UNITED STATES OF AMERICA

Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15918

In the Matter of **DENNIS J. MALOUF**	**DIVISION OF ENFORCEMENT'S PRE-HEARING BRIEF**

TABLE OF CONTENTS

FEDERAL STATUTES

I. SUMMARY

This proceeding involves fraud and other misconduct in bond trading by Dennis Malouf, the former majority owner of a Commission-registered investment adviser, UASNM, Inc. ("UASNM"). Between January 2008 and May 2011, Malouf directed UASNM client bond trades to a Raymond James Financial Services, Inc. ("RJFS") branch that he had formerly owned. The new owner of that branch, and Malouf's friend and former co-worker, Maurice ("Moe") Lamonde (now deceased) and Malouf had entered into a secret oral agreement that Lamonde would forward Malouf almost all of the commissions from that bond trading, which amounted to approximately $1.1 million in payments to Malouf. Malouf surrendered his broker-dealer registration when he sold his RJFS branch to Lamonde at the beginning of 2008. Thus, when Malouf subsequently directed bond trading through his old RJFS branch and received transaction-based compensation thereon, he operated as an unregistered broker-dealer in violation of Section 15(a) of the Securities Act. That violation alone subjects Malouf to forfeiture of all commissions earned.

In addition, Malouf's transaction-based compensation arrangement, and the resulting conflict of interest, were not disclosed to UASNM's clients. Specifically, UASNM's website made statements about impartial investment advice, best execution, and commissions that were false or misleading in light of this secret agreement, violating the antifraud provisions of the Securities Act, Securities Exchange Act, and Investment Advisor's Act. Malouf also violated his fiduciary duty to UASNM clients by failing to seek best execution on certain U.S. Treasury and Federal Agency bond trades by directing his client bond trades to RJFS without obtaining competing bids from other broker-dealers, and as a result, paying higher markups and markdowns than could reasonably have been obtained for those trades.

In May 2011, the minority owners of UASNM voted to terminate Malouf based upon

various misconduct.[1] During ensuing litigation between UASNM and Malouf, UASNM discovered the circumstances behind Malouf's receipt of significant ongoing payments from Lamonde that were generated through Malouf's bond trading. In September 2011, UASNM and Malouf settled the litigation by, among other things, agreeing to place $850,000 in escrow to compensate UASNM clients potentially harmed by Malouf's misconduct and to pay any regulatory fines. UASNM then self-reported to the Commission in October 2011. Following an investigation that confirmed the conduct set forth above, the Commission instituted this proceeding on June 9, 2014.

During the staff's investigation, Malouf's counsel withdrew and Malouf never filed a response to the staff's Wells submission. Now armed with new counsel, Malouf has employed a scorched-earth defense strategy that does not defend his conduct, but rather purports to lay the blame on Kopczynski, UASNM's outside compliance consultant ("ACA"), RJFS, and others in an effort to swing the spotlight away from the egregious conduct of UASNM's President, CEO, majority owner, and chief bond trader, and instead focus on largely irrelevant facts like the Division's investigation, Malouf's affair with a UASNM assistant and the purported plot to oust him that arose therefrom, ACA's consulting advice, and RJFS broker-dealer policies and procedures. The reality is that this case presents a relatively straightforward scheme by Malouf: a) he received over $1 million in payments for bond trades he directed and thereby operated as an unregistered broker-dealer, b) he failed to ensure that his agreement with Lamonde was disclosed to UASNM clients, c) he failed to fulfill his fiduciary responsibilities for best execution in bond trading by simply using RJFS instead of obtaining competing bids, and d) when caught in 2010, he came up with a sham PPA.

[1] UASNM's complaint's allegations included that Malouf: represented on UASNM ADV forms that he had a college degree when he did not; allowed excessive commissions to be charged for bond sales; opposed UASNM efforts to make full disclosure through its compliance audit firm; misused his UASNM credit card and funds for over $400,000; and engaged in an affair with a subordinate.

II. RESPONDENTS AND RELATED PARTIES

A. **Respondent, Dennis J. Malouf**, age 55, was the chief executive officer, president, and majority owner of UASNM from September 2004 until May 13, 2011, when he was terminated. He is currently the sole owner and president of NM Wealth Management, LLC, an investment adviser registered with the State of New Mexico with approximately $26 million in assets under management. Malouf was a registered representative associated with RJFS from February 1999 through December 2007.

B. **Related Parties**

1. **UASNM, Inc.** is a New Mexico corporation located in Albuquerque, New Mexico that registered as an investment adviser with the Commission on September 4, 2004. UASNM, also known as "Universal Advisory Services," provides discretionary advisory services primarily to individuals, charitable organizations, and employee benefit plans. UASNM's most recent Form ADV, dated March 31, 2014, reported approximately $275 million in assets under management.

2. **Raymond James Financial Services, Inc.** is a Florida corporation formed in 1999. RJFS, through a predecessor, has been registered with the Commission as a broker-dealer since 1974, and is a member of FINRA.

3. **Maurice Lamonde** was a registered representative associated with RJFS from March 2000 until August 2011, and, from January 2008 through August 2011, he owned an Albuquerque office of RJFS. He died on April 4, 2014 at age 65 from a self-inflicted gunshot wound.

4. **Joseph Kopczynski**, age 65, is currently the chairman of UASNM's board of directors, and its chief compliance officer ("CCO"). He started the UASNM business, and sold the firm to Malouf (his then son-in-law) and Kirk Hudson in September 2004, but maintained a 1%

ownership interest. Kopczynski was UASNM's CCO from 2004 to 2010, relinquished that position to Malouf in December 2010, and resumed the position in June 2011 after Malouf was terminated.

5. **Kirk Hudson**, age 52, held a minority ownership interest in UASNM from 2008-2011 and is currently UASNM's Chief Financial Officer and Chief Investment Officer.

III. FACTS

A. Background

1. The relationship between investment adviser UASNM and a branch office of broker-dealer RJFS

In 2004, Malouf purchased a majority interest in UASNM from Kopczynski. At that time, Malouf also owned a branch office affiliated with RJFS and was a registered representative for RJFS. UASNM and the RJFS branch owned by Malouf were located in the same physical office space, with the RJFS branch renting a few cubicles in one section of the office.

In 2007, RJFS became concerned about potential conflicts and supervision risks arising from Malouf's work at UASNM, and asked him to choose between associating with UASNM or RJFS. Malouf decided to continue his advisory work at UASNM, and to stop working as a registered representative for RJFS. As a result, at the end of 2007 Malouf terminated his registration with RJFS and he transferred his RJFS customers either to UASNM or to the new owner of the RJFS branch, Lamonde. Lamonde continued to operate the RJFS office within UASNM's office space until June 2011, when UASNM required Lamonde to find a new office location as a result of his involvement in Malouf's misconduct.

B. Lamonde Secretly Paid Malouf Substantially All of the Commissions Earned on UASNM Client Bond Trades Executed Through RJFS.

1. The secret oral agreement between Malouf and Lamonde

Lamonde admitted during testimony that at the end of 2007, he entered into a secret oral agreement to pay Malouf substantially all of his commissions from UASNM bond trades for at least

three years. Specifically, Lamonde testified that he would "pass[] along all or almost all of the commissions that Malouf made from RJFS bond trading on behalf of UASNM back to Malouf." Lamonde's payments to Malouf are generally consistent with the oral agreement he described. From January 2008 through May 2011, Lamonde earned $1,074,454 in commissions from RJFS on UASNM bond trades. Lamonde paid nearly all of that, $1,068,084, to Malouf.

Lamonde has testified that Malouf would often demand payment from him shortly after executing a bond trade with him. Others also recall Malouf demanding payments from Lamonde. That conduct, along with Lamonde's payment of nearly all commissions on UASNM trades to Malouf, is inconsistent with Malouf's claim that he was paid under a purchase of practice agreement he and Lamonde signed in early 2008 calling for monthly payments.

2. Malouf directed UASNM's bond trades to Lamonde and RJFS in order to receive payments under their secret oral agreement.

UASNM had discretionary authority over client accounts, and therefore determined to make bond trades on behalf of its clients and selected the broker-dealer for trade execution. Malouf was primarily the person at UASNM who identified which bonds should be purchased for UASNM customers and would usually select the broker dealer through which bond trades were executed. Malouf has testified that from 2008 to 2011, he did not solicit bids from other broker-dealers, but selected Lamonde and RJFS to execute his UASNM client bond transactions. RJFS' Trade Blotter (Ex. 29) shows that from January 2008 to May 2011, UASNM traded $140,819,708.15 in bonds through RJFS. UASNM's trade blotter (Ex. 30) shows that between January 2008 and May 2011, it traded only $16,789,390.30 in bonds through other brokers. Thus 89% of UASNM's bond trades were made through RJFS during the relevant period.[2] *See* Ex. 207. The trades were in U.S. Treasury, Federal Agency, and municipal bonds and averaged between $39 million and $48 million

[2] The trades made through brokers other than RJFS appear to have been made by other UASNM advisers.

in total trades per year. The trades were typically made in UASNM DVP accounts at RJFS, and then allocated after the purchase to different client accounts.[3]

3. Lamonde and Malouf attempted to conceal their arrangement by belatedly executing a sham Purchase of Practice Agreement.

Malouf disputes the existence of the oral agreement with Lamonde, and instead claims that he entered into a written "Purchase of Practice Agreement" ("PPA") with Lamonde at the end of 2007 whereby he sold his branch and certain brokerage customer accounts to Lamonde. The PPA stated in relevant part that Malouf was transferring to Lamonde the "exclusive right to provide investment advice and services ... to all of Seller's accounts." The PPA further purported to attach "Exhibit A," which was to "contain the names of all of his/her existing clients." Under the PPA, "[i]n consideration of the Seller's assignment of the assigned accounts, Buyer agrees to pay Seller 40% of all commissions and securities related fees received by Buyer during the production period beginning January 2, 2008, through and including December 31, 2012."

Malouf, however, cannot produce a copy of the PPA from 2008. Nor can he produce the critical Exhibit A to the PPA that purports to identify the clients whose portfolios would provide the basis for continuing payments to Malouf. Absent Exhibit A, the PPA provides no basis for Lamonde's payments to Malouf. In fact, there is no contract.

Malouf relies upon a PPA that was notarized on June 11, 2010, two and a half years after he sold his branch to Lamonde. That written agreement surfaced only after RJFS had made repeated requests to Lamonde for a copy of the agreement in connection with its oversight of the branch.

---

[3] A "delivery versus payment" ("DVP") account enabled Malouf to buy and sell securities from RJFS even though his client's assets were custodied at other firms. For example, if Malouf bought a U.S. Treasury bond on behalf of numerous clients, he combined the order into a single purchase in a UASNM DVP account (*e.g.*, $1 million), and then allocated the purchase among various clients after the trade was executed (*e.g.*, $100,000 to one client, $50,000 to another client, etc.). UASNM had separate DVP accounts with RJFS for each of the major custodians of its clients (Schwab, Fidelity and National Advisors Trust).

Emails throughout 2009 evidence Lamonde repeatedly brushing off requests by RJFS for a copy of a sales agreement with Malouf, evidencing that the agreement did not exist at the time. In a May 15, 2009 e-mail from Lamonde to his supervisor at RJFS, Kirk Bell, Lamonde wrote in response to a request for the agreement: "I am working on the purchase agreement and will have Sarah take a look at it to make sure it's okay." On June 9, 2009, Lamonde wrote to Bell "I am still working on the agreement and will send it as soon as we finish it." Bell has and will testify that neither Lamonde nor Malouf ever told him that they had entered into a written PPA until June 2010, following the discovery of Lamonde's payments to Malouf.

Regardless of when Malouf and Lamonde executed the PPA, their arrangement *never* followed its terms, further evidencing its sham nature. Under the terms of the PPA, Lamonde would pay Malouf 40% of all commissions received on the assigned accounts during the production period of Jan 2, 2008 through 2012. However, Lamonde's actual payments to Malouf from January 2008 through April 2011 represented approximately 73% of the total branch revenue. There is no way to determine what percentage of revenue it represented for customers Malouf transferred to Lamonde because Malouf cannot produce Exhibit A and thus cannot identify which accounts were assigned, but clearly it would be an even higher percentage of revenue from only his customers. Lamonde admitted in testimony that he and Malouf did not follow the terms of the PPA and that he paid Malouf more than the terms of the PPA required. Lamonde also testified that Malouf repeatedly demanded immediate cash payments for the entire commission that had been earned from particular UASNM bond trades (which was contrary to the terms of the agreement that provided for monthly payments) forcing him to seek at least 16 cash advances from RJFS to pay Malouf.

Malouf argues that Lamonde was simply pre-paying what he owed for the branch. But this defies logic given that at the time Lamonde was borrowing against a life insurance policy, taking money from his father-in-law's bank account and running up new credit card debt without telling his

wife. He was in no position to be voluntarily pre-paying tens of thousands of dollars to Malouf on a monthly basis.

This failure to follow the terms of the PPA is further evidence that the written agreement was a sham. Regardless, however, the PPA provides no defense to Malouf because it is undisputed that he was paid transaction-based compensation from commissions generated by his trading and those payments were not disclosed to UASNM clients.

4. Malouf failed to disclose Malouf's receipt of commissions from Lamonde and the resulting conflicts of interest in directing client bond trades to RJFS.

a. UASNM's Forms ADV

Malouf admits that UASNM's Forms ADV filed from February 2008 through March 2011 failed to disclose his arrangement with Lamonde and the resulting conflicts of interest. Certain relevant disclosures in UASNM's Forms ADV Part II and Part 2A include:

- Item 12 of UASNM's Form ADV Part II, dated April 12, 2010, affirmatively represented that "employees of UASNM are not registered representatives of Schwab, RJFS or Fidelity, and do not receive any commissions or fees from recommending these services." Given Malouf's receipt of transaction based compensation from Lamonde for executing bond trades through RJFS, this statement was misleading.

- Item 12 of UASNM's Forms ADV from February 2008 through March 2011 all made misleading disclosures relating to its best execution process by suggesting that numerous factors were being considered in selecting a broker and that the broker chosen was not based "upon any arrangement between the recommended broker and UAS[NM]." In reality, Malouf was using RJFS to execute the overwhelming majority of UASNM's bond trades, thereby profiting from his secret agreement with Lamonde.

- Items 8 and 9 of UASNM Forms ADV Part II, dated February 4, 2008, August 20, 2008, and December 1, 2008, disclosed that *employee(s)* of UASNM were or may be registered representatives of RJFS and could receive commissions. However, these disclosures related to another UASNM advisory representative. UASNM made no disclosure that Malouf had sold his RJFS branch to Lamonde, or that Malouf (who was no longer a registered representative for RJFS) was receiving continuing payments of any kind from Lamonde. Therefore, UASNM clients were not advised of the conflict of interest in executing their bond trades through Lamonde and RJFS.

- Items 8 and 9 of UASNM's Forms ADV Part II, dated October 1, 2009, January 1, 2010, and April 12, 2010, removed the prior disclosure regarding the UASNM employee's status as a registered representative of RJFS but were otherwise the same as the prior versions, *i.e.*, they made no disclosures regarding Malouf's arrangement with Lamonde.

- Items 10 and 12 of UASNM's Form ADV Part 2A, dated March 2011, finally disclosed that Malouf had sold his interest in a RJFS branch in exchange for a series of payments, and that an incentive may exist for UASNM to utilize RJFS to generate revenue that may be utilized to make payments to Malouf. However, even this disclosure was inadequate in that it generally referenced revenue generation for RJFS, rather than Malouf's receipt of substantially all of the *commissions* from UASNM's client bond trading.

b. Malouf concealed his arrangement with Lamonde from others at UASNM.

Malouf, Kopczynski, Hudson, and outside compliance consultant ACA each were involved to varying degrees in preparing UASNM's Forms ADV from 2008 through May 2011. Malouf, as the architect of the arrangement with Lamonde and recipient of the payments, bore primary responsibility to either prepare UASNM's disclosures regarding any potential conflict, or to ensure that others at the firm had sufficient knowledge to prepare such disclosures. He did neither. Malouf performed at least a cursory review of each Form ADV, focusing on disclosures relating to himself and RJFS. He admits that as UASNM's president, he was ultimately responsible for the ADV, and that he understood it was his responsibility to make sure the disclosures relating to him personally were accurate.

Malouf attempts to deflect responsibility by arguing that he delegated the Form ADV preparation and review work to Kopczynski, Hudson, and ACA, and each was fully aware of his arrangement with Lamonde. But Kopczynski, Hudson, and ACA deny this. And Paula Calhoun, the UASNM employee who kept Malouf's books, will testify that Malouf instructed her never to share any of that information with anyone at UASNM and threatened to fire her if she did.[4]

[4] Ms. Calhoun will testify that at one time she felt physically threatened when Malouf issued instructions regarding his personal account while opening and closing a switchblade knife in her cubicle.

In 2008, Kopczynski and Hudson understood that Malouf had sold his RJFS branch to Lamonde, but they were not aware of the terms of that sale, or that Lamonde was making ongoing payments to Malouf. Hudson learned in 2009 that Malouf was receiving ongoing payments from Lamonde, but he assumed that such payments were being made in connection with some type of financing or pre-arranged installment payment schedule. Hudson and Kopczynski testified that they did not suspect that Malouf was receiving *ongoing transaction-based compensation* from Lamonde until sometime in late 2010. Hudson became very concerned about Malouf's receipt of payments in the fall of 2010 when he learned that Malouf had questioned RJFS' decision to write down the commission charged on a particular bond trade.[5] Hudson thought it was odd that Malouf would be concerned about a commission write down because that money would be going to Lamonde.

Finally, Michael Ciambor of ACA will testify that Malouf concealed his receipt of ongoing payments from Lamonde until at least June 2010. Each year, ACA performed an on-site exam of UASNM, and used that process to recommend potential updates or changes to UASNM's Form ADV. Ciambor remembers specifically discussing removing the RJFS disclosures with Malouf in 2008, after Malouf told him he sold his branch. In those discussions, Malouf repeatedly assured him that he had *no* ongoing relationship with RJFS, and that he had severed all ties. However, in June 2010, Malouf admitted to ACA in an interview that he was continuing to receive ongoing payments from Lamonde (though Malouf continued to falsely characterize the *nature* of the payments as being made under the PPA). Ciambor believes that he was misled by Malouf.

5. Malouf caused UASNM to distribute advertisements that included misleading representations regarding the firm's independence.

Between 2008 and 2011, UASNM's website made the following statements:

[5] A September 17, 2010 e-mail exchange between Kirk Bell and Eva Skibicki at RJFS reflects that a 1 point commission on a $3.8 million bond trade was reduced to half a point per a discussion between Bell and Skibicki.

- "Uncompromised Objectivity Through Independence: UAS[NM] is not owned by any 'product' company nor compensated by any commissions. This allows us to provide investment advice void of conflicts of interest. UAS[NM] may place trades through multiple sources, ensuring that best cost/service/execution mix is met for clients."

- "We do not accept commissions and we vigorously maintain our independence to ensure absolute objectivity drives our decisions in managing our clients' portfolios."

Given Malouf's agreement with Lamonde to receive commission payments from UASNM client transactions through RJFS, these statements were materially false or misleading because UASNM's purported independence was compromised by Malouf's undisclosed incentives to place trades through RJFS. Malouf had in fact accepted commissions through Lamonde. Malouf caused UASNM's deceptive advertising because he was the lead salesman for the firm and was familiar with the contents of the website, including the statements about commissions and independence. Moreover, as head of the firm's marketing and its CEO, Malouf had responsibility for ensuring that the information on the website was accurate.

6. Malouf acted as an unregistered broker-dealer.

Between 2008 and 2011, Malouf was not registered as a broker-dealer or associated with a registered broker-dealer. However, he was involved in virtually every aspect of effecting bond transactions on behalf of UASNM clients. Malouf solicited and met with clients and made investment recommendations. He was a member of UASNM's Investment Committee that evaluated clients' investment options. Under UASNM's discretionary authority, Malouf made the majority of decisions regarding specific client bond transactions. And as described above, under his secret agreement with Lamonde, Malouf received substantially all of the transaction-based compensation generated by the UASNM client trades placed through RJFS.

7. Malouf failed to seek best execution on bond trades.

In various communications from 2008 through 2011, Malouf told Hudson, Kopczynski, and ACA that he often obtained three competing bids in order to determine the best price prior to making bond trades. However, Malouf has been unable to locate any records reflecting his seeking multiple bids, and he has now admitted that he did not obtain them. Instead, between 2008 and 2011, Malouf used Lamonde's branch of RJFS to execute bond trades on behalf of UASNM clients. In the lawsuit with UASNM, Malouf was asked: "[F]or best execution, couldn't you shop around and get a lower commission for your client?" and he answered, "I think that's possible, yeah. I guess you probably could. But the fact is that this whole thing was to give me money to put into the California office ...." Malouf only got money on his trades under his agreement with Lamonde if he traded through RJFS. Because Malouf failed to obtain competing bids, Malouf violated his fiduciary duty to seek best execution. As a result, UASNM clients often paid higher commissions than were necessary.

The Division's expert in this matter, Dr. Gary Gibbons, identified 81 trades in Treasury and Federal Agency bonds during the period in question. Dr. Gibbons excluded corporate and municipal bond trades to focus on only the most liquid and marketable bonds. The trades represented $95,954,806 in principal amount and generated $833,798 in commissions which, on a dollar weighted average basis, is 87.28 basis points or 0.8728%. Dr. Gibbons utilized his experience and other sources to opine that Treasury and Agency bond trades such as these should have been subject to commissions in the range of 10 to 70 basis points. By comparing what was actually paid in commissions to a range of reasonable commissions, Dr. Gibbons calculated that UASNM clients paid between $442,106 and $693,804 in excess commissions.[6]

[6] Dr. Gibbons has also opined that Malouf engaged in several repetitive short term bond trades that lost money for his clients. This non-standard industry practice is further evidence of Malouf's scheme to put his interests ahead of his clients and the conflict of interest that led him to execute bond trades through RJFS even where this may not have been in the best interests of UASNM clients.

Dr. Gibbons' conclusions are remarkably similar to the conclusions reached by Steven McGinnis. Mr. McGinnis is a consultant to Capital Forensics that was hired by UASNM in its lawsuit against Malouf to evaluate the evidence related to Malouf's bond trading and opine as to what would be the compliance response to UASNM. Mr. McGinnis found that the UASNM bond trades through RJFS that he reviewed were subject to an average markup or markdown of 107 and 77 basis points respectively, when a reasonable markup/markdown would have been on the order of 40 basis points, resulting in excess commissions of between $644,619.59 and $932,279.09.[7,8]

Malouf's own designated expert, Jerry DeNigris, found that UASNM customers' bond trades incurred a similar average commission of 88.9 basis points. Unlike Dr. Gibbons and McGinnis, DeNigris offers no opinion as to what a reasonable commission would be on the bond trades at issue or whether UASNM customers paid excessive commissions.[9] Malouf offers no expert to opine that the commissions he charged were reasonable.

Malouf and Lamonde also both testified that they would never charge more than 100 basis points on a bond trade. Yet, the evidence will show that multiple bond trades run through RJFS were subject to commissions in excess of 1%. Malouf's own proffered expert, DeNigris, includes dozens of bond trades through RJFS that exceeded this purported 1% limit in his Tab 1, including two trades with commissions of twice that amount.

---

[7] McGinnis' excess commission number is larger than Dr. Gibbons' in part because McGinnis considered all bond trades through UASNM, while Dr. Gibbons more conservatively considered only U.S. Treasury and Federal Agency trades.

[8] Mr. McGinnis recommended that UASNM self-report to the SEC, noting that "since 1989, I have never seen this problem before. I have seen conflict of interest, but not of this magnitude."

[9] DeNigris states in his rebuttal report that the "RJFS Mark-up guidelines are typical for Broker-Dealers in the Securities Industry" and "[n]one of the Agency or Treasury bond transactions in this matter exceeded the RJFS mark-up policy." But he says nothing about what appropriate mark-ups were for a broker-dealer for these type of bond trades (which were substantially larger than typical retail bond trades by individual customers), let alone an investment advisor subject to a fiduciary best execution obligation. The RJFS guidelines DeNigris refers to set forth enormous maximum "retail" mark-ups of up to 300 basis points, an amount 3 times what Malouf himself says is the maximum that should be paid on bond transactions like his.

IV. ARGUMENT

A. Malouf Acted as an Unregistered Broker-Dealer and Violated Section 15(a)(1) and 15C(a)(1)(A) of the Exchange Act.

Section 15(a)(1) of the Exchange Act makes it "unlawful for any [unregistered or unaffiliated] broker or dealer ... 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 security (other than an exempted security ...) unless such broker or dealer is registered with the Commission in accordance with Section 15(b) of the Exchange Act. 15 U.S.C. § 78o(a)(1). Scienter is not required for a violation of this provision. *SEC v. Martino*, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003). Similarly, Section 15C(a)(1)(A) of the Exchange Act makes it unlawful for any unregistered broker to effect any transaction in any government security and does not require scienter. 15 U.S.C. § 78oC(a)(1)(A).

1. Malouf acted as a broker.

Section 3(a)(4) of the Exchange Act defines a broker as "any person engaged in the business of effecting transactions in securities for the account of others."[10] The phrase "engaged in the business" connotes "a certain regularity of participation in securities transactions at key points in the chain of distribution." *Massachusetts Fin. Serv., Inc. v. Sec. Investor Prot. Corp.*, 411 F. Supp. 411, 415 (D. Mass. 1976); *see also SEC v. Kramer*, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011). Broker activity can be evidenced by such things as regular participation in securities transactions, receiving transaction-based compensation or commissions (as opposed to salary), a history of selling the securities of other issuers, involvement in advice to investors and active recruitment of investors. *See, e.g., SEC v. George*, 426 F.3d 786, 797 (6th Cir. 2005); *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 12-13 (D.D.C. 1998).

[10] It is not disputed that the bond trades at issue were securities and that Treasury bonds are government securities. Ex. 1, Stipulations No. 1-3. The use of interstate commerce is also not disputed. *Id.*, No. 5.

In this case, Malouf was engaged in significant aspects of the business of effecting transactions in securities, including the bond transactions described above, for the accounts of UASNM clients. Malouf's regular business involved meeting with and actively soliciting clients, providing advice to investors as to the merits of securities, and receiving substantially all of the transaction-based compensation generated by UASNM client bond trades executed through RJFS. Malouf has stipulated to most of this broker conduct. *See* Ex. 1, Stipulations 4-8, and 11. He claims in his defense only that he did not receive "commissions" because the commissions on the bond trades he made were paid to him through Lamonde. But even if this defense is credited, which it should not be, the Division's other evidence will overwhelmingly demonstrate that Malouf acted as an unregistered broker. *See Bandimere*, ID Release No. 507, 2013 WL 5553898, at *52, 82 (October 8, 2013) (finding that "[e]ven assuming [Respondent] did not receive transaction based compensation, the evidence that he acted as an unregistered broker is overwhelming," where Respondent was found to have distributed investor returns, received compensation based on the size of each investment, and advised investors on the merits of investments).

While the Division can establish that Malouf acted as a broker without evidence that he received commissions, the evidence is strong that he did. Beyond the undisputed fact that Lamonde was paying Malouf from the commissions he received from RJFS is evidence that: (1) Lamonde referred to the payments he made to Malouf as "commissions" on his 2008, 2009, and 2010 tax returns; (2) Lamonde provided Malouf with IRS Form 1099s for the payments just as Malouf had provided his brokers with Form 1099s prior to selling the branch to Lamonde; (3) Malouf's draft tax returns for 2008 and 2009 continued to state that Malouf was operating as an "investment broker" for RJFS (the same as his draft 2005-2007 tax returns)[11] and continued to deduct a variety of expenses relating to Malouf's brokerage business including car, telephone, dues, and legal expenses;

[11] The last tax return Malouf actually filed was for 2004; he has not filed his 2005-2013 tax returns.

(4) Malouf's profit and loss statement for 2005-2010 listed "Income-Raymond James" in the same fashion for each of those years; (5) payments from Lamonde roughly equaled Lamonde's payments from RJFS; and (6) Malouf repeatedly demanded to receive commission payments for particular trades.

Malouf was not registered with the Commission as a broker or dealer between 2008 and 2011. *See* Ex. 1, Stipulation 12. Accordingly, he acted as an unregistered broker of securities and government securities. Malouf's unregistered brokerage activities resulted in him receiving illegal transaction-based compensation from Lamonde of $1,174,048.

2. Malouf's purported written agreement with Lamonde is no safe haven.

Malouf claims to have entered into a written Purchase of Practice Agreement with Lamonde on January 2, 2008 that insulates him from Section 15 liability. But that is not the case. First, the evidence overwhelmingly refutes Malouf's claim that he and Lamonde entered into a written agreement in 2008 under which Lamonde would pay Malouf 40% of commissions. No other witness will attest to the existence of such an agreement. There is no contemporaneous documentary evidence in the files of Lamonde, Malouf, UASNM, RJFS, or ACA evidencing such an agreement. No Exhibit A has ever been found. Payments to Malouf were wholly inconsistent with the terms of the PPA."[12] And Lamonde himself, when confronted with e-mails and other evidence indicating that the agreement was not completed until June 2010, acknowledged that there

[12] In an effort to find some way to come close to the 40% number in the PPA, Malouf's purported expert Jerry DeNigris creatively calculates that Malouf received 44.59% of the RJFS branch gross commissions and 57.35% of branch retained commissions between 2008 and 2010, but these calculations do not match the plain terms of the PPA. First, the PPA clearly refers to commissions "received by buyer" (not gross commissions), making any comparison to gross commissions irrelevant. Second, in order to reduce the percentage for both calculations, DeNigris uses the total branch commissions for *all* representatives in Lamonde's branch (including Lamonde's own former clients) rather than just the subset of clients which Malouf transferred to Lamonde— the inclusion of all branch accounts is inappropriate because the PPA states that Malouf was only transferring his own clients (*i.e.* the client accounts where he was listed as the financial advisor), which of course makes sense. Without Exhibit A to the PPA listing the specific accounts transferred, DeNigris has no basis to make these calculations.

was no signed agreement until that time. The agreement that was finally produced, after repeated requests from RJFS, reflects that it was notarized in June of 2010, and clearly appears to have been back-dated by Malouf and Lamonde.

Moreover, even if the PPA that was finally produced in 2010 had been signed in 2008, as Malouf claims, and provided for Lamonde's payments to Malouf, it would not excuse Malouf's broker activities. Malouf appears to intend to rely on FINRA interpretive memo 2420-2, Continuing Commissions Policy ("IM-2420-2") to attempt to avoid unregistered broker-dealer liability. IM-2420-2 provides that "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," provided also that the unregistered representative does not solicit new business or open new accounts. Ex. 2.[13]

In November 2008, the Securities Industry and Financial Markets Association ("SIFMA"), an organization representing hundreds of securities firms, banks, and asset managers, requested guidance regarding NASD IM-2420-2.[14] Ex. 3. In the no-action request, SIFMA "suggest[ed] that the term 'retiring representative' include not only those who retire from a member firm but also those who die unexpectedly, become totally disabled or leave the securities industry." *Id.* at 1 n.2.[15] SIFMA further sought to update guidance found in three prior letters and "describe the terms under which a Firm may pay compensation" to a retiring representative. *Id.* at 2. Those terms included, among other things:

---

[13] One of Respondent's experts has stated that an oral contract may be a bona fide contract under IM-2420-2. While the Division disputes this, it is irrelevant because Malouf has testified twice that the agreement he is relying on with regard to his sale of the RJFS branch to Lamonde is the written agreement, Exhibit 57, and that a written agreement was required by RJFS.

[14] FINRA was then called NASD.

[15] Retiring Representative is a term that arose from the various requests for relief from liability for acting as an unregistered broker upon a registered representative ceasing to act as a broker dealer.

- The Firm must establish parameters for a reasonable period of time, not to exceed five years, following retirement and a percentage scale regarding the sharing of commissions;
- The shared commissions be limited to commissions derived from accounts held for continuing customers of the retiring representative;
- The retiring representative must comply with applicable federal and state securities statues and regulations;
- "The retiring representative must sever association with the Firm and with any ... investment adviser ... and is not permitted to be associated with any other broker, dealer, ... investment adviser or investment company, during the term of his or her agreement."
- "The retiring representative must certify at least annually to the Firm that he/she has adhered to the requirements and conditions of the agreement."

Id. at 3, 4 of 5. No-action relief was granted and the SIFMA letter was published shortly after Malouf's sale of his branch to Lamonde and was in effect as interpretive guidance of IM-2420-2 during the period of time Malouf was receiving ongoing payments from Lamonde. Moreover, the SIFMA letter explicitly references three prior no-action letters, issued prior to Malouf's sale, that contain similar requirements, most notably that the retiring representative sever association with any broker, dealer, or investment adviser. *See* Ex. 4.[16] This requirement is designed to prevent precisely the type of self-dealing Malouf engaged in here.

Malouf cannot point to a bona fide contract that might help provide a safe haven under IM-2420-2, but even if he could, his failure to retire, failure to comply with the terms of that contract, failure to seek best execution, continued involvement in broker dealer activities, association with an investment advisor, and failure to annual certify to RJFS that he adhered to the conditions of the agreement, cannot satisfy IM-2420-2. Nor could Malouf have reasonably believed that he did.

B. Malouf Violated Sections 206(1) and (2) of the Advisers Act.

Sections 206(1) and 206(2) of the Advisers Act prohibit an investment adviser from using

[16] FINRA Interpretive Letters prior to Malouf's sale of the RJFS branch to Malouf also instructed selling brokers that they could not "solicit new business, open new accounts, or service the accounts generating the continuing commission payments." *See, e.g.*, Ex. 5.

instruments of interstate commerce to employ any device, scheme, or artifice to defraud, or to engage in any transaction, practice, or course of business that operates as a fraud or deceit upon any client or prospective client. Section 206(1) requires scienter; Section 206(2) does not. *Steadman v. SEC*, 603 F.2d 1126, 1134-35 (5th Cir. 1979). Scienter may be established by showing extreme recklessness. *See SEC v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992).

Section 206 establishes a federal fiduciary standard for investment advisers, including the obligations to exercise the utmost good faith in dealing with their clients, to disclose to their clients all material facts, and to employ reasonable care to avoid misleading their clients. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963). Investment advisers have a duty "to eliminate, or at least to expose, all conflicts of interest which might incline [them] – consciously or unconsciously – to render advice which was not disinterested." *Id.*, 375 U.S. at 194. Information is "material" if there is a substantial likelihood that a reasonable person would consider the information important. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). Specifically, the existence of a conflict of interest is a material fact which an investment adviser, as a fiduciary, must disclose to a client. *Vernazza v. SEC*, 327 F.3d 851, 859 (9th Cir. 2003).

Malouf was the CEO and President of UASNM, a registered investment advisor, and he was an advisory representative for UASNM. As such, he was an investment advisor as defined by Section 202(a)(11) of the Advisers Act (an investment adviser is a "person who, for compensation, engages in the business of advising others ... as to the value of securities or as to the advisability of investing in, purchasing, or selling securities ...") and was, accordingly, bound by Section 206.

1. Failure to disclose Malouf's secret commission arrangement with Lamonde

As noted in Section III.B.3 and 4, above, Malouf failed to disclose his secret, transaction-based compensation agreement with Lamonde in both UASNM's website and its Forms ADV. The website's statements about independence, commissions, conflicts of interest, and best execution, and

the lack of disclosure of Malouf's continuing relationship with the RJFS branch on UASNM's Forms ADV were materially misleading to UASNM clients. The April 2010 Form ADV affirmatively misrepresented that "employees of UASNM are not registered representatives of Schwab, RJFS or Fidelity, and do not receive any commissions or fees from recommending these services."

As CEO and majority owner of UASNM and the sole person at UASNM aware of the scheme, Malouf had a responsibility to ensure that this potential conflict was disclosed in UASNM's Form ADV and on its website, but he failed to do so. He did not tell anyone at UASNM or ACA about his secret oral agreement with Lamonde, and he admits that the RJFS disclosures (particularly those relating to him) were his responsibility. Finally, the numerous actions described above demonstrate that Malouf acted with scienter by deliberately misleading others regarding his agreement with Lamonde and his best execution process for bond trades.

2. Failure to seek best execution

Malouf failed to seek best execution for UASNM's clients with regard to certain U.S. Treasury and Federal Agency bond trades between 2008 and 2011. One of an investment adviser's "basic duties" under Section 206 is to ensure that its clients' transactions are executed "in such a manner that the client's total cost or proceeds in each transaction is the most favorable under the circumstances." *Kidder, Peabody & Co., Inc.*, Rel. No. 34-8426, 1968 WL 87653, at *4 (Oct. 16, 1968) (settled). Failure to seek best execution or to conduct best execution review constitutes a violation of Section 206 of the Advisers Act. *See Jamison, Eaton & Wood, Inc.*, Rel. No. IA-2129, 2003 WL 21099127, at *1 (May 15, 2003) (settled). An adviser's failure to seek best execution for clients can be established by showing that clients paid higher commissions with no apparent corresponding benefit. *Id.* at *5, 6.

Between 2008 and 2011, as a matter of course, Malouf selected Lamonde's branch of RJFS to execute bond trades on behalf of UASNM clients, and failed to obtain any competing bids. As a result, Malouf did not seek best execution for client bond trades. Malouf's failure to obtain competing bids caused UASNM's clients to pay markups/markdowns that were significantly higher than industry norms on dozens of U.S. Treasury and federal agency bond trades. Dr. Gary Gibbons, the Division's outside expert, has concluded that UASNM failed to seek best execution for its U.S. Treasury and federal agency bond trades, and has estimated that UASNM's failures to seek best execution for bond trades caused UASNM clients to pay between $442,106 and $693,804 in excess commissions.[17]

Malouf's claim that he *always* obtained best execution through RJFS is also belied by evidence that another UASNM advisor, Matthew Keller, was able to get lower bond prices from other brokers or have RJFS lower its price to meet prices offered by other brokers.

C. Malouf Violated Section 17(a)(1) and 17(a)(3) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5(a) and 10b-5(c) thereunder.

Section 17(a) of the Securities Act prohibits employing a fraudulent scheme, obtaining money or property through material misrepresentations or omissions, or engaging in a course of conduct that acts as a fraud or deceit in the offer or sale of a security. Section 10(b) of the Exchange Act and Rule 10b-5 thereunder prohibit any person from employing a fraudulent scheme, making misstatements or omissions of material fact, or engaging in any practice or course of business that operates as a fraud upon any person in connection with the purchase or sale of a security. Scienter

[17] With no investment advisory experience, Mr. Malouf's best execution expert (Alan Wolper) boldly proclaims that seeking best execution involves only periodic after-the-trade review. Dr. Gibbons strongly disagrees with that opinion and will testify to the common-sense conclusion that the only way to obtain the best price for your client is by seeking bids at the time of trade rather than reviewing trades months after they occurred.

need not be demonstrated to establish a violation of Section 17(a)(2) or Section 17(a)(3) of the Securities Act. *Aaron v. SEC,* 446 U.S. 680, 702 (1980).

"To be liable for a scheme to defraud, a defendant must have 'committed a manipulative or deceptive act in furtherance of the scheme.'" *SEC v. Fraser*, 2010 U.S. Dist. LEXIS 7038, at *23 (D. Ariz. Jan. 28, 2010), *quoting Cooper v. Pickett*, 137 F.3d 616, 624 (9th Cir. 1997). The defendant "must have engaged in conduct that had the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme." *See Simpson v. AOL Time Warner, Inc.*, 452 F.3d 1040, 1048 (9th Cir. 2006), *vacated on other grounds by Simpson v. Homestore.com,* 519 F.3d 1041, 1041-42 (9th Cir. 2008).

Malouf is liable as a primary violator under a theory of scheme liability in connection with UASNM clients' purchases and sales of various bonds. The scheme and fraudulent course of business was Malouf's undisclosed agreement with Lamonde to receive substantially all the commissions from UASNM's bond trading executed through Malouf's former RJFS branch. UASNM's clients would have considered the agreement material because it resulted in a significant conflict of interest impacting Malouf's choice of a broker-dealer to execute client bond trades, and it caused UASNM clients (*i.e.*, the purchasers and sellers) to pay additional markups/markdowns in connection with their purchases and sales of those bonds. Malouf's manipulative or deceptive acts in furtherance of the scheme included receipt of at least 70 different commission payments from Lamonde between 2008 and 2011 totaling over a million dollars and misleading other members of UASNM management, as well as UASNM's compliance consultant, about:

- The actual terms of his agreement with Lamonde;
- The legitimacy of the purported PPA and its execution date; and
- His purported three-bid process for bond trades.

D. Malouf Violated Section 207 of the Advisers Act.

Section 207 of the Advisers Act makes it unlawful for any person willfully to make any untrue statement of a material fact or omit to state any material fact required to be stated in a report filed with the Commission, including Form ADV. *Vernazza*, 327 F.3d at 858. The materiality standard for Section 207 claims is essentially the same as for violations of Section 206. *Id.* at **12-13. Section 207 does not require a showing of scienter. *Jamison*, 2003 WL 21099127, at *6. Item 12.B of Form ADV Part II (and Item 12.A of the new Part 2A) requires an investment adviser to disclose the factors considered in selecting brokers and determining the reasonableness of their commissions. An investment adviser can violate Section 207 by failing to adequately disclose the factors considered in selecting a broker or by misstating that it would seek to obtain best execution. *See Parnassus Invs.*, Release No. 131, 1998 WL 558996 at *21 (Sept. 3, 1998) (initial decision); *Jamison*, Release No. IA-2129, 2003 WL 21099127, at *6.

In this case, as outlined above in Section III.B.4., the disclosures in UASNM's Forms ADV between 2008 and 2011, for which Malouf admits ultimate responsibility, were materially misleading or false with respect to broker selection and trading commissions.

E. UASNM Violated Section 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder, and Malouf Aided and Abetted and Caused that Violation.

Advisers Act Section 206(4) prohibits a registered investment adviser from engaging "in any act, practice, or course of business which is fraudulent, deceptive, or manipulative[,]" including those defined by the Commission. Neither scienter nor proof of client harm is required. *See, e.g., SEC v. C.R. Richmond & Co.*, 565 F.2d 1101, 1105 (9th Cir. 1977). Rule 206(4)-1(a)(5) prohibits a registered investment adviser from publishing, circulating, or distributing advertisements containing untrue statements of material facts, or that are otherwise false or misleading. A website can be considered an advertisement for purposes of the rule. *See Fields*, Release No. 474, 2012 WL

6042354 at *12 (Dec. 5, 2012) (initial decision finding that misleading representations on an adviser's website constituted an advertisement). UASNM violated Rule 206(4)-1(a)(5) by making statements about independence, commissions, conflicts of interest, and best execution which were false or misleading as a result of Malouf's secret commission agreement with Lamonde.

To establish aiding and abetting liability, the Commission must show: "that a principal committed a primary violation; (2) that the aider and abettor provided substantial assistance to the primary violator, and (3) that the aider and abettor had the necessary 'scienter'- *i.e.*, that she rendered such assistance knowingly or recklessly." *Graham v. S.E.C.*, 222 F.3d 994, 1000 (D.C. Cir. 2000); *see also First Interstate Bank of Denver v. Pring*, 969 F.2d 891, 898 (10th Cir. 1992), *overruled on other grounds by Central Bank of Denver, N.A v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). The Tenth Circuit applies a "recklessness" standard for aiding and abetting liability (*see First Interstate Bank*, 969 F.2d at 903), and the D.C. Circuit requires a showing that the aider and abettor acted with "extreme recklessness" (*see Howard v. SEC*, 376 F.3d 1136, 1143 (D.C. Cir. 2004)).

Negligence is sufficient to establish liability for causing a violation when a person is alleged to have caused a primary violation that does not require scienter. *KPMG Peat Marwick*, Release No. 34-43862, 2001 WL 34138819 (Jan. 19, 2001), *aff'd, KPMG v. SEC*, 289 F.3d 109 (D.C. Cir. 2002).

Here, Malouf aided and abetted and caused UASNM's false and misleading website statements by failing to disclose his receipt of payments from Lamonde.

F. In the Alternative, Malouf Aided and Abetted and Caused UASNM's Violations of Sections 206(1), 206(2) and 207 of the Advisers Act.

In the alternative to primary liability for violating Sections 206(1), 206(2) and 207 of the Advisers Act, Malouf may also be found liable for aiding and abetting UASNM's violations of those

section. Malouf clearly had knowledge of the ADV disclosures, substantially assisted with their preparation, and was extremely reckless in not disclosing his secret agreement with Lamonde.

V. RELIEF REQUESTED AGAINST MALOUF

The Division requests findings of liability for the violations alleged and an order to cease and desist from violating Section 17(a) of the Securities Act, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1), (2), and (4) and 207 of the Advisors Act. Industry bars should be imposed against Malouf for willful violations under Section 15(b) of the Exchange Act, Section 203(f) of the Advisers Act, and/or Section 9(b) of the Investment Company Act.

Respondent should be ordered to disgorge the $1,174,048 in payments received from Lamonde plus prejudgment interest under Section 8A of the Securities Act, Section 21C of the Exchange Act, Section 203(k) of the Advisers Act, and/or Section 9(e) of the Investment Company Act.[18] Respondent should be ordered to pay a civil penalty under Section 8A of the Securities Act, Section 21B of the Exchange Act, Section 203(i) of the Advisers Act, and/or Section 9(d) of the Investment Company Act. Penalties may be imposed up to $150,000 per violation for violations occurring after March 3, 2009, and $130,000 per violation for violations occurring before that date. *See* Section 21(d)(3) of the Exchange Act. Finally, the Administrative Law Judge should order the creation of a Fair Fund for the benefit of defrauded investors under Section 308 of the Sarbanes-Oxley Act.

[18] The Division would, however, credit Respondent with an offset for the $506,083.74 escrowed from his settlement with UASNM and returned to UASNM investors.

Respectfully submitted this 7th day of November, 2014.

Stephen C. McKenna
Dugan Bliss
John H. Mulhern
Counsel for the Division
1961 Stout St., Ste. 1700
Denver, CO 80294
Phone: 303-844-1000

SERVICE LIST

On November 7, 2014, the foregoing **DIVISION OF ENFORCEMENT'S PRE-HEARING BRIEF** was sent to the following parties and other persons entitled to notice:

Office of the Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557

Honorable Jason S. Patil
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E
Washington, DC 20549-2557

Stephen C. McKenna
Dugan Bliss
John H. Mulhern
Denver Regional Office
Securities and Exchange Commission
1801 California St., Suite 1500
Denver, CO 80202

Burt Wiand, Esq.
Robert K. Jamieson, Esq.
Wiand Guerra King
5505 W. Gray Street
Tampa, FL 33609
Attorneys for Respondent
(By e-mail)

Bill Chappell, Jr.
James B. Boone
Chappell Law Firm, P.A.
6001 Indian School Rd., NE, Suite 150
Albuquerque, NM 87110
Attorneys for UASNM, Inc.
(By e-mail)

Marla J. Pinkston
Senior Trial Paralegal

EXHIBIT 1

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15918

In the Matter of **DENNIS J. MALOUF**	**DIVISION OF ENFORCEMENT AND RESPONDENT DENNIS J. MALOUF'S SUBMISSION OF JOINT STIPULATIONS**

The Division of Enforcement ("Division") hereby submits its joint stipulations with Respondent Dennis J. Malouf:

1. United States Treasury, agency and municipal bonds traded on behalf of UASNM clients from 2008 through 2011 were "securities" as defined by Section 2(a)(1) of the Securities Act of 1933 and Section 3(a)(10) of the Securities Exchange Act of 1934 ("Exchange Act").

2. United States Treasury and municipal bonds are "exempted securities" as defined by Section 3(a)(12)(A)(i) and (A)(ii) of the Exchange Act, but municipal bonds are not deemed to be "exempted securities" for the purposes of Section 15 of the Exchange Act (*see* Section 3(a)(12)(B)(ii)).

3. United States Treasury bonds are "government securities" as defined by Section 3(a)(42) of the Securities Act.

4. From 2008 to May 2011, Malouf was one of several investment advisers at UASNM who provided advice regarding investments on behalf of UASNM customers and

transactions were carried out on behalf of UASNM customers pursuant to the advice of Malouf and other UASNM advisers.

5. In providing investment advice to UASNM customers, Malouf and other UASNM advisers utilized instruments of interstate commerce, such as telephones, electronic mail, and regular mail.

6. During 2008 to May 2011, Malouf was CEO and President of UASNM, a registered investment adviser, and he was an advisory representative for UASNM.

7. During 2008 to May 2011, Malouf solicited clients on behalf of UASNM.

8. Malouf was primarily the person at UASNM who identified which bonds should be purchased for UASNM customers.

9. At times, other UASNM advisers also identified bonds to be purchased for UASNM customers.

10. Malouf also relied upon the broker-dealers that executed bond transactions to achieve best execution.

11. During 2008 until his termination on May 13, 2011, Malouf served on UASNM's Investment Committee along with others including Kirk Hudson, Joseph Kopczynski, and Peter Lehrman.

12. From 2008 to May 2011, Malouf was not registered with the Commission as a broker or dealer and he was not associated with a broker or dealer.

13. On approximately January 1, 2008, Malouf sold a Raymond James Financial Services ("RJFS") broker-dealer branch that he founded in 1999 to his then branch manager Maurice Lamonde.

14. From 2008 into 2011, Lamonde made a series of ongoing payments to Malouf for the RJFS branch.

15. Kirk Hudson was an owner of approximately 36% of the shares of UASNM and was the chief operating officer of UASNM during 2008 through 2011.

16. Matt Keller was an investment adviser with UASNM during 2008 through 2011.

17. Hudson, Keller, and Malouf all placed bond trades with Lamonde and the RJFS branch office during 2008 through 2011.

18. Hudson was aware that Malouf sold the RJFS branch.

19. Paula Calhoun was the bookkeeper for UASNM, and also kept Malouf's personal books.

20. Calhoun received certain payments from Lamonde on behalf of Malouf.

21. Calhoun provided bookkeeping services for Maurice L. Lamonde Ltd.

22. Joseph Kopczynski was the chief compliance officer of UASNM during 2008 until January 2011.

23. UASNM engaged ACA, a compliance consulting firm, at various times beginning in 2002 through 2011.

24. ACA contracted with UASNM to provide mock SEC compliance audits annually.

25. Kopczynski, Hudson, and ACA all knew by May 2008 that Malouf sold the RJFS branch to Lamonde.

26. Kopczynski, Hudson, and ACA all knew no later than June 2010 that Malouf was receiving periodic payments from Lamonde.

27. UASNM did not update its Form ADV to specifically reflect the payments by Lamonde to Malouf for the sale of the RJFS branch until March 2011.

28. Lamonde died in April 2014 from an apparent self-inflicted gunshot wound.

29. On May 13, 2011, Kopczynski and Hudson voted to terminate Malouf as CEO of UASNM, and locked him out of the office.

30. On May 27, 2011, Kopczynski, Hudson, and UASNM filed a lawsuit against Malouf in the Second Judicial District Court, Bernalillo County, New Mexico seeking injunctive relief and declaratory judgment.

31. On May 14, 2014, Hudson executed an Offer of Settlement of UASNM, Inc. in anticipation of public administrative and cease-and-desist proceedings to be instituted against UASNM by the Commission and submitted it for the purpose of settling those proceedings. The Offer of Settlement stated that "UASNM has undertaken to pay $506,083.74 from the Escrow Account to compensate affected clients for the additional markups and markdowns paid by those clients as described in Paragraph 18 of the Order (the "Compensatory Payment")." The Commission accepted the Offer of Settlement.

32. The Commission instituted proceedings against UASNM and Malouf on June 9, 2014, in which it alleged that UASNM and Malouf violated the Investment Advisors Act of 1940 by breaching their fiduciary duty to UASNM customers by, among other things, failing to seek best execution on certain bond transactions.

33. Both before and after the sale of the RJFS branch to Lamonde, UASNM advisers placed bond trades through the RJFS branch

34. Both before and after the sale of the RJFS branch to Lamonde, UASNM advisers placed bond trades through other broker/dealers.

35. Both before and after the sale of the RJFS branch to Lamonde, the branch subleased office space from UASNM and was physically located within the same offices as UASNM. The employees of UASNM and the RJFS branch worked in close proximity until June 2011, at which time UASNM terminated the RJFS branch sublease.

Dated: October 24, 2014

Stephen C. McKenna
Dugan Bliss
Counsel for the Division
1961 Stout St., Ste. 1700
Denver, CO 80294
Phone: 303-844-1000

SERVICE LIST

On October 24, 2014, the foregoing **DIVISION OF ENFORCEMENT AND RESPONDENT DENNIS J. MALOUF'S SUBMISSION OF JOINT STIPULATIONS** was sent to the following parties and other persons entitled to notice:

Office of the Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557
(Original and three copies by UPS)

Honorable Jason S. Patil
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E
Washington, DC 20549-2557
(Courtesy copy by email)

Burt Wiand, Esq.
Peter King, Esq.
Robert K. Jamieson, Esq.
Wiand Guerra King
5505 W. Gray Street
Tampa, FL 33609
Attorneys for Respondent
(By e-mail)

Elinor Blomgren
Contract Trial Paralegal

FINRA

EXHIBIT 2

Text only | Print

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.

---

* "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.

EXHIBIT 3

DIVISION OF
TRADING AND MARKETS

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

November 20, 2008

Amal Aly, Esq.
Managing Director and
Associate General Counsel
Securities Industry and Financial Markets Association
360 Madison Avenue, 17th Floor
New York, NY 10017

Re: Request for No-Action Relief Relating to NYSE Rule 353(b) and NASD IM-2420-2

Dear Ms Aly:

Based on the facts and representations set forth in your letter dated November 19, 2008, the staff of the Division of Trading and Markets will not recommend enforcement action to the Commission under Section 15(a) of the Securities Exchange Act of 1934 against a retiring representative of a registered broker-dealer ("Firm") if the retiring representative, the Firm, and the receiving representative comply with the terms and conditions described in your letter, without the retiring representative maintaining his or her status as a registered associated person of the Firm upon retirement.

This staff position concerns enforcement action only and does not represent a legal conclusion regarding the applicability of the statutory or regulatory provisions of the federal securities laws. In addition, this position is based solely on the representations that you have made, and any different facts or circumstances might require a different response. Moreover, we express no view with respect to other questions the proposed activities may raise, including the applicability of any other federal or state laws or the applicability of any self-regulatory organization rules (including NYSE Rule 353(b) or NASD IM-2420-2).

Sincerely,

James L. Eastman
Chief Counsel

SIFMA
Securities Industry and
Financial Markets Association

November 19, 2008

James L. Eastman
Chief Counsel, Trading & Markets
U.S. Securities and Exchange Commission
100 F St. NE
Washington D.C. 20549

Re: Request for No Action Relief Relating to NYSE Rule 353(b) and NASD IM-2420-2

Dear Mr. Eastman:

The Securities Industry and Financial Markets Association ("SIFMA")[1] is writing to request that the staff of the Division of Trading and Markets advise us that the staff will not recommend Commission enforcement action under the Securities Exchange Act of 1934 (SEA) Section 15(a) against a retiring representative[2] of a registered broker dealer (Firm) based on the use of procedures described in this letter with respect to the circumstances by which a retiring representative may be compensated after the termination of employment for business done by or through his or her employer before the termination of employment.

The SEC Staff has issued three No Action letters in the past with respect to this topic.[3] In these letters, the Staff provided no action relief under Section 15(a) based on the described specific procedures with respect to permitting compensation to be paid to

[1] SIFMA brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C. and London, and its associated firm, the Asian Securities Industry and Financial Markets Association, is based in Hong Kong.

[2] SIFMA suggests that the term "retiring representative" include not only those who retire from a member firm but also those who die unexpectedly, become totally disabled or leave the securities industry to the extent they also satisfy the length of service, length of experience and conduct requirements set forth herein. In the case of death of the retiring representative, the retiring representative's beneficiary designated in the written contract, or the retiring representative's estate if no beneficiary is so designated, may be the beneficiary of the respective firm's agreement with the deceased representative.

[3] See Securities and Exchange Commission No Action Letters Gruntal & Co., L.L.C. (October 14, 1998), Prudential Securities Incorporated Incoming Letter Dated September 14, 1994 (October 11, 1994), and Shearson Lehman Brothers Inc. (March 25, 1993). Any relief granted in response to this letter would not be applicable to compensation arrangements entered into prior to the date of this no action request.

retiring representatives. The purpose of this request for No Action relief is to update those three prior letters, and to describe the terms and conditions under which a Firm may pay compensation. These terms and conditions will be contained in a bona fide contract that provides for the payment of compensation to the retiring representative by the Firm.

Under New York Stock Exchange (NYSE) Rule 353(b), no registered representative or officer shall be compensated for business done by or through his employer after the termination of his employment except as may be permitted by the NYSE.[4]

The Financial Industry Regulatory Authority (FINRA), under its predecessor NASD, issued an interpretive memo, IM-2420-2, "Continuing Commissions Policy", which specifically permitted the payment of "continuing commissions" in connection with the sale of securities to a registered representative who "even after they cease to be employed by a member...provided bona fide contracts call for such payment." IM-2420-2 specifically prohibited retiring representatives who have entered into these contracts to solicit new business or open new accounts if they are not registered.

The Firm and the retiring representative must meet the following as it applies to each of them:

- The retiring representative must have been continuously employed by or otherwise associated with the Firm for a threshold minimum number of years, but not less than three years, as of the date of retirement of the retiring representative ("Retirement Date").[5] Alternatively, the retiring representative must have been continuously a member of a team for a threshold minimum number of years, but not less than three years, as of the Retirement Date, and that team must have been in continuous existence as part of that, and (if applicable) a prior, Firm for a threshold minimum number of years,[6] but not less than three years, as of the Retirement Date.

- The retiring representative must demonstrate that he/she has conducted himself/herself in a manner exhibiting appropriate standards of professional and ethical conduct, which will be determined by the Firm consistent with the following standards:

---

[4] NYSE Rule 353(b) has been incorporated into the FINRA rulebook. http://www.finra.org/web/groups/corp_comm/documents/rules_regs/p019440.pdf

[5] An exception to this length of service requirement will be made in the case where a retiring representative's employment terminates unexpectedly before the three year requirement due to death or total disability.

[6] A "team" is defined as the retiring representative and at least one other registered representative who have jointly serviced on a continuous basis for not less than three years, as of the Retirement Date, more than 50% of the account holders subject to the agreement between the Firm and the retiring representative.

- low incidence of investment-related customer complaints, arbitrations or litigation involving the retiring representative and either settled or decided for $25,000 or more during the three years prior to the Retirement Date;

- low incidence of pending investment-related complaints, arbitration or litigation during the three years prior to the Retirement Date;

- If a retiring representative has been named in investment-related complaints, arbitrations or litigation that have either been settled or decided for $25,000 or more during the three year period prior to the Retirement Date in order to be eligible the Firm must: (i) have investigated the complaints, arbitration and/or litigation, (ii) have determined that the retiring representative's conduct does not merit any disciplinary action, or being placed on special or heightened supervision, and (iii) have determined in the Firm's reasonable judgment that the retiring representative is not responsible for the conduct alleged in the complaints, litigation and/or arbitrations, or that they involved non-sales practice allegations.

- The retiring representative must not be subject to a statutory disqualification resulting from any action of, or proceeding brought by, the Securities and Exchange Commission or any self-regulatory organization for which the sanction is currently in effect (or was in effect during any part of the three years prior to the Retirement Date).

- **The Firm must establish parameters for a reasonable time period, not to exceed five years, following retirement and a percentage scale (that is either fixed or decreases the percentage the retiring representative receives each year) regarding the sharing of commissions by the retiring representative and the receiving registered representative.[7]**

- **The retiring representative must not contact former clients for the purpose of soliciting such clients to enter into securities transactions, discussing any past, present, or future transactions with such former clients, or otherwise providing securities related services or advice to the extent the services or advice relates to transactions in securities. The retiring representative must acknowledge this limitation in writing.**

- **The retiring representative must comply, to the extent applicable, with federal and state securities statutes and regulations, all policies, procedures and rules of relevant regulatory and self-regulatory bodies, including, without limitation, the Securities and Exchange Commission, FINRA and the NYSE.**

---

[7] The sharing of commissions will be limited to commissions derived from accounts held for continuing customers of the retiring representative regardless of whether customer funds or securities are added to the accounts during the period after retirement.

- The retiring representative must sever association with the Firm and with any municipal securities dealer, government securities dealer, investment adviser or investment company affiliates (except as may be required to maintain any licenses or registrations required by any state) and is not permitted to be associated with any other broker, dealer, municipal securities dealer, government securities dealer, investment adviser or investment company, during the term of his or her agreement. The retiring representative also may not be associated with any bank, insurance company or insurance agency (affiliated with the Firm or otherwise) during the term of his or her agreement if the retiring representative's activities relate to effecting transactions in securities.

- The retiring representative must certify at least annually to the Firm that he/she has adhered to the requirements and conditions of the agreement.

- The Firm must contact a representative sample of the account holders including a significant set of high grossing customer accounts subject to the agreement at least annually to confirm that the retiring representative has not provided investment advice or solicited trades in securities in any way. For example, the Firm may contact annually: (i) holders of the top 10 highest grossing client accounts for that year; and (ii) holders of one-half of the next 25% highest grossing client accounts.

In addition to the agreement with the retiring representative, the Firm also may enter into an agreement with one or more receiving registered representatives of the Firm ("the receiving representative") who will service, and may receive compensation related to, the client accounts of the retiring representative. The retiring representative may recommend a receiving representative(s) but will not be personally compensated by the representative(s) for the referral. In all instances, the Firm shall approve the receiving representative. Prior to the Retirement Date, the Firm must inform the account holders of the applicable accounts in writing of the retiring representative's departure from the Firm and of the transfer of the applicable accounts to the receiving representative(s).[8]

The receiving representative must meet the following criteria:

- Except as provided below, the receiving representative must have been employed in the securities industry in a registered capacity for a minimum of three years as of the Retirement Date.

- Except as provided below, the receiving representative must have been continuously affiliated with the Firm in a registered capacity for a minimum of one year as of the Retirement Date. This one year requirement can be reduced to

[8] In the event that the retiring representative is disabled or dies, the Retirement Date would be the date of disability or death of the representative. In such circumstances, the Firm shall notify clients of the departure or death of the representative and the transfer of the accounts to the receiving representative.

six months if the Firm has established a transition period whereby the retiring representative works with the receiving representative to jointly service the account holders who are subject to the agreement.

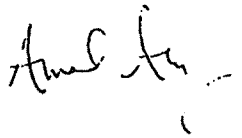
- If there is more than one receiving representative who will be jointly servicing the accounts under the agreement with the retiring representative, and one of the receiving representatives has less than three years of industry experience, or has been with the Firm for less than one year, then that person can jointly service the client accounts of the retiring representative so long as the Firm arranges for a more senior person to mentor that person for at least one year.

- The receiving representative must not be subject to a statutory disqualification resulting from any action of, or proceeding brought by, the SEC or any SRO for which the sanction is currently in effect (or was in effect during any part of the three years prior to the Retirement Date).

For the foregoing reasons, we respectfully request that the staff will not recommend enforcement action under SEA Section 15(a) against a retiring representative of a registered broker dealer based on the use of procedures as described above.

Thank you for your help in this matter. Please do not hesitate to call me at (212) 313-1268 if you have any questions.

Respectfully submitted,



Amal Aly

cc: Ira Hammerman
Marc Menchel

EXHIBIT 4

SEC No-Action Letters (1983 - 2003), Shearson Lehman Brothers Inc., Securities and Exchange Commission, (Mar. 25, 1993)

93 CCH Dec., FSLR ¶76,617, Shearson Lehman Brothers Inc.

93 CCH Dec., FSLR ¶76,617

Exchange Act--Registration of Broker-Dealers--Agreements--Financial Consultants.--
Enforcement action under Section 15(a) would not be recommended if a registered broker-dealer implements a program, under which it will enter into described agreements with certain of its retiring financial consultants, without requiring that the retiring financial consultants maintain their status as registered associated persons of the broker-dealer upon retirement. Particularly noted was that the broker-dealer was registered and that all personnel engaged in securities activities, including each continuing financial consultant, will be fully subject to the securities laws and the applicable rules of self-regulatory organizations.
See FSLR ¶25,001, "Exchange Act--Broker-Dealer Regulation "

Company: Shearson Lehman Brothers Inc.

Public Availability Date: March 25, 1993

WSB File No. 032993062

Fiche Locator No. 2199A8

WSB Subject Category: 081

Reference:
Securities Exchange Act of 1934, Section 15(a)(2)

...The staff will not recommend Commission action under 1934 Act section 15(a) if this company implements the franchise protection program (the "program "), as described below, without requiring that financial consultants participating in the program maintain their status as registered associated persons of the company upon retirement. The staff states that its position is based on the fact that the company is a registered broker-dealer and all personnel engaged in securities activities, including each active financial consultant, will be subject fully to the securities laws and the applicable rules of self-regulatory organizations. Under the program, the company will enter into agreements with certain of its retiring financial consultants. To be eligible for the program, a retiring financial consultant must be at least 55 years old and must have been employed by the company for at least 10 years. In addition, a retiring financial consultant must satisfy certain production criteria, together with certain quality criteria, including a low incidence of customer complaints, an absence of litigation, including any sanctions imposed by regulatory or self-regulatory organizations, and a low error rate on customer transactions. Alternatively, certain other financial consultants, with the approval of their branch manager, divisional director, and group president (collectively, "management group "), may qualify for participation in the program if they have been employed by the company for at least 15 years, and they satisfy the quality criteria. Moreover, financial consultants may qualify for participation, with the approval of the management group, if they have been employed by the company for at least five years, and they satisfy both the quality criteria and certain production criteria. Each retiring financial consultant, together with the company, will designate some or all active client accounts of the retiring financial consultant for servicing by a named continuing active financial consultant. Each agreement will provide that during a transition period of six to 12 months, the retiring financial consultant will introduce his or her clients to the active financial consultant, and both will exert best efforts to ensure that the clients of the retiring financial consultants enjoy uninterrupted service. Each agreement will provide further that for five years following the transition period, the retiring financial consultant and the active financial consultant will share any sales commissions generated by activity in the designated client accounts. The share of the commissions allotted to the retiring financial consultant will decrease in increments of 10% each year from 65% until the retiring financial consultant's allotted share reaches zero at the end of the period specified in

the agreement. Upon retirement of the retiring financial consultant and during the term of the agreement, the retiring financial consultant will not contact, either directly or indirectly, his or her former clients for the purpose of soliciting them to engage in securities transactions, and will not discuss securities transactions with his or her former clients, **the retiring financial consultant will terminate his or her association with the company, and will not be associated with any other broker, dealer, municipal securities dealer, government securities dealer, investment adviser, or investment company, nor hold himself or herself out as being so associated, and the retiring financial consultant will not engage in the securities business in any fashion.** If a retiring financial consultant fails to adhere to these conditions, he or she will not be eligible to receive any payments otherwise receivable under the program, and he or she will be required to forfeit all payments previously received under the program. The company will adopt measures to detect violations of the program's requirements, including notifying the retiring financial consultant's former clients in writing that the retiring financial consultant has retired, that the retiring financial consultant is precluded by contract from contacting them, either directly or indirectly, to discuss securities transactions, and that the former clients should contact the company in the event of such improper contact by the retiring financial consultant. Moreover, the company will contact former clients of the retiring financial consultant on a regular basis to verify that the former clients have not been contacted by the retiring financial consultants. The company also will require annual or semi-annual certification from each retiring financial consultant, as a condition of receiving payments under the program, that he or she has complied with the program's requirements, including certification that, upon retirement, he or she has not been in contact, either directly or indirectly, with his or her former clients to discuss securities transactions.

[INQUIRY LETTER 1]

WILMER, CUTLER & PICKERING

2445 M STREET, N.W.

WASHINGTON, D. C. 20037-1420

TELEPHONE(202) 663-6000

February 26, 1993

HAND DELIVERY

Robert L.D. Colby, Esquire

Chief Counsel

Division of Market Regulation

Securities and Exchange Commission

450 Fifth Street, N.W.

Washington, D.C. 20549

Dear Mr. Colby:

On behalf of our client Shearson Lehman Brothers Inc. ("Shearson ”), we respectfully request the written advice of the Staff of the Division of Market Regulation ("Staff ") that the Staff will not recommend any enforcement action to the Securities and Exchange Commission if Shearson implements the Franchise Protection Program ("Program ") that is described below. In particular, we request confirmation of the Staff's view that retiring Shearson Financial Consultants' (registered representatives) participating in the Franchise Protection Program need not continue their registrations upon retirement if their sole involvement in the securities business is to receive compensation pursuant to the Program.

Under the Program Shearson will enter into agreements with certain eligible Financial Consultants (registered representatives) who are close to retirement. Eligibility criteria for Financial Consultants include a minimum of 55 years of age, a minimum of ten years with the firm, the achievement of certain levels of production during the five years prior to becoming eligible for retirement and certain quality criteria. In addition, certain Financial Consultants may be eligible to participate prior to becoming eligible for retirement provided that they satisfy more stringent criteria (*i.e.,* significantly longer tenure). Pursuant to each agreement, the retiring Financial Consultant, along with Shearson, will designate some or all of the then active client accounts of the retiring Financial Consultant for servicing by a named continuing Financial Consultant, who will also be a party to the agreement.

The agreements will further provide that during a transition period, the retiring Financial Consultant will introduce his clients to the continuing Financial Consultant, and both will exert their best efforts to ensure that the clients of the retiring Financial Consultant enjoy uninterrupted customer service throughout the transition period and after the retirement of the retiring Financial Consultant.

The agreements will further provide that for five years following the transition period, the retiring and continuing Financial Consultants will share any sales commissions generated by activity in the designated client accounts. The share of the commissions allotted to the retiring Financial Consultant will decrease in increments of 10% each year from approximately 65% until it reaches zero at the end of the period set forth in the agreement.

There is one important set of conditions to the receipt of any commissions by the retiring Financial Consultant. During the term of the agreement, upon retirement, the retiring Financial Consultant must not contact his former clients for the purpose of soliciting them to engage in securities transactions, nor may he even discuss such transactions with them. **Upon retirement, the former Financial Consultant must sever his association with Shearson, and he may not be associated with any other broker, dealer, or investment adviser (nor hold himself out as being so associated) during the term of the agreement. In short, the Financial Consultant may not engage in the securities business in any fashion.**

If a retired Financial Consultant fails to adhere to these conditions, he will not be eligible to receive any payments otherwise receivable under the Franchise Protection Plan, and he will be required to forfeit all payments previously received under the Franchise Protection Plan. In other words, it is an absolute condition of the receipt of any funds under the Franchise Protection Plan that a retiring Financial Consultant be, in fact, retired and not engaged in the securities business in any fashion.

Shearson will adopt measures designed to make it likely that any retired Financial Consultant who violated the terms of his contract would be detected. These measures would reduce any risk to the investing public to negligible levels. The measures will include notifying the customer in writing of the retirement of the Financial Consultant, that the Financial Consultant is precluded by contract from contacting them to discuss investments, and that they should contact Shearson in the event of such improper contact; requiring annual or semi-annual certification from retired Financial Consultants, as a condition of receiving payments under the Franchise Protection Program, that upon retirement, they have not been in contact, directly or indirectly, with their former customers to discuss investments; contacting customers of retired Financial Consultants on a regular basis to verify that they have not been contacted by their former Financial Consultants; and of course ongoing supervision of active Financial Consultants.

It is Shearson's view that receipt of payments calculated as a percentage of the commissions otherwise payable to active Financial Consultants does not require retired Financial Consultants to maintain their status as registered associated persons with Shearson. Please confirm that the Staff of the Division of Market Regulation shares this view.

I appreciate your attention to this matter.

Sincerely,

Theodore A. Levine

[INQUIRY LETTER 2]

WILMER, CUTLER & PICKERING

2445 M STREET, N.W.

WASHINGTON, D. C. 20037-1420

TELEPHONE(202) 663-6000

March 10, 1993

HAND DELIVERY

Robert L.D. Colby, Esquire

Chief Counsel

Division of Market Regulation

Securities and Exchange Commission

450 Fifth Street, N.W.

Washington, D.C. 20549

Dear Mr. Colby:

This will supplement my letter to you of February 26, 1993, on behalf of our client Shearson Lehman Brothers Inc. ("Shearson ”) and its proposed Franchise Protection Program ("Program ”). In particular, this will provide additional information on the criteria that will govern eligibility of retiring Financial Consultants for participation in the Program.

As previously described to you, Financial Consultants are eligible for participation in the Program if they are at least 55 years old, have been employed by Shearson for at least ten years, and have achieved production levels in the first or second quintiles of Shearson 's Financial Consultants in each of the five years preceding their intended retirement date. In addition, Financial Consultants must meet certain quality criteria that are set by Shearson Quality Review Boards, which consist principally of Shearson senior management and compliance and legal department personnel. Among the relevant criteria are low incidence of customer complaints, an absence of litigation, and a low error rate on customer transactions.

Alternatively, Financial Consultants may qualify for participation in the Program if they have been employed by Shearson for at least 15 years and their participation is approved by their then Branch Manager, Divisional Director, and Group President; or they may qualify if they have been employed by Shearson for at least 5 years, they have achieved production levels in the first or second quintiles of Shearson's Financial Consultants in each of the five years preceding their intended retirement date, and their participation is approved by their then Branch Manager, Divisional Director, and Group President.

Recently, you requested that we confirm in writing the length of the transition period. This is to confirm that the transition period ranges from 6 to 12 months.

I hope the foregoing provides sufficient information. Please feel free to contact me should you need additional information. I appreciate your attention to this matter.

Sincerely,

Theodore A. Levine

[STAFF REPLY LETTER]

March 25, 1993

Theodore A. Levine, Esq.

Wilmer, Cutler & Pickering

2445 M Street, N.W.

Washington, D.C. 20037-1420

Re: *Shearson Lehman Brothers Inc.*

Dear Mr. Levine:

In your letters dated February 26, 1993 and March 10, 1993, on behalf of Shearson Lehman Brothers Inc. ("Shearson ”), as supplemented by telephone conversations with the staff, you request assurance that the staff will not recommend enforcement action to the Commission under Section 15(a) of the Securities Exchange Act of 1934 (the "Exchange Act ") if Shearson, a broker-dealer registered under Section 15(b) of the Exchange Act, implements the Franchise Protection Program (the "Program ”), as described herein, without requiring that financial consultants participating in the Program maintain their status as registered associated persons of Shearson upon retirement.

We understand the facts to be as follows:

Under the Program, Shearson will enter into agreements with certain of its retiring financial consultants. To be eligible for the Program, a retiring financial consultant must be at least fifty-five years old and must have been employed by Shearson for at least ten years. In addition, a retiring financial consultant must satisfy certain production criteria, together with certain quality criteria, including a low incidence of customer complaints, an absence of litigation (including any sanctions imposed by regulatory or self-regulatory organizations), and a low error rate on customer transactions.

Alternatively, certain other financial consultants, with the approval of their Branch Manager, Divisional Director, and Group President (collectively, the "Management Group "), may qualify for participation in the Program if they have been employed by Shearson for at least fifteen years, and they satisfy the quality criteria. Moreover, financial consultants may qualify for participation, with the approval of the Management Group, if they have been employed by Shearson for at least five years, and they satisfy both the quality criteria and certain production criteria. Financial consultants participating in the Program shall hereinafter be referred to individually as the "Retiring Financial Consultant " and collectively as the "Retiring Financial Consultants. "

Each Retiring Financial Consultant, together with Shearson, will designate some or all active client accounts of the Retiring Financial Consultant for servicing by a named continuing financial consultant (individually, the "Active Financial Consultant ”). Each agreement will provide that during a transition period of approximately six to twelve months (the "Transition Period "), the Retiring Financial Consultant will introduce his or her clients to the Active Financial Consultant, and both will exert best efforts to ensure that the clients of the Retiring Financial Consultant enjoy uninterrupted service.

Each agreement will further provide that for five years following the Transition Period, the Retiring Financial Consultant and the Active Financial Consultant will share any sales commissions generated by activity in the designated client accounts. The share of the commissions allotted to the Retiring Financial Consultant will decrease in increments of ten percent each year from approximately sixty-five percent until the Retiring Financial Consultant's allotted share reaches zero at the end of the period specified in the agreement.

Upon retirement of the Retiring Financial Consultant and during the term of the agreement, (1) the Retiring Financial Consultant will not contact, either directly or indirectly, his or her former clients for the purpose of soliciting them to engage in securities transactions, and will not discuss securities transactions with his or her former clients, (2) the Retiring Financial Consultant will terminate his or her association with Shearson, and will not be associated with any other broker, dealer, municipal securities dealer, government securities dealer, investment adviser, or investment company (nor hold himself or herself out as being so associated), and (3) the Retiring Financial Consultant will not engage in the securities business in any fashion. If a Retiring Financial

Consultant fails to adhere to these conditions, he or she will not be eligible to receive any payments otherwise receivable under the Program, and he or she will be required to forfeit all payments previously received under the Program.

Shearson will adopt measures to detect violations of the Program 's requirements, including notifying the Retiring Financial Consultant 's former clients in writing (a) that the Retiring Financial Consultant has retired, (b) that the Retiring Financial Consultant is precluded by contract from contacting them, either directly or indirectly, to discuss securities transactions, and (c) that the former clients should contact Shearson in the event of such improper contact by the Retiring Financial Consultant. Moreover, Shearson will contact former clients of the Retiring Financial Consultant on a regular basis to verify that the former clients have not been contacted by the Retiring Financial Consultant.

Shearson also will require annual or semi-annual certification from each Retiring Financial Consultant, as a condition of receiving payments under the Program, that he or she has complied with the Program 's requirements, including certification that, upon retirement, he or she has not been in contact, either directly or indirectly, with his or her former clients to discuss securities transactions.

Response:

On the basis of your representations and the facts presented, and strict adherence thereto by Shearson and each Retiring Financial Consultant, and particularly in view of the fact that Shearson is a registered broker-dealer and all personnel engaged in securities activities, including each Active Financial Consultant, will be fully subject to the securities laws and the applicable rules of self-regulatory organizations, the staff will not recommend enforcement action to the Commission under Section 15(a) of the Exchange Act if Shearson implements the Program, as described herein, without requiring that the Retiring Financial Consultants maintain their status as registered associated persons of Shearson upon retirement.

This staff position concerns enforcement action only and does not represent a legal conclusion regarding the applicability of the statutory or regulatory provisions of the federal securities laws. Moreover, this position is based solely on the representations that you have made, and any different facts or conditions might require a different response.

Sincerely,

Robert L.D. Colby

Chief Counsel

SEC No-Action Letters (1983 - 2003), Prudential Securities Inc., Securities and Exchange Commission, (Oct. 11, 1994)

Click to open document in a browser

Prudential Securities Inc.

Company: Prudential Securities Inc.

Public Availability Date: October 11, 1994

WSB File No. 103194001

Fiche Locator No. 2389B1

WSB Subject Categories: 081

Reference:
Securities Exchange Act of 1934, Section 15(a)(2)

...The staff will not recommend Commission action under 1934 Act section 15(a) if this company implements its retirement program for financial advisors, as described below, without requiring that retired financial advisors of the company ("participants ") maintain their status as registered associated persons of the company upon retirement. The staff notes that the company is a registered broker-dealer and all personnel engaged in securities activities, including each person with whom a participant enters into an agreement, which person will be a current financial advisor of the company or his or her assistant (each, a "receiving FA "), will be fully subject to the securities laws and applicable rules of self-regulatory organizations. A participant will qualify to participate in the program if: 1) the participant is a registered financial advisor who has been with the company at least five years and is 55 years of age or older; 2) the participant satisfies certain quality criteria; 3) except at the initiation of the program, the participant has provided the company with at least six months' advance notice of retirement; 4) the participant enters into an agreement with the company and a receiving FA setting forth the terms of the participant's participation in the program, and 5) the participant enters into a non-competition agreement with the company. Pursuant to the program, each participant will recommend a receiving FA who will service the participant's client accounts following the participant's retirement. The agreement entered into between the company, the participant and the receiving FA will provide that all of the participant's existing client accounts, together with other accounts carried by the company evidencing a change by an existing account in its account category within the company but not a change in beneficial ownership, will be eligible for inclusion in the program. During the transition period, the participant will introduce the receiving FA to his or her client accounts in order to effect a smooth, uninterrupted transition in the servicing of the clients' accounts upon the participant's retirement. Following the transition period, the participant and the receiving FA will share all gross commissions, excluding service fees, attributable to the eligible accounts for a three-year period on a declining scale as follows: 1) for the first year, the participant and receiving FA will split the commissions equally; 2) for the second year, the participant will receive 40% of the commissions and the receiving FA will receive the remaining 60% and 3) for the third year, the participant will receive 30% of the commissions and the receiving FA will receive 70%. After the third year, the receiving FA will receive 100% of the commissions. In addition, the company's asset accumulation awards and its performance and longevity awards derived from eligible accounts will be divided in the same proportions between the participant and the designated receiving FA during the three- year period. All payments under the program will be made by the company. The participant will receive no compensation for new account referrals after retirement, and the participant will agree to adhere to certain restrictions as well as to the other terms of the agreement and the non-competition agreement entered into under the program.

[INQUIRY LETTER]

ROSENMAN & COLIN

575 MADISON AVENUE

NEW YORK, NY 10022-2585

TELEPHONE(212) 940-8800

September 14, 1994

September 14, 1994

FAX AND AIR COURIER

Securities and Exchange Commission

450 Fifth Street, N.W.

Washington, D.C. 20549

Attention: Ms. Catherine McGuire; Division of Market Regulation

Ladies and Gentlemen:

On behalf of our client Prudential Securities Incorporated ("PSI "), we respectfully request the written advice of the Staff of the Division of Market Regulation (the "Staff ") that the Staff will not recommend any enforcement action to the Securities and Exchange Commission if PSI implements its Retirement Program for Financial Advisers (the "Client Continuity Program " or the "Program ") as hereinafter described. In particular, we seek the concurrence of the Staff in our view that retiring PSI Financial Advisers (the "Participants ") participating in the Program and adhering to the Program requirements need not maintain their status as registered associated persons of PSI upon retirement. We call your attention to Shearson Lehman Brothers Inc. (No-Action Letter, available March 25, 1993) (the "Shearson Letter ") in which the Staff took a no-action position with respect to a retirement/franchise protection program implemented by Shearson Lehman Brothers Inc. which is similar to the Client Continuity Program.

A Participant will qualify to participate in the Program if (i) the Participant is a registered Financial Advisor (not a branch manager) who has been with PSI at least five years and is 55 years of age or older, (ii) the Participant satisfies certain quality criteria, including (a) a low incidence of investment-related customer complaints, pending arbitration or litigation, or arbitration or litigation settled by the parties for less than $5,000; (b) a low error rate on customer transactions; (c) an absence of investment-related arbitration or litigation decided against the Participant or settled by the parties for $5,000 or more; and (d) the Participant not being subject to any sanctions imposed by regulatory or self-regulatory organizations or any statutory disqualification as defined in Section 3(a)(39) of the Securities Exchange Act of 1934; (iii) except at the initiation of the Program, the Participant has provided PSI with at least six months' advance notice of retirement, (iv) the Participant enters into an agreement with PSI and with one or more persons each of whom (the "Receiving FA ") is a current PSI Financial Advisor or a current PSI Financial Advisor's assistant who is a registered person and who has been recommended by the Participant, setting forth the terms of the Participant's participation in the Program, and (v) the Participant enters into a non-competition agreement with PSI. Each Participant's continued participation in the Program is contingent on the Participant continuing to satisfy the above-described quality criteria during the three-year period designated below.

Pursuant to the Program, each Participant will recommend a Receiving FA who will service the Participant's client accounts following the Participant's retirement. Such recommendation will be subject to approval by the Receiving FA's branch manager, regional director and PSI's committee administering the Program. In addition, for the Receiving FA to be eligible to participate in the Program, the Receiving FA must have no history of legal or compliance problems and must have a minimum of three years' industry experience and two years' experience with PSI as a Financial Advisor or as a Financial Advisor's registered assistant.

The agreement entered into between PSI, the Participant and the Receiving FA will provide that all of the Participant's existing client accounts and subsequent additions to existing client accounts, together with other accounts carried by PSI evidencing a change by an existing account in its account category within PSI (e.g., from regular securities account to COMMAND account) but not a change in beneficial ownership (collectively, the "Eligible Accounts "), will be eligible for inclusion in the Program. During the transition period (six to twelve months except at the initiation of the Program), the Participant will introduce the Receiving FA to his client accounts in order to effect a smooth, uninterrupted transition in the servicing of the clients' accounts upon the Participant's retirement.

Following the transition period, the Participant (or, upon his or her death, the Participant's designated beneficiary) and the Receiving FA will share all gross commissions, excluding service fees, attributable to the Eligible Accounts for a three-year period on a declining scale as follows:

Year Participant Receiving FA
1 50% 50%
2 40% 60%
3 30% 70%
thereafter 0% 100%

In addition, PSI's asset accumulation awards and PSI's performance and longevity awards derived from Eligible Accounts will be divided in the same proportions between the Participant and the designated Receiving FA during the three-year period; [1] after the three-year period, no further asset accumulation awards or performance and longevity awards will be paid to the Participant. All payments under the Program will be made by PSI.

The Participant will receive no compensation for new account referrals after retirement, and the **Participant will agree that, during the three-year period, he or she will not** (a) contact former clients, directly or indirectly, for the purpose or with the effect of soliciting them to maintain securities accounts or to engage in securities transactions, (b) discuss securities accounts or securities transactions with former clients, (c) **maintain any license as a registered or associated person of, or otherwise be associated with, PSI or any other broker, dealer, municipal securities dealer, government securities dealer, investment adviser, or investment company, or hold himself or herself out as being so associated, or (d) engage in the securities business in any other manner.** The Participant will, nevertheless, receive a monthly report of activity in the Eligible Accounts, omitting the names of individual Eligible Accounts, for purposes of verification of amounts remitted by PSI.

If a Participant does not adhere to the restrictions above summarized as well as to the other terms of the agreement and the non-competition agreement entered into under the Program, the Participant (or the Participant's beneficiary upon death) will not be entitled to receive further payments under the Program and will be required to forfeit all payments previously received. The agreements between PSI and the Participants will so provide, with a view to assuring that each Participant has in fact retired from the securities business and does not remain engaged in the securities business to any extent or in any manner.

PSI's Committee administering the Program will monitor compliance with the requirements of the Program, including, without limitation, the Participants' and the Receiving FAs' compliance with the obligations they have undertaken under the Program. In order to reduce any risk to the public to negligible levels, these monitoring procedures will include (a) written notification to clients that their Financial Advisor is retiring (with specification of the applicable retirement date in such notification), that he or she is precluded from contacting former clients either directly or indirectly, after retirement, to discuss securities accounts or securities transactions, and that clients should contact PSI's branch manager if they have any questions in that regard or in the event of what they consider improper contact by the Participant; (b) periodic (at least annual) written confirmation by Participants, during the three-year period after retirement and as a condition of receiving payments under the Program, that they are in compliance with all requirements of the Program, including confirmation that they have not been in contact, directly or indirectly, with former clients to discuss securities accounts or securities transactions; (c) confirmation on these subjects by Receiving FAs, to the extent of their knowledge, and, where appropriate, similar confirmation by clients, (d) specific instructions to, and reports from, branch managers,

(e) regular ongoing supervision of the activities of Receiving FAs, and (f) monitoring by the administering Committee, and annual reports on monitoring to the Compliance Committee of PSI's Board of Directors. PSI will, on a regular periodic basis, contact clients who were formerly clients of a Participant to verify that such clients have not been improperly contacted by the Participant.

On the basis of our review of the Program, and taking into account the Shearson Letter (among other matters), it is our view that the receipt by Participants of payments under the Program does not require the Participants to maintain their status as registered associated persons with PSI. Please confirm that the Staff of the Division of Market Regulation shares this view.

If the Staff does not concur with our view, we would appreciate the opportunity to confer with the Staff prior to any written response to this letter. Of course, if you have any questions regarding this matter or desire additional information, please do not hesitate to call me at the number listed above.

Your prompt attention to this matter will be greatly appreciated.

Very truly yours,

Edward H. Fleischman

EHF:ap

Enclosures

cc: Ms. Patrice M. Glniecki

[STAFF REPLY LETTER]

October 11, 1994

Edward H. Fleischman, Esq.

Rosenman & Colin

575 Madison Avenue

New York, NY 10022-2585

Re: *Prudential Securities Incorporated Incoming Letter Dated September 14, 1994*

Dear Mr. Fleischman:

On the basis of your representations and the facts presented, and strict adherence thereto by Prudential Securities Incorporated ("PSI "), each Participant, and each Receiving FA, and particularly in view of the fact that PSI is a registered broker-dealer and all personnel engaged in securities activities, including each Receiving FA, will be fully subject to the securities laws and the applicable rules of self-regulatory organizations, the staff of the Division of Market Regulation (the "Division ") will not recommend enforcement action to the Commission under Section 15(a) of the Securities Exchange Act of 1934 if PSI implements the Program, as described in your letter, without requiring that the Participants maintain their status as registered associated persons of PSI upon retirement.

This staff position concerns enforcement action only and does not represent a legal conclusion regarding the applicability of the statutory or regulatory provisions of the federal securities laws. Moreover, this position is based solely on the representations that you have made, and any different facts or conditions might require a different response.

Sincerely,

Catherine McGuire

Chief Counsel

CM/PG/dn

Footnotes

1 PSI's performance and longevity awards to its Financial Advisers are calculated under a formula based on the Financial Advisor's length of service in the securities industry, length of service at PSI and gross commission production. PSI's asset accumulation awards to its Financial Advisers are calculated under a formula based on assets under management, minimum commission production levels and length of service in the securities industry.

Fourteen Wall Street
New York, NY 10005-2176
Telephone (212) 225-4000
Fax (212) 962-1810

GRUNTAL & CO. L.L.C. ESTABLISHED 1890

MEMBER NEW YORK STOCK EXCHANGE

Over a Century of Service to Investors

Office of the General Counsel

May 12, 1998

Mr. S. Anthony Taggart
Assistant Director and Director of Corporate Finance
Utah Division of Securities
Herber M. Wells Building
P.O. Box 146760
Salt Lake City, Utah 84114-6760

Re: Gruntal & Co., L.L.C. Continuing Compensation Plan For Retiring Registered Representatives

Dear Mr. Taggart:

Please accept this letter as a request by Gruntal & Co., L.L.C. ("Gruntal"), a registered broker-dealer and member firm of the New York Stock Exchange, Inc. (the "NYSE") and of the National Association of Securities Dealers, Inc. (the "NASD"), for written confirmation by the Division of Securities (the "Division") that no enforcement action will be undertaken against Gruntal with regard to the implementation of a proposed retirement plan for registered representatives (the "Continuing Compensation Plan" or the "Plan"), as described in this letter.

Specifically, Gruntal seeks to confirm that the Division concurs with the view that retiring registered representatives who participate in the Plan (the "Participants") and who adhere to the Plan's eligibility and participation requirements will not need to remain actively registered after their retirement from Gruntal. I understand that, by letter dated October 19, 1995, from J. Matthew Jenkins, Director of Licensing, the Division previously has provided such assurance with regard to a similar retirement plan adopted and maintained by Salomon Smith Barney (previously Smith Barney, Inc.) ("Smith Barney") (the "Franchise Protection Plan"). I further note that the Securities & Exchange Commission (the "SEC") has provided assurance of no-action relative to the Smith Barney Franchise Protection Plan as well as to a similar broker retirement plan currently maintained by Prudential Securities, Inc. ("Prudential") (the "Client Continuity Program"). A copy of the Division's written assurance of no-action to Smith Barney and of the SEC no-action letters, as reported by the Lexis Reporting Service, are attached collectively hereto for your convenience.

The Continuing Compensation Plan which Gruntal proposes to adopt will permit the orderly and efficient transfer of client accounts from a retiring Participant to one or more actively registered receiving employees (individually and collectively, the "Recipient Broker"). The Plan will be administered and eligibility decisions will be made by a committee of senior employees (the "Plan Committee"). The Plan period will be for 3 years from the retirement date of the Participant. During a pre-retirement transition period, which will range from three to six months in duration, the subject client accounts (the "Core Accounts," as described below) will be serviced jointly by the Participant and the Recipient Broker to provide continuity and to permit the Recipient Broker to become acquainted with the investment needs of the respective clients.

GRUNTAL & CO. INCORPORATED ESTABLISHED 1880

MEMBER NEW YORK STOCK EXCHANGE

Admission into the Plan as a Participant or as a Recipient Broker will be subject to certain eligibility criteria and the approval of the Plan Committee. Each retiring broker applicant must be at least 55 years of age and must agree to enter into a written contract with Gruntal and with the Recipient Broker (the "Agreement"). The Agreement, among other provisions, will set forth the terms of the Participant's eligibility and compensation and will incorporate a non-solicitation and non-compete covenant with Gruntal. A Participant must demonstrate that he/she has conducted himself/herself in a manner exhibiting appropriate standards of professional and ethical conduct, as may be determined by the Plan Committee, including (1) a low incidence of investment-related customer complaints, arbitrations or litigations, (2) a low error rate on customer transactions, and (3) that he/she is not subject to any sanctions imposed by regulatory or self-regulatory agencies or to any statutory disqualification. The continued participation and compensation under the Plan of a Participant will be contingent on his/her continued satisfaction of the eligibility criteria at the commencement of as well as throughout the Plan period.

The Participant may nominate one or more active employees to be Recipient Brokers. In order to be accepted into the Plan as a Recipient Broker, an actively registered employee must be approved by management and the Plan Committee. The Recipient Broker must meet certain eligibility criteria, including employment with Gruntal for a minimum of two years, at least three years tenure as a registered member of the securities industry and, in the determination of management and the Plan Committee, a clean legal and compliance history. Any exceptions to the eligibility criteria applicable to Participants or Recipient Brokers must be approved in the sole determination of the Plan Committee.

Starting with the effective date of the Plan Agreement and continuing for a period of three years following the Participant's actual retirement date, the Participant (or a designated beneficiary, upon the Participant's death) will share with the Recipient Broker eligible gross commissions derived from the Core Accounts. The Participant's percentage share of the commissions will decline annually over the duration of the Plan, as set forth in the Agreement. The Core Accounts that are subject to transfer under this Plan principally will include Gruntal retail client accounts for which, as of the effective date of the Agreement, the Participant appears as the listed Account Executive, regardless of whether client funds or securities are added to the account after the effective date.

As a condition of participating in the Plan, the Participant agrees to comply, to the extent applicable, with all federal, state and local statutes and regulations, all policies, procedures and rules of relevant regulatory and self-regulatory bodies, including, without limitation, the Securities and Exchange Commission, the National Association of Securities Dealers, Inc. and the New York Stock Exchange, Inc., and all prevailing policies, procedures and rules of Gruntal. **The Participant further agrees that, after the retirement date, he/she will not** contact former clients, directly or indirectly, for the purpose or with the effect of soliciting them to maintain securities accounts or to engage in securities transactions, will not discuss securities accounts or securities transactions with former clients, will not **maintain any license as a registered person or otherwise be associated with Gruntal or any other broker, dealer, municipal securities dealer, government securities dealer, investment company or investment advisor or hold himself/herself out as being so associated and will not engage in the securities industry to any other extent or manner which would require the Participant to register with any regulatory or self-regulatory organizations, agencies, commissions or exchanges.**

EXHIBIT 5

A member firm may pay continuing commissions to a former registered representative who is no longer in the securities business provided the conditions of NASD IM-2420-2 are satisfied, and further, that such payments are made in compliance with SEC "no-action" letters addressing the permissibility of those payments under Section 15(a) of the Securities Exchange Act of 1934.

August 9, 2001

Joe Tully
Legal and Compliance Counsel
Commonwealth Financial Network
One University Office Park
29 Sawyer Road
Waltham, MA 02453-3483

Re: Representative Purchase of Book of Business Pursuant to NASD IM-2420-2

Dear Mr. Tully:

I am responding to your letter dated May 24, 2001 to NASD Regulation, Inc. wherein you request interpretive advice regarding the application of NASD IM-2420-2 ("Continuing Commissions Policy") to the payment by Commonwealth Financial Network ("Commonwealth") of certain commissions and fees to one of its registered representatives who will be retiring and relinquishing his license ("RR").

Background

Based on your letter, I understand the facts to be as follows: RR is a registered representative with Commonwealth and has a book of business that he wishes to sell prior to the time of his retirement. Another registered representative seeks to purchase RR's book of business. At the time RR is still a registered representative with Commonwealth, the parties will enter into a "bona fide contract" that, among other things, will provide that RR will receive an ongoing percentage of the commissions/fees generated by such accounts, for a specified period of time.

Response

NASD Rule 2420 generally prohibits members from paying fees and commissions to non-member broker/dealers. Rule 2420 has been interpreted by NASD Regulation to prohibit such payments to persons that operate (or based on the proposed activities would operate) as unregistered broker/dealers. The determination of whether a person should be registered as a broker/dealer rests with the Securities and Exchange Commission (the "SEC").[1] In this regard, you may wish to direct your inquiry to the SEC's Division of Market Regulation for guidance. To the extent that your client receives no-action relief from the SEC to make such payments, your client's payment of continuing commissions to RR would not violate NASD Rule 2420.

NASD IM-2420-2 ("Continuing Commissions Policy") provides that member firms are permitted to pay continuing commissions to registered representatives after they cease to be employed by a member, if, among other things, a bona fide contract between the member and the registered representative calling for the payments was entered into in good faith while the person was a registered representative of the employing member. The arrangement may not permit RR to solicit new business, open new accounts, or service the accounts generating the continuing commission payments. Based on the facts you have provided, and assuming a bona fide contract covering the arrangement is duly executed, RR would be eligible to receive continuing commissions from Commonwealth under NASD IM-2420-2.

I hope this letter responds to your inquiry. Please note that the opinions expressed herein are staff opinions only and have not been reviewed or endorsed by the Board of Directors of NASD Regulation. This letter responds only to the issues that you have raised based on the facts as you have described them, and does not address any other rule or interpretation of the NASD, or all the possible regulatory and legal issues involved.

Sincerely,

Kosha K. Dalal
Assistant General Counsel

cc: Frederick F. McDonald, Jr., District Director, District 11

---

1 You should be aware that the staff of the SEC's Division of Market Regulation has issued "no-action" letters that address the conditions under which a former retired registered representative, who is no longer employed by a broker/dealer, may continue to receive commissions without being required to register as a broker/dealer under Section 15 of the Exchange Act. The SEC staff has considered such factors as the age, length of service, and disciplinary history of the former registered representative in determining whether continuing commission payments made in the context of retiring registered representatives constitute a violation of the broker/dealer registration requirements of the Exchange Act.