UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

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

RESPONDENT DENNIS MALOUF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROPOSED FINDINGS OF FACT

No.	Proposed Finding of Fact
1	ACA conducted itself as if it was the SEC during the mock SEC inspections of UASNM. 718:24
2	The 2002 engagement letter between ACA and UASNM outlined the scope of services that ACA provided to UASNM. UASNM and Malouf were entitled to rely on that engagement letter with respect to the scope of services that would be provided. The engagement letter was signed by Kopczynski. 760:12-18 Ex. 351
3	In 31 years in the financial industry Malouf has never had a securities license suspended, has never had any discipline taken against a securities license, has never been fined for any securities related conduct, has never had a customer complaint, has never been sued by a customer, and has never had a customer complain to him about the price paid for a bond or any other aspect of a bond transaction. 1009:14-1010:8
4	BondDesk was a tool that assisted Malouf in meeting his best execution obligation. 1102:7-10
5	Besides daily bid-ask spreads for a few of the trades, Dr. Gibbons could not find any trade data for the bond trades that he analyzed. 482:3-9
6	Dr. Gibbons' expert opinion does not consider or take into account the conduct of Kirk Hudson. 521:8-10
7	The Fabozzi study relied upon by Dr. Gibbons examines trades in the interdealer market, which are unlike the trades placed by UASNM. 536:5-9
8	Dr. Gibbons did not review or consider any of the trade tickets for the trades at issue in preparing his expert report or forming any of his opinions. 542:14-15
9	Dr. Gibbons was unable to find and did not consider any studies regarding markups or commissions on bond trades. 544:5-8
10	There is no data available to compare the actual markups and commissions charged on UASNM's bond trades against other markups or commissions that were being charged on the same bonds at the same time. 558:16-23
11	BondDesk allows users to see what the best asks and best bids are from approximately 160 broker-dealers at any given time for particular bonds. 541:10-14
12	Representations made to UASNM customer Dan Moriarty regarding the fact that UASNM did not charge any commissions, but rather a flat fee for the amount of money being managed, were made to him by Joseph Kopczynski.

	595:11-18
13	From 2000 to 2004, when Kopczynski was the owner and CEO of UAS, Kopczynski never advised customer Dan Moriarty that UAS might place trades for him through RJFS, or that Malouf might receive commissions for such trades. 602:2-21
14	The advisers primarily responsible for Dan Moriarty's accounts were Kopczynski and Hudson. 603:10-12
15	RJFS maintained a policy requiring the price on all bond trades to be fair and reasonable. 669:13-16
16	As of September 2, 2008, the branch checking account records for Branch 4GE would have been reviewed by someone at RJFS. These records would have been reviewed by someone at RJFS for a second time by November 9, 2009. 691:17-25 693:25-694:12 862:1-16
17	There is no way to tell who placed the bond trade(s) for which RJFS lowered the commission, what type of bond it was, or for which customer the trade was placed. 706:25-709:15.
18	From 2008 to 2011 RJFS had written policies and procedures pertaining to best execution. 710:23-711:6
19	If a bond trade is placed through RJFS with a commission or markup that exceeds the RJFS commission/markup grid, that trade will be rejected by RJFS 710:6-9.
20	Part of the reason RJFS reviews the markups/commissions charged on bond trades is to ensure that its customers are getting best execution. 710:19-22 Ex. 126
21	Ciambor was the only ACA consultant who was not a former securities regulator. 718:19-21 757:12-15
22	Each year ACA performed a periodic and systematic evaluation of the execution quality of UASNM's client trades with respect to equities and fixed income. 725:11-726:7
23	Ciambor was advised that UASNM would seek bids from multiple brokers to achieve best execution on bond trades, and he was provided documentation which evidenced that process. 728:3-21
24	Based upon interviews with various UASNM personnel and his review of documents Ciambor's understanding was that a multi-bid process for bond transactions was used fairly consistently for the majority of trades, but that only a sample of the documentation evidencing that process was being maintained. 729:2-12 763:1-6
25	Hudson told Ciambor that he did bond trading for a significant number of his clients, and Ciambor understood that Hudson was the secondary trader at UASNM.

	731:22-25
26	Ciambor learned that LaMonde was making payments to Malouf for the sale of Branch 4GE because Malouf told him. 739:8-19
27	Ciambor primarily worked with Kopczynski and Hudson to update UASNM's Forms ADV. 751:16-22.
28	Ciambor did not undergo any formal training for his position at ACA with respect to best execution, identification of conflicts of interest, or identifying continuing commission payments. 757:16-758:12
29	Ciambor does not recall being told anything specifically by Malouf regarding his process for best execution. 766:18-20
30	Ciambor was aware that Hudson was placing a significant number of bond trades for UAS customers through Branch 4GE prior to 2008. 772:16-23
31	Ciambor was aware that UASNM continued to send a significant number of bond trades to Branch 4GE after January 2008. 773:6-10.
32	Ciambor did not ask Malouf for a copy of the purchase agreement for the sale of Branch 4GE and did not ask what the terms of the sale were in 2008. 774:11-18
33	ACA's annual review of UASNM included testing to ensure that UASNM's practices were consistent with the procedures set forth in its written compliance manual. 780:11-16
34	From 2008 to 2010 it was Kopczynski's responsibility as CCO to review the arrangements between UASNM and third-party providers such as RJFS. 787:24-788:13
35	Ciambor's primary contacts at UASNM were Kopczynski and Hudson, and Ciambor primarily interacted with them rather than Malouf. 790:15-20
36	In 2010 ACA would have normally charged $50,000 per year for the type of service provided to UASNM, but ACA was only charging UASNM $15,000. 790:6-14
37	The written semi-annual reviews of best execution that ACA provided to UASNM did not state that they were limited to equities. 793:12-16
38	In 2010 Ciambor's understanding of the payments made by LaMonde to Malouf is that they were payments for the sale of Branch 4GE and not commission-based compensation. 799:13-19
39	UASNM's California office closed in or around March 2008. 810:5-10 Exhibit 189
40	Ciambor believed the culture of compliance at UASNM was good from 2008 to 2010.

	814:8-15
41	Ciambor personally reviewed Pt II of UASNM's Forms ADV on at least an annual basis. 820:5-21
42	Ciambor told Kopczynski that Malouf had shown him evidence of bids regarding bond transactions. 837:6-12
43	Checks paid from LaMonde to Malouf were sometimes exchanged in the UASNM office. 877:21-23
44	Malouf and LaMonde had an understanding to not charge more than 1% on any bond transactions. 883:1-9 967:2-10
45	Judith Owens and Dan Moriarty were not told that the money they were paid for purported excess charges on bonds came from money that was owed to Malouf for his interest in UASNM. 902:7-10.
46	Letters sent to UASNM customers advising them of the payments for purported excess charges on bond trades did not explicitly advise customers that UASNM had been found to have breached its fiduciary duty to them. 901:18-25
47	On August 21, 2008, Judith Owens acknowledged with her signature that she received and read the information in UASNM's Form ADV Pt II. At that time the UASNM Form ADV Pt II stated that employees of UAS may receive compensation for transactions executed through RJFS. 905:25, 908:9-17
48	Malouf believed that ACA did a formal best execution analysis for UASNM each year or assisted Kopczynski with such a review. 947:14-19
49	Malouf spot-checked the bond market for pricing every morning. 951:2-20.
50	Malouf could not determine the precise commissions that LaMonde was charging on bond transactions from trade confirmations or the UASNM trade blotter. 971:17-22
51	Malouf learned about or was directed to NASD 2420 by RJFS. 1041:5-14 1043:6-11
52	Malouf agreed to put $850,000 owed to him for his interest in UASNM in escrow because he did not believe that any wrong had been done. 1058:8-25
53	During the time that Kopczynski was CCO, Malouf relied upon him to carry out all responsibilities of the compliance program at UASNM. 1062:3-8
54	The SEC conducted examinations of UASNM in 2002 and 2006. Neither examination resulted in UASNM being advised that any issues existed with respect to whether

	UASNM was satisfying its best execution obligations. 1125:12-15 Exhibits 391 and 558
55	UASNM's bond trading practices and procedures were generally unchanged from 2000 through May 2011. 1126:11-16
56	ACA never advised Malouf at any time from 2002 to 2010 that there was any issue with respect to UASNM's best execution. 1128:10-13
57	Keller knew Malouf sold Branch 4GE as of January 2008, and assumed he received payment for it. Keller knew Malouf received ongoing payments from LaMonde because Malouf told him. 1191:1-6
58	It was Kopczynski's opinion that RJFS no longer had to be disclosed on UASNM's Form ADV in 2010. 1194:14-1195:6
59	Keller placed 50-60% of the bond trades he directed through RJFS. 1165:21-1166:1
60	Keller knew that Malouf was receiving payments from LaMonde because Malouf told him sometime prior to March 2010. 1173:2-13
61	Malouf obtained multiple bids on all bond trades that Keller worked on with him. 1185:18-23
62	Malouf was one of the people who told Keller about the practice of obtaining multiple bids when purchasing bonds. 1201:4-6
63	Keller's belief that Malouf did not obtain best execution and that the prices paid on bond trades were too high is based solely upon information he received from Kopczynski and Hudson during the state court litigation. 1204:2-20
64	Kopczynski only reviewed UASNM's trade blotters, if at all, in response to something that ACA would have raised as a concern. 1291:8-11
65	Kopczynski sent UASNM trade blotters to ACA quarterly. 1291:12-14
66	ACA reviewed UASNM's trade confirms during ACA's annual reviews. 1303:19-24
67	The confirms that UASNM received for bond trades did not reflect the specific amount of any markups. 1308:8-10
68	Kopczynski would not take any action with respect to best execution, markups, or commissions unless ACA noted something about those issues on their annual reports. 1308:22-1309:4
69	Kopczynski was responsible for supervising Malouf's bond trading. 1311:11-14
70	Kopczynski personally reviewed UASNM's Forms ADV to ensure they were accurate

	and complete twice a year. 1325:14-25
71	UASNM customers were provided with Pt II of the UASNM Form ADV annually by mail, and prospective clients were handed a copy. 1377:1-12.
72	LaMonde and Malouf openly exchanged, discussed, and argued about the payments in the UASNM office. 1252:10-11
73	The sale value of Branch 4GE was based on 2-times trailing revenue of approximately $500,000 to $550,000. 924:22-925:6
74	The price paid by Malouf and Hudson to purchase UAS from Kopczynski was based upon a 2-times trailing revenues.
75	Dan Moriarty was on actual or constructive notice that employees of RJFS may earn commissions on transactions prior to 2008 and chose to do business with UASNM anyway.
76	Steve McGinnis never asked Malouf or RJFS for Exhibit A to the PPA. 460:21-461:5
77	LaMonde testified that the value of 4GE was about $1 million. (LaMonde Transcript 67:7-11.)
78	McGinnis relied upon representations by Hudson and Kopczynski that Exhibit A to the PPA did not exist. 461:6-15
79	The payments to Malouf were to be based upon a percentage of the gross commissions for the whole of Branch 4GE over a period of four years. (LaMonde Transcript 65:18-66:9).
80	No effort has been undertaken to determine the specific percentage of bond trades actually done by Malouf or anyone else.
81	None of the 81 bond trades at issue has been positively identified as having been directed by Malouf, and no effort to do so has been undertaken by anyone.
82	Ciambor did not ask Malouf for a copy of the PPA or what the terms of the sale of Branch 4GE were in 2008 or 2009. 774:11-18
83	Ciambor did not undertake to determine whether Malouf was receiving ongoing payments from LaMonde from 2008 to 2009. 799:4-11
84	Hudson did not object to Malouf receiving money from RJFS because it meant less borrowing from UASNM. Hudson Tr: 106:17-19
85	Gibbons, McGinnis, and Wolper agree that there are no rules, regulations, or laws setting maximum commissions on fixed income trades.
86	UASNM never charged or received commissions.
87	LaMonde was the broker who actually placed bond trades on behalf of UASNM through Branch 4GE at the direction of certain UASNM employees.
88	Hudson signed or authorized ACA to sign his name every Form ADV filed by UASNM. By doing so he and the investment adviser both certified, under penalty of

	perjury under the laws of the United States of America, that the information and statements made therein, including exhibits and any other information submitted, are true and correct.
89	Keller claims the reason Malouf was terminated from UASNM was because of toxic atmosphere in office created by Malouf's relationship with Monica Villa, erratic behavior, and excessive use of AmEx.
90	Hudson claims the reason Malouf was terminated from UASNM was erratic behavior, not being professional, and financial irregularity.
91	Kopczynski was ultimately responsible for the compliance function at UASNM.
92	Kopczynski relied upon ACA's expertise to ensure disclosures on UASNM's Form ADV were right.
93	A consent order was entered in 2000 by the FDIC that banned John Schmalzer, who prepared SEC exhibits 201 through 211, from the banking industry. Schmalzer sought to have his industrywide ban lifted in 2004, and the FDIC denied his request finding that he had "provided no evidence of his rehabilitation and no circumstances against which to assess: his fitness, the effect his participation would have on the risk to safety and soundness of any financial institution, and the effect his participation would have on the public confidence in the financial institution." In re Schmalzer, 2004 WL 2930775 (F.D.I.C.).
94	McGinnis testified that a CCO should spend more than a few hours a week on his duties.
95	Gibbons did not consider any misconduct by Kopczynski as CCO in his expert report.
96	McGinnis did not consider any misconduct by Kopczynski as CCO in his recommendations to UASNM.
97	McGinnis was not asked to identify which trades were directed by Malouf. 438:24-439:2
98	Gibbons has not seen any information that would confirm whether Malouf directed any specific bond trade at issue.
99	The ranges of "acceptable" markups/markdowns provided by Gibbons are not absolute.
100	Gibbons was unable to find any studies regarding markups/markdowns.
101	Ciambor saw evidence during ACA's annual mock audits that UASNM was achieving best execution on fixed income investments.
102	As a broker LaMonde had the power and authority to set the commission on trades placed through Branch 4GE.
103	From 1999 to 2004 it was disclosed to UAS customers in the Form ADV that employees of UAS who were also registered with RJFS could receive commissions for trades placed through RJFS
104	From 2004 to 2007 it was disclosed to UASNM customers in the Form ADV that employees of UASNM who were also registered with RJFS could receive commissions for trades placed through RJFS.
105	The fact that RJFS made templates for the sale of branch offices available to its registered representatives, such as the PPA, is evidence that such sales are a relatively common occurrence.
106	In addition to the written PPA, Malouf and LaMonde had certain oral agreements and understandings with respect to the sale of Branch 4GE. Specifically Malouf and LaMonde understood that the total purchase price for Branch 4GE would be $1.1

	million based upon a multiple of trailing revenues and LaMonde could pre-pay towards the purchase price without penalty. 1049:11-20 1056:4-13 1599:22-1600:5
107	The PPA contemplated that LaMonde would pay for Branch 4GE using a portion of the revenues that the branch generated. 1595:20-1596:11
108	RJFS conducted annual examination of Branch 4GE which included a review of the corporate checking account records. RJFS would have seen evidence of the payments from LaMonde to Malouf during these reviews.
109	From 2008 to 2011 the Branch 4GE corporate checking account records reflected the payments that LaMonde was periodically making to Malouf. 862:1-16 Ex. 107, 141, 147
110	RJFS actively reviewed commissions charged on bond trades placed through Branch 4GE to determine whether they were fair and reasonable. Ex. 126, 127
111	In or around April 2011, Malouf advised Kopczynski that he was going to file for divorce from his daughter and on May 2, 2011, Malouf filed for divorce.
112	In the self-report letter to the SEC Kopczynski and Hudson blamed Malouf for all of the conduct now at issue. Ex 332
113	Neither Kopczynski nor Hudson were charged with wrongdoing or subject to any terms of the settlement.
114	Under the settlement UASNM agreed to pay $506,083.74 to customers for purportedly excessive commissions, and a $100,000 civil money penalty.
115	Bell heard about a sale agreement between Malouf and LaMonde no later than May 2009 644:6-9
116	The process for the sale of an RJFS branch typically involves RJFS providing the registered representatives with a sample agreement, getting a list of client accounts that would be part of the buy-sell agreement, and then moving the accounts according to that list. 633:14-23
117	The sale agreement between Malouf and LaMonde required LaMonde to make periodic payments to Malouf for the purchase of the branch.
118	The sale agreement between Malouf and LaMonde was substantially memorialized in the PPA, which was signed sometime between December 2007 and June 2010.
119	Koczynski and Ciambor claim not to have asked about the payments for the sale of Branch 4GE despite knowing Malouf and Hudson had paid for UASNM with a series of payments over time
120	RJFS reviewed the Branch 4GE operational checking account annually to inspect for irregularities or payments that should not be occurring. 637:12-21
121	Hudson told the Division during its investigation that the payments were a good thing

	because it meant Malouf would borrow less from UASNM. Ex. 229 Hudson Tr: 106:15-22
122	The fact that UASNM was directing bond trades through Branch 4GE was not a secret at any time from 2004 to 2011.
123	LaMonde could not afford to purchase Branch 4GE outright, and agreed to pay over time using revenues generated by the branch.
124	The quarterly variances between the commissions generated at Branch 4GE and the payments made to Malouf are inconsistent with an agreement to pay 100% of commissions. Ex. 203
125	From 2008 through the beginning of 2011 (12 quarters) there are only two quarters during which the payments made by LaMonde to Malouf are within 5% of the commissions earned. The average variance between the payments and commissions over the entire time frame is almost 30%. Ex. 203
126	The significant and repeated variances between the commissions generated at Branch 4GE and the payments made to Malouf demonstrate that the similarity between the total commissions and total payments at the end of three years, upon which the Division relies, is more likely a coincidence than the product of a secret agreement.
127	If LaMonde had agreed to pay Malouf 100% of the commissions he could have easily calculated that amount.
128	LaMonde was making payments to Malouf for the purchase of Branch 4GE when and as he could afford to do so.
129	Kopczynski claimed that Malouf and LaMonde had a secret agreement in order to shift blame for UASNM's purported regulatory issues to Malouf.
130	Malouf is not high on Kopczynski's "favorites list." 1270:19-22
131	Because the payments made by LaMonde to Malouf were based upon branch revenues without regard for any specific transactions, they were not tied to the successful completion of any specific transactions.
132	Don Miller, who is Malouf and UASNM's accountant, reviewed the PPA and considered the nature of the payments that Malouf received. He determined the payments should not be treated as ordinary income because they were clearly not commissions. 1578:18-1579:22
133	The payments from LaMonde to Malouf are capital gains from the sale of a business, not income.
134	LaMonde made payments to Malouf as an ex-broker to compensate him for the sale of his branch, not to compensate him for transactions.
135	Malouf read information regarding NASD 2420 on the RJFS intranet, and he reviewed the plain language of the rule on the FINRA website. 1041:15-24
136	Malouf relied on NASD 2420 when selling Branch 4GE to LaMonde.
137	It would be unusual for a buy-sell agreement to be entered more than a year after accounts had been transferred. 683:14-19

138	Malouf did not solicit new business or open new accounts for Branch 4GE after 2007.
139	After selling Branch 4GE Maloufs securities work was limited to investment advisory work at UASNM.
140	When Malouf left RJFS he could have transferred to any other broker-dealer and continued doing business as a broker, but chose not to so he could focus his efforts on UASNM. 1039:17-1040:23
141	Malouf's actions are entirely consistent and typical with those of a registered investor adviser, not a broker.
142	To the extent Kopczynksi did not fully know the terms of Malouf's agreement with LaMonde, he should have asked. 1332:16-17
143	Hudson did not ask about or investigate the agreement between Malouf and LaMonde because he did not think it was part of his role or any of his business. 140:23-141:2
144	A CCO should review and approve drafts of a website before it is published and review the website to ensure what was approved actually made it on the screen. 449:10-16
145	Malouf reasonably believed that Kopczynski, Hudson, and Ciambor were all sufficiently experienced and qualified for their positions and the attendant duties.
146	At best, the evidence showed that from time to time another broker-dealer offered a better price and the trade was done at that broker-dealer, or RJFS offered to match the price.
147	There was no evidence of a trade placed at RJFS when a better price was available at the time from another broker-dealer.
148	Malouf reviewed the condition of bond markets generally each morning. 1103:1-4
149	When Malouf reviewed BondDesk information provided by LaMonde he knew it reflected data from 160 or more different broker-dealers and that he was being shown the 5 best prices/bid/ask on a particular bond. 1100:16-1102:19
150	Some broker dealers are simply better than others at transacting certain kinds of securities. 552:2-7
151	The RJFS commission grids are integral to RJFS' policies and procedures to ensure it met its best execution obligations. 1111:8-15 Ex. 127
152	It was not determined which Forms ADV introduced were drafts and which ones were finals that were filed and/or disseminated. 992:12-23 1352:14-15
153	Kopczynski claims he reviewed and approved the content posted on UASNM's website and to ensure the accuracy of the firms Forms ADV. 1354:12-18
154	Under its agreement with UASNM, ACA was obligated to provide changes to the

	Forms ADV when necessary, submit them to Kopczynski for approval, and ensure they were filed. 1342:18-20
155	Kopczynski claims to have reviewed the UASNM website and believed it to be accurate in 2008. 1356:14-1357:4
156	Neither Hudson nor Kopczysnki took any action to remove language from the UASNM website regarding UASNM being "free of conflicts of interest" until 2012, despite being specifically advised by ACA in its 2007 and 2009 annual reports that such language was problematic. 1363:13-21 1369:21-24
157	In October 2009 Kopczynski, Hudson, and Ciambor knew that UASNM was directing trades through RJFS, but they did nothing to ensure disclosure on UASNM's Form ADV that RJFS was a broker-dealer through which UASNM did business. 825:20-826:3

PROPOSED CONCLUSIONS OF LAW

No.	Proposed Conclusion of Law
1	Section 17(a)(1) makes it unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly to employ any device, scheme, or artifice to defraud.
2	To establish a violation of § 17(a)(1), the Division must prove (1) a material misrepresentation or materially misleading omission, (2) in the offer or sale of a security, (3) made with scienter. S.E.C. v. Morgan Keegan & Co., Inc., 678 F.3d 1233, 1244 (11th Cir. 2012)
3	Scienter can be found where a defendant acted with an "intent to deceive, manipulate, or defraud." S.E.C. v. Steadman, 967 F.2d 636, 641 (D.C. Cir. 1992), quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976).
4	Scienter may include "severe recklessness" or "extreme recklessness," which is limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it. S.E.C. v. Huff, 758 F.Supp.2d 1288, 1351-1352 (S.D. Fla. 2010).
5	To establish a violation of § 17(a)(3), the Division must show (1) a material misrepresentation or materially misleading omission, (2) in the offer or sale of a security, (3) made with negligence." S.E.C. v. Morgan Keegan & Co., Inc., 678 F.3d

	1233, 1244 (11th Cir. 2012)
6	Section 17(a)(3) focuses on the "effect of particular conduct on members of the investing public, rather than upon the culpability of the person responsible." Aaron v. S.E.C., 446 U.S. 680, 697 (1980).
7	Section 10(b) makes it unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
8	Rules 10b-5(a) and 10b-5(c), promulgated under § 10(b), make it unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) to employ any device, scheme, or artifice to defraud, or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.
9	To prove a violation of § 10(b) and Rule 10b-5, the Division must show (1) a material misrepresentation or materially misleading omission, (2) in connection with the purchase or sale of a security, (3) made with scienter." S.E.C. v. Morgan Keegan & Co., Inc., 678 F.3d 1233, 1244 (11th Cir. 2012).
10	Malouf did not violate Section 17(a)(1) and 17(a)(3) of the Securities Act.
11	Malouf did not violate Section 10(b) of the Exchange Act and Rule 10b-5(a) and 10-b-5(c).
12	Malouf did not commit a manipulative or deceptive act in furtherance of a scheme.
13	Malouf did not have an undisclosed agreement with LaMonde. The PPA, and any attendant understanding regarding accelerated payments, constituted a "bona fide contract" for the sale of Branch 4GE.
14	Malouf did not receive commissions. The payments received were in connection with the sale of the branch.
15	Malouf did not receive "substantially all" the commissions from UASNM's bond trading. The amounts paid to Malouf were substantially different than the commissions generated by UASNM bond trades. The Division's own calculations indicate that, on a quarterly basis, payments to Malouf differed substantially from the commissions generated by UASNM bond trades by as much as 61%, and often differed by 20-40%. There was no reason and no incentive for LaMonde to pay commissions to Malouf. The payments were for the branch purchase.

16	Reliance by an alleged perpetrator of securities fraud on professional advice may preclude a finding that he acted with the requisite scienter, where the professional "blesses" the perpetrator's work and is not a participant in the alleged fraud. S.E.C. v. Huff, 758 F.Supp.2d 1288, 1351-1352 (S.D. Fla. 2010).
17	UASNM and Kopczynski CCO relied on ACA to perform mock SEC audits and to advise UASNM with respect to compliance issues. Malouf, as CEO, delegated the compliance responsibilities to, and relied on, Kopczynski to advise UASNM with respect to compliance issues and take appropriate action.
18	Sections 206(1) and 206(2) make it unlawful for any investment adviser by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly: (1) to employ any device, scheme, or artifice to defraud any client or prospective client; and (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.
19	The "device, scheme, or artifice" language [in Sections 206(1) and 206(2)] is the same as in Rule 10b-5 and the same standards apply, except as to scienter in the case of 206(2). Carroll v. Bear, Stearns & Co., 416 F. Supp. 998, 1001 (S.D.N.Y. 1976).
20	Under § 206(2) of the Advisers Act the actions must at least be negligent. S.E.C. v. Steadman, 967 F.2d 636, 643 n.5 (D.C. Cir. 1992).
21	Malouf did not violate Section 206(1) and (2) of the Advisers Act.
22	Malouf did not have an undisclosed agreement with LaMonde to receive substantially all the commissions from UASNM's bond trading. As such, Malouf did not fail to disclose any "secret commissions."
23	Section 207 of the Advisers Act makes it unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission, or willfully to omit to state in any such application or report any material fact which is required to be stated therein.
24	In order to establish the element of willfulness, the Division much show that Respondent intended to engage in the action alleged regardless of his knowledge that the act constituted a violation of the securities law. S.E.C. v. Moran, 922 F. Supp. 867, 900 (S.D.N.Y. 1996).
25	Reliance on professional advice negates a finding of willfulness. S.E.C. v. Slocum, Gordon & Co., 334 F. Supp. 2d 144, 181-82 (D.R.I. 2004).
26	Kopczynski reasonably relied on ACA to evaluate what information should be disclosed on UASNM's Forms ADV. Similarly, Malouf reasonably relied upon Kopczynski and ACA.
27	Malouf did not make any statements or omissions on any Form ADV. All UASNM Forms ADV were signed by Hudson, who attested to their accuracy and truthfulness under penalty of perjury. Malouf did not sign the Forms ADV or attest to their accuracy.

28	The disclosures in UASNM's Forms ADV were sufficient to put a reasonable investor on notice of potential conflicts of interest with RJFS. In numerous Form ADV filings, UASNM disclosed that (a) Malouf had an ownership interest in the RJFS branch and may receive compensation for transactions executed through the branch; (b) one or more employees of UASNM were also associated with RJFS and may receive compensation on transactions executed through the branch; and/or (c) that Malouf was associated with RJFS.
29	Rule 206(4)–1(a)(5), promulgated under § 206(4), provides that it shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) of the Act for any investment adviser, directly or indirectly, to publish, circulate, or distribute any advertisement which contains any untrue statement of a material fact, or which is otherwise false or misleading.
30	To establish its claim for aiding and abetting, the Division must show: (1) a primary or independent securities law violation by an independent violator; (2) the aider and abettor's knowing and substantial assistance to the primary securities law violator; and (3) awareness or knowledge by the aider and abettor that his role was part of an activity that was improper. S.E.C. v. Slocum, Gordon & Co., 334 F. Supp. 2d 144, 184 (D.R.I. 2004)
31	"While it is unnecessary to show that an aider and abettor knew he was participating in or contributing to a securities law violation, there must be sufficient evidence to establish 'conscious involvement in impropriety.'" Id. (quoting Monsen v. Consolidated Dressed Beef Co., 579 F.2d 793, 799 (3d Cir.1978). "This involvement may be demonstrated by proof that the aider or abettor 'had general awareness that his role was part of an overall activity that [was] improper.'" SEC v. Coffey, 493 F.2d 1304, 1316 (6th Cir. 1974).
32	Malouf did not aid and abet or cause UASNM's violations of Section 206(1), 206(2) and 207 of the Advisers Act.
33	Malouf did not aid and abet or cause UASNM's violations of Section 206(4) of the Advisers Act and Rule 206(4)-1(a)(5)
34	Malouf did not fail to disclose his receipt of payments from LaMonde.
35	To establish its claims under § 15(a)(1) or § 15C(a)(1)(A), the Division must show that Malouf was a "broker," meaning "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A).
36	The Exchange Act does *not* define "effecting transactions," and various factors determine whether a person is a "broker." S.E.C. v. Kramer, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011).
37	Factors which may be considered to determine if a person is acting as a "broker" include whether the person: (1) works as an employee of the issuer; (2) receives a commission rather than a salary; (3) sells or earlier sold the securities of another issuer; (4) participates in negotiations between the issuer and an investor; (5) provides either

	advice or a valuation as to the merit of an investment; and (6) actively (rather than passively) finds investors. S.E.C. v. Kramer, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011). (citation omitted). Whether an individual receives commissions on sales is a "hallmark" of a broker. Id.
38	Malouf did not engage in any conduct that would classify him as a "broker" for purposes of Section 15(a)(1) and 15C(a)(1)(A).
39	Malouf was a registered investor adviser. An investment adviser is "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities." 15 U.S.C. 80b-2(11).
40	Malouf's conduct of meeting with and soliciting clients and providing advice to investors as to the merits of securities is consistent and typical of an investment adviser. This conduct does not establish that Malouf was acting as a broker.
41	Malouf did not receive commissions. Payments Malouf received from LaMonde were a portion of revenues earned by Branch 4GE paid as consideration for the purchase of the branch pursuant to the PPA.
42	IM 2420-2 sets forth the procedure by which FINRA member firms may pay continuing commissions to non-members.
43	IM 2420-2 provides that "the payment of continuing commissions in connection with the sale of securities is not improper so long as the person receiving the commissions remains a registered representative of a member of the Association. However, payment of compensation to registered representatives after they cease to be employed by a member of the Association — or payment to their widows or other beneficiaries — will not be deemed in violation of Association Rules, provided bona fide contracts call for such payment."
44	IM 2420-2 does not set forth any requirement that a broker retire from the securities industry. 1044:1-21
45	To establish its claim for aiding and abetting a violation of §§ 206(1), 206(2), and 207, the Division must show: (1) a primary or independent securities law violation; (2) the aider and abettor's knowing and substantial assistance in the primary violation; and (3) awareness or knowledge by the aider and abettor that his role was part of an activity that was improper. S.E.C. v. Slocum, Gordon & Co., 334 F. Supp. 2d 144, 184 (D.R.I. 2004).
46	"The element of substantial assistance is met when, based upon all the circumstances surrounding the conduct in question, a defendant's actions are a 'substantial causal factor' in bringing about the primary violation." S.E.C. v. K.W. Brown & Co., 555 F. Supp. 2d 1275, 1307 (S.D. Fla. 2007).
47	The awareness requirement can be satisfied by extreme recklessness, which can be

	shown by red flags, suspicious events creating reasons for doubt, or a danger so obvious that the actor must have been aware of the danger of violations." S.E.C. v. K.W. Brown & Co., 555 F. Supp. 2d 1275, 1307 (S.D. Fla. 2007).
48	"Reckless conduct is, at the least, conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47 (2d Cir. 1978); Monetta Fin. Servs., Inc. v. S.E.C., 390 F.3d 952, 956 (7th Cir. 2004).
49	Best execution involves "execut[ing] securities transactions for clients in such a manner that the client's total cost or proceeds in each transaction is the most favorable under the circumstances." Interpretive Release Concerning the Scope of Section 28(e) of the Securities Exchange Act of 1934, Exchange Act Release No. 23,170 (Apr. 23, 1986). Meeting this standard requires "consider[ing] the full range and quality of a broker's services in placing brokerage including, among other things, the value of research provided as well as execution capability, commission rate, financial responsibility, and responsiveness . . . ." Id. Best execution "is ***not*** [determined by] the lowest possible commission cost but whether the transaction represents the best qualitative execution for the managed account." Id. (emphasis added).
50	The only specific SEC requirement for ensuring compliance with best execution is "periodic and systematic review" of the procedures employed for best execution. See Exchange Act Release No. 23,170 (Apr. 23, 1986).
51	This periodic and systematic review was Kopczynski's responsibility as CCO. ACA conducted (or said it conducted) such a review every year and told UASNM that it was complying with its best execution obligations. Malouf reasonably relied on these clean reports as a validation of his bond trading activity.
52	The Division has not identified any bond trades that it can attribute to Malouf.
53	The Division has not identified any specific comparable trades against which it could be established that UASNM failed to obtain best execution.
54	SEC enforcement actions brought pursuant to the Securities Act, the Exchange Act, or the Advisers Act are subject to a five year statute of limitations. *See* 28 U.S.C.A. § 2462; Gabelli v. S.E.C., 133 Ct. 1216, 1219-23 (2013).
55	The statute runs from the date of the conduct, and there is no applicable "fraud discovery rule." Gabelli v. S.E.C., 133 Ct. 1216, 1222-24 (2013).
56	The five-year statute of limitations contained in 28 U.S.C. § 2462 applies to all forms of relief sought by the Division. SEC v. Graham, 21 F. Supp.3d 1300, 1308-10 (S.D. Fla. 2014).
57	This proceeding was instituted June 9, 2014, and therefore all claims, fines, penalties, or forfeitures are limited to conduct that occurred after June 9, 2009.
58	As CCO Kopczynski was responsible for ensuring that a multi-bid process was occurring for bond trades.

	1292:5-8
59	Kopczynski was responsible for supervising Malouf's bond trading. 1311:11-14
60	Kopczynksi may have violated his fiduciary duty by failing to disclose payments on Form ADV.
61	An investment adviser does not have to obtain multiple bids on every transaction. 551:24-552:18
62	It is a CCO's duty to review trade tickets to confirm best execution is being achieved.
63	Hudson, Kopczynski, and Ciambor had all the information they needed to ensure UASNM's Forms ADV and marketing materials adequately and accurately disclosed UASNM's trading through RJFS while Malouf received payments.
64	A contract is not voided when the parties do not explicitly follow its terms, the parties may modify the contract through express or implied agreement, which may be shown by conduct. Medina v. Sunstate Realty, Inc., 889 P.2d 171, 173 (N.M. 1995) (parties to a written contract may modify that contract by express or implied agreement as shown by the words and conduct); Lalow v. Codomo, 101 So.2d 390, 393 (Fla.1958) (noting that "the actions of the parties may be considered as a means of determining the interpretation that they themselves have placed upon the contract").
65	Contracts may be modified by non-conforming conduct by one party if the other party accepts the non-conforming performance. Medina v. Sunstate Realty, Inc., 889 P.2d 171, 173 (N.M. 1995) (parties to a written contract may modify that contract by express or implied agreement as shown by the words and conduct)
66	NASD IM 2420-2 requires only that an agreement be "bona fide," not that it be written. 1421:20-1422:17
67	Upon initial receipt of commissions by Branch 4GE, the funds stop being commissions and LaMonde was free to pay for any manner of business expenses with them, whether goods, services, or repayment for financing.
68	It cannot reasonably be concluded from the quarterly payment amounts to Malouf that LaMonde had agreed to pay Malouf 100% of the commissions.
69	The evidence supports a finding that LaMonde and Malouf agreed to a purchase price of approximately $1.1 million, that the purchase price was paid off early – in three years instead of four, and that extrapolating payments versus commissions over a fourth year approximates the 40% of branch revenue in the PPA.
70	The payments from LaMonde to Malouf were merely a form of financing tied to Malouf's ability to pay, and they did not meet the definition of transaction-based compensation.

71	Payment for participation in a trade is the essence of a commission
72	The wide variances between the commissions generated at Branch 4GE and the payments made to Malouf do not support a *quid pro quo* arrangement, and no inference can be drawn that the payments are tied to the commissions.
73	Commissions are not a hallmark of broker activity in this case because they are not tied to broker activity by Malouf.
74	If commissions were paid to Malouf, they were permissible under NASD 2420 and were not paid to him as a broker.
75	As of January 2008 ownership of Branch 4GE had changed from Malouf to LaMonde, accounts had been transferred from Malouf to LaMonde pursuant to a list, and LaMonde started making payments to Malouf for the branch. These events in and of themselves are conclusive evidence that a bona fide agreement for the sale of Branch 4GE existed as of January 2008.
76	Malouf's work as an investment adviser for UASNM complied with the language of NASD 2420.
77	The no-action letters cited and relied upon by the Division are not controlling or decisive, and they do not constitute binding rules, regulations, or interpretations of any rule or regulation. *Amalgamated Clothing and Textile Workers Union v. SEC*, 15 F.3d 254, 257 (2d Cir. 1994) *Gryl v. Shire Pharmaceuticals Group PLC*, 298 F.3d 136, 145 (2d Cir. 2002)
78	Malouf could receive payments pursuant to NASD 2420 because he was eligible for FINRA membership and was not a disqualified person
79	A president/CEO of an investment adviser may delegate ultimate responsibility for the functions of a firm to other qualified individuals, whereupon the delegate assumes ultimate responsibility, not the CEO. Wolper Rebuttal Report, No. 7 *Richard F. Kresge,* Exchange Act Rel. No. 55988 (June 29, 2007), 90 SEC Docket 3072, 3084 *(citing Rita H Malm,* 52 S.E.C. 64, 69 (1994))
80	Hudson had a duty to ensure the accuracy and completeness of UASNM's Forms ADV because he attested to their accuracy and completeness when he signed them or allowed others to sign them on his behalf.
81	ACA had a responsibility as UASNM's compliance consultant to properly advise UASNM regarding disclosures in its marketing materials and regulatory filings.
82	ACA specifically agreed to undertake responsibility to properly advise UASNM regarding disclosures in its marketing materials and regulatory filings in exchange for substantial compensation, and Malouf reasonably believed ACA was doing its job.
83	"Best execution" is not defined in federal securities laws or regulations.
84	There is no regulatory requirement for an investment adviser to obtain multiple bids on bond transactions. 803:7-12
85	A lack of documentation of a multi-bid process in every instance is not proof that such a process did not occur, or that best execution was not achieved

86	A trade-by-trade, real time comparison and analysis is not necessary to achieve best execution. Wolper Report No. 11 Wolper Rebuttal Report No. 5
87	The failings of Ciambor, Hudson, and Kopczynski are attributable to their own culpable negligence, not concealment by Malouf.
88	Malouf's delegation of responsibility to others and his reliance upon them was reasonable, and negates any finding of scienter or negligence.
89	Any alleged harm to investors has been rectified by the payment of compensation for purportedly excessive commissions.