SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Rel. No. 8348 / December 17, 2003

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 48940 / December 17, 2003

Admin. Proc. File No. 3-9933

In the Matter of

STUART E. WINKLER
Dannemora, New York 12929

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Violations of Antifraud, Anti-Manipulative, Registration, and Recordkeeping Provisions

Conviction of chief financial and compliance officer of registered broker-dealer for enterprise corruption established the factual basis for the violations of antifraud, anti-manipulative, registration, and recordkeeping provisions alleged in the order for proceedings. Held, it is in the public interest to assess a civil money penalty of $800,000.

APPEARANCES:

Stuart E. Winkler, pro se.

Robert Kaplan, for the Division of Enforcement

Appeal filed: July 21, 2003
Last brief received: October 15, 2003

I.

Stuart E. Winkler, who was chief financial and compliance officer and supervisor of operations at A.S. Goldmen & Co., Inc. ("Goldmen"), formerly a registered broker-dealer, [1] appeals from the initial decision of an administrative law judge. As more fully described below, the law judge found that Winkler's New York conviction for enterprise corruption established the factual basis for the violations that were alleged against Winkler in the order for proceedings here. The law judge barred Winkler from association with any broker or dealer, assessed a civil money penalty of $800,000, and issued a cease-and-desist order. Winkler appeals solely with respect to the law judge's imposition of a civil penalty. To the extent we make findings here, we base them on an independent review of the record.

II.

The order for proceedings in this action charged that, during the period from about July 1994 to June 1998, Winkler violated antifraud, anti-manipulative, registration, and recordkeeping provisions of the securities acts in connection with various Goldmen securities offerings. After that order was issued, action in this matter was stayed due to parallel state criminal proceedings in New York.

On January 4, 2001, Winkler was convicted of conspiracy in the second degree to murder the New York trial judge. [2] For that crime, he received a prison sentence of 8 1/3 to 25 years. On June 1, 2001, pursuant to his guilty plea, Winkler was convicted of the crime of enterprise corruption and was sentenced to an additional prison term of 3 to 9 years. [3] He is currently incarcerated in New York.

As part of his plea agreement, Winkler agreed to forfeit $3.5 million, $3 million of which was restitution to persons

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[1]Goldmen was a respondent in this proceeding. Its broker-dealer registration was revoked pursuant to an offer of settlement. A.S. Goldmen & Co., Inc., Securities Act Release No. 8165 (December 19, 2002), 79 SEC Docket 557.

[2]Indictment No. 4914/OO (N.Y. Sup. Ct., N.Y. County, Crim. Term).

[3]New York v. A.S. Goldmen & Co., Inc., Indictment No. 4772/99 (N.Y. Sup. Ct., N.Y. County, Crim. Term).

injured by his conduct: Winkler has paid the full $3.5 million. Winkler also stipulated to a lifetime bar to employment in the securities industry, and signed a factual allocution that described his criminal activity.

In his allocution, Winkler admitted that he was a leading member of the "Goldmen Criminal Enterprise" that "committed crimes through the underwriting and offering of securities to the public." Winkler stated that the techniques used by the Goldmen enterprise included "manipulation of securities prices, control of stock through nominee and other controlled accounts, unauthorized trading in customer accounts, falsification of records, requiring brokers to offset customer sell orders with fraudulently induced purchase orders, charging undisclosed and excessive markups and commissions, sales of securities by unlicensed persons, violation of 'blue sky' registration laws, high pressure sales tactics, and making misleading and false statements to investors."

Winkler included details of his criminal activity in the allocution, and conceded that he systematically tried to evade the scrutiny of regulators. Among other things, he hid and destroyed documents sought by regulators, lied about the documents' existence, falsified records, and created false records.

On the basis of Winkler's conviction for enterprise corruption, the Division of Enforcement moved for summary disposition pursuant to Rule 250 of the Commission's Rules of Practice. [4] The law judge noted that, in his allocution, Winkler admitted that he had violated New York's Martin Act which prohibits schemes to defraud in connection with the purchase or sale of securities. [5] The law judge further noted Winkler's admission that he had engaged in fraudulent actions in at least six public offerings, and falsified and destroyed documents. Applying the doctrine of collateral estoppel, the law judge granted the Division's motion for summary disposition to the extent of finding that Winkler's conviction (and materials related thereto of which the law judge took official notice, including Winkler's allocution) established that Winkler committed the violations alleged in the order for proceedings. Accordingly, the law judge found that Winkler willfully violated

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[4] 17 C.F.R. § 201.250.

[5] New York General Business Law §§ 352-C(5) and C(6).

Section 17(a) of the Securities Act of 1933, [6] Section 10(b) of the Securities Exchange Act of 1934, [7] and Exchange Act Rules 10b-5 [8] and 10b-6. [9] The law judge also found that Winkler willfully aided and abetted or caused Goldmen's violations of Section 5 of the Securities Act [10] Section 17(a) of the Exchange Act, [11] and Exchange Act Rules 17a-3 and 17a-4. [12]

The law judge scheduled a prehearing conference to give Winkler an opportunity to be heard on whether a hearing was necessary to determine if the public interest required the imposition of the sanctions recommended by the Division. [13] At that telephonic conference, Winkler accepted the imposition of a bar and a cease-and-desist order but opposed the assessment of a civil penalty. The law judge concluded that Winkler had been given a sufficient opportunity to address public interest criteria and, accordingly, that there was no need for an in-person hearing. However, noting Winkler's claim that he had no financial resources, the law judge ordered the Division to provide Winkler, by April 23, 2003, with a copy of "the financial disclosure form used when a respondent claims an inability to pay interest or penalties." Winkler was ordered to submit the completed form by May 19.

The Division sent Winkler a financial disclosure form by the specified date. [14] However, Winkler did not submit the form by

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[6]15 U.S.C. § 77q(a).

[7]15 U.S.C. § 78j(b).

[8]17 C.F.R. § 240.10b-5.

[9]Rule 10b-6 has been recodified as Rule 101 of Regulation M. 17 C.F.R. § 242.101.

[10]15 U.S.C. § 77(e).

[11]15 U.S.C. § 78q.

[12]17 C.F.R. §§ 240.17a-3 and 17a-4.

[13]The Division did not seek disgorgement in view of the fact that Winkler had paid the restitution ordered by the Court.

[14]It appears that the law judge understood that Winkler would be sent the Commission's Disclosure of Assets and Financial Information Form ("Form D-A"). However, the Division sent

(continued...)

the date required. Instead, on May 28, 9 days after the deadline set by the law judge for submitting the form, he wrote a letter to the law judge stating that he could not fill out any financial disclosure form sent to him by the Division until he spoke to legal counsel. [15] He also noted that some sections of the form asked him to supply financial information "since the date of the alleged violation," and stated that he did not know what that phrase meant. [16]

III.

As noted above, Winkler seeks review only with respect to the civil penalty imposed by the law judge. Section 21B(c) of the Securities Exchange Act [17] lists the factors that we may consider in determining whether a penalty is in the public interest. [18] As Winkler points out, he paid $3.5 million to the

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[14](...continued)
Winkler a Division form entitled "Statement of Financial Condition." Nevertheless, both forms require disclosure of nearly identical information, and both are routinely filled out by defendants and respondents in enforcement proceedings.

[15]Winkler did not have counsel at that time, and asked the law judge to appoint one. The law judge denied that request.

[16]To date, Winkler has not submitted a financial disclosure form.

[17]15 U.S.C. § 78u-2(c).

[18]The factors may be summarized as follows:

(1) whether the act involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement;

(2) the harm to other persons resulting from the conduct;

(3) the extent to which any person was unjustly enriched, taking any restitution into account;

(4) whether the person previously has been found by the Commission or other regulatory agency to have violated the securities laws;

(continued...)

State of New York as part of his plea agreement.[19] Moreover, he is subject to other significant sanctions. Winkler is currently serving a prison sentence, and has agreed to a bar from the securities industry and a cease-and-desist order. Nevertheless, his egregious misconduct far outweighs any mitigative factors.

Winkler engaged in wholesale fraud, deceit, and manipulation. He ignored and deliberately flouted regulatory requirements, and lied to regulators. His acts resulted in substantial losses to public investors. As the judge at the criminal trial noted, many persons lost their entire life savings to the criminal enterprise in which Winkler played a leading role, and Winkler reaped substantial profits from that enterprise. The extent of Winkler's contempt for the law and governmental authority is graphically illustrated by his conviction for conspiracy to murder the trial judge. Thus we consider that a penalty is warranted in the public interest.

Winkler argues that he is unable to pay any penalty. He asserts that the form financial disclosure statement that was sent to him was "confusing and impossible to fill out," and that no one can reconstruct financial records "from 1994 to the present," [20] especially if the person who must do so is in prison. He further asserts that the $3.5 million that he paid to the State of New York left him without any assets for the foreseeable future and, therefore, that no public interest would be served by imposing an additional penalty. Winkler also contends that the restitution he paid satisfied his obligation to pay back ill-gotten gains, and that he should not be required to pay money back twice.

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[18](...continued)

(5) the need to deter such person and other persons from committing such acts; and

(6) such other matters as justice may require.

[19]Winkler claims that $500,000 of this amount was a penalty. The Division believes that the $500,000 that Winkler paid (in addition to the $3 million that was clearly restitution) may have been earmarked for a special restitution fund set up by the District Attorney. The record does not resolve this issue.

[20]It thus appears that, contrary to the letter Winkler wrote to the law judge, he knew what the phrase "since the date of the alleged violation" meant.

The financial form sent to Winkler was not confusing or difficult to fill out. It straightforwardly sought disclosure of Winkler's current assets, liabilities, income, and expenses. To the extent that information was also requested as to prior years that Winkler could not recall or obtain, he could have stated as much in his response. At the prehearing conference, the law judge advised Winkler that it was his responsibility to establish his inability to pay the penalty requested by the Division. Yet Winkler did not make the requisite showing. [21] Thus we agree with the law judge that Winkler should be deemed to have waived his claim of inability to pay. [22]

Contrary to Winkler's contention, he is not being ordered to disgorge ill-gotten gains twice. Civil monetary penalties are not imposed to deprive wrongdoers of illicit profits but to punish unlawful conduct and deter its repetition. [23] The fact that Winkler may already have paid a penalty in the criminal action [24] is not a bar to the assessment of a civil penalty here.

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[21] See Brian A. Schmidt, Securities Act Rel. No. 8061 (January 24, 2002), 76 SEC Docket 2255, 2273 ("[S]ince the respondent carries the burden of demonstrating inability to pay, financial information supporting that argument must be presented before the law judge . . ."). See also Terry T. Steen, 53 S.E.C. 618, 628 (1998).

Winkler blames the Division for not answering his "simple questions" about the financial disclosure form. However, the record does not show that Winkler addressed any questions about the form to the Division. In any event, Winkler cannot shift his burden of demonstrating his inability to pay to the Commission's staff.

[22] Rule 630(e) of our rules (17 C.F.R. § 201.630(e)) provides that any respondent who, after making a claim of inability to pay a penalty, fails to file a financial disclosure statement when such a filing has been ordered may, in the discretion of the Commission or the hearing officer, be deemed to have waived the claim of inability to pay.

[23] See State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1519 (2003); Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001); BMW of North America, Inc. v. Gore, 517 U.S. 559, 568 (1996).

[24] See n.19, supra.

[25] We consider the law judge's imposition of an $800,000 third-tier penalty warranted in the public interest. [26]

An appropriate order will issue. [27]

By the Commission (Chairman DONALDSON and Commissioners GLASSMAN, GOLDSCHMID and CAMPOS); Commissioner ATKINS not participating.

Jonathan G. Katz
Secretary

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[25]See Hudson v. U.S., 522 U.S. 93, 100-105 (1997); William F. Lincoln, 53 S.E.C. 452, 459-462 (1998).

[26]See Section 21B(3) of the Exchange Act (15 U.S.C. § 78u-2(b)(3)). As the law judge noted, the maximum third-tier penalty for most of the period at issue in this matter was $100,000 for each violative act. The charges against Winkler in the order for proceedings herein, which the law judge found to be established by Winkler's conviction for enterprise corruption, allege that Winkler committed more than eight violative acts. Thus the $800,000 penalty is clearly warranted.

[27]We have considered all of the arguments advanced by the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Since Winkler sought review only with respect to the civil money penalty imposed on him by the law judge, our order shall give the requisite notice that the remainder of the law judge's decision with respect to him has become the final decision of this Commission. The law judge's order barring Winkler from association with any broker or dealer and ordering him to cease and desist from further violations of the provisions he was found to have violated shall be declared effective.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Rel. No. 8348 / December 17, 2003

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Rel. No. 48940 / December 17, 2003

Admin. Proc. File No. 3-9933

In the Matter of

STUART E. WINKLER
Dannemora, New York 12929

ORDER IMPOSING REMEDIAL SANCTION AND NOTICE OF FINALITY

On the basis of the Commission's opinion issued this day, it is

ORDERED that Stuart E. Winkler be, and he hereby is, assessed a civil money penalty of $800,000.

No appeal was taken with respect to the remainder of the administrative law judge's initial decision with respect to Winkler, and the Commission did not choose to review the decision as to him on its own initiative. Accordingly, notice is hereby given, pursuant to Rule 360(e) of the Commission's Rules of Practice, that the remainder of the law judge's decision with respect to Winkler has become the final decision of the Commission. * The order contained in that decision (1) barring Winkler from association with any broker or dealer, and (2) ordering Winkler to cease and desist from committing or causing any violations or any future violations of Sections 5 and 17(a) of the Securities Act of 1933, Sections 10(b) and 17(a) of the Securities Exchange Act of 1934, and Rules 10b-5, 10b-6, 17a-3 and 17a-4 is hereby declared effective.

Payment of the civil money penalty shall be: (i) made by United States postal money order, certified check, bank cashier's

*A.S. Goldmen & Co., Inc., Initial Decision Rel. No. 231 (June 27, 2003), 80 SEC Docket 2062.

check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed or delivered by hand to the Office of Financial Management, Securities and Exchange Commission, 6432 General Green Way, Alexandria, VA 22312 within thirty days of the date of this order; and (iv) submitted under cover letter that identifies the respondent and the file number of this proceeding. A copy of the cover letter and check shall be sent to Robert Kaplan, counsel for the Division of Enforcement, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549-0911.

By the Commission.

Jonathan G. Katz
Secretary