INITIAL DECISION RELEASE NO. 412
ADMINISTRATIVE PROCEEDING
FILE NO. 3-12978

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of		
	:	
SCOTT E. DESANO,	:	
THOMAS H. BRUDERMAN,	:	
TIMOTHY J. BURNIEIKA,	:	
ROBERT L. BURNS,	:	INITIAL DECISION AS TO
DAVID K. DONOVAN,	:	ROBERT L. BURNS
EDWARD S. DRISCOLL,	:	January 18, 2011
JEFFREY D. HARRIS,	:	
CHRISTOPHER J. HORAN,	:	
STEVEN P. PASCUCCI, and	:	
KIRK C. SMITH	:	

APPEARANCES: Martin F. Healey and Frank C. Huntington for the Division of Enforcement, Securities and Exchange Commission.

Robert L. Burns, pro se.

BEFORE: Robert G. Mahony, Administrative Law Judge.

The Securities and Exchange Commission (Commission) issued its Corrected Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on March 5, 2008, pursuant to Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 (Advisers Act) and Sections 9(b) and 9(f) of the Investment Company Act of 1940 (Investment Company Act). On September 17, 2008, I stayed the proceeding as to Respondent Robert L. Burns (Burns) for the Commission to consider the Offer of Settlement agreed to by him and the Division of Enforcement (Division).[1] On April 14, 2010, the Division notified my office that the Commission did not approve the settlement for Burns. Accordingly, pursuant to Rule 161(c)(2)(ii), the stay as to Burns lapsed.

[1] The Commission has previously accepted Offers of Settlement from eight of the remaining Respondents. Scott E. DeSano, Advisers Act Release Nos. 2812-19 (Dec. 11, 2008). Respondent Thomas H. Bruderman (Bruderman) has submitted an Offer of Settlement that is pending approval before the Commission. The proceeding was stayed on October 28, 2008, as to Bruderman.

The OIP alleges that Burns violated Section 17(e)(1) of the Investment Company Act, which prohibits any affiliated person of a registered investment company, or any affiliated person of such person (i.e., an investment adviser), acting as agent, from accepting from any source any compensation (other than a regular salary or wages from such registered company) for the purchase or sale of any property to or for such registered company or any controlled company thereof, except in the course of such person's business as an underwriter or broker. 15 U.S.C. § 80a-17(e)(1) (2010). As relief for the alleged violation, the Division seeks a cease-and-desist order, disgorgement plus prejudgment interest, a civil money penalty, and a bar from service with a registered investment company and association with an investment adviser.

Burns filed an Answer to the OIP, dated April 10, 2008. At a June 17, 2010, telephonic prehearing conference, at which the Division and Burns appeared, I granted the Division's request for leave to file a motion for summary disposition (Prehearing Conf. Tr. at 3-7; Order of June 17, 2010). The Division filed its Motion for Summary Disposition, a supporting Memorandum of Law, and accompanying exhibits on July 22, 2010 (Motion); Respondent filed an opposition to the Division's Motion on September 10, 2010 (Opposition); the Division filed a reply on September 17, 2010 (Reply); and Respondent filed a response to the Division's Reply on September 23, 2010 (Response).[2]

The Standards for Summary Disposition

Rule 250(a) of the Commission's Rules of Practice provides that, after a respondent's answer has been filed and documents have been made available to that respondent for inspection and copying, a party may make a motion for summary disposition of any or all allegations of the OIP with respect to that respondent. The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted pursuant to Rule 323 of the Commission's Rules of Practice.

Rule 250(b) of the Commission's Rules of Practice requires the hearing officer to promptly grant or deny the motion, or to defer decision on the motion. The hearing officer may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law.

In assessing the summary disposition record, the facts, as well as the reasonable inferences that may be drawn from them, must be viewed in the light most favorable to the non-moving party. See Felix v. N.Y. City Transit Auth., 324 F.3d 102, 104 (2d Cir. 2003); O'Shea v.

[2] Burns' Response is not a pleading contemplated by the Commission's Rules of Practice; however, in light of the fact that the Division did not object to its inclusion in the record and Burns' pro se status, I will consider it with the other pleadings. See 17 C.F.R. §§ 201.111(d), .154. Specifically, I will cite to the Division's Motion, Burns' Opposition, the Division's Reply, and Burns' Response as "(Div. Mot. at __.)," "(Burns Opp. at __.)," "(Div. Reply at __.)," and "(Burns Resp. at __.)," respectively. I will cite to Exhibits to the Division's Motion as "(Ex. __.)."

Yellow Tech. Svcs., Inc., 185 F.3d 1093, 1096 (10th Cir. 1999); Cooperman v. Individual, Inc., 171 F.3d 43, 46 (1st Cir. 1999).

By analogy to Rule 56 of the Federal Rules of Civil Procedure, a factual dispute between the parties will not defeat a motion for summary disposition unless it is both genuine and material. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Once the moving party has carried its burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The opposing party must set forth specific facts showing a genuine issue for a hearing and may not rest upon the mere allegations or denials of its pleadings. At the summary disposition stage, the hearing officer's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for resolution at a hearing. See Anderson, 477 U.S. at 249.

FINDINGS OF FACT

A. Burns and Relevant Entities

Burns, age forty-eight, resided in Brookline, Massachusetts, at the time he filed his Answer on April 10, 2008; however, he now lives with friends and provided a mailing address in Chestnut Hill, Massachusetts. (Answer at 2; Prehearing Conf. Tr. at 13; Burns Opp. at 3-4.) From 1986 until his resignation in December 2004, Burns was an equity trader at FMR Co., Inc. (FMR Co.). (Answer at 2.) From at least January 1, 2002, through October 31, 2004 (Relevant Period), Burns was a sector trader specializing in technology stocks and reported to David K. Donovan (Donovan). (Id.)

FMR Co. is a privately-held Massachusetts corporation registered with the Commission as an investment adviser pursuant to Section 203(c) of the Advisers Act, with its principal place of business in Boston, Massachusetts. (Answer at 4.) FMR Co. is a wholly-owned subsidiary of Fidelity Management & Research Company (FMR) (collectively, with FMR Co., Fidelity) and provides portfolio management services as a sub-adviser to certain clients of FMR, including the "Fidelity Investments" group of mutual funds (Fidelity Funds), all of which are registered with the Commission as investment companies.[3]

As an equity trader at FMR Co., Burns received orders from portfolio managers and could select brokers to handle certain securities transactions under certain circumstances, using a list of brokers that had been formally approved by Fidelity. (Answer at 7.) During the Relevant Period, Burns sent securities transactions to more than fifty brokerage firms, including the following: Robert W. Baird & Co. (Baird), Fidelity Capital Markets (FCM), Instinet, LLC (Instinet), Jefferies & Co. (Jefferies),[4] Knight Securities (Knight), Lehman Brothers (Lehman),

[3] I take official notice of public official records concerning FMR and FMR Co. See 17 C.F.R. § 201.323.

[4] Jefferies settled administrative charges arising from its provision of travel, entertainment, and gifts to Fidelity traders, including Burns. Jefferies & Co., Securities Exchange Act Release No. 54861 (Dec. 1, 2006).

Morgan Stanley & Co. (Morgan Stanley), Needham & Co. (Needham), Robertson Stephens (Robertson), and Schwab Soundview Capital (Schwab) (formerly Soundview Technology (Soundview)). (Exs. 4, 20, 165-66, 266, 269, 273, 276-77, 292, 294, 296, 298, 308, 321-22, 324, 360, 403, 435-39, 624, 682-83.) Also during the Relevant Period, Burns received various travel, entertainment, and gifts from these brokerage firms. (Burns Opp. at 2-3.).

B. Burns' Receipt of Travel, Entertainment, and Gifts from Brokerage Firms Doing Business with Fidelity.[5]

1. A broker at Robertson gave Burns two tickets to a Boston Celtics (Celtics) game in March 2002. (Ex. 4 at 1-3.) The Division estimates that Roberston paid $250 each for the tickets.[6] (Mot. at 2.) Burns provides no alternative valuation.

2. The Division alleges that a broker at FCM gave Burns two tickets to a Celtics playoff game in April 2002 and estimates that FCM paid $1,000 for them. (Mot. at 2.) In an April 24, 2002, email to the broker, Burns stated, "I NEED THOSE FRIGGIN' SEATS." (Ex. 4 at 10-18.) However, neither the evidence cited by the Division nor any other evidence in the record conclusively shows that Burns actually received the tickets.[7] (Ex. 4 at 4-18.)

3. The Division alleges that a broker at Soundview gave Burns two tickets to a Celtics playoff game in May 2002 and estimates that Soundview paid $1,000 for them. (Mot. at 2.) In a May 13, 2002, email to the broker, Burns stated, "IT WAS A BLAST. THANKS AGAIN." (Ex. 4 at 26.) However, neither the evidence cited by the Division nor any other evidence in the record conclusively shows that the tickets were to a Celtics playoff game or the actual value of the tickets.[8] (Ex. 4 at 19-20, 24-27.) Burns provides no alternative valuation.

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[5] For ease of reference, I will number the travel, entertainment, and gifts received by Burns and subsequently refer to them as "Fact __."

[6] The Division's estimates are based on a review of all expense vouchers produced by numerous brokerage firms during the investigation that preceded the filing of this action. (Mot. at 3.) However, those expense vouchers are not in the record; therefore, the Division's estimates will be given no weight, particularly in light of my obligations to take the facts of Burns' pleadings as true and view all facts in the light most favorable to him and the standard of proof. For instances for which there is nothing in the record to show conclusively the value of the travel, entertainment, or gift received by Burns, I will accept Burns' estimate (as indicated in the record) or consider the benefit not received, if Burns did not provide an estimate. In his Opposition and his Response, Burns repeatedly opines that the Division improperly overvalues the travel, entertainment, and gifts he received as a result of markups that he never would have paid. (Burns Opp. at 8-9; Burns Resp. at 1, 3-5.) I give no weight to these blanket statements unless specifically supported by evidence in the record.

[7] For instances for which there is nothing in the record to show conclusively that Burns actually received the travel, entertainment, or gift, I will consider the benefit not received.

[8] For instances for which there is nothing in the record to show conclusively what travel, entertainment, or gift Burns received, I will consider the benefit not received.

4. The Division alleges that the broker at FCM gave Burns two tickets to a Celtics playoff game in May 2002 and estimates that FCM paid $1,000 for them. (Mot. at 2.) In a May 9, 2002, email to the broker, Burns stated, "YOU'RE THE BEST." (Ex. 4 at 22-23.) However, neither the evidence cited by the Division nor any other evidence in the record conclusively shows that Burns actually received tickets to the event or any event in May 2002. (Ex. 4 at 21-23.)

5. Kevin Quinn (Quinn), a broker at Jefferies, gave Burns eight tickets (four tickets for two days) to the Wimbledon tennis tournament in London, England (Wimbledon), in July 2002, for which Jefferies paid $19,100.[9] (Ex. 266.)

6. Quinn gave Burns two front-row tickets to a Rolling Stones concert in Boston in September 2002. (Exs. 4 at 46-51; 20 at 6a; 624 at 26-28.) The Division estimates that Jefferies paid $200 each for the tickets. (Mot. at 2.) Burns provides no alternative valuation.

7. Quinn, plus brokers from Baird, Lehman, and Morgan Stanley, gave Burns a total of fourteen tickets to the U.S. Open tennis tournament in New York, New York (U.S. Open), in September 2002. (Exs. 4 at 28-45, 52-55; 20 at 6-6a.) In a September 3, 2002, email, Burns told Quinn, "DON'T EVER CHANGE!!!!!" (Ex. 4 at 45.) Baird paid $1,850 each for two of the tickets provided. (Ex. 165.) There is no evidence in the record, indicating the cost of the tickets purchased by Jefferies, Lehman, and Morgan Stanley.

8. Quinn gave Burns four tickets to a Bruce Springsteen concert at Fenway Park in Boston in October 2002, for which Jefferies paid $800. (Exs. 20 at 6a; 273 at 122-24.)

9. Quinn gave Burns three tickets to a performance of the "Lion King" in Los Angeles in October 2002, for which Jefferies paid $675. (Exs. 4 at 56-59; 20 at 6a; 269 at 32-33; 624 at 28-34.) Burns had asked Quinn to get the tickets after receiving a request from Peter Lynch (Lynch), the vice chairman and director of Fidelity, and the former portfolio manager of Fidelity's Magellan Fund, who wanted the tickets for his daughter.[10] (Ex. 624 at 28-34; Answer at 4.)

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[9] Quinn settled administrative charges arising from his provision of travel, entertainment, and gifts to Fidelity traders, including Burns. Kevin W. Quinn, Investment Company Act Release No. 27588 (Dec. 1, 2006).

[10] Lynch settled administrative charges arising from his receipt of entertainment from brokers doing business with Fidelity. Peter S. Lynch, Investment Company Act Release No. 28189 (Mar. 5, 2008). The Division argues that Burns' receipt of tickets on behalf of Lynch is a violation of Section 17(e)(1) of the Investment Company Act, but it is not seeking disgorgement or civil money penalties for such alleged violations since Lynch paid more than $17,000 pursuant to his settlement with the Commission. (Mot. at 3.) I, too, find Burns' receipt of tickets for Lynch to be violations of Section 17(e)(1), but I will not consider these items for the purpose of calculating any disgorgement and/or civil money penalties. See infra p. 15-19.

10. A broker at Baird gave Burns three tickets to an unidentified theater event in October 2002. (Ex. 4 at 60.) The Division estimates that Baird paid $200 each for the tickets. (Mot. at 3.) Burns provides no alternative valuation.

11. A broker at Soundview gave Burns two tickets to an unidentified event in November 2002. (Ex. 4 at 62.) The Division estimates that Soundview paid $200 each for the tickets. (Mot. at 3.) However, neither the evidence cited by the Division nor any other evidence in the record conclusively shows for what event the tickets were or their actual value. (Ex. 4 at 62.) Burns provides no alternative valuation.

12. Quinn and brokers at Morgan Stanley and Needham gave Burns wine in November and December 2002. Jefferies paid for five bottles at $149.95 each and three bottles at $1,675 each, and Morgan Stanley paid $118.47 total. (Exs. 4 at 61, 63; 20 at 11; 277 at 176; 435; 624 at 34-35.) The Division alleges that Needham paid $268 for the wine it purchased. (Mot. at 3.) However, there is no evidence in the record, indicating the cost of the wine purchased by Needham. Burns provides no alternative valuation.

13. Quinn gave Burns eight tickets to a performance of "Hairspray" in New York in December 2002, for which Jeffries paid $3,610. (Exs. 4 at 64-80; 20 at 6a; 276 at 169-72; 624 at 35-36.) In a December 19, 2002, email Quinn told Burns, "THESE TIXS ARE NOT EASY BY THE WAY." Burns replied, "I KNOW. THAT'S WHY I ASKED KEVIN 'THE MAN' QUINN FOR A BIG FAVOR." In a December 20, 2002, email, Quinn asked Burns, "CAN I BE YOUR #1 BROKER TODAY. [sic]" Burns replied, "WHAT DO YOU MEAN TODAY? YOU WILL ALWAYS BE #1 WITH ME!!!" (Ex. 4 at 64-80.)

14. A broker at Soundview gave Burns two tickets to a Celtics game in January 2003. (Ex. 4 at 81-82.) The Division estimates that Soundview paid $200 each for the tickets. (Mot. at 3.) Burns provides no alternative valuation.

15. The Division alleges that a broker at Soundview gave Burns two tickets to a Celtics game in February 2003 and estimates that Soundview paid $400. (Mot. at 3.) However, neither the evidence cited by the Division nor any other evidence in the record conclusively shows that the tickets were to a Celtics game or the actual value of the tickets. (Ex. 4 at 83-87.) Burns provides no alternative valuation.

16. Quinn gave Burns four tickets to a performance by the Alvin Ailey Dance Company in April 2003, for which Jefferies paid $700. (Exs. 4 at 95-98; 20 at 5; 292 at 428-29; 624 at 37-38.)

17. Quinn gave Burns twelve tickets to the Federal Cup tennis tournament in Lowell, Massachusetts, in April 2003. Burns estimates the tickets cost $30-40 each. (Exs. 4 at 88-94; 20 at 5; 624 at 81-85.)

18. A broker at Soundview gave Burns four tickets to a Celtics playoff game in April 2003. (Ex. 4 at 99, 102-05.) The Division estimates that Soundview paid $1,000 for them. (Mot. at 3.) Burns provides no alternative valuation.

19. An unidentified broker gave Burns four tickets to a performance of "Lion King" in May 2003. Burns estimates the tickets cost $85-100. (Exs. 4 at 110; 20 at 6a.)

20. A broker at Soundview gave Burns four tickets to a Boston Red Sox (Red Sox) game in May 2003, for which Soundview paid $1,100. (Exs. 4 at 111-12; 20 at 5; 682 at 3363-64.)

21. A broker at Lehman gave Burns four tickets to a Broadway musical performance in June 2003, for which Lehman paid $800.[11] (Exs. 20 at 6; 403 at 4.)

22. Quinn gave Burns eight tickets (four tickets for two days) to Wimbledon in July 2003, for which Jefferies paid $31,216. (Exs. 20 at 5; 294; 624 at 38-42.)

23. A broker at Soundview gave Burns two tickets to a Red Sox game in July 2003. Burns asked the broker to get the tickets after receiving a request from Lynch. (Exs. 4 at 113-16; 20 at 6.)

24. Quinn gave Burns four, front-row tickets to a Justin Timberlake and Christina Aguilera concert in August 2003, for which Jefferies paid $600. (Exs. 4 at 117-20; 624 at 43-44.)

25. A broker at Knight allowed Burns to use her home on Cape Cod in Massachusetts for a week's vacation in August 2003. Burns estimates the rental cost would have been $1,000, and he claims that he reimbursed the broker $700-800. (Exs. 20 at 9; 624 at 85-86.)

26. Quinn gave Burns eight tickets (four tickets for two days) to the U.S. Open in September 2003, for which Jefferies paid $7,200. (Exs. 4 at 121-27; 298; 624 at 20-24.) In a September 8, 2003, email, Burns told Quinn, "THE SEATS WERE GREAT." (Ex. 4 at 121-27.)

27. Quinn gave Burns two tickets to a performance of "The Producers" in New York in September 2003. Burns asked Quinn to get the tickets after receiving a request from Lynch. (Exs. 20 at 6; 624 at 29.)

28. The Division alleges Quinn gave Burns two tickets to a Red Sox playoff game in October 2003 and estimates that Jefferies paid $1,000 for them. (Mot. at 4.) In an October 2, 2003, email, Quinn told Burns, "I HAVE OUT DONE [sic] MYSELF W/ THOSE TIXS," to which Burns responded in an October 6, 2003, email that the game was "GREAT!!!!!!" (Ex. 4 at 129-31.) However, neither the evidence cited by the Division nor any other evidence in the record conclusively shows that the tickets were to a Red Sox playoff game or the actual value of the tickets. (Id.) Burns provides no alternative valuation.

29. The Division alleges a broker at Baird gave Burns two tickets to a Red Sox playoff game in October 2003 and estimates that Baird paid $1,000 for them. (Mot. at 4.) However,

[11] Burns indicated the tickets were for a performance of "42nd Street," and Lehman's records indicate they were for a performance of "Nine." (Exs. 20 at 6; 403 at 4.)

neither the evidence cited by the Division nor any other evidence in the record conclusively shows that the tickets were to a Red Sox playoff game or the actual value of the tickets. (Ex. 4 at 140-42.) Burns provides no alternative valuation.

30. A broker at Soundview gave Burns four tickets to a Red Sox playoff game in October 2003, for which Soundview paid $1,950. (Exs. 4 at 132-39, 143-44; 683.) In an October 7, 2003, email, less than fifteen minutes after Burns asked for the tickets, the broker told him, "I HAVE MIRACULOUSLY BEEN ABLE TO MAKE 4 GREAT SEATS APPEAR. I HAVE NO DOUBT YOU WILL REWARD ME FOR BEING A TRUE FRIEND. A FRIEND IN NEED IS A FRIEND INDEED." Burns replied, "ABSOLUTELY." (Ex. 4 at 132-39.)

31. Burns received wine from Quinn (a case), brokers at Instinet (a case), and Morgan Stanley in December 2003. (Exs. 4 at 145; 20 at 11-12; 624 at 46-47.) Jefferies and Morgan Stanley paid $628.95 and $127.77, respectively. (Exs. 308 at 650; 436.) The Division estimates that Instinet paid $1,200 for the wine. (Mot. at 4.) Burns provides no alternative valuation.

32. A broker at FCM gave Burns one ticket for a New England Patriots playoff game in January 2004, for which FCM paid $503.75. (Exs. 4 at 146-52; 439.)

33. A broker at Knight allowed Burns to use her condominium in Waterville Valley, New Hampshire, for a ski weekend in January 2004. Burns estimates that the rental cost would have been $300. (Exs. 20 at 9; 624 at 87-88.)

34. Quinn gave Burns four tickets each to performances of "Moving Out" and "Avenue Q" in New York in February 2004. Burns estimates that the tickets cost $65-85 each. (Exs. 20 at 5; 624 at 50-51.)

35. A broker at Baird gave Burns four tickets to a performance of "The Producers" in February 2004. (Ex. 4 at 153-56.) The Division estimates that Baird paid $800 for the tickets. (Mot. at 4.) Burns provides no alternative valuation.

36. A broker at Knight allowed Burns to use her condominium in Waterville Valley for a ski weekend in March 2004. Burns estimates that the rental cost would have been $300 in addition to the $700 he paid her. (Exs. 20 at 9; 624 at 88-89.)

37. The Division alleges that a broker at Schwab gave Burns two tickets to a Celtics game in March 2004 and estimates that Schwab paid $500. (Mot. at 4.) In a March 8, 2004, email, Burns thanked the broker and added that "SYSTEMS/TECH SUPPORT SEND THEIR THANKS AS WELL," to which the broker replied, "THAT IS EXACTLY WHAT I WAS HOPING FOR. PLUS IT IS ALWAYS GOOD TO MAKE YOU LOOK LIKE THE CONQUERING HERO." (Ex. 4 at 157-60.) However, neither the evidence cited by the Division nor any other evidence in the record conclusively shows that the tickets were to a Celtics game or the actual value of the tickets. (Id.) Burns provides no alternative valuation.

38. Quinn gave Burns tickets to an Erykah Badu concert in March 2004, for which Jefferies paid $1,080. (Exs. 321; 624 at 51-53.)

39. Quinn gave Burns a shirt for the Masters golf tournament in April 2004, for which Jefferies paid $125. (Exs. 4 at 161, 168-70; 20 at 12; 322; 624 at 54-55.)

40. A broker at Needham gave Burns four tickets to a Red Sox game in August 2004, for which Needham paid $900. (Exs. 20 at 4; 438; 624 at 91-92.)

41. Quinn gave Burns four tickets to a Madonna concert in June 2004, and Burns estimates that the tickets cost $100 each. (Exs. 20 at 5; 624 at 53-54.)

42. A broker at Schwab gave Burns four tickets to a Red Sox game in the summer of 2004, for which Schwab paid $240. (Exs. 4 at 162-67; 20 at 5.)

43. Quinn gave Burns twelve tickets (four tickets for three days) to Wimbledon in July 2004, and he arranged for Burns to stay at the Lanesborough Hotel in London, for which Jefferies paid $51,016.76 total. (Exs. 20 at 5; 324 at 1051-57; 624 at 56-74, 98-101.)

44. A broker at Baird gave Burns four tickets each to performances of "Avenue Q" and "Carolina Change" in New York in August 2004. Burns estimates that the tickets cost $65-85 each. (Exs. 20 at 5; 624 at 93-94.)

45. Quinn and a broker at Baird gave Burns a total of ten tickets to a Prince concert in August 2004. The face value of the tickets was $75. (Exs. 20 at 4-5; 624 at 77-80.)

46. A broker at Baird gave Burns a total of twelve tickets (four tickets for three days) to the Ryder Cup golf tournament in Michigan in September 2004. Burns asked the broker to get the tickets after receiving a request from Lynch. The face value of each ticket was $75. (Exs. 20 at 5; 166; 624 at 94-95.)

47. A broker at Knight gave Burns two tickets to a Red Sox playoff game in September 2004. Burns asked the broker to get the tickets after receiving a request from Lynch. Knight paid $1,900 for the tickets. (Exs. 20 at 5; 360; 624 at 90-92.)

48. Quinn gave Burns four tickets to a Neil Diamond concert in 2003 or 2004. Burns asked Quinn to get the tickets after receiving a request from Lynch. (Exs. 20 at 6a; 624 at 29.)

DISCUSSION AND CONCLUSIONS

Paragraph II.D.75 of the OIP alleges that Burns violated Section 17(e)(1) of the Investment Company Act willfully by receiving travel, entertainment, and gifts from brokerage firms that sought and obtained brokerage business from Fidelity.

Section 17(e)(1) of the Investment Company Act provides:

> It shall be unlawful for any affiliated person of a registered investment company, or any affiliated person of such person—

> (1) acting as agent, to accept from any source any compensation (other than a regular salary or wages from such registered company) for the purchase or sale of any property to or for such registered company or any controlled company thereof, except in the course of such person's business as an underwriter or broker.

15 U.S.C. § 80a-17(e)(1) (2010). The Investment Company Act "was designed primarily to correct the abuses of self-dealing which had produced injury to stockholders of investment companies." United States v. Deutsch, 451 F.2d 98, 108 (2d Cir. 1972), cert. denied, 404 U.S. 1019 (1972). To this end, the Investment Company Act "establish[es] broad standards which would more easily enable the government to convict affiliated persons for self-dealing in the management of investment companies—an industry the very nature of which made it particularly difficult to gather proof." Id. Section 17 "[is] aimed specifically at insuring the independence of management and its fidelity to stockholders," and "[t]he objective of § 17(e)(1) is to prevent affiliated persons from having their judgment and fidelity impaired by conflicts of interest." Id. at 108-09; see also Investors Research Corp. v. SEC, 628 F.2d 168, 177 (D.C. Cir. 1980), cert. denied, 449 U.S. 919 (1980) ("[Section 17(e)(1)] sets forth a flat ban on certain conduct tending to compromise the fiduciary judgment of affiliated persons.").

There are four elements to a violation of Section 17(e)(1) of the Investment Company Act: (1) an "affiliated person" of a registered investment company, (2) who is "acting as agent" for the investment company, (3) accepts "compensation" from any source other than his regular salary or wages, (4) "for the purchase or sale of any property" to or for the investment company.

A. Affiliated Person

Section 17(e)(1) applies to "any affiliated person of a registered investment company, or any affiliated person of such person." 15 U.S.C. § 80a-17(e)(1). An "affiliated person" of another person means . . . any officer, director, partner, copartner, or employee of such other person; [and,] if such other person is an investment company, any investment adviser thereof or any member of an advisory board thereof." 15 U.S.C. § 80a-2(a)(3)(D)-(E). As an equity trader at FMR Co., an investment adviser to the Fidelity Funds (registered investment companies), Burns was an affiliated person for purposes of Section 17(e)(1).

B. Acting as Agent

"[A]n affiliated person is acting as agent within the meaning of § 17(e)(1) in all cases when he is not acting as broker for the investment company." Deutsch, 628 F.2d at 111. As an equity trader at FMR Co., who selected brokers to handle certain securities transactions for the Fidelity Funds, Burns was acting as agent for the investment companies for purposes of Section 17(e)(1).[12]

[12] Burns concedes that he was acting as agent for the Fidelity Funds. (Burns Resp. at 9.)

C. Compensation

"Compensation," under the Investment Company Act, "has been broadly construed to include any economic benefit paid directly or indirectly to an adviser." 1986 Soft Dollar Release, 35 SEC Docket 905, 911 n.46 (Apr. 23, 1986); see also Steadman Sec. Corp., 46 S.E.C. 896, 910 n. 38 (1977) (finding loans to be compensation because they are of economic benefit to those who received them), rev'd on other grounds, 603 F.2d 1126 (5th Cir. 1979), aff'd, 450 U.S. 91 (1981); Investors Research, 628 F.2d at 179 (affirming the Commission's opinion in which it determined that payments for computer access constituted compensation); Imperial Fin. Servs., Inc., 42 S.E.C. 717, 727-28 (1965) (finding that benefits in the form of an interest free loan and a discount price on the purchase of certain shares was compensation in violation of Section 17(e)(1)). "Section 17(e)(1) requires only that the affiliated person believe that the gratuity he has received constitutes 'something of value' at the time he received it. The precise value of the gratuity in the marketplace is of little importance." United States v. Milken, 759 F.Supp. 109, 120 (S.D.N.Y. 1990) (citation omitted); see also United States v. Ostrander, 999 F.2d 27, 31 (2d Cir. 1993) ("[I]t is enough if the item received was regarded as a benefit by the recipient, whether or not others might have taken a different view of its value."). The travel, entertainment, and gifts Burns received from brokerage firms doing business with Fidelity, collectively costing at least $135,281.45, to all of which he attributed some value, and for which he often expressed gratitude to the givers, constituted compensation for purposes of Section 17(e)(1). See supra Facts 2-4, 7, 13, 26, 28, 30, 37.

D. Purchase or Sale of Property

In order to show that compensation was accepted for the purchase or sale of property to or for a registered investment company, "some nexus must be established between the compensation received and the property bought or sold." Decker v. SEC, 631 F.2d 1380, 1384-85 (10th Cir. 1980) (citations omitted). Burns interprets this nexus requirement to mean the Division must prove that his trading was actually influenced by the receipt of gifts by showing an explicit quid pro quo (i.e., a purchase or sale of securities for a broker in return for the travel, entertainment, or gift received from him or her). (Burns Opp. at 4-5; Burns Resp. at 7.) However, "Section 17(e)(1) does not explicitly make it an element of the offense that the recipient of the compensation take any action as a result thereof." Deutsch, 451 F.2d at 109. "[A]n offense under § 17(e)(1) is complete when the compensation is delivered and received with the forbidden intent." Id.; see also Wellman v. Dickinson, 475 F.Supp. 783, 834 (S.D.N.Y. 1979) ("It is not necessary to establish that the compensation had any influence on conduct."). To find a violation only when the affiliated person acted as a result of receiving something of value would emasculate Section 17(e)(1). Deutsch, 451 F.2d at 109. "Given the nature of the investment company industry, it would be extremely difficult to prove that the payment of compensation actually caused a particular purchase." Id.

Burns contends that Deutsch must be considered in light of United States v. Sun-Diamond Growers of Cal., in which the Supreme Court held: "in order to establish a violation of 18 U.S.C. § 201(c)(1)(A) [the federal gratuity statute], the Government must prove a link between a thing of value conferred upon a public official and a specific "official act" for or because of which it was given." 526 U.S. 398, 414 (1999). Specifically, he argues, "[T]here is

no evidence that links [his] acceptance of any particular gratuity to any specific trade, action, or investment decision."[13] (Burns Opp. at 7.) However, this reliance on Sun-Diamond is misplaced. In fact, the decision itself questions the applicability of its precedential value within the same statutory scheme. See Sun-Diamond, 526 U.S. at 409, 412 ("[Section] 201(c)(1)(A) is merely one strand of an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials . . . ," and "we ought not expand this one piece of the regulatory puzzle so dramatically as to make many other pieces misfits.")

Additionally, several courts have refused to apply it outside of the context of the federal gratuity statute. See, e.g., United States v. Sawyer, 239 F.3d 31, 40 n.8 (1st Cir. 2001) (finding Sun-Diamond inapplicable to the honest services mail fraud statute); United States v. Ganim, 510 F.3d 134, 146 (2d Cir. 2007) ("[T]here is good reason to limit Sun-Diamond's holding to the statute at issue in that case, as it was the very text of the illegal gratuity statute— 'for or because of *any official act*'—that led the Court to its conclusion that a direct nexus was required to sustain a conviction . . . ."); United States v. Abbey, 560 F.3d 513, 521 (6th Cir. 2009) (finding Sun-Diamond to be inapplicable to the Hobbs Act, a different statute without the "official act" language which the Supreme Court "found 'pregnant with the requirement that some particular official act be identified and proved'"); United States v. McNair, 605 F.3d 1152, 1191 (11th Cir. 2010) ("'Nor is there any principled reason to extend Sun-Diamond's holding beyond the illegal gratuity context.'") (citation omitted). Here, Section 17(e)(1) of the Investment Company Act does not include the same "official act" language which the Sun-Diamond court found essential to creating the direct nexus requirement contemplated by Burns, and there is no compelling reason to extend Sun-Diamond to Section 17(e)(1). Accordingly, I will analyze Decker's nexus requirement as discussed herein.

Burns argues that, because the majority of the gifts were of minimal value and the values of the more costly ones were unknown to him, it is illogical to believe that the receipt of the gifts would influence his trading. (Burns Opp. at 8.) However, "the language of § 17(e)(1) makes no mention of intent to influence; the subsection is cast in the familiar "for" terminology of the gratuity statutes . . . where the only intent required is that the payment be given and accepted in appreciation of past, or in anticipation of future, conduct." Deutsch, 450 F.2d at 112. "The paying of compensation is an evil in itself, even though the payor does not corruptly intend to influence the affiliated person's acts, for it tends to bring about preferential treatment in favor of the payor that can easily injure the beneficiaries of investment companies. Id. Ultimately, "a requirement of intent to influence would frustrate [the] statutory purpose."[14] Id. at 113.

Consequently, Decker reconciles its nexus requirement with the holding in Deutsch by shifting the burden of proof to the affiliated person.

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[13] However, there is evidence, on at least two occasions, of Burns acknowledging that he would reward a broker for entertainment the broker provided. See supra Facts 13, 30. Such evidence is less than the nexus contemplated by Burns, but more than that required for a violation of Section 17(e)(1). See pp. 11-13.

[14] At least two brokers used entertainment to influence Burns' selection of brokers for transactions for the Fidelity Funds. See supra note 13.

> In order to prove a violation of [Section] 17(e)(1), the . . . Division must show that some form of compensation was received in exchange for the purchase or sale of investment company property. Direct evidence of such a transaction will ordinarily not be available. The forbidden compensation will often be disguised by arrangements which are facially proper. In light of this difficulty of proof, the delicate fiduciary relationship involved, and the statutory policy of preventing conflicts of interest, . . . "once a conflict of interest is proven, the burden shifts to the party in conflict to prove that he has been faithful to his trust."

Decker, 631 F.2d at 1385 (citations omitted).

> [T]he ultimate burden of proof remains on the . . . Division to prove each element of the alleged violation by a preponderance of the evidence. When the . . . Division introduces prima facie evidence of a conflict of interest in the allocation of brokerage business, the burden is properly shifted to [the respondent] to come forward with evidence sufficient to justify a finding that no money was received as compensation for the sale or purchase of . . . property. If [the respondent] produces such evidence, the presumption is no longer operative and [I] must consider all relevant evidence and determine whether the . . . Division established its case by a preponderance of the evidence.

Id. (citation omitted).

Burns received travel, entertainment, and gifts from brokerage firms on at least twenty-nine occasions, each constituting a willful[15] violation of Section 17(e)(1). There is no need for each item of compensation to be directly linked to any particular transaction; Burns committed the violations upon receipt of the compensation from the various brokerage firms with which the Fidelity Funds were doing business. Thus, the Division has introduced prima facie evidence of a conflict of interest, shifting the burden of proof to Burns to justify a finding that no money was received as compensation for the sale or purchase of property. Burns has not met that burden,[16] and I find that he, acting as agent for the Fidelity Funds, accepted compensation for the purchase or sale of property. There is no genuine issue with regard to any material fact and the Division is entitled to summary disposition as a matter of law.

SANCTIONS

[15] "Willfully" means "intentionally committing the act which constitutes the violation. There is no requirement that the actor also be aware that he is violating one of the Rules or Acts." Decker, 631 F.2d at 1386 (quoting Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965)).

[16] Burns emphatically argues that he never purchased or sold securities for anything other than the best price available and that the Division has not offered one instance in which he traded to the detriment of the Fidelity Funds; however, he admits that the acceptance of gifts was inappropriate. (Burns Opp. at 2-3, 5-6.)

The Division seeks a cease-and-desist order, bars from serving with any registered investment company and association with any investment adviser, disgorgement of ill-gotten gains plus prejudgment interest, and a civil penalty for Burns' willful violations of Section 17(e)(1) of the Investment Company Act. (OIP ¶ III.B; Div. Mot. at 2, 9-14.)

A. Cease-and-Desist Order

Section 9(f)(1) of the Investment Company Act authorizes the Commission to impose a cease-and-desist order upon any person who "is violating, has violated, or is about to violate" any provision of the Investment Company Act or the rules and regulations thereunder. 15 U.S.C. § 80a-9(f)(1).

In considering whether to issue a cease-and-desist order, the Commission considers the the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that the respondent's occupation will present opportunities for future violations. See Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981); KPMG Peat Marwick LLP, 54 S.E.C. 1135, 1183-84 (2001) (citations omitted). In KPMG, the Commission explained that the Division must show some risk of future violations. Id. at 1185. However, it also ruled that such a showing should be "significantly less than that required for an injunction" and that, "absent evidence to the contrary," a single past violation ordinarily suffices to raise a sufficient risk of future violations. Id. at 1185, 1191. Further, the Commission considers "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings." Id. at 1192. The Commission weighs these factors in light of the entire record, and no one factor is dispositive. Id.

Based on an analysis of these factors, I conclude that the proven violations were serious and recurrent over a period of almost three years. Burns' repeated acceptance of travel, entertainment, and gifts on at least twenty-nine[17] occasions from brokerage firms, with whom he was conducting business on behalf of the Fidelity Funds, created the exact type of conflict of interest Section 17(e)(1) of the Investment Company Act was intended to prevent. See Deutsch, 451 F.2d at 109. Burns did not act with scienter, and he has offered assurances against future violations, but he has not recognized fully the wrongful nature of his conduct, attempting to diminish his violations as "common practice at Fidelity while [he] was employed there." (Burns Opp. at 3, 5-6, 9.)

Burns is currently unemployed and submits that there is little likelihood that his occupation will present opportunities for future violations as he considers it "highly unlikely that a registered broker dealer will every [sic] hire [him] to trade securities again." (Burns Opp. at 6.) However, his age, forty-eight, and his previous extensive experience as a securities trader suggest that a career with similar opportunities to purchase and sell securities on behalf of

[17] This number does not include any of Burns' violations at the request of Lynch.

registered investment companies remains a possibility and he could readily repeat the type of misconduct proven here. Lastly, the violations are not recent, and the Division has not presented evidence of harm to specific investors or to the market in general. Ultimately, the mitigating factors are not outweighed by the other factors previously discussed. See Robert W. Armstrong, III, Exchange Act Release No. 51920, 2005 SEC LEXIS 1497, at *66 (June 24, 2005) (imposing a cease-and-desist order against a respondent for misconduct that ended ten years earlier). Thus, a cease-and-desist order will help to ensure that Burns will take greater care to obey the law should he become active in the financial markets in the future. I will impose a cease-and-desist order against Burns for violating Section 17(c)(1) of the Investment Company Act.

B. Industry Bars

Section 9(b)(2) of the Investment Company Act authorizes the Commission to bar, temporarily or permanently, a person who willfully violated any provision of the Investment Company Act "from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter." 15 U.S.C. § 80a-9(b)(2). Section 203(f) of the Advisers Act authorizes the Commission to censure, place limitations on the activities of a person associated with an investment adviser at the time of the misconduct, suspend for up to twelve months, or bar such person where it is in the public interest to do so, if the person has willfully violated the Investment Company Act. 15 U.S.C. § 80b-3(f).

The Steadman factors are applicable in making this public interest determination. Paragraph III.B of the OIP authorizes the imposition of remedial sanctions in the public interest against Burns under Section 203(f) of the Advisers Act and Sections 9(b), 9(d), and 9(f) of the Investment Company Act. I incorporate by reference my discussion of the Steadman factors above. Burns additionally argues that, because he has been unemployed for almost six years as a result of this proceeding and the investigations leading up to it, bars are not warranted. (Burns Opp. at 6, 11.) In light of this representation, the mitigating Steadman factors, and the other sanctions ordered herein, I conclude that the public interest requires only a censure, as opposed to the industry bars sought by the Division.

C. Disgorgement and Prejudgment Interest

Pursuant to Sections 9(e) and 9(f)(5) of the Investment Company Act,[18] the Division seeks an order requiring disgorgement of ill-gotten gains, plus reasonable interest. 15 U.S.C. §§ 80a-9(e), (f)(5). Disgorgement is defined as "'an equitable remedy designed to deprive [respondents] of all gains flowing from their wrong.'" SEC v. AMX, Int'l, Inc., 872 F. Supp. 1541, 1544 (N.D. Tex. 1994) (citations omitted). A violator is returned to where he or she would have been absent the misconduct. Disgorgement deprives a wrongdoer of his or her ill-gotten gains and deters others from violating the securities laws. See SEC v. First City Fin. Corp., 890

[18] These statutory provisions also authorize the Commission to adopt rules and regulations and issue orders concerning rates of interest and periods of accrual. The Commission promulgated Rule 600 of its Rules of Practice, Interest On Sums Disgorged, in 1995. 17 C.F.R. § 201.600.

F.2d 1215, 1230-32 (D.C. Cir. 1989). "The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable. The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits." Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1104 (2d Cir. 1972).

An order to disgorge a certain amount "need only be a reasonable approximation of profits causally connected to the violation." First City, 890 F.2d at 1231. Once the Division shows that its disgorgement figure reasonably approximates the amount of unjust enrichment, the burden shifts to the respondent to demonstrate clearly that the Division's disgorgement figure is not a reasonable approximation. See SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996); SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995). Any risk of uncertainty as to the disgorgement amount falls on the wrongdoer whose illegal conduct created the uncertainty. See First City, 890 F.2d at 1232.

The Division has shown by a preponderance of the evidence that Burns received travel, entertainment, and gifts (ill-gotten gains) in the amount of at least $135,281.45, as indicated in the table below.

Fact	Date	Item	Brokerage Firm	Value
5	July 2002	Wimbledon Tickets (8)	Jefferies	$19,100
7	Sept. 2002	U.S. Open Tickets (2)	Baird	$3,700
8	Oct. 2002	Bruce Springsteen Tickets (4)	Jefferies	$800
12	Nov./Dec. 2002	Wine	Jefferies and Morgan Stanley	$5,893.22
13	Dec. 2002	"Hairspray" Tickets (8)	Jefferies	$3,610
16	Apr. 2003	Alvin Ailey Dance Company Tickets (4)	Jefferies	$700
17	Apr. 2003	Federal Cup Tickets (12)	Jefferies	$420[19]
19	May 2003	"Lion King" Tickets (4)	Unidentified	$370
20	May 2003	Red Sox Tickets (4)	Soundview	$1,100
21	June 2003	Broadway Musical Tickets (4)	Lehman	$800
22	July 2003	Wimbledon Tickets (8)	Jefferies	$31,216
24	Aug. 2003	Justin Timberlake/Christina Aguilera Tickets (4)	Jefferies	$600
25	Aug. 2003	Cape Cod Home 1-Week Rental	Knight	$250
26	Sept. 2003	U.S. Open Tickets (8)	Jefferies	$7,200
30	Oct. 2003	Red Sox Playoff Tickets (4)	Soundview	$1,950
31	Dec. 2003	Wine	Jefferies and Morgan Stanley	$756.72
32	Jan. 2004	New England Patriots Ticket	FCM	$503.75
33	Jan. 2004	Waterville Valley Condo Weekend Rental	Knight	$300
34	Feb. 2004	"Moving Out" and "Avenue Q" Tickets (8)	Jefferies	$600

[19] For instances in which Burns provides a range for an estimate, I will use the average of the range to calculate the value of the travel, entertainment, or gift received.

36	Mar. 2004	Waterville Valley Condo Weekend Rental	Knight	$300
38	Mar. 2004	Erykah Badu Tickets (unknown)	Jefferies	$1,080
39	Apr. 2004	Masters Shirt	Jefferies	$125
40	Aug. 2004	Red Sox Tickets (4)	Needham	$900
41	June 2004	Madonna Tickets (4)	Jefferies	$400
42	Summer 2004	Red Sox Tickets (4)	Schwab	$240
43	July 2004	Wimbledon Tickets (12) and Accommodations	Jefferies	$51,016.76
44	Aug. 2004	"Avenue Q" and "Carolina Change" Tickets (8)	Baird	$600
45	Aug. 2004	Prince Tickets (10)	Jefferies and Baird	$750

Burns argues that the proper value for tickets received as gifts is their face value, which he claims is a matter of public record for many at issue; however, he provides no persuasive precedent and offers no evidence indicating such values.[20] (Burns Opp. at 5, 9-10.) Further, I found violations only for instances in which the Division provided explicit proof of the cost of the travel, entertainment, or gifts (including tickets) and/or when Burns provided an estimate of the cost. Thus, $135,281.45 is a reasonable approximation of Burns' unjust enrichment, and he has not satisfied his burden to show otherwise. Accordingly, I will order disgorgement in that

[20] Burns, citing Ostrander and Milken, continues that "[t]he appropriate measure of value for purposes of Section 17(e)(1) is based on the recipient's belief concerning the value of the compensation at issue." (Burns Opp. at 8.) Burns' argument misses the mark as the discussion in those cases of valuation pertains to the legal determination of what constitutes compensation for a violation of Section 17(e)(1), not the actual valuation of such violations. Therefore, for the purpose of calculating disgorgement, without sufficient proof of his belief, it is irrelevant that Burns did not value the tickets and other benefits received as much as they cost the brokerage firms.

Finally, Burns claims that these valuations are a violation of due process and that "[he] did not have fair warning that Section 17(e)(1) would be used to charge vastly inflated and unknowable prices for tickets; prices that [he] would never have paid [himself] and, if [he] had known, gifts [he] would never have accepted." (Burns Resp. at 5.) However, "securities professionals . . . are part of a highly regulated industry and, as such, required to know the law that is applicable to their conduct within that industry. In light of this requirement, it would 'make no sense' to permit ignorance of the law to serve as a defense." Marc N. Geman, 54 S.E.C. 1226, 1260 (2001) (citing Jacob Wonsover, 54 S.E.C. 1, 20 (1999)), aff'd, 334 F.3d 1183 (10th Cir. 2003). Additionally, I give no merit to this argument as Burns does not argue that he did not know the receipt of travel, entertainment, and gifts was against the law, which he has conceded was inappropriate; he only argues that he would not have broken the law if he knew it would cost him so much. This position is a baseless claim, and I find that Burns had sufficient notice of his legal obligation under Section 17(e)(1) and the potential consequences of violating it.

amount, plus prejudgment interest on that amount as calculated in accordance with Rule 600 of the Commission's Rules of Practice, subject to any proven inability to pay.

D. Civil Money Penalties

Under Section 9(d)(1)(A) of the Investment Company Act and Section 203(i) of the Advisers Act, the Commission may assess a civil penalty if a respondent has willfully violated the Investment Company Act, or the rules or regulations thereunder. 15 U.S.C. §§ 80a-9(d)(1)(A); 80b-3(i). Section 9(d)(2) of the Investment Company Act and Section 203(i)(2) of the Advisers Act specifies a three-tier system, identifying the maximum amount of a civil penalty. 15 U.S.C. §§ 80a-9(d)(2); 80b-3(i)(2). For each "act or omission" by a natural person, the adjusted maximum amount of a penalty in the first tier is $6,500; in the second tier, it is $60,000; and, in the third tier, it is $120,000.[21] For a second-tier penalty, the act or omission must have "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." 15 U.S.C. §§ 80a-9(d)(2)(B); 80b-3(i)(2)(B). A third-tier penalty not only must meet the requirements for a second-tier penalty, but the act or omission also must have "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission." 15 U.S.C. §§ 80a-9(d)(2)(C); 80b-3(i)(2)(C).

The Commission also must find that a monetary penalty is in the public interest. Six factors are relevant to the public interest determination: (1) fraud, deceit, manipulation, or the deliberate or reckless disregard of a regulatory requirement; (2) harm to others; (3) unjust enrichment; (4) prior violations; (5) deterrence; and (6) such other factors as justice may require. See 18 U.S.C. §§ 80a-9(d)(3); 80b-3(i)(3). In its discretion, the Commission may consider evidence of a respondent's ability to pay. See 15 U.S.C. §§ 80a-9(d)(4); 80b-3(i)(4).

The Division seeks a civil money penalty for each occasion on which Burns received travel, entertainment, or gifts. (Div. Mot. at 13.) Burns uses the same arguments against civil money penalties as he did against the other sanctions sought. See supra p. 14-17. Although Burns was unjustly enriched through receipt of travel, entertainment, and gifts, the Division has not quantified any harm to others. Burns has no prior disciplinary record. Additionally, the Division did not argue, and I do not find, that Burns' misconduct involved fraud, deceit, manipulation, or a deliberate or reckless disregard of a regulatory requirement; and the Division did not demonstrate that Burns' acceptance of travel, entertainment, and gifts resulted in substantial losses to other persons or that it created a significant risk of the same. Thus, second- and third-tier civil money penalties do not apply; however, the need for deterrence is not fully satisfied by the cease-and-desist order and the censure.[22] First-tier civil money penalties will help to deter future lapses by others in the same position as Burns.

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[21] As required by the Debt Collection Improvement Act of 1996, the Commission has periodically increased the maximum penalty amounts for violations. See 17 C.F.R. §§ 201.1001, .1002, .1003, .1004. Since Burns' misconduct occurred between January 2002 and October 2004, the adjusted maximum penalty amounts in 17 C.F.R. § 201.1002 govern here.

[22] The Commission has imposed or sustained both cease-and-desist orders and/or bars with substantial civil penalties/fines in prior cases. See, e.g., vFinance Invs., Inc., Exchange Act

The Division's request for penalties for each of Burns' twenty-nine violations would require a civil money penalty in the amount of $188,500. In separate settlement orders, the Commission has already imposed civil penalties against Respondents Scott E. DeSano (DeSano) ($125,000),[23] Timothy J. Burnieika ($30,000), Donovan ($45,000), Edward S. Driscoll (Driscoll) ($30,000),[24] Jeffrey D. Harris ($30,000), Christopher J. Horan ($30,000), Steven P. Pascucci ($30,000), and Kirk C. Smith ($30,000) for violating Section 17(e)(1) of the Invesment Company Act. Scott E. DeSano, Advisers Act Release Nos. 2812-19 (Dec. 11, 2008). In light of the mitigating Steadman factors and the other sanctions ordered herein, I impose a civil penalty of $40,000 against Burns. A civil penalty in a higher amount is not consistent with the public interest.

E. Inability to Pay

Although the statute does not require a hearing officer to address the inability to pay disgorgement, interest, or penalties, a respondent may present evidence of an inability to pay, and the Commission may consider evidence of ability to pay as a factor in determining whether a respondent should be required to pay disgorgement and interest, as well as civil money penalties. See 15 U.S.C. §§ 80a-9(d)(4), 80b-3(i)(4); 17 C.F.R. § 201.630(a).

Burns, representing that he has been unemployed for almost six years and has a net worth of $260,000, including retirement accounts and the blue book value of his car, claims an inability to pay, but has not provided a sworn financial statement.[25] (Burns Opp. at 2, 4; Burns Resp. at

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Release No. 62448 (July 2, 2010); Gregory O. Trautman, Exchange Act Release No. 61167A (Dec. 15, 2009); John A. Carley, 92 SEC Docket 1693 (Jan. 31, 2008); Robert J. Prager, 85 SEC Docket 3413, 3436-38 (July 6, 2005); Quest Capital Strategies, Inc., 55 S.E.C. 362, 380-81 (2001); Consol. Inv. Servs., 52 S.E.C. 582, 590-91 (1996).

[23] DeSano's settlement also indicates that he failed reasonably to supervise the other Respondents with a view to preventing their violations and caused FMR Co.'s violations of Section 206(2) of the Advisers Act. Scott E. DeSano, Advisers Act Release No. 2815 (Dec. 11, 2008).

[24] Driscoll's settlement also indicates that he caused one of FMR Co.'s violations of Section 206(2) of the Advisers Act. Scott E. DeSano, Advisers Act Release No. 2816 (Dec. 11, 2008).

[25] Burns represents that he provided the Division with a financial statement in March 2009. (Burns Opp. at 3.) On June 17, 2010, I previously notified Burns of his opportunity to file an updated version of any financial statement he previously submitted to the Division for my consideration of his inability to pay any potential disgorgement and/or civil money penalties ordered in this proceeding. (Prehearing Conf. Tr. at 6-7, 10-12, 15.) Contrary to Burns' position, the Division represents that, pursuant to its offer during the June 17th prehearing conference, it provided Burns with a copy of Rule 630 of the Commission's Rules of Practice and Form D-A when it served him with its Motion. (Reply at 3 n.2.) There is no reason to doubt the Division's representation, but Burns, having previously submitted the form to the Division, likely had a copy of it and could have easily contacted the Division for a new one if he did not. In his Response, Burns offers to file a Form D-A at my request, but, as noted previously, he had ample notice of the opportunity to claim an inability to pay and access to the standard form used to support it. (Burns Resp. at 1.)

1.) Without such evidence and in light of his net worth representation, I do not find that Burns is unable to pay the disgorgement, prejudgment interest, and civil money penalties ordered in this decision.

ORDER

Based on the findings and conclusions set forth above:

IT IS ORDERED THAT, pursuant to Section 9(f)(1) of the Investment Company Act of 1940, Robert L. Burns shall cease and desist from committing or causing any violations or future violations of Section 17(e)(1) of the Investment Company Act of 1940;

IT IS FURTHER ORDERED THAT, pursuant to Section 203(f) of the Investment Advisers Act of 1940, Robert L. Burns is censured;

IT IS FURTHER ORDERED THAT, pursuant to Sections 9(e) and 9(f)(5) of the Investment Company Act of 1940, Robert L. Burns shall disgorge $135,281.45 plus prejudgment interest as calculated by and in accordance with Rule 600 of the Securities and Exchange Commission's Rules of Practice; and

IT IS FURTHER ORDERED THAT, pursuant to Section 9(d) of the Investment Company Act of 1940 and Section 203(i) of the Investment Advisers Act of 1940, Robert L. Burns shall pay a civil money penalty in the amount of $40,000.

Payment of the disgorgement and prejudgment interest shall be paid in accordance with the order of finality issued pursuant to Rule 360(d)(2) of the Commission's Rules of Practice. Payment shall be made by wire transfer, certified check, United States Postal money order, bank cashier's check, or bank money order, payable to the Securities and Exchange Commission. The payments, and a cover letter identifying the Respondents and the proceeding designation, shall be delivered to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312. A copy of the cover letter and the instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after the service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision pursuant to Rule 111 of the Commission's Rules of Practice. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact.

The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact, or unless the Commission determines on its own

initiative to review this Initial Decision as to any party. If any of these events occur, the Initial Decision shall not become final as to that party.

_____
Robert G. Mahony
Administrative Law Judge