(1) and 206(2) - (15 U.S.C. § 80b-6(1), (2))

Sections 206(1) and 206(2) make it unlawful for any investment adviser by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly to employ any device, scheme, or artifice to defraud any client or prospective client. See Exh. D. The "device, scheme, or artifice" language is the same as in Rule 10b-5 and the same standards apply, except as to scienter in the case of 206(2). Carroll v. Bear, Stearns & Co., 416 F. Supp. 998, 1001 (S.D.N.Y. 1976). To establish a claim under § 206(1), the Division must establish that Malouf acted with scienter. Steadman, 967 F.2d at 641. Under § 206(2) the actions must at least be negligent. Id at 643 n.5.

E. Investment Advisers Act of 1940 – Section 207 - (15 U.S.C. § 80b-7)

Section 207 makes it unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission, or willfully to omit to state in any such application or report any material fact which is required to be stated therein. See Exh. E. Section 207 applies to the Division's allegations regarding UASNM's Forms ADV.

Willfulness: In order to establish the element of willfulness, the Division much show that Malouf merely intended to engage in the action alleged regardless of his knowledge that the act constituted a violation of the securities law. S.E.C. v. Moran, 922 F. Supp. 867, 900 (S.D.N.Y. 1996); compare S.E.C. v. Slocum, Gordon & Co., 334 F. Supp. 2d 144, 181-82 (D.R.I. 2004) (concluding that defendant did not act willfully when he relied on outside compliance and SEC guidance to the effect that his firm was fully compliant with applicable securities laws)

Who is responsible for misleading statements or omissions in the UASNM Forms ADV?: The Commission requires registered investment advisers to designate a chief compliance officer to be responsible for administering the firm's compliance policies and procedures. See Compliance Programs of Investment Companies and Investment Advisers, 81 SEC Docket 3447, 68 Fed. Reg. 74714 (Dec. 24, 2003) (http://www.gpo.gov/fdsys/pkg/FR-2003-12-24/pdf/03-31544.pdf) (requiring advisors to designate a chief compliance officer to be responsible for administering the firm's compliance policies and procedures).

F. Investment Advisers Act of 1940 – Section 206(4) and Rule 206(4)–1(a)(5) - (15 U.S.C. § 80b-6(4) and 17 C.F.R. § 275.206(4)-1(a)(5))

The Division alleges that Malouf aided and abetted UASNM's violations of § 206(4), which makes it unlawful for any investment adviser by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly to engage in any act, practice, or

course of business which is fraudulent, deceptive, or manipulative. See Exh. D. Rule 206(4)–1(a)(5), promulgated under § 206(4), provides that it shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) of the Act for any investment adviser, directly or indirectly, to publish, circulate, or distribute any advertisement which contains any untrue statement of a material fact, or which is otherwise false or misleading. See Exh. F.

To establish its claim for aiding and abetting, the Division must show: (1) a primary or independent securities law violation by an independent violator; (2) the aider and abettor's knowing and substantial assistance to the primary securities law violator; and (3) awareness or knowledge by the aider and abettor that his role was part of an activity that was improper. Slocum, Gordon & Co., 334 F. Supp. 2d at 184. "While it is unnecessary to show that an aider and abettor knew he was participating in or contributing to a securities law violation, there must be sufficient evidence to establish 'conscious involvement in impropriety.'" Id. (quoting Monsen v. Consolidated Dressed Beef Co., 579 F.2d 793, 799 (3d Cir.1978). "This involvement may be demonstrated by proof that the aider or abettor 'had general awareness that his role was part of an overall activity that [was] improper.'" SEC v. Coffey, 493 F.2d 1304, 1316 (6th Cir.1974).

G. Exchange Act - Sections 15(a)(1) and 15C(a)(1)(A) - (15 U.S.C. § 78o(a)(1) and 15 U.S.C. § 78o-5)

Section 15(a)(1) makes it unlawful for any broker or dealer or a natural person not associated with a broker or dealer to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security unless such broker or dealer is properly registered. See Exh. G. Section 15C(a)(1)(A) makes it unlawful for any government securities broker or government securities

dealer (other than a registered broker or dealer or a financial institution) to make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any government security unless such government securities broker or government securities dealer is registered. See Exh. H.

To establish its claims under § 15(a)(1) or § 15C(a)(1)(A), the Division must show that Malouf was a "broker," meaning "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A). The Exchange Act does *not* define "effecting transactions," and various factors determine whether a person is a "broker." S.E.C. v. Kramer, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011). Factors which may be considered to determine if a person is acting as a "broker" include whether the person: (1) works as an employee of the issuer; (2) receives a commission rather than a salary; (3) sells or earlier sold the securities of another issuer; (4) participates in negotiations between the issuer and an investor; (5) provides either advice or a valuation as to the merit of an investment; and (6) actively (rather than passively) finds investors. Id. at 1334 (citation omitted). Whether an individual receives commissions on sales is a "hallmark" of a broker. Id.

H. NASD Rule 2420

Relevant to the claim under § 15(a)(1) is NASD Rule 2420 and Interpretive Memorandum 2420-2. Rule 2420 addresses dealings between FINRA member firms (such as RJFS) and non-members (such as Malouf, who voluntarily relinquished his FINRA registration upon sale of the RJFS branch, effective December 31, 2007). IM 2420-2 addresses FINRA policies (applicable only to its member firms and their associated persons) regarding continuing commissions. It provides that "the payment of continuing commissions in connection with the sale of securities is not improper so long as the person receiving the commissions remains a registered representative of a member of the Association. However, payment of compensation to

registered representatives after they cease to be employed by a member of the Association — or payment to their widows or other beneficiaries — will not be deemed in violation of Association Rules, provided bona fide contracts call for such payment." See Exh. I. IM 2420-2 sets forth the procedure by which FINRA member firms may pay continuing commissions to non-members. IM 2420-2 refers only to "bona fide contracts," it does not specify that such contracts must be in writing. To establish its claim under § 15(a)(1), the Division must prove that the payments to Malouf were "commissions" and that the contract between Malouf and LaMonde – which every relevant witness acknowledges existed orally or in writing – was not "bona fide."

I. Investment Advisers Act – Aiding and Abetting Violations of Sections 206(1), 206(2), and 207

Sections 206(1) and 206(2) make it unlawful for any investment adviser by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly: (1) to employ any device, scheme, or artifice to defraud any client or prospective client; and (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client. See Exh. D.

To establish its claim for aiding and abetting a violation of §§ 206(1), 206(2), and 207, the Division must show: (1) a primary or independent securities law violation; (2) the aider and abettor's knowing and substantial assistance in the primary violation; and (3) awareness or knowledge by the aider and abettor that his role was part of an activity that was improper. Slocum, Gordon & Co., 334 F. Supp. 2d at 184.

Substantial assistance: "The element of substantial assistance is met when, based upon all the circumstances surrounding the conduct in question, a defendant's actions are a 'substantial causal factor' in bringing about the primary violation." S.E.C. v. K.W. Brown & Co., 555 F. Supp. 2d 1275, 1307 (S.D. Fla. 2007).

Knowledge or awareness: The awareness requirement can be satisfied by extreme recklessness, which can be shown by red flags, suspicious events creating reasons for doubt, or a danger so obvious that the actor must have been aware of the danger of violations. See Id. (internal citation and quotation omitted).

Recklessness: "Reckless conduct is, at the least, conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47 (2d Cir. 1978); Monetta Fin. Servs., Inc. v. S.E.C., 390 F.3d 952, 956 (7th Cir. 2004) (finding president did not aid and abet firm's violation of Section 206(2) of the Advisers Act since the SEC failed to provide any evidence that he was aware that disclosure of the IPO allocations was required).

III. MALOUF'S DEFENSES, ARGUMENTS, AND AUTHORITIES

A. Five Year Statute of Limitations

SEC enforcement actions brought pursuant to the Securities Act, the Exchange Act, or the Advisers Act are subject to a five year statute of limitations. *See* 28 U.S.C.A. § 2462; Huff, 758 F.Supp.2d at 1351-1352, Gabelli v. S.E.C., 133 Ct. 1216, 1219-23 (2013). The statute runs from the date of the conduct, and there is no applicable "fraud discovery rule." Gabelli, 133 S. Ct. at 1222-24. This proceeding was instituted June 9, 2014, and therefore all claims, fines, penalties, or forfeitures are limited to conduct that occurred after June 9, 2009.

B. Securities Act Section 17(a)(1), Exchange Act Section 10(b) and Rule 10b-5, and Investment Advisers Act Section 206(1)

Reliance on professional advice negates a finding of scienter: Reliance by an alleged perpetrator of securities fraud on professional advice may preclude a finding that he acted with the requisite scienter, where the professional "blesses" the perpetrator's work and is not a

participant in the alleged fraud. Huff, 758 F.Supp.2d at 1351-1352. UASNM and Kopczynski CCO relied on ACA to perform mock SEC audits and to advise UASNM with respect to compliance issues. Malouf, as CEO, delegated the compliance responsibilities to, and relied on, Kopczynski to advise UASNM with respect to compliance issues and take appropriate action.

C. Investment Advisers Act – Section 207 and Other Claims Based on Forms ADV

Reliance on professional advice negates a finding of willfulness: Section 207 requires a showing of a willfully made untrue statement or omission of material fact on a "report," e.g. a Form ADV. If a statement or omission is made on a Form ADV based upon reasonable reliance on an external evaluation, the requisite mental state to establish a violation of Section 207 cannot be established and the Division cannot meet its burden. Slocum, Gordon & Co., 334 F. Supp. 2d at 181-82. Here, Kopczynski reasonably relied on ACA to evaluate what information should be disclosed on UASNM's Forms ADV. Similarly, Malouf reasonably relied upon Kopczynski and ACA.

Malouf did not make any statements or omissions: All UASNM Forms ADV were signed by Hudson, who attested to their accuracy and truthfulness under penalty of perjury. Malouf did not sign the Forms ADV or attest to their accuracy.

Kopczynski was responsible for the Forms ADV and the UASNM's marketing materials. UASNM designated Kopczynski as its CCO during the relevant period. He was responsible for supervising the completion and filing of the Forms ADV, for establishing policies and procedures for the firm, and for conducting best execution reviews. The UASNM Compliance Manual provides that the CCO is responsible for ensuring that the Forms ADV are properly maintained, and that he will periodically review them to ensure they are accurate and complete.

The Compliance Manual also provides that "[a]ll marketing materials must be submitted to the CCO for approval prior to dissemination." Kopczynski, as CCO, is therefore responsible for any alleged misstatements or omissions in UASNM's Forms ADV or marketing materials. He was also responsible for UASNM's alleged failure to adopt and implement best execution compliance policies and procedures that were consistent with UASNM's representations about its recommendation of brokers described in its Forms ADV. Goelzer Investment Management, S.E.C. Release No. 3638 (2013).

The disclosures in UASNM's Forms ADV were sufficient to put a reasonable investor on notice of potential conflicts of interest with RJFS. In numerous Form ADV filings, UASNM disclosed that (a) Malouf had an ownership interest in the RJFS branch and may receive compensation for transactions executed through the branch; (b) one or more employees of UASNM were also associated with RJFS and may receive compensation on transactions executed through the branch; and/or (c) that Malouf was associated with RJFS. For years, customers did business with UASNM with actual or constructive knowledge of UASNM's relationship with the RJFS branch, and there is no indication anyone ever raised any questions or concerns about the potential conflicts of interest.

Kopczynski, the CCO, did not perceive any conflict of interest, even after the point at which he admits knowing about the ongoing payments from LaMonde. Malouf was relying on Kopczynski as the CCO to identify conflicts of interest and to alert UASNM as to its disclosure obligations. However, even after the point in time Kopczynski says he knew about the ongoing payments from LaMonde, he did not perceive a conflict of interest and therefore did not advise UASNM as to its disclosure obligations. Any alleged violative non-disclosure by Malouf prior to this time is moot and irrelevant (at least as to Malouf), because Kopczynski did not advise

UASNM to disclose a conflict even after he knew about the payments, and would not have advised it to do so if he had known earlier.

D. Exchange Act Sections 15(a)(1) and 15C(a)(1)(A)

Malouf did not receive commissions or engage in any other conduct that would classify him as a "broker" for purposes of Section 15(a)(1) and 15C(a)(1)(A). Payments Malouf received from LaMonde were a portion of revenues earned by Branch 4GE paid as consideration for the purchase of the branch pursuant to the PPA.

E. Aiding and Abetting Investment Advisers Act Sections 206(1), 206(2), 206(4), and 207, and Rule 206(4) – 1(a)(5)

Malouf was not paid "substantially all" commissions on UASNM bond trades: The amounts paid to Malouf were substantially different than the commissions generated by UASNM bond trades. The Division's own calculations indicate that, on a quarterly basis, payments to Malouf differed substantially from the commissions generated by UASNM bond trades by as much as 61%, and often differed by 20-40%. There was no reason and no incentive for LaMonde to pay commissions to Malouf. The payments were for the branch purchase.

Payments Malouf received from LaMonde are not commissions for tax purposes: According to Don Miller, accountant for UASNM and Malouf, payments Malouf received from LaMonde are properly treated as capital gains from the sale of a business for tax reporting purposes. They should not be treated as ordinary income because, from a tax standpoint, it is clear that the payments were not commissions.

A bona fide contract existed: Even if payments to Malouf were "commissions," continuing commissions may be paid to a former registered representative if: (1) a "bona fide contract" calls for such payment; (2) the selling broker does not undertake any "solicitation of new business or the opening of new accounts;" and (3) no payments are made to anyone not

eligible for membership in FINRA or anyone disqualified from being associated with a member. See NASD IM 2420-2. The PPA, and any attendant understanding regarding accelerated payments, constituted a "bona fide contract" for the sale of Branch 4GE. Malouf did not solicit any new business on behalf of or open any new accounts at Branch 4GE after the sale to LaMonde, and he was not subject to disqualification from FINRA membership or from being associated with a member at the time Branch 4GE was sold to LaMonde.

F. Best Execution

Guidance from the Commission specifies that an adviser need not seek the lowest commission on a trade: "Best execution" is not defined in federal securities laws or regulations and no uniform definition of the term exists among securities market participants. An investment adviser's obligation to obtain "best execution" is similarly not codified. The Commission has stated that best execution involves "execut[ing] securities transactions for clients in such a manner that the client's total cost or proceeds in each transaction is the most favorable under the circumstances." Interpretive Release Concerning the Scope of Section 28(e) of the Securities Exchange Act of 1934, Exchange Act Release No. 23,170 (Apr. 23, 1986). Meeting this standard requires "consider[ing] the full range and quality of a broker's services in placing brokerage including, among other things, the value of research provided as well as execution capability, commission rate, financial responsibility, and responsiveness . . . ." Id. Best execution "is ***not*** [determined by] the lowest possible commission cost but whether the transaction represents the best qualitative execution for the managed account." Id. (emphasis added). Whether UASNM obtained "best execution" on the bond trades at issue is not determined by whether the commissions on those trades were the lowest possible.

No established standard for excessive markups or commissions: There are no published standards indicating a reasonable range of markups or commissions on Treasury and agency bond trades against which to show that the markups or commissions on the bond trades at issue were "excessive."[2] The only relevant standard is the "5% Policy" mentioned in NASD IM-2440-1 "Mark-Up Policy." This standard does not apply because neither UASNM nor Malouf were registered with FINRA and were not subject to its rules and, in any event, the mark-ups/commissions at issue are nowhere near 5%.

The only specific SEC requirement for ensuring compliance with best execution is "periodic and systematic review" of the procedures employed for best execution. The Division's expert opines that Malouf was obligated to comparison shop every bond trade. There is no published requirement, however, that an adviser comparison shop each and every trade. The only published requirement is that the adviser "periodically and systematically evaluate the execution performance of broker-dealers executing their transactions." See Exchange Act Release No. 23,170 (Apr. 23, 1986). This periodic and systematic review was Kopczynski's responsibility as CCO. ACA conducted (or said it conducted) such a review every year and told UASNM that it was complying with its best execution obligations. Malouf reasonably relied on these clean reports as a validation of his bond trading activity.

The Division has not identified any bond trades that it can attribute to Malouf: Other UASNM advisers directed bond trades, both at RJFS and at other broker/dealers. There is scant evidence identifying the particular adviser who directed any specific trade. Keller and Hudson admittedly directed bond trades with RJFS. The Division will be unable to provide evidence to

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[2] A September 2004 NASD Report of the Corporate Debt Market Panel indicates that, with respect to NASD Rule 2320 ("Best Execution Rule"), the Panel deemed a bond's yield (inclusive of brokerage charges) to be a good measure of overall "price" paid for a given bond that could be compared to the broader market to gauge competitiveness of price and quality of execution.

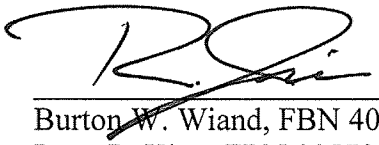
support its assertion that Malouf directed all or most of the bond trades at issue, or that the bond trades with the highest markups or commissions were directed by Malouf.

The Division has not identified any comparable trades to support its contention that UASNM failed to achieve best execution: The Division has not identified any specific comparable trades against which it could be established that UASNM failed to obtain "best execution," and relies solely on the relatively limited "personal experience" of their expert and fact witnesses, who themselves disagree widely about what a "reasonable" markup or commission is. The experts do not cite any empirical data on commissions or markups; the only "empirical" data cited is a tortured and irrelevant computation of bid/ask spreads.

ACA never identified issues regarding best execution until Kopczynski decided to terminate Malouf. Malouf conducted bond transactions through the RJFS for years before and after the sale of the branch to LaMonde in 2008. From 2002, when ACA first conducted its annual mock SEC compliance audit, it never identified any issues regarding best execution until it "found" such issues in the audit following Kopczynski's decision to terminate Malouf. Malouf reasonably relied upon ACA's clean reports of its "best execution" reviews as an indication that UASNM was satisfying its best execution obligations.

The broker/dealer had its own best execution obligation, and maintained pre-established guidelines for reasonable commissions. RJFS, the broker/dealer through which the bond trades at issue were placed, owed its own duty of best execution and appears to have complied with it. RJFS also maintained pre-established guidelines for reasonable commissions, which appear to have been monitored and enforced on all the trades at issue. The few instances in which RJFS reduced the commissions on certain UASNM bond trades gave Malouf reassurance that LaMonde's commissions were being monitored and were not excessive.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served via email and/or U.S. Mail to the following this 7th day of November, 2014:

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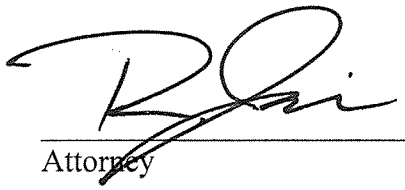

Attorney

United States Code Annotated
Title 15. Commerce and Trade
Chapter 2A. Securities and Trust Indentures (Refs & Annos)
Subchapter I. Domestic Securities (Refs & Annos)

15 U.S.C.A. § 77q

§ 77q. Fraudulent interstate transactions

Currentness

(a) Use of interstate commerce for purpose of fraud or deceit

It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 78c(a)(78) of this title) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain 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, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) Use of interstate commerce for purpose of offering for sale

It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) Exemptions, of section 77c not applicable to this section

The exemptions provided in section 77c of this title shall not apply to the provisions of this section.

(d) Limitation

The authority of the Commission under this section with respect to security-based swap agreements (as defined in section 78c(a)(78) of this title) shall be subject to the restrictions and limitations of section 77b-1(b) of this title.

CREDIT(S)

United States Code Annotated
Title 15. Commerce and Trade
Chapter 2B. Securities Exchanges (Refs & Annos)

15 U.S.C.A. § 78j

§ 78j. Manipulative and deceptive devices

Currentness

<Notes of Decisions for 15 USCA § 78j are displayed in two separate documents. Notes of Decisions for subdivisions I to XVI are contained in this document. For Notes of Decisions for subdivisions XVII to end, see second document for 15 USCA § 78j.>

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

(a)(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security other than a government security, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement [1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(c)(1) To effect, accept, or facilitate a transaction involving the loan or borrowing of securities in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Nothing in paragraph (1) may be construed to limit the authority of the appropriate Federal banking agency (as defined in section 1813(q) of Title 12), the National Credit Union Administration, or any other Federal department or agency having a responsibility under Federal law to prescribe rules or regulations restricting transactions involving the loan or borrowing of securities in order to protect the safety and soundness of a financial institution or to protect the financial system from systemic risk.

Rules promulgated under subsection (b) of this section that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) of this section and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements to the same extent as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i, 78*o*,

Code of Federal Regulations
Title 17. Commodity and Securities Exchanges
Chapter II. Securities and Exchange Commission
Part 240. General Rules and Regulations, Securities Exchange Act of 1934 (Refs & Annos)
Subpart A. Rules and Regulations Under the Securities Exchange Act of 1934
Manipulative and Deceptive Devices and Contrivances

17 C.F.R. § 240.10b–5

§ 240.10b–5 Employment of manipulative and deceptive devices.

Currentness

<Notes of Decisions for 17 CFR § 240.10b–5 are displayed in separate documents. Notes of Decisions for subdivisions I to IX are contained in this document. For text of section, and references, see first document for 17 CFR § 240.10b–5. For Notes of Decisions for subdivisions X to end, see documents for 17 CFR § 240.10b–5, post.>

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage 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 any security.

(Authority: Sec. 10; 48 Stat. 891; 15 U.S.C. 78j)

Credits
[13 FR 8183, Dec. 22, 1948, as amended at 16 FR 7928, Aug. 11, 1951]

SOURCE: 50 FR 27946, July 9, 1985; 50 FR 28394, July 12, 1985; 50 FR 37654, Sept. 17, 1985; 50 FR 41870, Oct. 16, 1985; 50 FR 42678, Oct. 22, 1985; 51 FR 8801, March 14, 1986; 51 FR 12127, April 9, 1986; 51 FR 14982, April 22, 1986; 51 FR 18580, May 21, 1986; 51 FR 25882, July 17, 1986; 51 FR 36551, Oct. 14, 1986; 51 FR 44275, Dec. 9, 1986; 52 FR 3000, Jan. 30, 1987; 52 FR 8877, March 20, 1987; 52 FR 9154, March 23, 1987; 52 FR 16838, May 6, 1987; 52 FR 27969, July 24, 1987; 52 FR 42279, Nov. 4, 1987; 53 FR 26394, July 12, 1988; 53 FR 33459, Aug. 31, 1988; 53 FR 37289, Sept. 26, 1988; 54 FR 23976, June 5, 1989; 54 FR 28813, July 10, 1989; 54 FR 30031, July 18, 1989; 54 FR 35481, Aug. 28, 1989; 54 FR 37789, Sept. 13, 1989; 55 FR 23929, June 13, 1990; 55 FR 50320, Dec. 6, 1990; 56 FR 7265, Feb. 21, 1991; 56 FR 9129, March 5, 1991; 56 FR 12118, March 22, 1991; 56 FR 19156, April 25, 1991; 56 FR 28322, June 20, 1991; 56 FR 30067, July 1, 1991; 57 FR 18218, April 29, 1992; 57 FR 32168, July 21, 1992; 57 FR 36501, Aug. 13, 1992; 57 FR 47409, Oct. 16, 1992; 58 FR 14682, March 18, 1993; 59 FR 10985, March 9, 1994; 59 FR 55012, Nov. 2, 1994; 59 FR 66709, Dec. 28, 1994; 61 FR 48328,

54 Stat. 825; 15 U.S.C. 80a–23(c);; Section 240.13f–2(T) also issued under sec. 13(f)(1) (15 U.S.C. 78m(f)(1));; Section 240.13p–1 is also issued under sec. 1502, Pub.L. 111–203, 124 Stat. 1376.; Section 240.13q–1 is also issued under sec. 1504, Pub.L. 111–203, 124 Stat. 2220.; Sections 240.14a–1, 240.14a–3, 240.14a–13, 240.14b–1, 240.14b–2, 240.14c–1, and 240.14c–7 also issued under secs. 12, 15 U.S.C. 781, and 14, Pub.L. 99–222, 99 Stat. 1737,15 U.S.C. 78n;; Sections 240.14a–3, 240.14a–13, 240.14b–1 and 240.14c–7 also issued under secs. 12, 14 and 17, 15 U.S.C. 781, 78n and 78g;; Sections 240.14c–1 to 240.14c–101 also issued under sec. 14, 48 Stat. 895; 15 U.S.C. 78n;; Section 240.14d–1 is also issued under 15 U.S.C. 77g, 77j, 77s(a), 77ttt(a), 80a–37.; Section 240.14e–2 is also issued under 15 U.S.C. 77g, 77h, 77s(a), 77sss, 80a–37(a).; Section 240.14e–4 also issued under the Exchange Act, 15 U.S.C. 78a et seq., and particularly sections 3(b), 10(a), 10(b), 14(e), 15(c), and 23(a) of the Exchange Act (15 U.S.C. 78c(b), 78j(a), 78j(b), 78n(e), 78*o*(c), and 78w(a)).; Section 240.15a–6, also issued under secs. 3, 10, 15, and 17, 15 U.S.C. 78c, 78j, 78*o*, and 78q;; Section 240.15b1–3 also issued under sec. 15, 17; 15 U.S.C. 78*o*78q;; Sections 240.15b1–3 and 240.15b2–1 also issued under 15 U.S.C. 78*o*, 78q;; Section 240.15b2–2 also issued under secs. 3, 15; 15 U.S.C. 78c, 78*o*;; Sections 240.15b10–1 to 240.15b10–9 also issued under secs. 15, 17, 48 Stat. 895, 897, sec. 203, 49 Stat. 704, secs. 4, 8, 49 Stat. 1379, sec. 5, 52 Stat. 1076, sec. 6, 78 Stat. 570; 15 U.S.C. 78*o*, 78q, 12 U.S.C. 241 nt.;; Section 240.15c2–6, also issued under secs. 3, 10, and 15, 15 U.S.C. 78c, 78j, and 78*o*.; Section 240.15c2–11 also issued under 15 U.S.C. 78j(b), 78*o*(c), 78q(a), and 78w(a).; Section 240.15c2–12 also issued under 15 U.S.C. 78b, 78c, 78j, 78*o*, 78*o*–4 and 78q.; Section 240.15c3–1 is also issued under secs. 15(c)(3), 15 U.S.C. 78*o*(c)(3).; Sections 240.15c3–1a, 240.15c3–1e, 240.15c3–1f, 240.15c3–1g are also issued under Pub.L. 111–203, secs. 939, 939A, 124. Stat. 1376 (2010) (15 U.S.C. 78c, 15 U.S.C. 78*o*–7 note).; Section 240.15c3–3 is also issued under 15 U.S.C. 78*o*(c)(2), 78(c)(3), 78q(a), 78w(a); sec. 6(c), 84 Stat. 1652; 15 U.S.C. 78fff.; Section 240.15c3–3a is also issued under Pub.L. 111–203, §§ 939, 939A, 124. Stat. 1376 (2010) (15 U.S.C. 78c, 15 U.S.C. 78*o*–7 note).; Section 240.15c3–3(o) is also issued under Pub.L. 106–554, 114 Stat. 2763, section 203.; Section 240.15d–5 is also issued under 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a).; Section 240.15d–10 is also issued under 15 U.S.C. 80a–20(a) and 80a–37(a), and secs. 3(a) and 302, Pub.L. No. 107–204, 116 Stat. 745.; Section 240.15d–11 is also issued under secs. 3(a) and 306(a), Pub.L. 107–204, 116 Stat. 745.; Section 240.15d–14 is also issued under secs. 3(a) and 302, Pub.L. No. 107–204, 116 Stat. 745.; Section 240.15d–15 is also issued under secs. 3(a) and 302, Pub.L. No. 107–204, 116 Stat. 745.; Sections 240.15Ba1–1 through 240.15Ba1–8 are also issued under sec. 975, Public Law 111–203, 124 Stat. 1376 (2010).; Section 240.15Bc4–1 is also issued under sec. 975, Public Law 111–203, 124 Stat. 1376 (2010).; Sections 240.15Ca1–1, 240.15Ca2–1, 240.15Ca2–2, 240.15Ca2–3, 240.15Ca2–4, 240.15Ca2–5, 240.15Cc1–1 also issued under secs. 3, 15C; 15 U.S.C. 78c, 78*o*–5;; Section 240.15Ga–1 is also issued under sec. 943, Pub.L. 111–203, 124 Stat. 1376.; Section 240.15Ga–2 is also issued under sec. 943, Pub.L. 111–203, 124 Stat. 1376.; Section 240.16a–1(a) is also issued under Public Law 111–203 § 766, 124 Stat. 1799 (2010).; Section 240.17a–3 also issued under secs. 2, 17, 23a, 48 Stat. 897, as amended; 15 U.S.C. 78d–1, 78d–2, 78q; secs. 12, 14, 17, 23(a), 48 Stat. 892, 895, 897, 901; secs. 1, 4, 8, 49 Stat. 1375, 1379; sec. 203(a), 49 Stat. 704; sec. 5, 52 Stat. 1076; sec. 202, 68 Stat. 686; secs. 3, 5, 10, 78 Stat. 565-568, 569, 570, 580

secs. 1, 3, 82 Stat. 454, 455; secs. 28(c), 3–5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 14, 18, 89 Stat. 117, 118, 137, 155; 15 U.S.C. 78*l*, 78n, 78q, 78w(a); ; Section 240.17a–4 also issued under secs. 2, 17, 23(a), 48 Stat. 897, as amended; 15 U.S.C. 78a, 78d–1, 78d–2; sec. 14, Pub.L. 94–29, 89 Stat. 137 (15 U.S.C. 78a); sec. 18, Pub.L. 94–29, 89 Stat. 155 (15 U.S.C. 78w);; Section 240.17a–23 also issued under 15 U.S.C. 78b, 78c, 78*o*, 78q, and 78w(a);; Section 240.17f–1 is also authorized under sections 2, 17 and 17A, 48 Stat. 891, 89 Stat. 137, 141 (15 U.S.C. 78b, 78q, 78q–1);; Section 240.17g–7 is also issued under sec. 943, Pub.L. 111–203, 124 Stat. 1376.; Section 240.17g–8 is also issued under sec. 938, Pub.L. 111–203, 124 Stat. 1376.; Section 240.17g–9 is also issued under sec. 936, Pub.L. 111–203, 124 Stat. 1376.; Section 240.17h–1T also issued under 15 U.S.C. 78q.; Sections 240.17Ac2–1(c) and 240.17Ac2–2 also issued under secs. 17, 17A and 23(a); 48 Stat. 897, as amended, 89 Stat. 137, 141 and 48 Stat. 901 (15 U.S.C. 78q, 78q–1, 78w(a));; Section 240.17Ad–1 is also issued under secs. 2, 17, 17A and 23(a); 48 Stat. 841 as amended, 48 Stat. 897, as amended, 89 Stat. 137, 141, and 48 Stat. 901 (15 U.S.C. 78b, 78q, 78q–1, 78w);; Sections 240.17Ad–5 and 240.17Ad–10 are also issued under secs. 3 and 17A; 48 Stat. 882, as amended, and 89 Stat. (15 U.S.C. 78c and 78q–1);; Section 240.17Ad–7 also issued under 15 U.S.C. 78b, 78q, and 78q–1.; Section 240.17Ad–17 is also issued under Pub.L. 111–203, section 929W, 124 Stat. 1869 (2010).; Section 240.17Ad–22 is also issued under 12 U.S.C. 5464(a)(2).; Section 240.19b–4 is also issued under 12 U.S.C. 5465(e).; Sections 240.19c–4 also issued under secs. 6, 11A, 14, 15A, 19 and 23 of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*–3, and 78s);; Section 240.19c–5 also issued under Sections 6, 11A, and 19 of the Securities Exchange Act of 1934, 48 Stat. 885, as amended, 89 Stat. 111, as amended, and

United States Code Annotated
Title 15. Commerce and Trade
Chapter 2D. Investment Companies and Advisers
Subchapter II. Investment Advisers (Refs & Annos)

15 U.S.C.A. § 80b-6

§ 80b-6. Prohibited transactions by investment advisers

Effective: July 22, 2010
Currentness

It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly--

(1) to employ any device, scheme, or artifice to defraud any client or prospective client;

(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

(3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction; or

(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

CREDIT(S)

(Aug. 22, 1940, c. 686, Title II, § 206, 54 Stat. 852; Sept. 13, 1960, Pub.L. 86-750, §§ 8, 9, 74 Stat. 887; July 21, 2010, Pub.L. 111-203, Title IX, § 985(e)(2), 124 Stat. 1935.)

Notes of Decisions (129)

15 U.S.C.A. § 80b-6, 15 USCA § 80b-6
Current through P.L. 113-163 approved 8-8-14

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15 U.S.C.A. § 80b-7

§ 80b-7. Material misstatements

Currentness

It shall be unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission under section 80b-3 or 80b-4 of this title, or willfully to omit to state in any such application or report any material fact which is required to be stated therein.

CREDIT(S)

(Aug. 22, 1940, c. 686, Title II, § 207, 54 Stat. 853.)

Notes of Decisions (8)

15 U.S.C.A. § 80b-7, 15 USCA § 80b-7
Current through P.L. 113-163 approved 8-8-14

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Title 15. Commerce and Trade
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15 U.S.C.A. § 80b-7

§ 80b-7. Material misstatements

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It shall be unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission under section 80b-3 or 80b-4 of this title, or willfully to omit to state in any such application or report any material fact which is required to be stated therein.

CREDIT(S)

(Aug. 22, 1940, c. 686, Title II, § 207, 54 Stat. 853.)

Notes of Decisions (8)

15 U.S.C.A. § 80b-7, 15 USCA § 80b-7
Current through P.L. 113-163 approved 8-8-14

End of Document

F

Code of Federal Regulations
Title 17. Commodity and Securities Exchanges
Chapter II. Securities and Exchange Commission
Part 275. Rules and Regulations, Investment Advisers Act of 1940 (Refs & Annos)

17 C.F.R. § 275.206(4)–1

§ 275.206(4)–1 Advertisements by investment advisers.

Currentness

(a) It shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b–6(4)) for any investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b–3), directly or indirectly, to publish, circulate, or distribute any advertisement:

(1) Which refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser or concerning any advice, analysis, report or other service rendered by such investment adviser; or

(2) Which refers, directly or indirectly, to past specific recommendations of such investment adviser which were or would have been profitable to any person: Provided, however, That this shall not prohibit an advertisement which sets out or offers to furnish a list of all recommendations made by such investment adviser within the immediately preceding period of not less than one year if such advertisement, and such list if it is furnished separately: (i) State the name of each such security recommended, the date and nature of each such recommendation (e.g., whether to buy, sell or hold), the market price at that time, the price at which the recommendation was to be acted upon, and the market price of each such security as of the most recent practicable date, and (ii) contain the following cautionary legend on the first page thereof in print or type as large as the largest print or type used in the body or text thereof: "it should not be assumed that recommendations made in the future will be profitable or will equal the performance of the securities in this list"; or

(3) Which represents, directly or indirectly, that any graph, chart, formula or other device being offered can in and of itself be used to determine which securities to buy or sell, or when to buy or sell them; or which represents directly or indirectly, that any graph, chart, formula or other device being offered will assist any person in making his own decisions as to which securities to buy, sell, or when to buy or sell them, without prominently disclosing in such advertisement the limitations thereof and the difficulties with respect to its use; or

(4) Which contains any statement to the effect that any report, analysis, or other service will be furnished free or without charge, unless such report, analysis or other service actually is or will be furnished entirely free and without any condition or obligation, directly or indirectly; or

(5) Which contains any untrue statement of a material fact, or which is otherwise false or misleading.

(b) For the purposes of this section the term advertisement shall include any notice, circular, letter or other written communication addressed to more than one person, or any notice or other announcement in any publication or by radio or television, which offers (1) any analysis, report, or publication concerning securities, or which is to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (2) any graph, chart, formula, or other

United States Code Annotated
Title 15. Commerce and Trade
Chapter 2B. Securities Exchanges (Refs & Annos)

15 U.S.C.A. § 78o

§ 78o. Registration and regulation of brokers and dealers

Currentness

(a) Registration of all persons utilizing exchange facilities to effect transactions; exemptions

(1) It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

(2) The Commission, by rule or order, as it deems consistent with the public interest and the protection of investors, may conditionally or unconditionally exempt from paragraph (1) of this subsection any broker or dealer or class of brokers or dealers specified in such rule or order.

(b) Manner of registration of brokers and dealers

(1) A broker or dealer may be registered by filing with the Commission an application for registration in such form and containing such information and documents concerning such broker or dealer and any persons associated with such broker or dealer as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Within forty-five days of the date of the filing of such application (or within such longer period as to which the applicant consents), the Commission shall--

(A) by order grant registration, or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred twenty days of the date of the filing of the application for registration. At the conclusion of such proceedings, the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if the Commission finds that the requirements of this section are satisfied. The order granting registration shall not be effective until such broker or dealer has become a member of a registered securities association, or until such broker or dealer has become a member of a national securities exchange, if such broker or dealer effects transactions solely on that exchange, unless the Commission has exempted such broker or dealer, by rule or order, from such

(B) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor or of a substantially equivalent crime by a foreign court of competent jurisdiction which the Commission finds--

(i) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, any substantially equivalent activity however denominated by the laws of the relevant foreign government, or conspiracy to commit any such offense;

(ii) arises out of the conduct of the business of a broker, dealer, municipal securities dealer municipal advisor,, [1] government securities broker, government securities dealer, investment adviser, bank, insurance company, fiduciary, transfer agent, nationally recognized statistical rating organization, foreign person performing a function substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act (7 U.S.C. 1 et seq.) or any substantially equivalent foreign statute or regulation;

(iii) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds, or securities, or substantially equivalent activity however denominated by the laws of the relevant foreign government; or

(iv) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of Title 18, or a violation of a substantially equivalent foreign statute.

(C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer, municipal securities dealer municipal advisor,, [1] government securities broker, government securities dealer, security-based swap dealer, major security-based swap participant, transfer agent, nationally recognized statistical rating organization, foreign person performing a function substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent foreign statute or regulation, or as an affiliated person or employee of any investment company, bank, insurance company, foreign entity substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent foreign statute or regulation or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(D) has willfully violated any provision of the Securities Act of 1933 [15 U.S.C.A. § 77a et seq.], the Investment Advisers Act of 1940 [15 U.S.C.A. § 80b-1 et seq.], the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.], the Commodity Exchange Act, this chapter, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or is unable to comply with any such provision.

(E) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, this chapter, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this subparagraph (E) no person shall be deemed to have failed reasonably to supervise any other person, if--

necessary or appropriate in the public interest or for the protection of investors. Any registered broker or dealer may, upon such terms and conditions as the Commission deems necessary or appropriate in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any registered broker or dealer is no longer in existence or has ceased to do business as a broker or dealer, the Commission, by order, shall cancel the registration of such broker or dealer.

(6)(A) With respect to any person who is associated, who is seeking to become associated, or, at the time of the alleged misconduct, who was associated or was seeking to become associated with a broker or dealer, or any person participating, or, at the time of the alleged misconduct, who was participating, in an offering of any penny stock, the Commission, by order, shall censure, place limitations on the activities or functions of such person, or suspend for a period not exceeding 12 months, or bar any such person from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock, if the Commission finds, on the record after notice and opportunity for a hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person--

(i) has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), or (E) of paragraph (4) of this subsection;

(ii) has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within 10 years of the commencement of the proceedings under this paragraph; or

(iii) is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4).

(B) It shall be unlawful--

(i) for any person as to whom an order under subparagraph (A) is in effect, without the consent of the Commission, willfully to become, or to be, associated with a broker or dealer in contravention of such order, or to participate in an offering of penny stock in contravention of such order;

(ii) for any broker or dealer to permit such a person, without the consent of the Commission, to become or remain, a person associated with the broker or dealer in contravention of such order, if such broker or dealer knew, or in the exercise of reasonable care should have known, of such order; or

(iii) for any broker or dealer to permit such a person, without the consent of the Commission, to participate in an offering of penny stock in contravention of such order, if such broker or dealer knew, or in the exercise of reasonable care should have known, of such order and of such participation.

(C) For purposes of this paragraph, the term "person participating in an offering of penny stock" includes any person acting as any promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from such term.

(A) Notice registration

(i) Contents of notice

Notwithstanding paragraphs (1) and (2), a broker or dealer required to register only because it effects transactions in security futures products on an exchange registered pursuant to section 78f(g) of this title may register for purposes of this section by filing with the Commission a written notice in such form and containing such information concerning such broker or dealer and any persons associated with such broker or dealer as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. A broker or dealer may not register under this paragraph unless that broker or dealer is a member of a national securities association registered under section 78*o*-3(k) of this title.

(ii) Immediate effectiveness

Such registration shall be effective contemporaneously with the submission of notice, in written or electronic form, to the Commission, except that such registration shall not be effective if the registration would be subject to suspension or revocation under paragraph (4).

(iii) Suspension

Such registration shall be suspended immediately if a national securities association registered pursuant to section 78*o*-3(k) of this title suspends the membership of that broker or dealer.

(iv) Termination

Such registration shall be terminated immediately if any of the above stated conditions for registration set forth in this paragraph are no longer satisfied.

(B) Exemptions for registered brokers and dealers

A broker or dealer registered pursuant to the requirements of subparagraph (A) shall be exempt from the following provisions of this title and the rules thereunder with respect to transactions in security futures products:

(i) Section 78h of this title.

(ii) Section 78k of this title.

(iii) Subsections (c)(3) and (c)(5) of this section.

(iv) Section 78*o*-4 of this title.

(1)(A) No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills), or any security-based swap agreement by means of any manipulative, deceptive, or other fraudulent device or contrivance.

(B) No broker, dealer, or municipal securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security or any security-based swap agreement involving a municipal security by means of any manipulative, deceptive, or other fraudulent device or contrivance.

(C) No government securities broker or government securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or to attempt to induce the purchase or sale of, any government security or any security-based swap agreement involving a government security by means of any manipulative, deceptive, or other fraudulent device or contrivance.

(2)(A) No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange of which it is a member, in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation.

(B) No broker, dealer, or municipal securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in connection with which such broker, dealer, or municipal securities dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation.

(C) No government securities broker or government securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or induce or attempt to induce the purchase or sale of, any government security in connection with which such government securities broker or government securities dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation.

(D) The Commission shall, for the purposes of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative and such quotations as are fictitious.

(E) The Commission shall, prior to adopting any rule or regulation under subparagraph (C), consult with and consider the views of the Secretary of the Treasury and each appropriate regulatory agency. If the Secretary of the Treasury or any appropriate regulatory agency comments in writing on a proposed rule or regulation of the Commission under such subparagraph (C) that has been published for comment, the Commission shall respond in writing to such written comment before adopting the proposed rule. If the Secretary of the Treasury determines, and notifies the Commission, that such rule or regulation, if implemented, would, or as applied does (i) adversely affect the liquidity or efficiency of the market for government securities; or (ii) impose any burden on competition not necessary or appropriate in furtherance of the purposes of this section, the Commission shall, prior to adopting the proposed rule or regulation, find that such rule or regulation is necessary and appropriate in furtherance of the purposes of this section notwithstanding the Secretary's determination.

(6) No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security, municipal security, commercial paper, bankers' acceptances, or commercial bills) in contravention of such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest and for the protection of investors or to perfect or remove impediments to a national system for the prompt and accurate clearance and settlement of securities transactions, with respect to the time and method of, and the form and format of documents used in connection with, making settlements of and payments for transactions in securities, making transfers and deliveries of securities, and closing accounts. Nothing in this paragraph shall be construed (A) to affect the authority of the Board of Governors of the Federal Reserve System, pursuant to section 78g of this title, to prescribe rules and regulations for the purpose of preventing the excessive use of credit for the purchase or carrying of securities, or (B) to authorize the Commission to prescribe rules or regulations for such purpose.

(7) In connection with any bid for or purchase of a government security related to an offering of government securities by or on behalf of an issuer, no government securities broker, government securities dealer, or bidder for or purchaser of securities in such offering shall knowingly or willfully make any false or misleading written statement or omit any fact necessary to make any written statement made not misleading.

(8) Prohibition of referral fees

No broker or dealer, or person associated with a broker or dealer, may solicit or accept, directly or indirectly, remuneration for assisting an attorney in obtaining the representation of any person in any private action arising under this chapter or under the Securities Act of 1933 [15 U.S.C.A. § 77a et seq.].

(d) Supplementary and periodic information

(1) In general

Each issuer which has filed a registration statement containing an undertaking which is or becomes operative under this subsection as in effect prior to August 20, 1964, and each issuer which shall after such date file a registration statement which has become effective pursuant to the Securities Act of 1933, as amended [15 U.S.C.A. § 77a et seq.], shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 78m of this title in respect of a security registered pursuant to section 78*l* of this title. The duty to file under this subsection shall be automatically suspended if and so long as any issue of securities of such issuer is registered pursuant to section 78*l* of this title. The duty to file under this subsection shall also be automatically suspended as to any fiscal year, other than the fiscal year within which such registration statement became effective, if, at the beginning of such fiscal year, the securities of each class, other than any class of asset-backed securities, to which the registration statement relates are held of record by less than 300 persons, or, in the case of bank [3] or a bank holding company, as such term is defined in section 1841 of Title 12, 1,200 persons persons [4]. For the purposes of this subsection, the term "class" shall be construed to include all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges. The Commission may, for the purpose of this subsection, define by rules and regulations the term "held of record" as it deems necessary or appropriate in the public interest or for the protection of investors in order to prevent circumvention of the provisions of this subsection. Nothing in this subsection shall apply to securities issued by a foreign government or political subdivision thereof.

No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any penny stock by any customer except in accordance with the requirements of this subsection and the rules and regulations prescribed under this subsection.

(2) Risk disclosure with respect to penny stocks

Prior to effecting any transaction in any penny stock, a broker or dealer shall give the customer a risk disclosure document that--

(A) contains a description of the nature and level of risk in the market for penny stocks in both public offerings and secondary trading;

(B) contains a description of the broker's or dealer's duties to the customer and of the rights and remedies available to the customer with respect to violations of such duties or other requirements of Federal securities laws;

(C) contains a brief, clear, narrative description of a dealer market, including "bid" and "ask" prices for penny stocks and the significance of the spread between the bid and ask prices;

(D) contains the toll free telephone number for inquiries on disciplinary actions established pursuant to section 78*o*-3(i) of this title;

(E) defines significant terms used in the disclosure document or in the conduct of trading in penny stocks; and

(F) contains such other information, and is in such form (including language, type size, and format), as the Commission shall require by rule or regulation.

(3) Commission rules relating to disclosure

The Commission shall adopt rules setting forth additional standards for the disclosure by brokers and dealers to customers of information concerning transactions in penny stocks. Such rules--

(A) shall require brokers and dealers to disclose to each customer, prior to effecting any transaction in, and at the time of confirming any transaction with respect to any penny stock, in accordance with such procedures and methods as the Commission may require consistent with the public interest and the protection of investors--

(i) the bid and ask prices for penny stock, or such other information as the Commission may, by rule, require to provide customers with more useful and reliable information relating to the price of such stock;

(ii) the number of shares to which such bid and ask prices apply, or other comparable information relating to the depth and liquidity of the market for such stock; and

Except as provided in subparagraph (B), no State or political subdivision thereof may enforce any law, rule, regulation, or other administrative action against a registered funding portal with respect to its business as such.

(B) Examination and enforcement authority

Subparagraph (A) does not apply with respect to the examination and enforcement of any law, rule, regulation, or administrative action of a State or political subdivision thereof in which the principal place of business of a registered funding portal is located, provided that such law, rule, regulation, or administrative action is not in addition to or different from the requirements for registered funding portals established by the Commission.

(C) Definition

For purposes of this paragraph, the term "State" includes the District of Columbia and the territories of the United States.

(3) De minimis transactions by associated persons

No law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof may prohibit an associated person of a broker or dealer from effecting a transaction described in paragraph (3) for a customer in such State if--

(A) such associated person is not ineligible to register with such State for any reason other than such a transaction;

(B) such associated person is registered with a registered securities association and at least one State; and

(C) the broker or dealer with which such person is associated is registered with such State.

(4) Described transactions

(A) In general

A transaction is described in this paragraph if--

(i) such transaction is effected--

(I) on behalf of a customer that, for 30 days prior to the day of the transaction, maintained an account with the broker or dealer; and

(II) by an associated person of the broker or dealer--

(aa) to which the customer was assigned for 14 days prior to the day of the transaction; and

(bb) who is registered with a State in which the customer was a resident or was present for at least 30 consecutive days during the 1-year period prior to the day of the transaction; or

views with respect to the nature of the new hybrid product; the history, purpose, extent, and appropriateness of the regulation of the new product under the Federal banking laws; and the impact of the proposed rule on the banking industry.

(2) Limitation

The Commission shall not--

(A) require a bank to register as a broker or dealer under this section because the bank engages in any transaction in, or buys or sells, a new hybrid product; or

(B) bring an action against a bank for a failure to comply with a requirement described in subparagraph (A),

unless the Commission has imposed such requirement by rule or regulation issued in accordance with this section.

(3) Criteria for rulemaking

The Commission shall not impose a requirement under paragraph (2) of this subsection with respect to any new hybrid product unless the Commission determines that--

(A) the new hybrid product is a security; and

(B) imposing such requirement is necessary and appropriate in the public interest and for the protection of investors.

(4) Considerations

In making a determination under paragraph (3), the Commission shall consider--

(A) the nature of the new hybrid product; and

(B) the history, purpose, extent, and appropriateness of the regulation of the new hybrid product under the Federal securities laws and under the Federal banking laws.

(5) Objection to Commission regulation

(A) Filing of petition for review

The Board may obtain review of any final regulation described in paragraph (2) in the United States Court of Appeals for the District of Columbia Circuit by filing in such court, not later than 60 days after the date of publication of the final regulation, a written petition requesting that the regulation be set aside. Any proceeding to challenge any such rule shall be expedited by the Court of Appeals.

(i) was not subjected to regulation by the Commission as a security prior to November 12, 1999;

(ii) is not an identified banking product as such term is defined in section 206 of such Act [15 U.S.C.A. § 78c note]; and

(iii) is not an equity swap within the meaning of section 206(a)(6) of such Act [15 U.S.C.A. § 78c note].

(B) Board

The term "Board" means the Board of Governors of the Federal Reserve System.

(k) [6] Registration or succession to a United States broker or dealer

In determining whether to permit a foreign person or an affiliate of a foreign person to register as a United States broker or dealer, or succeed to the registration of a United States broker or dealer, the Commission may consider whether, for a foreign person, or an affiliate of a foreign person that presents a risk to the stability of the United States financial system, the home country of the foreign person has adopted, or made demonstrable progress toward adopting, an appropriate system of financial regulation to mitigate such risk.

(l) [7] Termination of a United States broker or dealer

For a foreign person or an affiliate of a foreign person that presents such a risk to the stability of the United States financial system, the Commission may determine to terminate the registration of such foreign person or an affiliate of such foreign person as a broker or dealer in the United States, if the Commission determines that the home country of the foreign person has not adopted, or made demonstrable progress toward adopting, an appropriate system of financial regulation to mitigate such risk.

(k) [8] Standard of conduct

(1) In general

Notwithstanding any other provision of this chapter or the Investment Advisers Act of 1940, the Commission may promulgate rules to provide that, with respect to a broker or dealer, when providing personalized investment advice about securities to a retail customer (and such other customers as the Commission may by rule provide), the standard of conduct for such broker or dealer with respect to such customer shall be the same as the standard of conduct applicable to an investment adviser under section 211 of the Investment Advisers Act of 1940. The receipt of compensation based on commission or other standard compensation for the sale of securities shall not, in and of itself, be considered a violation of such standard applied to a broker or dealer. Nothing in this section shall require a broker or dealer or registered representative to have a continuing duty of care or loyalty to the customer after providing personalized investment advice about securities.

(2) Disclosure of range of products offered

In developing any rules under paragraph (1), the Commission shall consider whether the rules will promote investor protection, efficiency, competition, and capital formation.

(3) Form and contents of documents and information

Any documents or information designated under a rule promulgated under paragraph (1) shall--

(A) be in a summary format; and

(B) contain clear and concise information about--

(i) investment objectives, strategies, costs, and risks; and

(ii) any compensation or other financial incentive received by a broker, dealer, or other intermediary in connection with the purchase of retail investment products.

(o) Authority to restrict mandatory pre-dispute arbitration

The Commission, by rule, may prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any broker, dealer, or municipal securities dealer to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors.

CREDIT(S)

(June 6, 1934, c. 404, Title I, § 15, 48 Stat. 895; May 27, 1936, c. 462, § 3, 49 Stat. 1377; June 25, 1938, c. 677, § 2, 52 Stat. 1075; Aug. 20, 1964, Pub.L. 88-467, § 6, 78 Stat. 570; Dec. 30, 1970, Pub.L. 91-598, § 11(d), formerly § 7(d), 84 Stat. 1653, renumbered § 11(d), May 21, 1978, Pub.L. 95-283, § 9, 92 Stat. 260; June 4, 1975, Pub.L. 94-29, § 11, 89 Stat. 121; Dec. 19, 1977, Pub.L. 95-213, Title II, § 204, 91 Stat. 1500; June 6, 1983, Pub.L. 98-38, § 3(a), 97 Stat. 206; Aug. 10, 1984, Pub.L. 98-376, §§ 4, 6(b), 98 Stat. 1265; Oct. 28, 1986, Pub.L. 99-571, Title I, § 102(e), (f), 100 Stat. 3218; Dec. 4, 1987, Pub.L. 100-181, Title III, § 317, 101 Stat. 1256; Nov. 19, 1988, Pub.L. 100-704, § 3(b)(1), 102 Stat. 4679; Oct. 15, 1990, Pub.L. 101-429, Title V, §§ 504(a), 505, 104 Stat. 952, 953; Nov. 15, 1990, Pub.L. 101-550, Title II, § 203(a), (c)(1), 104 Stat. 2715, 2718; Dec. 17, 1993, Pub.L. 103-202, Title I, §§ 105, 106(b)(2)(B), 109(b)(2), 110, 107 Stat. 2348, 2350, 2353; Dec. 22, 1995, Pub.L. 104-67, Title I, § 103(a), 109 Stat. 756; Oct. 11, 1996, Pub.L. 104-290, Title I, § 103(a), 110 Stat. 3420; Nov. 3, 1998, Pub.L. 105-353, Title III, § 301(b)(8), 112 Stat. 3236; Nov. 12, 1999, Pub.L. 106-102, Title II, § 205, 113 Stat. 1391; Dec. 21, 2000, Pub.L. 106-554, § 1(a)(5) [Title II, §§ 203(a)(1), (b), 206(h), Title III, § 303(e), (f)], 114 Stat. 2763, 2763A-421, 2763A-422, 2763A-432, 2763A-454, 2763A-455; July 30, 2002, Pub.L. 107-204, Title VI, § 604(a), (c)(1)(B)(ii), 116 Stat. 795, 796; Sept. 29, 2006, Pub.L. 109-291, § 4(b)(1)(A), 120 Stat. 1337; July 21, 2010, Pub.L. 111-203, Title I, § 173(c), Title VII, §§ 713(a), 762(d)(4), 766(d), Title IX, §§ 913(g)(1), (h)(1), 919, 921(a), 925(a)(1), 929L(3), 929X(c), 942(a), 975(g), 985(b)(5)(A), 124 Stat. 1440, 1646, 1761, 1799, 1828, 1829, 1837, 1841, 1850, 1861, 1870, 1896, 1923, 1933; Pub.L. 112-106, Title III, § 305(d)(1), Title VI, § 601(b), Apr. 5, 2012, 126 Stat. 323, 326.)

EFFECTIVE DATE OF 2010 AMENDMENT

United States Code Annotated
Title 15. Commerce and Trade
Chapter 2B. Securities Exchanges (Refs & Annos)

15 U.S.C.A. § 78*o*-5

§ 78o-5. Government securities brokers and dealers

Currentness

(a) Registration requirements; notice to regulatory agencies; manner of registration; exemption from registration requirements

(1)(A) It shall be unlawful for any government securities broker or government securities dealer (other than a registered broker or dealer or a financial institution) to make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any government security unless such government securities broker or government securities dealer is registered in accordance with paragraph (2) of this subsection.

(B)(i) It shall be unlawful for any government securities broker or government securities dealer that is a registered broker or dealer or a financial institution to make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any government security unless such government securities broker or government securities dealer has filed with the appropriate regulatory agency written notice that it is a government securities broker or government securities dealer. When such a government securities broker or government securities dealer ceases to act as such it shall file with the appropriate regulatory agency a written notice that it is no longer acting as a government securities broker or government securities dealer.

(ii) Such notices shall be in such form and contain such information concerning a government securities broker or government securities dealer that is a financial institution and any persons associated with such government securities broker or government securities dealer as the Board of Governors of the Federal Reserve System shall, by rule, after consultation with each appropriate regulatory agency (including the Commission), prescribe as necessary or appropriate in the public interest or for the protection of investors. Such notices shall be in such form and contain such information concerning a government securities broker or government securities dealer that is a registered broker or dealer and any persons associated with such government securities broker or government securities dealer as the Commission shall, by rule, prescribe as necessary or appropriate in the public interest or for the protection of investors.

(iii) Each appropriate regulatory agency (other than the Commission) shall make available to the Commission the notices which have been filed with it under this subparagraph, and the Commission shall maintain and make available to the public such notices and the notices it receives under this subparagraph.

(2) A government securities broker or a government securities dealer subject to the registration requirement of paragraph (1)(A) of this subsection may be registered by filing with the Commission an application for registration in such form and containing such information and documents concerning such government securities broker or government securities dealer and any persons associated with such government securities broker or government securities dealer as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Within 45 days of the date of filing of such application (or within such longer period as to which the applicant consents), the Commission shall--

of custody and use of customers' securities, the carrying and use of customers' deposits or credit balances, and the transfer and control of government securities subject to repurchase agreements and in similar transactions.

(B) Such rules shall require every government securities broker and government securities dealer to make reports to and furnish copies of records to the appropriate regulatory agency, and to file with the appropriate regulatory agency, annually or more frequently, a balance sheet and income statement certified by an independent public accountant, prepared on a calendar or fiscal year basis, and such other financial statements (which shall, as the Secretary specifies, be certified) and information concerning its financial condition as required by such rules.

(C) Such rules shall require records to be made and kept by government securities brokers and government securities dealers and shall specify the periods for which such records shall be preserved.

(2) Risk assessment for holding company systems

(A) Obligations to obtain, maintain, and report information

Every person who is registered as a government securities broker or government securities dealer under this section shall obtain such information and make and keep such records as the Secretary by rule prescribes concerning the registered person's policies, procedures, or systems for monitoring and controlling financial and operational risks to it resulting from the activities of any of its associated persons, other than a natural person. Such records shall describe, in the aggregate, each of the financial and securities activities conducted by, and customary sources of capital and funding of, those of its associated persons whose business activities are reasonably likely to have a material impact on the financial or operational condition of such registered person, including its capital, its liquidity, or its ability to conduct or finance its operations. The Secretary, by rule, may require summary reports of such information to be filed with the registered person's appropriate regulatory agency no more frequently than quarterly.

(B) Authority to require additional information

If, as a result of adverse market conditions or based on reports provided pursuant to subparagraph (A) of this paragraph or other available information, the appropriate regulatory agency reasonably concludes that it has concerns regarding the financial or operational condition of any government securities broker or government securities dealer registered under this section, such agency may require the registered person to make reports concerning the financial and securities activities of any of such person's associated persons, other than a natural person, whose business activities are reasonably likely to have a material impact on the financial or operational condition of such registered person. The appropriate regulatory agency, in requiring reports pursuant to this subparagraph, shall specify the information required, the period for which it is required, the time and date on which the information must be furnished, and whether the information is to be furnished directly to the appropriate regulatory agency or to a self-regulatory organization with primary responsibility for examining the registered person's financial and operational condition.

(C) Special provisions with respect to associated persons subject to Federal banking agency regulation

(i) Cooperation in implementation

or reporting requirements of a Federal banking agency may be disclosed to any other person (other than a self-regulatory organization), without the prior written approval of the Federal banking agency. Nothing in this clause shall authorize the Secretary or any appropriate regulatory agency to withhold information from Congress, or prevent the Secretary or any appropriate regulatory agency from complying with a request for information from any other Federal department or agency requesting the information for purposes within the scope of its jurisdiction, or complying with an order of a court of the United States in an action brought by the United States or the Commission.

(vi) Notice to banking agencies concerning financial and operational condition concerns

The Secretary or appropriate regulatory agency shall notify the Federal banking agency of any concerns of the Secretary or the appropriate regulatory agency regarding significant financial or operational risks resulting from the activities of any government securities broker or government securities dealer to any associated person thereof which is subject to examination by or reporting requirements of the Federal banking agency.

(vii) Definition

For purposes of this subparagraph, the term "Federal banking agency" shall have the same meaning as the term "appropriate Federal banking agency" in section 1813(q) of Title 12.

(D) Exemptions

The Secretary by rule or order may exempt any person or class of persons, under such terms and conditions and for such periods as the Secretary shall provide in such rule or order, from the provisions of this paragraph, and the rules thereunder. In granting such exemptions, the Secretary shall consider, among other factors--

(i) whether information of the type required under this paragraph is available from a supervisory agency (as defined in section 3401(6) of Title 12, a State insurance commission or similar State agency, the Commodity Futures Trading Commission, or a similar foreign regulator;

(ii) the primary business of any associated person;

(iii) the nature and extent of domestic or foreign regulation of the associated person's activities;

(iv) the nature and extent of the registered person's securities transactions; and

(v) with respect to the registered person and its associated persons, on a consolidated basis, the amount and proportion of assets devoted to, and revenues derived from, activities in the United States securities markets.

(E) Conformity with requirements under section 78q(h) of this title

In exercising authority pursuant to subparagraph (A) of this paragraph concerning information with respect to associated persons of government securities brokers and government securities dealers who are also associated persons of registered

(5) In promulgating rules and issuing orders under this section, the Secretary--

(A) may appropriately classify government securities brokers and government securities dealers (taking into account relevant matters, including types of business done, nature of securities other than government securities purchased or sold, and character of business organization) and persons associated with government securities brokers and government securities dealers;

(B) may determine, to the extent consistent with paragraph (2) of this subsection and with the public interest, the protection of investors, and the purposes of this chapter, not to apply, in whole or in part, certain rules under this section, or to apply greater, lesser, or different standards, to certain classes of government securities brokers, government securities dealers, or persons associated with government securities brokers or government securities dealers;

(C) shall consider the sufficiency and appropriateness of then existing laws and rules applicable to government securities brokers, government securities dealers, and persons associated with government securities brokers and government securities dealers; and

(D) shall consult with and consider the views of the Commission and the Board of Governors of the Federal Reserve System, except where the Secretary determines that an emergency exists requiring expeditious or summary action and publishes its reasons for such determination.

(6) If the Commission or the Board of Governors of the Federal Reserve System comments in writing on a proposed rule of the Secretary that has been published for comment, the Secretary shall respond in writing to such written comment before approving the proposed rule.

(7) No government securities broker or government securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any government security in contravention of any rule under this section.

(c) Sanctions for violations

(1) With respect to any government securities broker or government securities dealer registered or required to register under subsection (a)(1)(A) of this section--

(A) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding 12 months, or revoke the registration of such government securities broker or government securities dealer, if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such government securities broker or government securities dealer, or any person associated with such government securities broker or government securities dealer (whether prior or subsequent to becoming so associated), has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), (E), (H), or (G)[2] of paragraph (4) of section 78*o*(b) of this title, has been convicted of any offense specified in

(D) Nothing in this paragraph shall be construed to affect in any way the powers of such appropriate regulatory agency to proceed against such government securities broker or government securities dealer under any other provision of law.

(E) Each appropriate regulatory agency (other than the Commission) shall promptly notify the Commission after it has imposed any sanction under this paragraph on a government securities broker or government securities dealer, or a person associated with a government securities broker or government securities dealer, and the Commission shall maintain, and make available to the public, a record of such sanctions and any sanctions imposed by it under this subsection.

(3) It shall be unlawful for any person as to whom an order entered pursuant to paragraph (1) or (2) of this subsection suspending or barring him from being associated with a government securities broker or government securities dealer is in effect willfully to become, or to be, associated with a government securities broker or government securities dealer without the consent of the appropriate regulatory agency, and it shall be unlawful for any government securities broker or government securities dealer to permit such a person to become, or remain, a person associated with it without the consent of the appropriate regulatory agency, if such government securities broker or government securities dealer knew, or, in the exercise of reasonable care should have known, of such order.

(d) Records of brokers and dealers subject to examination

(1) All records of a government securities broker or government securities dealer are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the appropriate regulatory agency for such government securities broker or government securities dealer as such appropriate regulatory agency deems necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter.

(2) Information received by an appropriate regulatory agency, the Secretary, or the Commission from or with respect to any government securities broker, government securities dealer, any person associated with a government securities broker or government securities dealer, or any other person subject to this section or rules promulgated thereunder, may be made available by the Secretary or the recipient agency to the Commission, the Secretary, the Department of Justice, the Commodity Futures Trading Commission, any appropriate regulatory agency, any self-regulatory organization, or any Federal Reserve Bank.

(3) Government securities trade reconstruction

(A) Furnishing records

Every government securities broker and government securities dealer shall furnish to the Commission on request such records of government securities transactions, including records of the date and time of execution of trades, as the Commission may require to reconstruct trading in the course of a particular inquiry or investigation being conducted by the Commission for enforcement or surveillance purposes. In requiring information pursuant to this paragraph, the Commission shall specify the information required, the period for which it is required, the time and date on which the information must be furnished, and whether the information is to be furnished directly to the Commission, to the Federal Reserve Bank of New York, or to an appropriate regulatory agency or self-regulatory organization with responsibility for examining the government securities broker or government securities dealer. The Commission may require that such information be furnished in machine readable form notwithstanding any limitation in subparagraph (B). In utilizing its authority to require information in machine readable

(1) It shall be unlawful for any government securities broker or government securities dealer registered or required to register with the Commission under subsection (a)(1)(A) of this section to effect any transaction in, or induce or attempt to induce the purchase or sale of, any government security, unless such government securities broker or government securities dealer is a member of a national securities exchange registered under section 78f of this title or a securities association registered under section 78*o*-3 of this title.

(2) The Commission, after consultation with the Secretary, by rule or order, as it deems consistent with the public interest and the protection of investors, may conditionally or unconditionally exempt from paragraph (1) of this subsection any government securities broker or government securities dealer or class of government securities brokers or government securities dealers specified in such rule or order.

(f) Large position reporting

(1) Reporting requirements

The Secretary may adopt rules to require specified persons holding, maintaining, or controlling large positions in to-be-issued or recently issued Treasury securities to file such reports regarding such positions as the Secretary determines to be necessary and appropriate for the purpose of monitoring the impact in the Treasury securities market of concentrations of positions in Treasury securities and for the purpose of otherwise assisting the Commission in the enforcement of this chapter, taking into account any impact of such rules on the efficiency and liquidity of the Treasury securities market and the cost to taxpayers of funding the Federal debt. Unless otherwise specified by the Secretary, reports required under this subsection shall be filed with the Federal Reserve Bank of New York, acting as agent for the Secretary. Such reports shall, on a timely basis, be provided directly to the Commission by the person with whom they are filed.

(2) Recordkeeping requirements

Rules under this subsection may require persons holding, maintaining, or controlling large positions in Treasury securities to make and keep for prescribed periods such records as the Secretary determines are necessary or appropriate to ensure that such persons can comply with reporting requirements under this subsection.

(3) Aggregation rules

Rules under this subsection--

(A) may prescribe the manner in which positions and accounts shall be aggregated for the purpose of this subsection, including aggregation on the basis of common ownership or control; and

(B) may define which persons (individually or as a group) hold, maintain, or control large positions.

(4) Definitional authority; determination of reporting threshold

any violation or threatened violation of the provisions of this section, other than subsection (d)(3) of this section [1] or the rules or regulations thereunder, unless the Commission is the appropriate regulatory agency for such government securities broker or government securities dealer. Nothing in the preceding sentence shall be construed to limit the authority of the Commission with respect to violations or threatened violations of any provision of this chapter other than this section (except subsection (d)(3) of this section), the rules or regulations under any such other provision, or investigations pursuant to section 78u(a)(2) of this title to assist a foreign securities authority.

(h) Emergency authority

The Secretary may, by order, take any action with respect to a matter or action subject to regulation by the Secretary under this section, or the rules of the Secretary under this section, involving a government security or a market therein (or significant portion or segment of that market), that the Commission may take under section 78*l*(k)(2) of this title with respect to transactions in securities (other than exempted securities) or a market therein (or significant portion or segment of that market).

CREDIT(S)

(June 6, 1934, c. 404, Title I, § 15C, as added Oct. 28, 1986, Pub.L. 99-571, Title I, § 101, 100 Stat. 3208; amended Dec. 4, 1987, Pub.L. 100-181, Title VIII, § 801(a), 101 Stat. 1265; Aug. 9, 1989, Pub.L. 101-73, Title VII, § 744(u)(3), 103 Stat. 441; Oct. 16, 1990, Pub.L. 101-432, § 4(b), 104 Stat. 970; Nov. 15, 1990, Pub.L. 101-550, Title II, § 203(c), 104 Stat. 2718; Dec. 17, 1993, Pub.L. 103-202, Title I, §§ 102-104, 106(a), 108, 109(b)(1), (c), 107 Stat. 2345, 2346, 2349, 2351-2353; Nov. 3, 1998, Pub.L. 105-353, Title III, § 301(b)(10), 112 Stat. 3236; July 30, 2002, Pub.L. 107-204, Title VI, § 604(c)(1)(B), 116 Stat. 796; Dec. 17, 2004, Pub.L. 108-458, Title VII, § 7803(d), 118 Stat. 3863; July 21, 2010, Pub.L. 111-203, Title III, § 376(3), Title IX, §§ 929F(b), 985(b)(6), 124 Stat. 1569, 1854, 1934.)

Notes of Decisions (1)

Footnotes

1 So in original. Probably should be followed by a comma.

2 So in original. Probably should be "(G) or (H)".

15 U.S.C.A. § 78*o*-5, 15 USCA § 78o-5

Current through P.L. 113-163 approved 8-8-14

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2420. Dealing with Non-Members

(a) No member shall deal with any non-member broker or dealer except at the same prices, for the same commissions or fees, and on the same terms and conditions as are by such member accorded to the general public.

(b) Without limiting the generality of the foregoing, no member shall:

(1) in any transaction with any non-member broker or dealer, allow or grant to such non-member broker or dealer any selling concession, discount or other allowance allowed by such member to a member of a registered securities association and not allowed to a member of the general public;

(2) join with any non-member broker or dealer in any syndicate or group contemplating the distribution to the public of any issue of securities or any part thereof; or

(3) sell any security to or buy any security from any non-member broker or dealer except at the same price at which at the time of such transaction such member would buy or sell such security, as the case may be, from or to a person who is a member of the general public not engaged in the investment banking or securities business.

(c) Transaction with Foreign Non-Members

The provisions of paragraphs (a) and (b) of this Rule shall not apply to any non-member broker or dealer in a foreign country who is not eligible for membership in a registered securities association, but in any transaction with any such foreign non-member broker or dealer, where a selling concession, discount, or other allowance is allowed, a member shall as a condition of such transaction secure from such foreign broker or dealer an agreement that, in making any sales to purchasers within the United States of securities acquired as a result of such transactions, he will conform to the provisions of paragraphs (a) and (b) of this Rule to the same extent as though he were a member of the Association.

(d) "Non-Member Broker or Dealer"

For the purpose of this Rule, the term "non-member broker or dealer" shall include any broker or dealer who makes use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security, otherwise than on a national securities exchange, who is not a member of any securities association registered with the Commission pursuant to Section 15A of the Act, except a broker or dealer who deals exclusively in commercial paper, bankers' acceptances or commercial bills.

(e) Nothing in this Rule shall be so construed or applied as to prevent any member of the Association from granting to any other member of any registered securities association any dealer's discount, allowance, commission, or special terms.

IM-2420-1. Transactions Between Members and Non-Members*

(a) Non-members of the Association

(1) "Member"

Rule 0120(i) defines a "member" as any individual, partnership, corporation or other legal entity admitted to membership in the Association. All other persons, firms or corporations, whether or not they are brokers or dealers, are therefore to be regarded as non-members of the Association.

(2) Expelled Dealer

A dealer who has been expelled from the Association by order either of the Commission or the Association becomes a non-member of the Association from the effective date of such order.

(3) Suspended Dealer

A dealer who has been suspended from membership in the Association by order either of the Commission or the

Association is to be treated as a non-member of the Association from the effective date of such order and during the period of such suspension. At the termination of the suspension period, such dealer is automatically reinstated to membership in the Association.

(4) Broker or Dealer Registration Revoked by SEC

Revocation by the Commission of an Association member's registration as a broker or dealer automatically terminates the membership of such broker or dealer in the Association as of the effective date of such order. Under Article III, Section 4 of the By-Laws of the Corporation, a firm whose registration as a broker or dealer is revoked is thereby disqualified for membership in the Association, and from the effective date of such order, the membership of such broker or dealer in the Association is discontinued. Thereafter such broker or dealer is a non-member of the Association.

(5) Membership Resigned or Canceled

The membership of a broker or dealer in the Association is automatically terminated when the Association accepts the resignation of such member or cancels its membership in the Association under the provisions of Article III, Section 3; Article IV, Section 5; or Article XIII, Section 1, of the By-Laws. After the date of acceptance by the Association of the resignation of such member or the date of cancellation of membership by the Association, such broker or dealer is a non-member of the Association.

(b) Transactions in "Exempted Securities"

Rule 2420 shall not apply to "exempted securities," which are defined by Section 3(a)(12) of the Act. The Rule therefore does not apply to transactions in government or municipal securities if within the definition of "exempted securities." Members may join with non-members or with banks in a joint account, syndicate or group to purchase and distribute an issue of "exempted securities" and may trade such securities with non-members or with banks at different prices or on different terms and conditions than are accorded to members of the general public.

(c) Transactions on an Exchange

(1) An Association member may pay a commission to a member of a national securities exchange for executing an order upon an exchange even though the exchange member is not a member of the Association. Rule 2420 does not apply to transactions upon an exchange and, therefore, does not prohibit such transactions.

(2) Where an Association member is also a member of an exchange, an order of the Commission or of the Association expelling or suspending the firm from membership in the Association will not directly affect the business of the firm as a member of an exchange because Rule 2420 does not apply to transactions on the floor of an exchange. While an order of suspension or expulsion is in effect, the firm may continue to conduct its normal business on an exchange and participate in special offerings on an exchange without involving any violation by an Association member of Rule 2420.

(d) Over-the-Counter Transactions in Securities Other than "Exempted Securities"

(1) Participation in Underwriting or Selling Groups

An Association member may not enter into a joint account, underwriting or selling group, or join a syndicate or group, with any non-member broker or dealer or with a member of a national securities exchange, who is not also a member of the Association, for the purpose of acquiring and distributing an issue of securities. Rule 2420, paragraphs (a) and (b) would be applicable and such exchange member would be a "non-member broker or dealer" within the definition of paragraph (d) of that Rule.

(2) Sale to Bank or Trust Company

An Association member, participating in the distribution of an issue of securities as an underwriter or in a selling group, may not allow any selling concession, discount or other allowance in connection with the sale of such securities to any bank or trust company. Under Article I, paragraphs (e) and (h), of the By-Laws a bank or trust company is excluded from the definition of a broker or dealer and therefore may not receive selling concessions, discounts or other allowances from an Association member under Rule 2740.

(3) Suspended or Expelled Dealer — Group Contemplating Distribution

An Association member may not join any underwriting or selling group with a dealer who has been and is suspended from membership in the Association by order of the Commission or of the Association if at the time such group was organized, it was contemplating the distribution of an issue of securities to the public. A dealer who has been suspended from membership in the Association is to be treated as a non-member during the suspension period and Rule

2420(b)(2) prohibits members from joining with non-members in a group "contemplating the distribution to the public of any issue of securities." Even though the suspension period had terminated before the time when the securities were to be distributed, the Rule prohibits a member from joining with a non-member in a group which is contemplating the distribution of an issue of securities at a future time.

(4) Dealer Suspended or Expelled After Underwriting Group Formed

Where a dealer is suspended or expelled from membership in the Association by an order of the Commission or of the Association which became effective after such dealer had joined an underwriting group under which each underwriter had severally purchased securities from the issuer, such dealer could thereafter during the period of suspension or expulsion accept delivery from the issuer of the securities which it had underwritten prior to the effective date of such order and pay to the issuer its commitment therefor without involving any violation of the Rules by members. After the effective date of such order and during the period of suspension or expulsion, Association members could only buy the securities from or sell the securities to the dealer, who was suspended or expelled, at the public offering price, regardless of whether the Association members were also members of the underwriting or selling group for the particular issue. Rule 2420 prohibits an Association member from dealing with any non-member broker or dealer except at the same prices, for the same commissions or fees, and on the same terms and conditions as the member would deal with a member of the general public at the same time. Delivery of the securities by the issuer to the particular dealer suspended or expelled and payment therefor by such dealer would not involve a violation of Rule 2420 in this situation.

(5) Dealer Suspended or Expelled After Selling Group Formed

Where a dealer is suspended or expelled from the Association by an order of the Commission or of the Association which became effective after such dealer had joined a selling group, members of the Association, including the underwriters and other selling group members, would be prohibited by Rule 2420 from selling the securities to, or buying the securities from, such dealer at any price different from the public offering price. Members would not violate Rule 2420 by accepting from such dealer, during the period such order of suspension or expulsion was in effect, payment of the full public offering price for the securities allotted to such dealer. After the effective date of such order, Rule 2420 prohibits Association members from granting or allowing to the dealer suspended or expelled any selling concession, discount or other allowance for the securities distributed by such dealer. While such order is in effect, Association members could only deal with such dealer at the same prices, for the same commissions, fees, concessions, discounts or other allowances as the Association members would deal at the time of the transaction with a member of the general public.

(6) Commissions in Over-the-Counter Transactions with Non-Members

An Association member may not pay a commission to any non-member broker or dealer for executing a brokerage order for the Association member in the over-the-counter market. Rule 2420 requires an Association member to deal with non-members only on the same terms and conditions as are accorded by such Association member to members of the general public. On the other hand, Rule 2420 does not prohibit an Association member from executing over-the-counter an order for a non-member and charging such non-member a commission therefore. Rule 2420 merely requires that in transactions with a non-member, such non-member must be dealt with at the same prices, for the same commissions or fees and on the same terms and conditions as are by such member accorded to the general public.

(7) Members of a National Securities Exchange

In over-the-counter transactions in either listed or unlisted securities an Association member may not buy from or sell to a member of a national securities exchange who is not also a member of the Association at different prices or on different terms or conditions that are accorded by such Association member to members of the general public. Such exchange member, with respect to such over-the-counter transactions, comes within the definition of a "non-member broker or dealer" in Rule 2420(d), and Rule 2420 is therefore applicable. For the same reason an Association member may not pay a commission to an exchange member, who is not also a member of the Association, for executing a brokerage order over-the-counter.

When a dealer has been and is suspended or expelled from membership in the Association by order of the Commission or of the Association, under Rule 2420, during the period of such suspension or expulsion, an Association member may only deal with such dealer at the same prices, for the same commissions, fees, concessions, discounts or other allowances as the Association member would deal at the time of the transaction with a member of the general public.

(8) Investment Advisory Fee

When an Association member has rendered an investment advisory service for a fee to other members and thereafter is suspended or expelled from membership in the Association by order of the Commission or of the Association, another Association member may continue to pay the fee to such investment adviser provided that over-the-counter transactions in securities with such investment adviser are made only at the same price and on the same terms

as the member would deal with the public and the fee for acting as investment adviser is not used as a method of avoiding the provisions of Rule 2420.

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* "The reader should be aware of the decision of the Commission in what is commonly called the *Aetna* proceeding partially abrogating former Article III, Section 25, Securities Exchange Act Release No. 9632 (June 7, 1972), as well as the Commission's decision in the *Plaza Securities Corporation* case. Securities Exchange Act Release No. 10643 (February 14, 1974) setting aside Association disciplinary action under former Section 25. The Commission's order in first case reads, in pertinent part, that Section 25 is partially abrogated "... to the extent that it permits or has been construed to permit the Association to bar a member's receipt of commissions, concessions, discounts, or other allowances from nonmember brokers or dealers...."

Amended by SR-NASD-98-86 eff. Nov. 19, 1998.
Amended by SR-NASD-95-39 eff Aug 30, 1996.

IM-2420-2. Continuing Commissions Policy

The Board of Governors has held that the payment of continuing commissions in connection with the sale of securities is not improper so long as the person receiving the commissions remains a registered representative of a member of the Association.

However, payment of compensation to registered representatives after they cease to be employed by a member of the Association — or payment to their widows or other beneficiaries — will not be deemed in violation of Association Rules, provided bona fide contracts call for such payment.

Also, a dealer-member may enter into a bona fide contract with another dealer-member to take over and service his accounts and, after he ceases to be a member, to pay to him or to his widow or other beneficiary continuing commissions generated on such accounts.

An arrangement for the payment of continuing commissions shall not under any circumstances be deemed to permit the solicitation of new business or the opening of new accounts by persons who are not registered. Any arrangement for payment of continuing commissions must, of course, conform with any applicable laws or regulations.

This policy recognizes the validity of contracts entered into in good faith between employers and employees at the time the employees are registered representatives of the employing members. Such a contract may vest in an employee the right to receive continuing compensation on business done in the event the employee retires and the right to designate such payments to his widow or other beneficiary.

It is not to be implied that the Board suggests that members must enter into contracts with registered representatives for continuing compensation. Nor will the Board specify or rule on the terms of such contracts.

The Board has also considered the question as to whether Rule 2830(c) requires that a sales agreement be in effect in order for a dealer-member to receive continuing commissions. The Board has concluded that the sales agreement requirement is intended to apply to new business, such as the sale of a new plan or a "wire order." It is not intended that a sales agreement be required in order for a dealer to receive commissions on direct payments by existing clients to the fund or its agent, or on automatic dividend reinvestments. (See Notice to Members 74-33, Aug. 9, 1974).

Under no circumstances shall payment of any kind be made by a member to any person who is not eligible for membership in the Association or eligible to be associated with a member because of any disqualification, as set forth in Article III of the Association's By-Laws, such as revocation, expulsion, or suspension still in effect.

Amended by SR-NASD-98-86 eff. Nov. 19, 1998.