

## SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for April 2006, with respect to which the final votes of individual Members of the Commission are required to be made available for public inspection pursuant to the provisions of that Act. Chairman Donaldson resigned from the Commission on June 30, 2005. Commissioner Glassman was Acting Chairman from July 1, 2005 through August 2, 2005. Commissioner Goldschmid resigned from the Commission on July 31, 2005. Chairman Cox took office on August 3, 2005. Commissioner Nazareth took office on August 4, 2005.

Unless otherwise noted, each of the following individual Members of the Commission voted affirmatively upon each action of the Commission shown in the file:

CHRISTOPHER COX, CHAIRMAN

CYNTHIA A. GLASSMAN, COMMISSIONER

PAUL S. ATKINS, COMMISSIONER

ROEL C. CAMPOS, COMMISSIONER

ANNETTE NAZARETH, COMMISSIONER

43 Documents

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**INVESTMENT ADVISERS ACT OF 1940**

**Release No. 2506 / April 3, 2006**

**ADMINISTRATIVE PROCEEDING**

**File No. 3-12253**

**In the Matter of**

**JON E. HANKINS,**

**Respondent.**

**ORDER INSTITUTING  
ADMINISTRATIVE PROCEEDINGS  
PURSUANT TO SECTION 203(f) OF THE  
INVESTMENT ADVISERS ACT OF 1940,  
MAKING FINDINGS, AND IMPOSING  
REMEDIAL SANCTIONS**

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") [15 U.S.C. § 80b-3(f)] against Jon E. Hankins ("Hankins" or "Respondent").

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.4. below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

*Document 1 of 43*

### III.

On the basis of this Order and Respondent's Offer, the Commission finds that

1. Tenet Capital Partners Convertible Opportunities Fund, LP ("Convertible Opportunities Fund" or the "Fund"), a Delaware limited partnership, was a hedge fund open to qualified U.S. persons and entities. The Fund commenced investment activities on April 1, 2004, and ceased investment activities after the United States District Court for the Southern District of New York ("S.D.N.Y."), appointed Susan E. Brune, Esq. as receiver (the "Receiver") for the Fund on June 22, 2005.

2. Tenet Asset Management, LLC ("Tenet"), a Delaware limited liability corporation located in Knoxville, Tennessee, was the Fund's investment adviser, responsible for all of the Fund's investment decisions, from April 1, 2004 until the S.D.N.Y. placed Tenet into receivership on June 22, 2005. During this time, Tenet was also the sole general partner of the Fund.

3. Hankins is a resident of Tennessee who served as Tenet's principal member, managing member and controlling person from April 1, 2004 until the S.D.N.Y.'s appointment of the Receiver. During this period, Hankins made all of the investment decisions with respect to the Fund.

4. On March 24, 2006, a final judgment was entered by consent against Hankins, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 [15 U.S.C. § 77q(a)], Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. §§ 240.10b-5], and Sections 206(1) and 206(2) of the Advisers Act [15 U.S.C. §§ 80b-6(1) and 80b-6(2)], in the civil action entitled Securities and Exchange Commission v. Jon E. Hankins, Tenet Asset Management, LLC and Tenet Capital Partners Convertible Opportunities Fund, LP, 05 Civ. 5808 (KMW), in the S.D.N.Y.

5. The Commission's complaint alleged that, between February and June 2005, Hankins made false and misleading statements to investors about the Fund's performance and strategy. In particular, Hankins concealed large losses by, among other things, altering the Fund's audited financial statements and providing false performance data showing profits when the Fund in fact had a negative return. At the time that Hankins made these false and misleading statements, Hankins knew these statements were false, and he personally altered the Fund's financial records and then gave them to investors. Hankins made these false and misleading statements to conceal the Fund's substantial investment losses as a result of large, naked short positions in Google, Inc. stock.

### IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

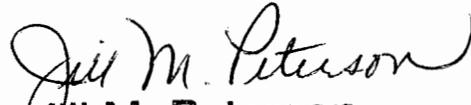
Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act [15 U.S.C. § 80b-3(f)], that Respondent Hankins be, and hereby is barred from association with any investment adviser.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Nancy M. Morris  
Secretary

  
By: **Jill M. Peterson**  
**Assistant Secretary**

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION  
April 4, 2006

Administrative Proceeding File No. 3-12254

In the Matter of	:	ORDER INSTITUTING PUBLIC
	:	PROCEEDINGS AND NOTICE OF
INTERNATIONAL BIOCHEMICAL	:	HEARING PURSUANT TO SECTION
INDUSTRIES, INC.,	:	12(j) OF THE SECURITIES
	:	EXCHANGE ACT OF 1934
Respondent.	:	
	:	

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act").

II.

After an investigation, the Division of Enforcement alleges that:

A. International Biochemical Industries, Inc. ("Biochemical" or "Respondent"), CIK 1059623, is a Georgia corporation headquartered in Norcross, Georgia, and was in the business of developing, marketing, and selling antimicrobial products, including an anthrax-remediation product.

B. Biochemical's common stock (symbol "IBCL") is registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act") and is quoted on the Pink Sheets. The company has filed annual and quarterly reports on Forms 10-KSB and 10-QSB.

C. Biochemical has not filed any reports with the Commission since March 3, 2003, when it filed an amended Form 10-QSB for the quarter ended December 31, 2002.

D. Biochemical has failed to comply with Section 13(a) of the Exchange Act and Rule 13a-13 thereunder by failing to file Forms 10-QSB for the quarters ended March 31, 2003, September 30, 2003, December 31, 2003, March 31, 2004, September 30, 2004, December 31, 2004, March 31, 2005, September 30, 2005 and December 31, 2005.

Document 2 of 43

E. Biochemical has failed to comply with Section 13(a) of the Exchange Act and Rule 13a-1 thereunder by failing to file Forms 10-KSB for the years ended June 30, 2003, June 30, 2004 and June 30, 2005.

### III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public proceedings be instituted to determine:

A. Whether the allegations set forth in Section II. above are true, and in connection therewith, to afford the Respondent an opportunity to establish any defenses to such allegations; and

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months or to revoke the registration of the securities of the Respondent identified in Section II. pursuant to Section 12 of the Exchange Act.

### IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III. above be held at a time and place to be fixed and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS FURTHER ORDERED that the Respondent shall file an Answer to the allegations contained in the Order Instituting Proceedings within ten (10) days after service of this Order as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If the Respondent fails to file the directed Answer or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against it upon consideration of this Order Instituting Proceedings, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served upon the Respondent personally or by certified or registered mail or by other means of verifiable delivery.

IT IS FURTHER ORDERED THAT THE Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Nancy M. Morris  
Secretary

*Jill M. Peterson*  
By: **Jill M. Peterson**  
**Assistant Secretary**

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-53589; File No. 4-516)

April 4, 2006

Joint Industry Plan; Notice of Filing of Options Regulatory Surveillance Authority Plan by the American Stock Exchange LLC, Boston Stock Exchange, Inc., Chicago Board Options Exchange, Incorporated, International Securities Exchange, Inc., Pacific Exchange, Inc. (n/k/a NYSE Arca, Inc.) and Philadelphia Stock Exchange, Inc.

I. Introduction

On January 31, 2006, pursuant to Rule 608 under the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> the American Stock Exchange LLC, Boston Stock Exchange, Inc., Chicago Board Options Exchange, Incorporated (“CBOE”), International Securities Exchange, Inc., Pacific Exchange, Inc. (n/k/a NYSE Arca, Inc.)<sup>2</sup> and Philadelphia Stock Exchange, Inc. (collectively, “Exchanges”) filed with the Securities and Exchange Commission (“Commission”) the Options Regulatory Surveillance Authority Plan, a plan providing for the joint surveillance, investigation and detection of insider trading on the markets maintained by the Exchanges (“ORSA Plan”).<sup>3</sup> Pursuant to Rule 608(b)(1),<sup>4</sup> the Commission is publishing this notice of, and soliciting comments on, the ORSA Plan.

The purpose of the ORSA Plan is to permit the Exchanges to act jointly in the administration, operation, and maintenance of a regulatory system for the surveillance,

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<sup>1</sup> 17 CFR 240.608.

<sup>2</sup> On March 6, 2006, the Pacific Exchange, Inc. (“PCX”), filed with the Commission a proposed rule change, which was effective upon filing, to change the name of PCX, as well as several other related entities, to reflect the recent acquisition of PCX Holdings, Inc., the parent company of PCX, by Archipelago Holdings, Inc. (“Archipelago”) and the merger of the New York Stock Exchange, Inc. with Archipelago. See File No. SR-PCX-2006-24. All references herein have been changed to reflect these transactions.

<sup>3</sup> The Exchanges initially filed the ORSA Plan with the Commission on May 5, 2005. The Exchanges filed revised versions of the ORSA Plan on July 6, 2005 and September 29, 2005.

<sup>4</sup> 17 CFR 240.608(b)(1).

investigation, and detection of the unlawful use of undisclosed, material information in trading on one or more of their markets. By sharing the costs of these regulatory activities and by sharing the regulatory information generated under the ORSA Plan, the Exchanges believe they will be able to enhance the effectiveness and efficiency with which they regulate their respective markets and the national market system for options. The Exchanges also believe that the ORSA Plan will avoid duplication of certain regulatory efforts on the part of the Exchanges.

A summary of the ORSA Plan is provided below. The full text of the ORSA Plan is available on the Commission's website at [www.sec.gov](http://www.sec.gov), at the principal offices of the Exchanges, and at the Commission.

## II. Description of the ORSA Plan

### A. Policy Committee

The ORSA Plan provides for the establishment of a Policy Committee, on which each Exchange will have one representative and one vote. The Policy Committee is responsible for overseeing the operation of the ORSA Plan and for making all policy decisions pertaining to the ORSA Plan, including, among other things, the following:

1. determining the extent to which regulatory, surveillance, and investigative functions will be conducted on behalf of the Exchanges;
2. making all determinations pertaining to contracts with (i) persons who provide goods and services under the ORSA Plan, including parties to the ORSA Plan who provide such goods and services, and (ii) parties to the ORSA Plan and other self-regulatory organizations who engage in regulatory, surveillance, or investigative activities under the ORSA Plan;

3. reviewing and approving surveillance standards and other parameters to be used by self-regulatory organizations who perform regulatory and surveillance functions under the ORSA Plan; and
4. determining budgetary and financial matters.

All decisions by the Policy Committee, except as otherwise indicated, will be by majority vote, subject to any required approval of the Commission. Regular meetings of the Policy Committee may be attended by one or more nonvoting representatives of the Exchanges.

B. Delegation of Functions

The ORSA Plan permits the Exchanges, as and to the extent determined by the Policy Committee, to delegate all or part of the regulatory and surveillance functions under the ORSA Plan (other than the Policy Committee's own functions) to one or more Exchanges or other self-regulatory organizations. The Policy Committee has determined to delegate the operation of the surveillance and investigative facility contemplated by the ORSA Plan to CBOE. The Exchanges have entered into a Regulatory Services Agreement ("RSA") with CBOE, as service provider, pursuant to which CBOE will perform certain regulatory and surveillance functions under the ORSA Plan and use its automated insider trading surveillance system to perform these functions on behalf of the Exchanges. The Exchanges have not filed the RSA for Commission approval.

Although CBOE will be delegated responsibility for these activities, the ORSA Plan specifically provides that each Exchange will remain responsible for the regulation of its market and for bringing enforcement proceedings whenever it appears that persons subject to its regulatory jurisdiction may have violated the Exchange's own rules, the Act, or the rules of the Commission thereunder.

### C. Review of Service Provider

The ORSA Plan provides that the Policy Committee must periodically, but not less frequently than annually, review the performance of persons to whom regulatory and surveillance activities have been delegated under the ORSA Plan. The Policy Committee must evaluate whether such activities have been performed by the service provider in a reasonably acceptable manner consistent with any contract governing the performance of such services and whether the costs of such services are reasonable. The ORSA Plan also provides that, if the Policy Committee determines that the performance of delegated activities is not reasonably acceptable or that the costs are unreasonable, the Policy Committee may terminate the delegation of activities to such persons subject to applicable contractual terms.

### D. Potential Insider Trading Violations

When in the course of performing regulatory and surveillance functions the Exchanges acting under the ORSA Plan, or a self-regulatory organization to whom such functions have been delegated, obtain information indicating that there may have been an insider trading violation by members or associated persons of one or more of the Exchanges, the Exchanges or such delegatee will promptly inform all such parties of the relevant facts. The Exchanges acting jointly will not have authority to take disciplinary action against members or associated persons of any individual Exchange. All such authority will remain that of the Exchanges acting in their individual capacities.

### E. Dispute Resolution

Disputes arising in connection with the operation of the ORSA Plan will be resolved by the Policy Committee acting by majority vote. As stated above, each Exchange will have one representative and one vote on the Policy Committee.

F. Other Regulatory or Surveillance Functions

The ORSA Plan permits the Exchanges to provide for the joint performance of any other regulatory or surveillance functions or activities that the Exchanges determine to bring within the scope of the ORSA Plan, but any determination to expand the functions or activities under the ORSA Plan would be an amendment to the ORSA Plan subject to the requirements for amendments described below.

G. Allocation of Costs

The costs under the ORSA Plan to be allocated among the Exchanges will consist of all costs duly incurred by any Exchange as a direct result of its performing regulatory or surveillance functions under the ORSA Plan, together with any amounts charged under the ORSA Plan (or charged to any Exchange authorized to incur such charges under the ORSA Plan) by any other person for goods or services provided under the ORSA Plan. The costs incurred by CBOE in developing the insider trading surveillance system to be used by CBOE as the ORSA Plan service provider will be borne by CBOE without reimbursement. Costs incurred by CBOE in maintaining and upgrading its system going forward will be allocated among the Exchanges, provided that such costs have been authorized by the Exchanges.

Costs in each calendar quarter will be allocated among the Exchanges in accordance with a three element formula: (i) fifty percent of costs will be allocated equally among the Exchanges (with a pro rata adjustment for any exchange that was not an Exchange for the entire calendar quarter); (ii) twenty-five percent of costs will be allocated among the Exchanges in accordance with their respective contract volume market shares during the calendar quarter; and (iii) twenty-five percent of costs will be allocated among the Exchanges in accordance with their respective numbers of classes of securities options traded at any time during the calendar quarter.

#### H. New Parties to the ORSA Plan; Participation Fee

Any other self-regulatory organization that maintains a market for the trading of securities options in accordance with rules approved by the Commission may become a party to the ORSA Plan, subject to agreeing to the terms and conditions of the ORSA Plan, agreeing to the terms and conditions of any contract pursuant to which the parties to the ORSA Plan have delegated regulatory and surveillance functions under the ORSA Plan, and payment of a participation fee.

The participation fee will be an amount determined by a majority of the Exchanges to be fair and reasonable compensation for the costs incurred in developing and maintaining the facilities used under the ORSA Plan and in providing for participation by the new party. In determining the amount of the participation fee, the Exchanges must consider the following factors:

1. The portion of costs previously paid for the development, expansion and maintenance of facilities used under the ORSA Plan which, under generally accepted accounting principles, would have been treated as capital expenditures and would have been amortized over the five years preceding the admission of the new party;
2. an assessment of costs incurred and to be incurred, if any, to accommodate the new party, which are not otherwise required to be paid by the new party; and
3. previous participation fees paid by other new parties.

If the Exchanges and a new party cannot agree on the amount of the participation fee, the matter will be subject to review by the Commission.

A self-regulatory organization that does not maintain a market for the trading of securities options may become a party to the ORSA Plan, and a self-regulatory organization that

ceases to maintain such a market may continue to be a party to the ORSA Plan, only if permitted by a majority of the other parties.

I. Term and Termination

The ORSA Plan will remain in effect for so long as there are two or more parties to the ORSA Plan. Any Exchange may withdraw from the ORSA Plan at any time on not less than six months prior written notice to each of the other parties. Any Exchange withdrawing from the ORSA Plan will remain liable for its proportionate share of costs allocated to it for the period during which it was a party, but it will have no further obligations under the ORSA Plan or to any of the other Exchanges with respect to the period following the effectiveness of its withdrawal. The right of an Exchange to participate in joint regulatory services under the ORSA Plan is not transferable without the consent of the other Exchanges.

J. Amendments

The ORSA Plan may be amended by the affirmative vote of all of the parties, provided that the provisions pertaining to the allocation of costs may be amended by the affirmative vote of not less than two-thirds of the parties, subject in each case to any required approval of the Commission.

III. Phases of Development

The automated insider trading surveillance system proposed to be used under the ORSA Plan has been developed by CBOE and is currently being used by CBOE for the surveillance, investigation, and detection of insider trading on its own market. The system is available for immediate use by the Exchanges under the ORSA Plan. If the ORSA Plan is approved by the Commission, CBOE intends to supplement its database of options subject to surveillance by the system to include those relatively few options that are traded on the markets of one or more of

the other Exchanges but not on CBOE. CBOE has represented that this supplementation will be accomplished promptly after the ORSA Plan has been approved by the Commission.

IV. Impact on Competition

The Exchanges do not believe that the operation of the ORSA Plan will have any impact on competition.

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the ORSA Plan is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>);
- or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number 4-516 on the subject line.

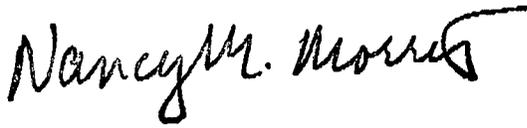
Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number 4-516. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the ORSA Plan that are filed with the Commission, and all written communications relating to the ORSA Plan between the Commission and any person, other than those that may be withheld from the public in

accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchanges. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number 4-516 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

By the Commission.



Nancy M. Morris  
Secretary

UNITED STATES OF AMERICA  
BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940  
Release No. 27280 / April 4, 2006

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In the Matter of :  
 :  
MCG Capital Corporation :  
c/o Bryan J. Mitchell :  
Chief Executive Officer :  
1100 Wilson Boulevard, Suite 3000 :  
Arlington, VA 22209 :  
 :  
(812-13233) :  
 :

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ORDER UNDER SECTIONS 6(c), 57(a)(4), AND 57(i) OF THE INVESTMENT  
COMPANY ACT OF 1940 AND RULE 17d-1 UNDER THE ACT

MCG Capital Corporation filed an application on September 2, 2005, and an amendment to the application on January 31, 2006, requesting an order under section 6(c) of the Investment Company Act of 1940 ("Act") granting an exemption from sections 23(a), 23(b) and 63 of the Act; and under sections 57(a)(4) and 57(i) of the Act and rule 17d-1 under the Act. The order would permit applicants to adopt equity-based employee and director compensation plans.

On March 8, 2006, a notice of the filing of the application was issued (Investment Company Act Release No. 27258). The notice gave interested persons an opportunity to request a hearing and stated that an order disposing of the application would be issued unless a hearing was ordered. No request for a hearing has been filed, and the Commission has not ordered a hearing.

The matter has been considered and it is found, on the basis of the information set forth in the application, as amended, that granting the requested exemption is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

Document 4 of 43

It is further found that participation by the investment company in the proposed arrangement is consistent with the provisions, policies and purposes of the Act and is on a basis no less advantageous than that of other participants.

Accordingly,

IT IS ORDERED, under section 6(c) of the Act, that the exemption from sections 23(a), 23(b) and 63 of the Act, requested by MCG Capital Corporation (File No. 812-13233), is granted, effective immediately, subject to the conditions contained in the application, as amended.

IT IS FURTHER ORDERED, under sections 57(a)(4) and 57(i) of the Act and rule 17d-1 under the Act, that the investment company's participation in the proposed arrangement is approved, effective immediately, subject to the conditions contained in the application, as amended.

By the Commission.



Nancy M. Morris  
Secretary

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

April 7, 2006

IN THE MATTER OF

GOLDEN APPLE OIL AND GAS, INC.

File No. 500-1

ORDER OF SUSPENSION  
OF TRADING

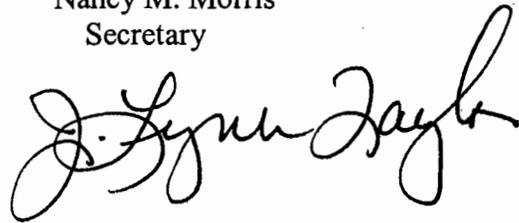
It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Golden Apple Oil and Gas, Inc. ("Golden Apple"), a Nevada corporation headquartered in Phoenix, Arizona. Questions have arisen regarding the accuracy of assertions by Golden Apple, and by others, in press releases and internet postings to investors concerning, among other things: (1) the company's assets, (2) the company's business operations, (3) the company's current financial condition, and (4) financing arrangements involving the issuance of Golden Apple shares.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above-listed company is suspended for the period from 9:30 a.m. EDT, April 7, 2006, through 11:59 p.m. EDT, on April 21, 2006.

By the Commission.

Nancy M. Morris  
Secretary



**By: J. Lynn Taylor**  
Assistant Secretary

Document 5 of 43

Commissioner Glassman  
Not Participating

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
April 7, 2006

CORRECTED

ADMINISTRATIVE PROCEEDING  
File No. 3-12250

In the Matter of

GLOBAL CROWN CAPITAL,  
LLC,  
J&C GLOBAL SECURITIES  
INVESTMENTS, LLC,  
RANI T. JARKAS, AND  
ANTOINE K. CHAYA,

Respondents.

ORDER INSTITUTING ADMINISTRATIVE  
AND CEASE-AND-DESIST PROCEEDINGS  
PURSUANT TO SECTIONS 203(e), 203(f),  
AND 203(k) OF THE INVESTMENT  
ADVISERS ACT OF 1940 AND SECTIONS  
15(b)(4) AND 15(b)(6) OF THE SECURITIES  
EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") and Sections 15(b)(4) and 15(b)(6) of the Securities Exchange Act of 1934 ("Exchange Act") against Global Crown Capital, LLC ("Global Crown"), J&C Global Securities Investments, LLC ("J&C"), Rani T. Jarkas ("Jarkas"), and Antoine K. Chaya ("Chaya") (collectively "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

**Nature of Proceeding**

1. This matter involves hedge fund managers who exaggerated the fund's performance in order to conceal trading losses from the fund's investors. In the first three months of operation in early 2003, the value of the hedge fund, Cogent Capital Management, LLC ("Cogent"), declined by over 20%. In response, the fund's managers decided to form a purported "redemption reserve" of \$228,000 (about 15% of the fund's value at the time) and planned to use their own cash to fund the reserve. They then calculated the fund's performance, obscuring the substantial trading loss by adding the \$228,000 amount to the fund's total value. The managers never disclosed this to investors, nor did they fund the \$228,000 reserve at the

Document 6 of 43

time. Cogent's managers then sent Cogent investors quarterly and year-end account statements that included the purported "reserve" but failed to disclose that the reserve increased Cogent's reported performance. The statements understated the fund's actual losses by as much as 90%. By providing Cogent investors with misleading account statements for the last three quarters of 2003, the managers caused violations of Sections 206(1) and 206(2) of the Advisers Act.

### Respondents

2. Global Crown Capital, LLC, a Delaware company founded in 2001, is based in San Francisco, California and is dually registered with the Commission as a broker-dealer and an investment adviser. Global Crown maintains approximately 300 active brokerage accounts, has approximately 70 advisory clients and about \$30 million in assets under management. Global Crown, which has about 15 employees, is majority-owned and operated by two managing members, Rani T. Jarkas and Antoine K. Chaya. Global Crown served as Cogent's manager from January through July 2003.

3. J&C Global Securities Investments, LLC is a Delaware company formed in 2003 by Jarkas and Chaya, the two principals of Global Crown. J&C is not registered with the Commission or any state securities regulator. J&C has served as Cogent's manager from July 2003 to the present.

4. Rani T. Jarkas is a managing member and an associated person of Global Crown and serves as Global Crown's Chief Investment Officer. Jarkas is also a managing member of J&C. Jarkas holds the Series 7, 24, and 63 securities licenses. Jarkas, 33 years old, is a resident of San Francisco, California.

5. Antoine K. Chaya is a managing member and an associated person of Global Crown and serves as Global Crown's Chief Operating Officer and Chief Financial Officer. Chaya is also a managing member of J&C. Chaya holds or has held the Series 3, 4, 7, 24, and 66 securities licenses. Chaya, 40 years old, is resident of San Francisco, California.

### Facts

6. In January 2003, Jarkas and Chaya formed a hedge fund, Cogent, with almost \$1.4 million in capital contributions from six of Global Crown's existing clients. At least five additional clients invested in Cogent subsequent to its formation. The stated objective of the fund was to achieve consistent returns in all market environments by trading equities and equity options in a manner consistent with capital preservation.

7. In its first three months of operations, January through March 2003, the fund's value declined by over 20%. Although Cogent's offering memorandum stated that investors would receive quarterly performance summaries, Jarkas and Chaya did not provide account statements or otherwise report Cogent's first quarter performance to investors.

8. As the end of Cogent's second quarter approached, Jarkas and Chaya established a purported "redemption reserve" to be added to Cogent's total assets on its financial statements. The "redemption reserve" was created to reimburse Cogent's initial investors for losses should any of them redeem their investment during Cogent's first year of operation. After estimating market performance for the rest of 2003 along with what they could afford to contribute, Jarkas and Chaya set the reserve amount at \$228,000. However, no money was actually paid into the reserve at the time.

9. Jarkas and Chaya never informed investors of the existence of the "redemption reserve." Nonetheless, they prepared second-quarter reports for certain investors that added this undisclosed "redemption reserve" in calculating Cogent's performance. On July 29, 2003, Jarkas and Chaya sent account statements to investors that reported the investor's net income or loss to date on his or her Cogent investment. As a consequence of adding the unfunded and undisclosed \$228,000 "redemption reserve," Jarkas and Chaya reported to investors that they had losses ranging from 2% to 5% when in reality, without the "redemption reserve," some investors had lost as much as 18% of their investment to date.

10. Jarkas and Chaya continued to report misleading returns to investors in subsequent quarters. On October 29, 2003, Jarkas and Chaya provided account statements to six of its ten investors for the third quarter of 2003 that once again calculated Cogent's performance using the undisclosed "redemption reserve" and significantly understated the fund's losses to date.

11. In the second half of 2003, Cogent's investment performance improved slightly. As a result, Jarkas and Chaya reduced the "redemption reserve" amount to \$158,000 (although the "redemption reserve" continued to exist solely on paper—Jarkas and Chaya had not yet paid any funds into the Cogent reserve). Again, this amount was used to calculate the performance of investors' investments for the year ended December 31, 2003 but was not disclosed to the investors. The inclusion of the undisclosed "redemption reserve" allowed Jarkas and Chaya to report losses of only 3.5% to certain investors when, in reality, they had lost as much as 16% year to date.

12. In March 2004, in connection with an independent audit of Cogent's 2003 financial statements, Jarkas and Chaya made a cash deposit to Cogent to fund the "redemption reserve." However, Cogent investors were never informed of the cash infusion, and Jarkas and Chaya continued to report performance that reflected the cash infusion without disclosing that Cogent's returns were derived in part from the cash infusion rather than from the actual investment performance of the fund.

13. At all relevant times, Respondents made use of the mails or means or instrumentalities of interstate commerce in connection with the conduct described above.

### Violations

14. As a result of the conduct described above, Global Crown and J&C willfully violated Section 206(1) of the Advisers Act, which makes it unlawful for an investment adviser to employ any device, scheme, or artifice to defraud any client or prospective client, and Section 206(2) of the Advisers Act, which makes it unlawful for an investment adviser to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

15. As a result of the conduct described above, Jarkas and Chaya willfully aided and abetted and caused Global Crown's and J&C's violation of Section 206(1) of the Advisers Act, which makes it unlawful for an investment adviser to employ any device, scheme, or artifice to defraud any client or prospective client, and Section 206(2) of the Advisers Act, which makes it unlawful for an investment adviser to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

### **III.**

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative and cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II are true and, in connection therewith, to afford Respondents an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest against Global Crown pursuant to Section 203(e) of the Advisers Act and Section 15(b)(4) of the Exchange Act including, but not limited to, civil penalties pursuant to Section 203(i) of the Advisers Act and Section 21B of the Exchange Act;

C. What, if any, remedial action is appropriate in the public interest against J&C pursuant to Section 203(e) of the Advisers Act and Section 15(b)(6) of the Exchange Act including, but not limited to, civil penalties pursuant to Section 203(i) of the Advisers Act and Section 21B of the Exchange Act;

D. What, if any, remedial action is appropriate in the public interest against Chaya and Jarkas pursuant to Section 203(f) of the Advisers Act and Section 15(b)(6) of the Exchange Act including, but not limited to, civil penalties pursuant to Section 203(i) of the Advisers Act and Section 21B of the Exchange Act; and

E. Whether, pursuant to Section 203(k) of the Advisers Act, Respondents should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 206(1) and 206(2) of the Advisers Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondents fail to file the directed answer, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310.

This Order shall be served forthwith upon Respondents personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Nancy M. Morris  
Secretary

*Jill M. Peterson*  
By: **Jill M. Peterson**  
Assistant Secretary

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**

**Release No. 53624 / April 10, 2006**

**ADMINISTRATIVE PROCEEDING**

**File No. 3-12257**

**In the Matter of**

**Metropolitan Life  
Insurance Company,**

**Respondent.**

**ORDER INSTITUTING  
ADMINISTRATIVE AND CEASE-  
AND-DESIST PROCEEDINGS,  
MAKING FINDINGS, AND  
IMPOSING REMEDIAL  
SANCTIONS AND A CEASE-  
AND-DESIST ORDER  
PURSUANT TO SECTIONS 15(b)  
AND 21C OF THE SECURITIES  
EXCHANGE ACT OF 1934**

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Metropolitan Life Insurance Company ("MetLife" or "Respondent").

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over Respondent and the subject matter of these proceedings, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (the "Order"), as set forth below.

**III.**

On the basis of this Order and Respondent's Offer, the Commission finds that:<sup>1</sup>

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<sup>1</sup> The findings herein are made pursuant to MetLife's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

*Document 2 of 43*

### **Respondent**

1. MetLife, a New York life insurance corporation with its principal place of business in New York, New York, has been registered with the Commission as a broker-dealer since 1969 and as an investment adviser since 1977.

### **Relevant Entity**

2. The Fulton County Sheriff's Office ("FCSO"), headquartered in Atlanta, Georgia, is the largest sheriff's office in the state of Georgia, with approximately 1,000 employees and an annual budget in excess of \$80 million.

### **Summary**

3. From February 2003 through January 2004, while employed by and associated with MetLife in south Florida, a registered representative of MetLife (the "Registered Representative") made misrepresentations of material fact to the FCSO and defrauded the FCSO with respect to the investment of approximately \$7.2 million in securities. MetLife failed reasonably to supervise the Registered Representative with a view to detecting and/or preventing these fraudulent actions. MetLife also failed to keep certain customer records required by Section 17(a)(1) of the Exchange Act and Rule 17a-4 thereunder.

### **The Registered Representative Made False Statements to Defraud the FCSO**

4. In March 2003, upon the recommendation of the Registered Representative, the FCSO invested \$2,036,134 with an entity other than MetLife in what it was led to believe was a federal bond fund (the "non-MetLife Investment"). The funds that the FCSO invested were derived from tax sale proceeds held in trust for the benefit of the owners of certain real property located within Fulton County, Georgia. MetLife received no proceeds from the non-MetLife Investment and was unaware of the existence of the non-MetLife Investment.

5. In connection with the non-MetLife Investment, the Registered Representative made false statements to the FCSO, including that the entity receiving the proceeds of the non-MetLife Investment was an affiliated company of MetLife. In furtherance of such false statements, the Registered Representative caused to be sent to the FCSO: (a) a forged list of MetLife affiliated companies, sent on MetLife letterhead from the facsimile machine of the Registered Representative's former MetLife office, which falsely included the entity receiving the proceeds of the non-MetLife Investment; and (b) quarterly account statements which falsely represented that the proceeds of the non-MetLife Investment were invested in a federal bond fund. MetLife has no records of the correspondence sent from its office relating to the non-MetLife Investment.

6. Contrary to both the Registered Representative's statements regarding the non-MetLife Investment and the representations within the quarterly account statements, the majority of the proceeds from the non-MetLife Investment were used as loans for start-up or otherwise speculative

business ventures. The remainder of the proceeds from the non-MetLife Investment was directed primarily to the Registered Representative.

7. In April 2003, upon the recommendation of the Registered Representative, the FCSO invested \$5,191,000 of public funds in a MetLife variable annuity (the "MetLife Variable Annuity"). In purchasing the MetLife Variable Annuity, the FCSO completed and returned to the Registered Representative multiple forms relating to asset allocation and suitability. In connection with the sale of the MetLife Variable Annuity, the Registered Representative made false statements to the FCSO, including statements that the MetLife Variable Annuity was a permissible investment for the FCSO under Georgia state law.

8. In March 2004, the FCSO became further aware of many of the actual details concerning the non-MetLife Investment and the MetLife Variable Annuity and requested a return of all investments from the appropriate entities.

9. In March 2004, MetLife initially returned \$4,981,201 to the FCSO, an amount equal to the surrender value of the MetLife Variable Annuity less early withdrawal charges and fees. In April 2004, MetLife returned to the FCSO an additional \$363,370, representing all withdrawal charges and fees related to the MetLife Variable Annuity, plus all accrued interest. MetLife does not have any copies of the suitability and asset allocation forms the FCSO completed and is unable to locate the FCSO customer file.

10. Neither the Registered Representative nor the entities receiving the \$2,036,134 have returned any of these proceeds to the FCSO. Although MetLife had previously returned \$5,344,571 to the FCSO relating to the MetLife Variable Annuity, in September 2005, MetLife agreed to and thereafter paid to the FCSO an additional \$1,500,000 related to the non-MetLife Investment.

11. The Registered Representative's activities discussed above, including, but not limited to, recommending unsuitable securities and making material misrepresentations of fact to the FCSO in the offer or sale of securities and in connection with the purchase or sale of securities violated Section 17(a) of the Securities Act of 1933 (the "Securities Act") and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

**MetLife was on Notice of Compliance Concerns  
From When It First Hired the Registered Representative**

12. MetLife hired the Registered Representative in February 2000. During the Registered Representative's application and licensing review, MetLife personnel noted several issues. Specifically, they discovered that the Registered Representative had misrepresented his education on his employment application and that one of the Registered Representative's previous employers was investigating him for the misappropriation of customer funds. The Registered Representative failed to disclose this information in the initial application process. The previous employer ultimately cleared the Registered Representative of any misappropriation but cited the Registered Representative for violations of customer file and fund submission policies. After the previous

employer cleared the Registered Representative of misappropriation, MetLife completed its review and formally hired the Registered Representative.

13. Despite these initial compliance concerns MetLife established no heightened supervisory procedures for the Registered Representative.

**Even with Increasing Compliance Concerns, MetLife Permitted  
the Registered Representative to Work Offsite with No Heightened Supervision**

14. In 2001, additional compliance concerns arose regarding the Registered Representative. Specifically, MetLife's Corporate Ethics and Compliance department ("MetLife Compliance") investigated and learned that the Registered Representative while employed at MetLife had "bounced" more than \$100,000 in personal checks. Also, MetLife's annuity department began questioning the suitability of the Registered Representative's sales.

15. During this time, MetLife granted the Registered Representative permission to operate as a MetLife registered representative from a "detached location." This meant that the Registered Representative's supervising manager was located at a "main agency location" separate and apart from the physical location where the Registered Representative typically conducted business. While at his detached location, the Registered Representative was still required to attend periodic meetings with management, and management was required to periodically visit the Registered Representative's detached MetLife office and conduct unannounced audits.

16. Despite these further compliance concerns and the grant of permission for the Registered Representative to work offsite at a detached location, MetLife established no heightened supervisory procedures for the Registered Representative.

17. In August 2001, after the Registered Representative had begun to operate out of his detached office, MetLife Compliance presented these more recent compliance concerns, along with the prior concerns uncovered during the Registered Representative's employment processing, for review to a local manager for the Registered Representative. The local manager concluded that the Registered Representative had not been trained properly in MetLife policies and procedures and that the Registered Representative should have been monitored closely by his assigned supervising manager from the date of his hire. The local manager raised an additional concern regarding the Registered Representative working at a detached office and made two heightened supervisory recommendations: (1) that the Registered Representative's customer files be reviewed one day per week by staff from his assigned main agency location; and (2) that management from his assigned main agency location visit the Registered Representative's detached MetLife office unannounced once a month to review his overall conduct. Despite the explicit recommendation of the local manager consulted, the heightened supervisory procedures were not implemented.

**The Registered Representative Continually  
Violated MetLife's Policies and Procedures**

18. MetLife conducts periodic unannounced compliance audits of main agency and detached office locations. In January 2002, MetLife conducted a periodic unannounced audit of the Registered Representative's detached MetLife office, as well as his assigned main agency location.

19. The January 2002 audit report revealed that, contrary to MetLife policies: (1) outgoing mail was sent sealed by the Registered Representative and was not reviewed prior to mailing; (2) no correspondence review files existed at the Registered Representative's detached MetLife office; and (3) the Registered Representative's supervising manager was not reviewing his customer files on a timely basis.

20. In January 2003, MetLife conducted a periodic unannounced audit of the Registered Representative's detached MetLife office, as well as his assigned main agency location. The January 2003 audit report again cited violations of MetLife correspondence review and customer file maintenance policies, indicating that these were repeat violations from January 2002 that had not been sufficiently addressed.

**MetLife Failed to Adequately Investigate Potential  
Unlawful Conduct by the Registered Representative**

21. In early 2002, MetLife re-assigned supervisory responsibility for the Registered Representative to a new supervising manager. From the beginning of this new supervising manager's oversight of the Registered Representative, he noted that the Registered Representative failed to attend required supervisory meetings and had difficulty adhering to MetLife sales practice policies. In June 2002, the supervising manager formally requested that he no longer be responsible for supervising the Registered Representative. MetLife then transferred primary securities supervisory responsibility for the Registered Representative to another supervising manager in July 2002. This new supervising manager immediately became concerned with the flow of funds between the Registered Representative and his customers, and in July 2002 formally requested that MetLife initiate an investigation of the Registered Representative for potential money laundering or related activities.

22. Although the Registered Representative's supervising manager requested an investigation of the Registered Representative in July 2002, the investigation did not effectively begin until January 2003. Between the request of the Registered Representative's supervising manager for an investigation of the Registered Representative and the effective start of the investigation MetLife did not establish any heightened supervisory procedures for the Registered Representative.

23. MetLife had in place no policies or procedures regarding the timeliness of such investigations or specifying the manner in which an investigation of a registered representative suspected of potential compliance or sales practice violations, or potential unlawful actions, was to be conducted. At no point in time did the MetLife employees investigating the Registered Representative review his MetLife personnel or compliance files or his publicly available National Association of Securities Dealers, Inc. ("NASD") disclosure file. In failing to review any of these

files, or take any steps related to investigating any prior misconduct or compliance concerns, the MetLife employees conducting the investigation failed to learn of any of the Registered Representative's prior compliance violations and concern over his sales practices.

24. The MetLife employees conducting the investigation of the Registered Representative did learn in January 2003 of a previously unknown lawsuit naming the Registered Representative as a defendant. The lawsuit concerned the Registered Representative's referral, while he was previously employed at another broker-dealer, of a customer to the broker-dealer which he partially owned. The MetLife investigators first accepted the Registered Representative's statements that the lawsuit had been dismissed. In February 2003, the MetLife investigators learned that the lawsuit had not been dismissed but rather only stayed pending arbitration, that the Registered Representative had misrepresented the lawsuit's status, and that the lawsuit in fact contained allegations of fraud relating to the sale of securities. No follow up action was ever taken against the Registered Representative for misrepresenting the lawsuit's status to the investigators. Moreover, at no point in time did the MetLife employees conducting the investigation, or any other MetLife employees, take any action beyond questioning the Registered Representative to investigate the allegations of fraud within the lawsuit.

25. The lawsuit concerned a pattern of conduct very similar to that involving the FCSO, as it alleged that the Registered Representative had misrepresented the identity of the broker-dealer a customer would be doing business with and then, at the last minute, diverted the customer's funds to another source for his personal benefit. Had MetLife reasonably investigated and responded to the allegations of compliance violations against the Registered Representative through heightened supervision or implemented procedures to review adequately his customer files and correspondence through March 2003, it is likely that the firm could have prevented and/or detected the Registered Representative's fraud of the FCSO.

#### **The Registered Representative's Antifraud Violations**

26. The Registered Representative violated the antifraud provisions of the federal securities laws in connection with the FCSO's purchase of the MetLife Variable Annuity and the non-MetLife Investment. Specifically, the Registered Representative intentionally misrepresented that the MetLife Variable Annuity was a permissible investment under Georgia state law and directed his assistant to forge a list of MetLife affiliated companies that falsely identified the entity receiving the proceeds of the non-MetLife investment as an affiliated company of MetLife. He also caused bogus account statements related to the non-MetLife investment to be sent to the FCSO, falsely identifying that the investment was in a federal bond fund. These misrepresentations are material in that there is a substantial likelihood a reasonable investor would consider an investment's potential violation of state law, the true identity of the entity receiving the investment, and the nature of the investment product being purchased to be important factors in making an investment decision. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); accord Basic, Inc. v. Levinson, 485 U.S. 224, 232 (1988). Such materially false statements made: (a) in connection with the purchase or sale of securities constitute violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; and (b) in the offer or sale of securities constitute violations of Section 17(a) of the Securities Act. See, e.g., S.E.C. v. Scherm, 854 F. Supp. 900, 906 (N.D. Ga. 1993).

### MetLife's Failure to Supervise

27. Section 15(b)(4)(E) of the Exchange Act provides for the imposition of sanctions against a broker or dealer who "has failed reasonably to supervise, with a view to preventing violations of [the federal the securities laws], another person who commits such a violation, if such other person is subject to his supervision." The Commission has repeatedly emphasized that "it is critical for investor protection that a broker establish and enforce effective procedures to supervise its employees." In the Matter of Donald T. Sheldon, 51 S.E.C. 59, 78-79 (1992), aff'd, 45 F.3d 1515 (11th Cir. 1995). Establishment of policies and procedures alone is not sufficient to discharge supervisory responsibility. The firm must also establish a system to implement such procedures and must have an adequate system of follow-up and review in place if red flags are detected. See, e.g., In the Matter of David Lerner Assocs., Inc., Exchange Act Release No. 49729, \*2 (May 19, 2004); In the Matter of W.J. Nolan & Co., et al., Exchange Act Release No. 44833, \*5 (Sep. 24, 2001).

28. MetLife failed to develop procedures or a system to implement procedures for heightened supervision of the Registered Representative in response to his compliance violations. MetLife implemented no heightened supervision of the Registered Representative despite his prior false statements and material omissions on his employment application, his bouncing more than \$100,000 in personal checks, his having the suitability of his annuity sales called into question, and recommendations for heightened supervision by supervisors. Further, MetLife had no policies or procedures in place for how to conduct a comprehensive and timely investigation of the Registered Representative once multiple red flags, including allegations of securities fraud, were detected. Had MetLife developed and implemented a system of heightened supervision for the Registered Representative or had policies or procedures in place for conducting a comprehensive investigation of the Registered Representative once multiple red flags were detected, it is likely that the firm could have detected and/or prevented the fraud perpetrated by the Registered Representative that led to the FCSO's loss. MetLife's conduct evidences a failure to reasonably supervise the Registered Representative with a view to preventing his violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

29. MetLife has now drafted and adopted certain compliance policies and procedures in response to certain of the specific failures that allowed the Registered Representative to defraud the FCSO.

30. MetLife also has independently negotiated a settlement with the FCSO to address the FCSO's losses stemming from the conduct of MetLife's Registered Representative. Pursuant to MetLife's Offer and as reflected in this Order, MetLife voluntarily repaid to the FCSO the negotiated amount of \$1,500,000.

**MetLife's Violation of Section 17(a)(1)  
of the Exchange Act and Rule 17a-4 thereunder**

31. Section 17(a)(1) of the Exchange Act provides that each member of a national securities exchange, broker, or dealer "shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title."

32. Exchange Act Rule 17a-4(b)(4) provides that brokers and dealers shall preserve: "[o]riginals of all communications received and copies of all communications sent . . . by the member, broker or dealer . . . relating to its business as such."

33. By failing to retain the suitability and asset allocation forms completed by the FCSO, along with all correspondence sent to the FCSO, MetLife willfully violated Section 17(a)(1) of the Exchange Act and Rule 17a-4 thereunder.

**Remedial Efforts**

34. In determining to accept the Offer, the Commission has considered the remedial acts promptly undertaken by Respondent and cooperation afforded the Commission staff.

**Undertakings**

35. Respondent has undertaken to pay and has paid \$1,500,000 to the FCSO.

**IV.**

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent MetLife's Offer.

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Pursuant to Section 15(b)(4) of the Exchange Act, Respondent be, and hereby is, censured;

B. Pursuant to Section 21C of the Exchange Act, Respondent shall cease and desist from committing or causing any violations and any future violations of Section 17(a)(1) of the Exchange Act and Rule 17a-4 thereunder; and

C. Respondent shall, with ten days of entry of this Order, pay a civil monetary penalty in the amount of \$250,000 to the United States Treasury. Such payment shall be: (a) made by United States postal money order, certified check, bank cashier's check or bank money order; (b) made payable to the Securities and Exchange Commission; (c) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432

General Green Way, Stop 0-3, Alexandria, Virginia 22312; and (d) submitted under cover letter that identifies Metropolitan Life Insurance Company as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Richard P. Murphy, Assistant Director, Division of Enforcement, Atlanta District Office, 3475 Lenox Road, Suite 500, Atlanta, Georgia 30326.

By the Commission.

Nancy M. Morris  
Secretary

  
By **Jill M. Peterson**  
**Assistant Secretary**

Chairman Cox  
Not Participating

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 53622 / April 10, 2006

ADMINISTRATIVE PROCEEDING  
File No. 3-12256

In the Matter of

THOMAS J. GERBASIO,

Respondent.

ORDER INSTITUTING  
ADMINISTRATIVE PROCEEDINGS  
PURSUANT TO SECTION 15(b) OF THE  
SECURITIES EXCHANGE ACT OF 1934,  
MAKING FINDINGS, AND IMPOSING  
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Thomas J. Gerbasio ("Gerbasio" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

Document 8 of 43

### III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Gerbasio, age 35, is a resident of Ocean City, New Jersey. From August 2002 until May 2003, Gerbasio ran the New York office of Fiserv Securities, Inc. ("Fiserv"), a broker-dealer registered with the Commission. In May 2003, Gerbasio assumed responsibility for Fiserv's Packaged Product Division.

2. On March 30, 2006, a final judgment was entered by consent against Gerbasio, permanently enjoining him from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Thomas J. Gerbasio, Civil Action Number 05-1833, in the United States District Court for the Eastern District of Pennsylvania.

3. The Commission's complaint alleged that, from at least August 2002 until November 2003, Respondent participated in a scheme to defraud hundreds of mutual funds and their shareholders by engaging in deceptive practices in connection with market timing by two hedge fund customers. The Complaint further alleged that, in order to evade and circumvent controls implemented by mutual funds seeking to restrict excessive trading, Gerbasio and his subordinate employed, on a daily basis, a variety of deceptions and evasions on behalf of the hedge fund customers, including misrepresenting the nature of their trades to the funds, opening dozens of accounts to conceal the customers' identities from the funds, entering trades in amounts that would avoid the funds' detection triggers, and advising the customers on strategies to conceal their market timing from mutual funds. The Complaint alleged that, using these fraudulent tactics, between August 2002 and November 2003, Gerbasio and his subordinate placed substantially more than 37,000 market timing trades for the hedge fund customers, many or all of which would have been rejected by the mutual fund companies absent the fraud.

### IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Gerbasio be, and hereby is barred from association with any broker or dealer;

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Nancy M. Morris  
Secretary

A handwritten signature in cursive script, appearing to read "J. Lynn Taylor".

By: J. Lynn Taylor  
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 202

Release No. 34-53638

RIN 3235-AJ55

Policy Statement Concerning Subpoenas to Members of the News Media

AGENCY: Securities and Exchange Commission.

ACTION: Policy Statement.

SUMMARY: The Securities and Exchange Commission is issuing a policy statement concerning the issuance of subpoenas to members of the media.

EFFECTIVE DATE: April 12, 2006.

FOR FURTHER INFORMATION CONTACT: Joan McKown (202-551-4933), Office of the Chief Counsel, Division of Enforcement, or Richard Levine (202-551-5468), Office of General Counsel.

SUPPLEMENTARY INFORMATION:

The Securities and Exchange Commission is issuing a policy statement concerning the issuance of subpoenas to members of the media. In this policy statement the Commission sets forth guidelines for the agency's professional staff to ensure that vigorous enforcement of the federal securities laws is conducted completely consistently with the principles of the First Amendment's guarantee of freedom of the press, and specifically to avoid the issuance of subpoenas to members of the media that might impair the news gathering and reporting functions.

Document 9 of 43

## Regulatory Requirements

The provisions of the Administrative Procedure Act ("APA") regarding notice of proposed rulemaking, opportunities for public comment, and prior publication are not applicable to general statements of policy, such as this one.<sup>1</sup> Similarly, the provisions of the Regulatory Flexibility Act,<sup>2</sup> which apply only when notice and comment are required by the APA or another statute, are not applicable.

## List of Subjects in 17 CFR Part 202

Administrative practice and procedure.

## Text of Amendment

In accordance with the foregoing, the Securities and Exchange Commission amends 17 CFR chapter II as follows:

### **PART 202 – INFORMAL AND OTHER PROCEDURES**

1. The authority citation for part 202 continues to read, in part, as follows:

Authority: 15 U.S.C. 77s, 77t, 78d-1, 78u, 78w, 78ll(d), 79r, 79t, 77sss, 77uuu, 80a-37, 80a-41, 80b-9, and 80b-11, unless otherwise noted.

\* \* \* \* \*

2. Add § 202.10 to read as follows:

**§ 202.10 Policy statement of the Securities and Exchange Commission concerning subpoenas to members of the news media.**

Freedom of the press is of vital importance to the mission of the Securities and Exchange Commission. Effective journalism complements the Commission's efforts to

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<sup>1</sup> 5 U.S.C. 553.

<sup>2</sup> 5 U.S.C. 601-602.

ensure that investors receive the full and fair disclosure that the law requires, and that they deserve. Diligent reporting is an essential means of bringing securities law violations to light and ultimately helps to deter illegal conduct. In this Policy Statement the Commission sets forth guidelines for the agency's professional staff to ensure that vigorous enforcement of the federal securities laws is conducted completely consistently with the principles of the First Amendment's guarantee of freedom of the press, and specifically to avoid the issuance of subpoenas to members of the media that might impair the news gathering and reporting functions. These guidelines shall be adhered to by all members of the staff in all cases:

(a) In determining whether to issue a subpoena to a member of the news media, the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective enforcement of the federal securities laws.

(b) When the staff investigating a matter determines that a member of the news media may have information relevant to the investigation, the staff should:

(1) Determine whether the information might be obtainable from alternative non-media sources.

(2) Make all reasonable efforts to obtain that information from those alternative sources. Whether all reasonable efforts have been made will depend on the particular circumstances of the investigation, including whether there is an immediate need to preserve assets or protect investors from an ongoing fraud.

(3) Determine whether the information is essential to successful completion of the investigation.

(c) If the information cannot reasonably be obtained from alternative sources and the information is essential to the investigation, then the staff, after seeking approval from the responsible Regional Director, District Administrator, or Associate Director, should contact legal counsel for the member of the news media. Staff should contact a member of the news media directly only if the member is not represented by legal counsel. The purpose of this contact is to explore whether the member may have information essential to the investigation, and to determine the interests of the media with respect to the information. If the nature of the investigation permits, the staff should make clear what its needs are as well as its willingness to respond to particular problems of the media. The staff should consult with the Commission's Office of Public Affairs, as appropriate.

(d) The staff should negotiate with news media members or their counsel, consistently with this Policy Statement, to obtain the essential information through informal channels, avoiding the issuance of a subpoena, if the responsible Regional Director, District Administrator, or Associate Director determines that such negotiations would not substantially impair the integrity of the investigation. Depending on the circumstances of the investigation, informal channels may include voluntary production, informal interviews, or written summaries.

(e) If negotiations are not successful in achieving a resolution that accommodates the Commission's interest in the information and the media's interests without issuing a subpoena, the staff investigating the matter should then consider whether to seek the issuance of a subpoena for the information. The following principles should guide the determination of whether a subpoena to a member of the news media should be issued:

(1) There should be reasonable grounds to believe that the information sought is essential to successful completion of the investigation. The subpoena should not be used to obtain peripheral or nonessential information.

(2) The staff should have exhausted all reasonable alternative means of obtaining the information from non-media sources. Whether all reasonable efforts have been made to obtain the information from alternative sources will depend on the particular circumstances of the investigation, including whether there is an immediate need to preserve assets or protect investors from an ongoing fraud.

(f) If there are reasonable grounds to believe the information sought is essential to the investigation, all reasonable alternative means of obtaining it have been exhausted, and all efforts at negotiation have failed, then the staff investigating the matter shall seek authorization for the subpoena from the Director of the Division of Enforcement. No subpoena shall be issued unless the Director, in consultation with the General Counsel, has authorized its issuance.

(g) In the event the Director of the Division of Enforcement, after consultation with the General Counsel, authorizes the issuance of a subpoena, notice shall immediately be provided to the Chairman of the Commission.

(h) Counsel (or the member of the news media, if not represented by counsel) shall be given reasonable and timely notice of the determination of the Director of the Division of Enforcement to authorize the subpoena and the Director's intention to issue it.

(i) Subpoenas should be negotiated with counsel for the member of the news media to narrowly tailor the request for only essential information. In negotiations with

counsel, the staff should attempt to accommodate the interests of the Commission in the information with the interests of the media.

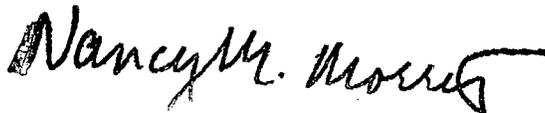
(j) Subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of their demand for documents.

(k) In the absence of special circumstances, subpoenas to members of the news media should be limited to the verification of published information and to surrounding circumstances relating to the accuracy of published information.

(l) Because the intent of this policy statement is to protect freedom of the press, news gathering functions, and news media sources, this policy statement does not apply to demands for purely commercial or financial information unrelated to the news gathering function.

(m) Failure to follow this policy may constitute grounds for appropriate disciplinary action. The principles set forth in this statement are not intended to create or recognize any legally enforceable rights in any person.

By the Commission.

A handwritten signature in black ink that reads "Nancy M. Morris". The signature is written in a cursive style with a long horizontal flourish at the end.

Nancy M. Morris  
Secretary

April 12, 2006

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 53631 / April 12, 2006

ADMINISTRATIVE PROCEEDING  
File No. 3-12259

In the Matter of

INET ATS, Inc.

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE AND  
CEASE-AND-DESIST PROCEEDINGS, MAKING  
FINDINGS, AND IMPOSING REMEDIAL  
SANCTIONS AND A CEASE-AND-DESIST  
ORDER PURSUANT TO SECTIONS 15(b) AND  
21C OF THE SECURITIES EXCHANGE ACT OF  
1934**

I.

The Securities and Exchange Commission ("Commission" or "SEC") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against INET ATS, Inc. ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

Document 10 of 43

### III.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>1</sup> that:

1. INET ATS, Inc. ("INET"), a subsidiary of Instinet Group Incorporated ("Instinet Group") during the relevant period, is a Jersey City, NJ-based registered broker-dealer that operates an alternative trading system ("ATS") pursuant to Regulation ATS under the Exchange Act. INET was formed between December 2003 and February 2004, through the combination of two ATSs: (i) an ATS operated by Instinet Corporation ("Instinet's ATS"), a subsidiary of Instinet Group, and (ii) The Island ECN, Inc. ("Island"), another ATS purchased by Instinet Group on September 20, 2002. The combined ATS was then renamed INET. The conduct addressed in this order was committed by Instinet's ATS before it was merged with Island and renamed INET. An ATS is any organization, association, person, group of persons, or system: (a) that constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange within the meaning of Exchange Act Rule 3b-16; and (b) that does not: (i) set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system; or (ii) discipline subscribers other than by exclusion from trading.

2. Rule 301(a) of Regulation ATS provides that an ATS must comply with Rule 301(b) of Regulation ATS, unless the ATS is registered as a national securities exchange or qualifies for another enumerated exclusion. During the relevant period, Instinet's ATS was not registered as a national securities exchange and did not qualify for an enumerated exclusion. Therefore, Instinet's ATS was required to comply with Rule 301(b) of Regulation ATS.

3. During the relevant period, Rule 301(b)(5) of Regulation ATS required an ATS that had 20 percent or more of the average daily volume (the "fair access threshold") for any covered security during four of the preceding six months to comply with "fair access" requirements including: (a) establishing written standards for granting access to trading on its system with respect to such security; and (b) not unreasonably prohibiting or limiting any person in respect to access to services offered by the ATS with respect to such security by applying such standards in an unfair or discriminatory manner. 17 CFR 242.301(b)(5)(ii) (A) and (B); Exchange Act Release No. 40760 (December 8, 1998), 68 SEC Docket 2188, 2217-2218 ("Adopting Release"). The fair access requirements apply on a security-by-security basis. Adopting Release, 68 SEC Docket at 2217 ("The twenty percent volume threshold will be applied on a security-by-security basis for equity securities. Accordingly, if an alternative trading system accounted for twenty percent or more of the share volume in any equity security, it must comply with fair access requirements in granting access to trading in that security."). A denial of access is reasonable if it is based on objective standards that are applied in a fair and non-discriminatory manner. A denial of access might be unreasonable if it were discriminatorily applied among similar subscribers. Adopting Release, 68 SEC Docket 2188, 2218.

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<sup>1</sup> The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

4. The fair access requirements of Regulation ATS were based on the principle that qualified market participants should have fair access to the nation's securities markets. Adopting Release, 68 SEC Docket at 2217. Fair treatment of potential and current subscribers by an ATS is particularly important when an ATS captures a large percentage of the trading volume in a security because viable alternatives to trading may be limited. Adopting Release, 68 SEC Docket at 2216. Direct participation in an ATS offers certain benefits with respect to which an ATS that crosses the fair access threshold for a covered security should not unfairly discriminate in granting access with respect to such security. Adopting Release, 68 SEC Docket at 2216; Exchange Act Release No. 39884 (April 17, 1998), 66 SEC Docket 3119, 3154. These benefits include the ability to view all orders (depth of book), not just the best bid or offer (top of book), which provides important information about the depth of interest in that security. Adopting Release, 68 SEC Docket at 2216.

5. Regulation ATS requires an ATS that crosses the fair access threshold in a covered security to report all grants, denials, and limitations of access (and the reasons, for each applicant, for granting, denying, or limiting access) with respect to such security on its quarterly Form ATS-R. 17 CFR 242.301(b)(5)(ii)(D).

6. Instinet's ATS crossed the fair access threshold every month between February 2002 and July 2003 (the "relevant period") with respect to between 12 and 105 covered securities in each month. Therefore, with respect to these securities during the relevant period, Instinet's ATS was subject to the fair access requirements of Regulation ATS as well as the requirement to report all grants, denials, and limitations of access (and the reasons, for each applicant, for granting, denying, or limiting access) with respect to such securities on its quarterly Form ATS-R.

7. During the relevant period, Instinet's ATS functioned as an agency broker and as an ATS. As an ATS, Instinet's ATS collected, prioritized, displayed, provided routing services and matched orders within its member network, and provided certain other services.

8. During the relevant period, Instinet's ATS had a member network composed of broker-dealer subscribers, who entered into contractual agreements to access the ATS for purposes of effecting transactions in securities or submitting, disseminating, or displaying orders on the ATS.

9. In early 2002, Instinet's ATS developed a data-only product called "BookStream" that allowed a subscriber the ability only to view orders contained in the ATS book without interacting with the order book, or submitting, disseminating or displaying orders on the ATS. BookStream featured the full "depth of book" data that allowed a subscriber the ability to view not only the best bids and offers, but all of the bids and offers on the ATS. BookStream was an important ATS feature because it enabled subscribers to view, on a real-time basis, market data regarding the depth of trading interest in covered securities.

10. During the relevant period, Instinet's ATS had written access standards that incorporated by reference subscriber agreements that contained a clause governing "redistribution" of services, which stated, in relevant part: "subscribers are prohibited from making Instinet services and data available, directly or indirectly, to third parties (other than subscriber's properly

authorized employees, affiliates, employees of affiliates) without the prior written approval of Instinet.” This “redistribution” standard was not an objective standard applied in a fair and non-discriminatory manner because it did not specify the circumstances under which Instinet’s ATS would authorize subscribers to provide or redistribute these services to customers.

11. After BookStream was implemented by Instinet’s ATS, various broker-dealer subscribers requested to redistribute BookStream to their customers.

12. BookStream was an ATS function and a benefit to ATS membership to which an ATS could not unreasonably prohibit or limit access in an unfair or discriminatory manner with respect to those covered securities for which Instinet’s ATS crossed the fair access threshold. 17 CFR 242.301(b)(5)(ii)(B).

13. During the relevant period, Instinet’s ATS contractually granted permission to some subscribers to redistribute BookStream while other similarly situated subscribers were not permitted to redistribute BookStream. While such disparate treatment may be justified if it is based on objective standards that are applied in a fair and non-discriminatory manner (Adopting Release, 68 SEC Docket at 2218), this was not the case here. Therefore, Instinet’s ATS willfully violated Rule 301(b)(5)(ii)(B) of Regulation ATS under the Exchange Act.<sup>2</sup>

14. During the relevant period, Instinet’s ATS filed five Forms ATS-R with the Commission. These filings did not disclose all required grants, denials and limitations of access to BookStream.

15. By failing to disclose, with respect to covered securities in which Instinet’s ATS exceeded the fair access threshold, all required grants, denials, or limitations of access on its Form ATS-R during the relevant period, Instinet’s ATS willfully violated Rule 301(b)(5)(ii)(D) of Regulation ATS under the Exchange Act.

#### IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions specified in Respondent’s Offer.

**Accordingly, it is hereby ORDERED:**

A. That Respondent be, and hereby is, censured;

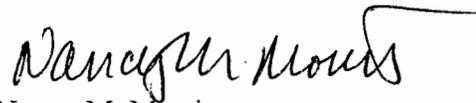
B. That Respondent cease and desist from committing or causing any violations and any future violations of Rules 301(b)(5)(ii)(B) and 301(b)(5)(ii)(D) of Regulation ATS under the Exchange Act; and

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<sup>2</sup> “Willfully” as used in this Offer means intentionally committing the act which constitutes the violation. *see Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000); *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965). There is no requirement that the actor also be aware that he is violating one of the Rules or Acts.

C. That Respondent shall, within thirty (30) days of the entry of this Order, pay a civil money penalty in the amount of \$350,000 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies INET ATS, Inc. as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to David P. Bergers, Securities and Exchange Commission, Boston District Office, 73 Tremont Street, 6<sup>th</sup> Floor, Boston, MA 02108.

By the Commission.



Nancy M. Morris  
Secretary



purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III., Paragraph 3, below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

### III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

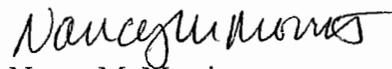
1. Karsch, age 45, is an attorney licensed to practice in Florida, Texas and New York.
2. 2DoTrade was, at all relevant times, a Nevada corporation with its principal place of business in British Columbia, Canada, and London, England. 2DoTrade was purportedly engaged in an import/export business. 2DoTrade's common stock was registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act"), and its shares were quoted on the OTC Bulletin Board.
3. On September 30, 2003, the Commission filed a complaint against Karsch and others in SEC v. 2DoTrade, Inc., et al. (Civil Action No. 3:03-CV-2246/NDTX). On March 29, 2006, the court entered an order permanently enjoining Karsch, by consent, from future violations of Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Karsch was ordered to pay \$2,721 in disgorgement of ill-gotten gains from his sales of stock while participating in the fraud, and \$238 in prejudgment interest.
4. The Commission's complaint alleged that certain defendants engaged in a "pump and dump" scheme designed to inflate 2DoTrade's stock price. Between at least June and November 2001, the defendants, among other things, issued materially false and misleading press releases claiming that 2DoTrade had entered into several large international trading contracts and had developed an anti-anthrax compound. During the same period, the defendants sold shares of 2DoTrade stock for illegal trading profits of at least \$1.8 million. The complaint alleged further that Karsch assisted the defendants in perpetrating and executing the scheme, and that MCG Partners, Inc., of which Karsch was a director, sold shares of 2DoTrade for illegal trading profits.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction agreed to in Respondent Karsch's Offer.

Accordingly, it is hereby ORDERED, effective immediately, that Karsch is suspended from appearing or practicing before the Commission as an attorney.

By the Commission.

  
Nancy M. Morris  
Secretary

**UNITED STATES OF AMERICA  
BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES ACT OF 1933**  
Release No. 8675 / APRIL 12, 2006

**SECURITIES EXCHANGE ACT OF 1934**  
Release No. 53633 / April 12, 2006

**ACCOUNTING AND AUDITING ENFORCEMENT**  
Release No. 2409 / April 12, 2006

**ADMINISTRATIVE PROCEEDING**  
File No. 3-12261

**In the Matter of**

**PKF, ANTHONY FREDERICK JOHN  
MEAD, FCA, and STUART JOHN  
BARNSDALL, ACA,**

**Respondents.**

**ORDER INSTITUTING PUBLIC  
ADMINISTRATIVE AND CEASE-  
AND-DESIST PROCEEDINGS  
PURSUANT TO SECTION 8A OF THE  
SECURITIES ACT OF 1933, SECTION  
21C OF THE SECURITIES EXCHANGE  
ACT OF 1934, AND RULE 102(e) OF THE  
COMMISSION'S RULES OF PRACTICE,  
MAKING FINDINGS, AND IMPOSING  
REMEDIAL SANCTIONS AND A  
CEASE-AND-DESIST ORDER**

**I.**

The Securities and Exchange Commission ("SEC" or "Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against PKF, Anthony Frederick John Mead, FCA, and Stuart John Barnsdall, ACA ("Barnsdall") (collectively "Respondents") pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Rules 102(e)(1)(ii) and 102(e)(1)(iii) of the Commission's Rules of Practice.<sup>1</sup>

<sup>1</sup> Rule 102(e)(1)(ii) provides, in pertinent part, that:

The Commission may ... deny, temporarily or permanently, the privilege of appearing or practicing before it ... to any person who is found ... to have engaged in ... improper professional conduct.

Rule 102(e)(1)(iii) provides, in pertinent part, that:

The Commission may ... deny, temporarily or permanently, the privilege of appearing or practicing before it ... to any person who is found ... to have willfully violated ... any provision of the Federal securities laws or the rules and regulations thereunder.

## II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934, and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, as set forth below.<sup>2</sup>

## III.

On the basis of this Order and Respondents' Offers, the Commission finds<sup>3</sup> that:

### A. RESPONDENTS

1. **PKF**, an accounting firm based in the United Kingdom, was AremisSoft Corporation's ("AremisSoft's") principal outside auditor from before AremisSoft was a public company until January 23, 2002. PKF is the eighth largest firm of accountants and business advisers in the United Kingdom, with more than 1,500 partners and staff operating from 25 offices in the United Kingdom.<sup>4</sup> PKF is a member firm of PKF International Ltd., a network of independent firms of accountants and business advisers with more than 430 member firm offices, which have 12,800 staff and partners in more than 100 countries.

2. **Anthony Frederick John Mead ("Mead")**, age 64, was a partner of PKF until he took his standard retirement on April 6, 2002. He is a Fellow of the Institute of Chartered Accountants ("FCA") in England and Wales and was the audit partner for PKF's audits of AremisSoft while AremisSoft was a public company. Mead had specific responsibilities for planning, supervising, and reviewing the audit work.

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<sup>2</sup> Simultaneously with this proceeding, the Commission filed a settled action in which PKF and Mead, without admitting or denying the allegations in the Commission's complaint, consented to the entry of final judgments by the U.S. District Court for the Southern District of New York pursuant to Section 21(d) of the Exchange Act. The Commission's complaint alleges that PKF violated Section 10A of the Exchange Act, and that Mead violated Section 10A(a) of the Exchange Act. The final judgment as to PKF (1) orders PKF to pay a \$2 million civil penalty; and (2) orders PKF to pay disgorgement of audit fees of \$309,048 and to pay prejudgment interest thereon of \$87,090. The final judgment as to Mead orders Mead to pay a \$50,000 civil penalty.

<sup>3</sup> The findings herein are made pursuant to Respondents' Offers and are not binding on any other person or entity in this or any other proceeding.

<sup>4</sup> On May 23, 2005, PKF converted to PKF (UK) LLP, a limited liability partnership. For purposes of this order PKF will refer to PKF and PKF (UK) LLP.

3. **Barnsdall**, age 44, is an audit partner of PKF. He was the concurring partner on PKF's audit of AremisSoft's fiscal year 2000 financial statements. Barnsdall is an Associate of the Institute of Chartered Accountants ("ACA") in England and Wales.

## **B. OTHER RELEVANT PARTIES**

1. **Savvides & Partners/PKF Cyprus** ("PKF Cyprus") is an accounting firm with offices in Limassol, Cyprus and Nicosia, Cyprus. It is a member of PKF International Ltd. PKF Cyprus performed audit work on several AremisSoft subsidiaries during the year 2000 audit of AremisSoft.

2. **Pavlos Meletiou** ("Meletiou") was a partner of PKF Cyprus while AremisSoft was a public company. Meletiou was responsible for the audits and reviews of the AremisSoft subsidiaries that PKF Cyprus conducted. He was a certified accountant in Cyprus until his license was revoked by the Institute of Certified Public Accountants of Cyprus ("ICPAC") in June 2005 for, among other things, failing to comply with independence rules and failing to submit correct information to the ICPAC.

3. **AremisSoft Corporation**, a Delaware corporation headquartered in London, was an international software company with offices in New Jersey, London, Cyprus, and India. AremisSoft became a public company in April 1999 through an initial public offering of 3.3 million shares. Until trading in AremisSoft stock was halted on July 30, 2001, its shares (symbol: AREM) traded on the Nasdaq National Market System. On August 29, 2001, Nasdaq delisted AremisSoft's common stock from the Nasdaq system. In a settlement with the Commission, AremisSoft consented to a judgment enjoining it from violating the antifraud and reporting provisions of the federal securities laws. The judgment, entered on July 22, 2002, binds AremisSoft's successor, Softbrands, Inc. In the settlement, AremisSoft consented to the issuance of a Commission Order revoking the registration of its common stock. The Commission's Revocation Order was issued on July 31, 2002. AremisSoft's fiscal year ended on December 31.

## **C. FACTS**

### **1. Summary of Fraud at AremisSoft**

AremisSoft went public in April 1999, and reported revenues of \$52.6 million for 1998, \$73.4 million for 1999, and \$123.6 million for 2000. In November 2000, AremisSoft had a market capitalization of more than \$1 billion. Eight months later, the company failed to file its second quarter 2001 Form 10-Q with the Commission. Shortly thereafter, as part of an internal investigation, PKF conducted a special forensic review, which found that AremisSoft could not confirm receipt of \$5.4 million in revenues on its most significant contract. Thereafter AremisSoft announced that it could not substantiate approximately \$90 million of the revenues the company reported in 2000. On March 15, 2002 AremisSoft filed for bankruptcy.

AremisSoft and its co-chairmen and co-CEOs Roys Poyiadjis ("Poyiadjis") and Lycourgos Kyprianou ("Kyprianou") (sued by the Commission in *SEC v. AremisSoft*

*Corporation, Roys Poyiadjis, Lycourgos Kyprianou, et al.*, Civil Action No. 01 CV 8903 [S.D.N.Y.] engaged in a number of fraudulent practices to make it appear as if AremisSoft was a sprawling international software company with accelerating sales growth. AremisSoft booked fictitious sales and accounts receivable and overstated earnings in two Cyprus-based subsidiaries, AremisSoft (EE.ME.A.) Ltd. (“EEM”) and L.K. Global Information Systems B.V. (“LK Global”). In its 2000 Form 10-K, AremisSoft reported that \$97.5 million of its \$123.6 million in revenues (nearly 80%) came from these two Cyprus-based subsidiaries, when, in fact, together, the two subsidiaries had just \$1.7 million in revenues for the year.

To hide its revenue and earnings shortfall in EEM and LK Global, AremisSoft reported acquisitions at inflated prices, making it seem as if cash AremisSoft collected from customers was used to purchase companies. In December 1999, AremisSoft announced that it had acquired a company called e-nnovations.com for \$14.5 million in cash. In its 2000 Form 10-K, AremisSoft reported that it had acquired two companies in December 2000, e-ChaRM Pvt Ltd. (“e-ChaRM”), for cash of \$10.9 million and Denon International Ltd. (“Denon”), for cash of \$7.34 million. In September 2001, AremisSoft acknowledged in a press release that the three acquisitions had been reported at amounts not substantiated by information developed in the internal investigation. Rather than the \$7.34 million to \$14.5 million purchase prices reported, the actual prices paid ranged from approximately \$200,000 to \$400,000.

AremisSoft also grossly misstated its cash balance as of December 31, 2000. AremisSoft claimed to have \$33.33 million in cash, but \$9.98 million of that cash was actually in Kyprianou’s personal bank account and \$10.7 million of it was received by AremisSoft in mid-January 2001. Accordingly, AremisSoft should have reported no more than \$12.65 million of cash at December 31, 2000, and should have reported a \$10.7 million reduction in stockholders’ equity.

## **2. PKF’s Involvement with AremisSoft**

At the time of the 2000 audit, PKF had been AremisSoft’s outside auditor for a number of years, including the period before AremisSoft’s initial public offering in April 1999. PKF audited AremisSoft’s annual financial statements and, beginning in 2000, conducted reviews of its quarterly financial statements.<sup>5</sup> AremisSoft was PKF’s only client to file with the Commission.

PKF used the work and reports of other auditing firms to report on AremisSoft’s 2000 consolidated financial statements. One of the firms, PKF Cyprus, a Cyprus-based accounting firm, issued unqualified audit reports on EEM and LK Global. Meletiou, a PKF Cyprus partner, signed or directed the issuance of the audit reports for PKF Cyprus. PKF assumed complete responsibility under generally accepted auditing standards (“GAAS”) for the work of the other auditing firms during the 2000 audit and did not refer to the work of other auditors in its audit report or in AremisSoft’s 2000 filing with the Commission.<sup>6</sup>

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<sup>5</sup> PKF also reviewed AremisSoft’s financial statements as of and for the three months ended March 31, 2001, filed with the Commission on May 15, 2001.

<sup>6</sup> GAAS require that an audit “report should contain a clear-cut indication of the auditor’s work, if any, and the degree of responsibility the auditor is taking.” See AICPA, CODIFICATION OF STATEMENTS ON AUDITING STANDARDS (“AU”) 150.02. PKF could have referred to the work done by PKF Cyprus and the other audit firms

On March 22, 2001, PKF issued an unqualified audit report on AremisSoft's 2000 financial statements, which stated that PKF had conducted its audits in accordance with GAAS and that AremisSoft's financial statements presented AremisSoft's consolidated financial position fairly, in conformity with generally accepted accounting principles ("GAAP"). The unqualified audit report was filed with the Commission as part of AremisSoft's Form 10-K for 2000.

Contrary to the representations in PKF's audit report, AremisSoft's 2000 financial statements did not conform to GAAP and the audit was not conducted in accordance with GAAS in effect at the time of the audit.<sup>7</sup> On December 7, 2001, PKF advised AremisSoft that its audit reports "must no longer be associated with [AremisSoft's financial] statements and that such auditors' reports should no longer be relied on."

### **3. PKF and Mead Engaged in Improper Professional Conduct**

With respect to accountants, Rule 102(e)(1) provides that "improper professional conduct" includes "highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted." PKF and Mead engaged in improper professional conduct in connection with the audit of AremisSoft's 2000 financial statements. PKF and Mead engaged in highly unreasonable conduct that resulted in repeated violations of applicable professional standards in circumstances in which PKF and Mead knew or should have known warranted heightened scrutiny.

#### **(a) Failure to Adequately Staff the Audit**

Under GAAS (AU 150.02), audits are required to be performed by a person or persons having adequate technical training and proficiency as an auditor. The auditor having ultimate authority for the audit should "know, at a minimum, the relevant professional accounting and auditing standards and should be knowledgeable about the client." The auditor "with final responsibility is responsible for the assignment of tasks to, and supervision of, assistants." (AU 230.06).

Partners and staff assigned to the AremisSoft audit had little, if any, experience in GAAS or GAAP. Neither the audit partner, Mead, nor the concurring partner on the 2000 audit, Barnsdall, had significant training or experience in GAAS or GAAP. The PKF staff person with the most significant involvement with the 2000 audits of EEM and LK Global had limited familiarity with GAAS or GAAP and no training in conducting audits of U.S. companies. Likewise, PKF Cyprus had little knowledge of GAAS or GAAP or experience in conducting U.S. company audits. Meletiou also had no significant training or experience in conducting

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in the audit report, thereby sharing audit responsibility with them. If a principal auditor refers to the work of another auditor, the report is expanded to indicate the division of responsibility and magnitude of the portion of the financial statements audited by the other auditor (AU 543, *Part of Audit Performed by Other Independent Auditors*). By not referring to the work of PKF Cyprus or other accounting firms involved in the audit, PKF took full responsibility for their work.

<sup>7</sup> In this order, GAAP and GAAS refer to U.S. GAAP and U.S. GAAS, respectively.

audits under GAAS or GAAP. PKF did not comply with GAAS, notwithstanding that a director of another PKF International member firm in the United States provided certain advice concerning GAAS and GAAP to PKF during its 2000 audit engagement in his role as filing reviewer. The filing reviewer, however, was not aware of the nature and extent of the warning signs, nor was he involved in all audit matters.

**(b) Failure to Obtain Sufficient Competent Evidential Matter**

GAAS requires that an audit of the financial statements be planned and performed “to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud.” (AU 316.01). Auditors must consider potential fraud factors when planning and performing the audit. GAAS states that the “assessment of the risk of material misstatement due to fraud is a cumulative process” and one that should be ongoing throughout the audit. (See AU 316). Auditors must obtain sufficient competent evidence to afford a basis for an opinion regarding the financial statements under audit. (AU 326.01). The validity and sufficiency of required evidence depends on the circumstances and the auditors' judgment, but should be “persuasive” though it need not be “convincing.” (AU 326.02 & .21-.23). With respect to such judgment, an auditor must maintain an attitude of professional skepticism and assess the risk that errors and irregularities may cause the financial statements to contain a material misstatement. (AU 316.13). An assessment of higher risk may cause the auditor to expand the extent of procedures applied or modify the nature and/or the timing of procedures to obtain more persuasive evidence.

PKF and Mead failed to comply with these requirements and failed to exercise the required heightened degree of professional skepticism or to obtain sufficient competent evidential matter concerning AremisSoft’s financial statements -- even after being confronted with numerous warning signs before and during the performance of the audit that should have alerted PKF and Mead to the possibility that AremisSoft’s financial statements were materially misstated.

**Anonymous Letter, Suspicious Contracts, and CFO Resignation**

PKF had been AremisSoft’s auditor until May 15, 1998, when the London office of a “Big Four” accounting firm was engaged to audit AremisSoft’s financial statements in connection with AremisSoft’s registration statement (Form S-1) filed with the Commission on July 1, 1998.<sup>8</sup> On July 14, 1998, the Big Four accounting firm received a copy of an anonymous letter addressed to the SEC. According to the letter:

AremisSoft wants to register statements to sell shares on the United States Nasdaq exchange. These statements will contain fraudulent information about revenue ... for large [sales] of management services and contracts. The chairman and managing directors and [lawyers] in the United Kingdom are [recording revenue] from some former directors, some customers, some not, to issue purchase notes of one million dollars or greater each for services to be provided .... This done to make future look good for sells [sic] of shares.

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<sup>8</sup> This registration statement never went effective.

Review accounts and you will locate.

When the Big Four firm reviewed AremisSoft's draft financial statements for the six months ended June 30, 1998, it found that the financial statements included revenue from three contracts for more than \$1 million each. The contracts were purportedly being performed in AremisSoft's Indian office (which had no significant previous sales), and the customers were allegedly in Czechoslovakia and Croatia (where the company had not previously done business). The Big Four firm immediately requested full details of the contracts, including agreements and customer correspondence, and consulted the underwriters; they had no knowledge of the contracts, despite having been provided a list of AremisSoft's work in the pipeline just four months earlier.

Based on this information, the Big Four firm undertook an investigation into the three contracts, which uncovered numerous irregularities, including: (1) all negotiations with customers on the contracts were undertaken by Kyprianou and communications were claimed to have been by e-mail, no copies of which were maintained; (2) copies of the contracts were held in Kyprianou's private office in Cyprus rather than the corporate offices in London; (3) all information relating to the contracts was in India; (4) no cash was received from the customers; (5) no payments were made to the consultants performing sub-contracting work on the contracts; and (6) the customer addresses appeared to be small offices rather than industrial concerns. Moreover, staff from one of the Big Four firm's Indian offices raised doubts as to whether the main subcontractor on the contracts was capable of performing the contract work.

As a result of its review, the Big Four firm concluded that AremisSoft's "percentage of completion" method of revenue recognition for the three contracts was improper. Rather, it determined, the "completed contract" method should be used, resulting in deletion of all revenue and gross profit related to the purported contracts from AremisSoft's income statement and deferred recognition until the contracts were completed and the related fees collected. AremisSoft agreed to the change.

On October 9, 1998, the Big Four firm received a telefax from AremisSoft's then chief financial officer ("CFO"), complaining of his inability to get "access to ... financial records" to "ensure that the [financial statements] are objective, true and fair." The CFO expressed concern about Kyprianou's "significant involvement and influence in the preparation of the [financial statements]." In a telephone conversation with the Big Four firm audit partner, the CFO denied having any knowledge of the three contracts prior to April 1998.

On October 15, 1998, representatives from the Big Four firm met with Poyiadjis, Kyprianou, AremisSoft's then CFO, and others, to discuss the CFO's allegations and the accounting for the three contracts. Also attending the meeting and introduced as a prospective director of AremisSoft was a corporate finance partner from PKF, who, according to AremisSoft's year 2000 Form 10-K, was then PKF's head of the United Kingdom and European mergers and acquisition group. There were heated exchanges concerning the contracts at the meeting. The PKF corporate finance partner stated that the Big Four firm was unable to verify the contracts because it did not understand AremisSoft's business, and suggested that AremisSoft re-engage PKF to perform the audit work.

Shortly thereafter, AremisSoft's CFO resigned and Poyiadjis assumed the CFO duties. In November 1998, the "Big Four" firm was informed that AremisSoft had made a decision to

re-appoint PKF as its independent auditor and the engagement of the “Big Four” firm was discontinued as of December 16, 1998. PKF was then re-engaged as AremisSoft’s independent auditor. The PKF corporate finance partner who attended the October 15 meeting became the relationship partner and Mead became the audit partner on the AremisSoft audit engagement. On or about this time, PKF obtained copies of the anonymous letter and the October 9 telefax from AremisSoft’s CFO.

AremisSoft’s financial statements eventually filed in connection with its initial public offering in April 1999 included the revenues and gross profit from the three large contracts, and employed the percentage of completion method. These financial statements were audited by PKF. AremisSoft continued to use that method throughout its existence as a public company.

The three large contracts were shams. AremisSoft never performed any services related to the contracts and never collected any revenues from the purported customers.

### **AremisSoft’s Inadequate Accounting Staff and Questionable Revenue Recognition**

In its 1999 management letter, issued in March 2000, PKF expressed concern that AremisSoft’s internal “accounting function [relied] very heavily on its [outside] professional advisers in connection with US reporting and disclosure requirements.” On May 2, 2000, the Chairman of AremisSoft’s audit committee recommended in a memorandum to Kyprianou and Poyiadjis -- forwarded to PKF’s Mead -- that AremisSoft hire a “senior financial person,” citing a “few close calls with respect to our financial reporting,” which had been brought to the audit committee’s attention. But in PKF’s 2000 audit checklist entitled “Consideration of Fraud and Error,” the question whether there was “significant or prolonged under-staffing of [AremisSoft’s] accounting department” was answered in the negative.

During PKF’s interim work during 2000, PKF saw additional warning signs that should have further heightened concern about AremisSoft’s accounting. During PKF’s quarterly review of AremisSoft’s June 30, 2000 financial statements, a PKF staff accountant wrote that an AremisSoft employee had told him about “a potential cut-off problem,” *i.e.*, improper delay of revenue. The staff accountant’s notes say “the June 2000 quarter accounted for a large element that should have been booked in the first quarter of the year.”

PKF and Mead did not appropriately consider how these risk factors affected the audit, nor revise the audit plan, nor took any additional steps to gain an understanding of AremisSoft’s operations sufficient to detect the ongoing fraud.<sup>9</sup>

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<sup>9</sup> In addition, in December 2000, the filing reviewer from a PKF-member firm in the United States cautioned PKF staff and Mead about potential improper revenue acceleration by AremisSoft in one of its UK divisions. In an e-mail, he wrote:

It seems that [AremisSoft is] trying hard to recognize more revenue in the year 2000. My suggestion is that you include in your audit procedures additional steps to ensure that revenue is being properly recorded.

PKF staff forwarded this e-mail to the PKF manager on the engagement, adding: “This came in from [the PKF International Ltd. member firm director] last week—he seems quite concerned!” While PKF addressed this issue in the context of its audit of the AremisSoft UK division, it never considered how this information affected other AremisSoft divisions or the overall audit.

## **Warning Signs in Cyprus**

Though AremisSoft's Cyprus-run operations represented just a fraction of its business before it went public, they accounted for nearly 80% of AremisSoft's revenues and over 50% of its assets by the time of the 2000 audit. Accordingly, and because PKF took responsibility for the entire audit, Mead assigned a PKF accountant to Cyprus in late January 2001 to work with Meletiou, the PKF Cyprus partner, on the Cyprus-based subsidiaries. But that staff accountant was relatively junior and had no training or background in GAAP or GAAS.

Although AremisSoft's CEO and CFO had offices in Cyprus and EEM and LK Global were both headquartered there, the staff accountant learned upon his arrival in Cyprus that the contracts and accounting records for both subsidiaries were actually in India, not Cyprus. This made it impossible for the staff accountant to conduct substantive revenue testing in Cyprus, although the staff accountant did prepare audit work programs for Meletiou to use in performing the audit. The staff accountant notes show that he told Mead that documents necessary for testing were unavailable and alerted him to "shortcomings of the audits being performed, particularly the lack of documented testing, and address [sic] of fundamental issues such as debtor recoverability, cut-off testing, systems understanding, and post balance sheet event reviews." His notes also reflect that, when he advised Meletiou about his concerns, especially the limited audit testing, Meletiou "suggested that the testing be carried out after the audit, i.e., April/May 2001!!!" The staff accountant telephoned Mead regarding his conversation with Meletiou.

In early February 2001, the staff accountant returned with Mead to Cyprus to conduct the audit work he was previously unable to perform, including a review of previously unavailable documents. But no one from PKF ever reviewed any cash receipts related to purported contracts. Instead, PKF limited its testing based on its reliance on AremisSoft's internal control system. After the second trip to Cyprus, Mead sent a telefax to Meletiou enumerating a number of outstanding steps required to be completed prior to the audit close and emphasizing that Meletiou needed to travel to India to conduct audit tests on AremisSoft's internal controls. Meletiou agreed he or someone on his staff would go to India for the systems testing, but no one from PKF determined whether such testing ever occurred.

## **Account Managers in 2000**

PKF and Mead learned for the first time, during the January 2001 trip to Cyprus, that neither EEM nor LK Global had any regular contact with their customers. Rather, since 2000, both had purportedly used third party contractors -- called "account managers" -- to bill customers, collect funds due, and remit the difference net of expenses to AremisSoft, making "periodic reports" of gross sales and expenses for incorporation in AremisSoft's books and records. The EEM and LK Global general ledgers reflect that neither subsidiary recorded accounts receivable by customer; both relied only on reports of the account managers.

Despite the account managers' obvious importance to AremisSoft and their role as sole source for EEM and LK Global sales and expense data, neither PKF nor Mead ever (a) developed any audit procedures to examine transactions with the account managers; (b) reviewed payments from account managers; (c) communicated with account managers; (d) saw any of the "periodic reports;" (e) took any steps to audit transactions between AremisSoft and the account managers or between the account managers and AremisSoft's customers; or (f) designed any

procedures to test AremisSoft's progress on contracts. Instead PKF and Mead relied solely on AremisSoft's representations with respect to the sham contracts and the review of the PKF Cyprus audit files, which included false documentation.

### **EEM and LK Global Audit File Deficiencies**

On March 9, 2001, Meletiou brought the EEM and LK Global audit files to PKF's London office. Mead spent five hours reviewing the EEM audit files and assigned a second PKF partner, who had no knowledge of AremisSoft, to review the LK Global audit files.<sup>10</sup>

Mead found numerous problems in the EEM audit file, including serious deficiencies in two significant audit areas -- cash and accounts receivable. Mead's notes show the workpapers included only copies, not originals, of cash confirmations, and both cash and accounts receivable confirmations were "apparently not received directly by PKF [Cyprus]." Moreover, confirmations of deposits and payables purportedly from numerous different customers and vendors were "poor copies," not originals, and inventory confirmations were provided by AremisSoft management rather than third parties.

The second PKF partner found multiple problems in the LK Global audit file including similar problems with cash and accounts receivable. His three page hand-written notes to Mead noted that:

- LK Global had no bank account;
- The file contained copies of accounts receivable confirmations, not originals;
- The file contained no evidence of how accounts receivable confirmations were carried out;
- The file contained no evidence of an overall analytical review;
- The file contained no evidence of audit planning, an adopted audit approach, or a risk assessment;
- The file contained no evidence of a review of internal controls;
- The file included no evidence of a subsequent events review; and
- There was no engagement letter in the file.

Late that same night, the second PKF partner wrote Mead an e-mail from his home computer that concluded:

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<sup>10</sup> Approximately two and one-half weeks earlier, on February 20, 2001, AremisSoft's audit committee held a telephone conference call concerning its earnings release for the 2000 year. PKF participated in the call and expressed no objection to the release. The next day, February 21, AremisSoft issued its year 2000 earnings release.

I suppose I am nervous about the fact that we have a company generating \$20 million + [sales] and quite significant profits, all of it being on paper with no evidence of any cash – it just seems suspicious. The more I think about it, the more unusual the whole thing seems and I think we need convincing explanations before sign off.

On March 20, 2001, Mead received an e-mail from Meletiou asserting that “[a]ll outstanding points that should be dealt with before signing the report have been completed except the management letter which is under preparation.” But no one from PKF ever collected any documents or other evidence to support Meletiou’s contention.

### **EEM and LK Global General Ledger Irregularities**

The EEM and LK Global general ledgers included in PKF’s files showed obvious irregularities. Most of the ledger entries simply reflect assets netted against liabilities to eliminate account balances. All of the entries appear to have been created at the same time -- after AremisSoft’s year-end. Moreover, the ledgers reflected cash receipts of only \$4.3 million for the entire year, even though EEM and LK Global reported more than \$97 million in combined sales that year.

### **Questionable AremisSoft Acquisitions**

AremisSoft reported in its 1999 and 2000 Forms 10-K that it paid over \$32 million in cash to acquire three companies -- e-nnovations.com., e-ChaRM, and Denon. However, PKF and Mead failed to examine any documents purportedly evidencing the payments. Had PKF or Mead matched the transactions to payment documents, it would have been discovered that, rather than the \$7 to \$14.5 million purchase prices reportedly paid for these companies, the actual prices ranged from approximately \$200,000 to \$400,000.

### **Inadequate Third Party Confirmations**

At no time during its audit did PKF or Mead obtain original accounts receivable or cash confirmations, verify that the confirmations had been sent directly to PKF Cyprus or PKF, or review subsequent cash receipts to corroborate that the receivables in fact existed. No one from PKF reviewed accounts receivable remittance advices or attempted to contact any of AremisSoft’s purported customers. Had PKF or Mead taken any of these steps, they would have learned that the accounts receivable and associated revenues were fraudulent. And while the PKF Cyprus audit workpapers reviewed by PKF included confirmations from LK Global creditors, in what should have been an obvious irregularity that should have warranted heightened scrutiny, all creditors confirmed that they owed money to LK Global rather than the other way around.

The accounts receivable confirmations in the PKF Cyprus audit workpapers reviewed by PKF and Mead evidence additional irregularities that should have warranted heightened scrutiny. None are originals; many have identical or similar handwriting; and, according to the dates printed on the top of each, eight of seventeen were returned on the same two dates -- February 2 or February 5, 2001. The accounts receivable confirmations also were addressed to customers of AremisSoft rather than to account managers -- despite the company’s claim that the account managers, not the end users, were indebted to AremisSoft.

PKF and Mead understood from the PKF Cyprus audit files that EEM maintained a Swiss bank account containing \$9.98 million of AremisSoft's cash (nearly 30% of total cash) on December 31, but PKF and Mead did not obtain satisfactory audit evidence concerning the bank account that was included as cash on AremisSoft's consolidated financial statements. The unnumbered Swiss bank account, which nowhere appears on EEM's ledger until December 23, 2000, suddenly materialized immediately before AremisSoft's year end. The only evidence obtained by either PKF Cyprus or PKF from third parties related to the account is an irregular confirmation letter to Meletiou from a Swiss bank dated March 20, 2001 -- the same day as PKF's audit report -- which states, without explanation, that "since 29th of December 2000, we hold an amount of \$9.980.000 blocked in favor of [EEM]." AremisSoft had no such account at any time during or before 2000. But Kyprianou did have bank accounts at the Swiss bank. Kyprianou deposited proceeds of his AremisSoft stock sales in those accounts.

Finally, neither PKF nor Mead obtained cash confirmations for AremisSoft's cash held at U.S. banks at December 31, 2000, even though the company reported \$10.7 million in a U.S. bank as of that date. But the \$10.7 million was not in a U.S. bank account as of December 31, 2000. PKF's workpapers show that the money was due to AremisSoft from Kyprianou and Poyiadjis stock options exercises in mid-December 2000. PKF and Mead accepted the treatment of these funds as cash "in transit" as of December 31. But the cash was not transferred from Poyiadjis' Swiss bank accounts until mid-January. Therefore those funds should not have been included in AremisSoft's cash balance at December 31, 2000.

**(c) Failure to Obtain Sufficient Understanding of Internal Controls**

PKF and Mead failed to comply with GAAS (AU 150.02), which requires an auditor to obtain a sufficient understanding of a company's system of internal controls to plan the audit and determine the nature, extent, and timing of testing to be performed.

PKF and Mead relied on AremisSoft's system of internal controls to limit substantive testing of revenue reported by EEM and LK Global but neither obtained a sufficient understanding of the internal controls for these subsidiaries. PKF and Mead did not obtain evidence that the accounting systems in India existed or were tested by Meletiou, or travel to India to test the systems.

**(d) Failure to Properly Plan the Audit**

GAAS requires that the auditor plan the audit "to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud." (AU 316.01). In planning, the auditor must assess the risk of material misstatement due to fraud or error, which includes consideration of "conditions that may require extension or modification of audit tests, such as the risk of material errors or irregularities or the existence of related party transactions." (AU 311.03; *see also* AU 316A ("Consideration of Fraud in a Financial Statement Audit")). In addition, the risk assessment process should "be ongoing throughout the audit" and should consider whether the "nature of audit procedures performed may need to be changed to obtain evidence that is more reliable or to obtain additional corroborative information." (AU 316.28). Contrary to GAAS, PKF and Mead failed to adequately plan the 2000 audit after learning of numerous facts that, either standing alone or in the context of other facts learned prior to the audit, warranted heightened scrutiny that should

have alerted them to the possibility that AremisSoft's financial statements might be misstated due to fraud.

In December 1998, PKF concluded that Kyprianou's control and influence was a "general risk factor." However, neither PKF nor Mead considered this factor in planning the 2000 audit and did not design or implement any audit procedures in consideration of Kyprianou's control in its audit of AremisSoft's year 2000 financial statements.

GAAS requires a specific substantive risk assessment and consideration of "that assessment in designing the audit procedures to be performed." (AU 312 & 316). But PKF and Mead never undertook a substantive risk analysis in planning the 2000 audit; the audit planning was perfunctory at best. PKF and Mead merely used standard checklist work programs that were not modified to account for AremisSoft's high risk environment. Despite being presented with numerous warning signs during its audit, PKF and Mead failed to design audit procedures to test AremisSoft's revenues, accounts receivable, and cash accounts more extensively than originally planned or to heighten the scrutiny in the audit of the Cyprus subsidiaries. Moreover, despite numerous warning signs, PKF and Mead failed to reassess whether the "nature of audit procedures performed [needed] to be changed to obtain evidence that is more reliable or to obtain additional corroborative information." (AU 316.52).

**(e) Failure to Exercise Due Professional Care and Professional Skepticism**

GAAS requires that auditors exercise due professional care in performing an audit and in preparing the audit report. (AU 230.01). Due professional care requires that the auditor exercise professional skepticism in performing audit and review procedures and gathering and analyzing audit evidence. (AU 230.07-.08). "In exercising professional skepticism, the auditor should not be satisfied with less than persuasive evidence because of a belief that management is honest." (AU 230.09). Exercise of professional skepticism requires auditors to demonstrate a questioning mind and to critically assess audit evidence. (AU 230; *see also* AU 316.13).

For all the reasons stated in the paragraphs above, PKF and Mead acted unreasonably in failing to exercise due professional care and professional skepticism in violation of this standard.

**(f) Failure to Issue Accurate Audit Reports**

GAAS requires that the auditor's report contain an opinion on the financial statements taken as a whole and contain a clear indication of the character of the auditor's work. (AU 508.04). The auditor can determine that he is able to issue an audit report containing an unqualified opinion only if he has conducted his audit in accordance with GAAS and the financial statements comply with GAAP. (AU 508.07 & .22).

In auditing AremisSoft's financial statements, PKF and Mead acted unreasonably in rendering audit reports containing unqualified opinions. Mead signed and transmitted to AremisSoft's counsel PKF's audit report on AremisSoft's year 2000 financial statements before Barnsdall conducted his concurring partner review. PKF partners and employees knew or should have known that AremisSoft's financial statements did not comply with GAAP and that PKF and Mead did not conduct the audits in accordance with GAAS. Nevertheless, PKF and Mead issued

audit reports containing unqualified opinions that falsely stated that AremisSoft's financial statements conformed to GAAP and that they had conducted the audits in accordance with GAAS.

#### **4. Barnsdall Engaged in Improper Professional Conduct**

With respect to accountants, Rule 102(e)(1) provides that "improper professional conduct" includes "repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission." Barnsdall engaged in improper professional conduct. His conduct was unreasonable and resulted in violations of applicable professional standards.

As recited above at paragraph 3(e), AU 230.01, 230.07-.09, and 316.13, require auditors to exercise due professional care and maintain an attitude of professional skepticism, rely solely on persuasive audit evidence, demonstrate a questioning mind, and critically assess audit evidence. GAAS also requires that auditors obtain sufficient competent evidential matter through inspection, observation, inquiries, and confirmations to afford a reasonable basis for an audit opinion. (AU 326.01)

Barnsdall was the concurring partner on PKF's audit of AremisSoft's year 2000 financial statements but did not participate in PKF's pre-2000 audits of AremisSoft. He was required, as concurring partner, to be sufficiently involved in the review of the audit to reach informed conclusions regarding the quality and sufficiency of the audit procedures performed. Barnsdall conducted his concurring partner review the day after Mead signed and transmitted to AremisSoft's counsel PKF's audit report for inclusion in AremisSoft's year 2000 Form 10-K. But he backdated his sign-off to the date of the audit report. He did not, indeed could not, review the EEM and LK Global files because they had already been returned to Cyprus by the time of his file review. And although he reviewed the lists of notes prepared by Mead and the PKF partner who reviewed the LK Global audit files, he did not sufficiently follow up to ensure that the issues raised in those reviews were resolved. In fact, certain of the most significant issues were not resolved. Barnsdall acted unreasonably in failing to exercise due professional care and to maintain an attitude of professional skepticism, and to assure that the audit workpapers evidenced that sufficient competent evidential matter had been obtained to support the audit report, in violation of these standards.

#### **D. LEGAL ANALYSIS**

Section 17(a)(2) of the Securities Act prohibits obtaining money or property by means of untrue statements of material fact or misleading omissions of material fact in the offer or sale of securities. Section 17(a)(3) prohibits engaging in transactions, practices or courses of business which operate or would operate as a fraud or deceit upon the purchaser in the offer or sale of securities. Information is material where there is a substantial likelihood that a reasonable investor would consider the information important in making an investment decision. *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). Establishing violations of Sections 17(a)(2) and 17(a)(3) does not require a showing of scienter. *Aaron v. SEC*, 446 U.S. 680, 697 (1980).

Section 13(a) of the Exchange Act and Rule 13a-1 thereunder require all issuers with securities registered under Section 12 of the Exchange Act to file annual reports. Exchange Act Rule 12b-20 requires an issuer to provide any additional information in the reports necessary to make the reports not misleading. The obligation to file these periodic reports includes the requirement that they be complete and accurate in all material respects. *See, e.g., United States v. Bilzerian*, 926 F.2d 1285, 1298 (2d Cir. 1991); *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1165 (D.C. Cir. 1978). No showing of scienter is necessary to establish a violation of Section 13(a) of the Exchange Act and Rules 13a-1 and 12b-20. *See Savoy Indus., Inc.*, 587 F.2d at 1167; *SEC v. Wills*, 472 F. Supp. 1250, 1268 (D.D.C. 1978).

Section 13(b)(2)(A) of the Exchange Act requires issuers to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.” Section 13(b)(2)(B) requires issuers to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurance that transactions are recorded as necessary to permit the preparation of financial statements in conformity with GAAP and to maintain the accountability of assets. No showing of scienter is necessary to establish a violation of Sections 13(b)(2)(A) or 13(b)(2)(B). *See SEC v. McNulty*, 137 F.3d 732, 740-741 (2d Cir. 1998); *SEC v. World-Wide Coin Investments, Ltd.*, 567 F. Supp. 724, 749-51 (N.D. Ga. 1983).

Rule 13b2-1 of the Exchange Act prohibits any person from directly or indirectly falsifying, or causing to be falsified, any book, record or account subject to Section 13(b)(2)(A). Scienter is not an element of a violation of Rule 13b2-1. *McNulty*, 137 F.3d at 740-741.

AremisSoft violated each of these provisions of the federal securities laws by, among other things, including false and misleading financial statements and information in its 2000 report filed with the Commission and in registration statements that incorporated that report and financial information.

PKF’s failure to comply with GAAS was a “cause of”<sup>11</sup> AremisSoft’s violations. Likewise, Mead’s failure to comply with GAAS was a “cause of” AremisSoft’s violations. PKF issued an audit report signed by Mead containing an unqualified opinion stating that PKF had conducted its audit of AremisSoft’s financial statements in accordance with GAAS, that AremisSoft’s financial statements were consistent with GAAP, and that AremisSoft’s reported results fairly represented its financial condition and results of operation. Mead consented on behalf of PKF to the inclusion of this audit report in AremisSoft’s annual report on Form 10-K and in registration statements filed or in effect for that period. However, the audit report was misleading because PKF and Mead failed to conduct the audit in accordance with GAAS. PKF and Mead knew or should have known that AremisSoft’s reported financial results did not fairly present the company’s financial condition or its results of operations.

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<sup>11</sup> As described in this Order, the standard for liability as “a cause of” a violation under Section 21C of the Exchange Act is negligence. *See KMPG LLP v. SEC*, 289 F.3d 109, 112 (D.C. Cir. 2002). In this instance, PKF and Mead engaged in an act or omission that they knew or should have known would contribute to the primary violation. *See* Section 8A(a) of the Securities Act; Section 21C(a) of the Exchange Act.

In auditing AremisSoft, PKF and Mead failed to exercise due professional care and skepticism, failed to obtain sufficient competent evidential matter, failed to properly plan or expand the procedures in the face of risk of material misstatement of the financial statements including risk due to fraudulent accounting.

Despite these accounting and auditing failures, and in further violation of GAAS, PKF did not issue a qualified or adverse audit report, or disclaim an ability to express any opinion at all, but instead issued an unqualified audit report signed by Mead on AremisSoft's 2000 financial statements. Accordingly, PKF's failure to comply with GAAS was a cause of AremisSoft's violations of Section 17(a)(2) and (3) of the Securities Act and Sections 13(a) and 13(b)(2)(A) and (B) of the Exchange Act and Rules 12b-20, 13a-1, and 13b2-1 thereunder. Likewise, Mead's failure to comply with GAAS was a cause of AremisSoft's violations of Section 17(a)(2) and (3) of the Securities Act and Sections 13(a) and 13(b)(2)(A) and (B) of the Exchange Act and Rules 12b-20, 13a-1, and 13b2-1 thereunder.

Section 10A of the Exchange Act requires each audit to include procedures designed to provide reasonable assurance of detecting illegal acts that would have a direct and material effect on the determination of financial statement amounts and if, in the course of conducting an audit, the auditor becomes aware of information indicating that an illegal act had or may have occurred, the auditor is required to investigate and notify management, the board of directors, or the audit committee. No showing of scienter is necessary to establish a violation of Section 10A. *SEC v. Solucorp Industries, Ltd.*, 197 F. Supp. 2d 4 (S.D.N.Y. 2002). Mead willfully violated Section 10A(a) of the Exchange Act by failing to design appropriate audit procedures to determine whether or not senior management of AremisSoft had committed fraud. PKF willfully<sup>12</sup> violated Section 10A of the Exchange Act because during its audit PKF became aware of information indicating that illegal acts had or may have occurred but did not bring that information to the attention of AremisSoft's management, its board of directors, or its audit committee.

## **E. FINDINGS**

Based on the foregoing, the Commission finds that:

1. PKF willfully violated Section 10A of the Exchange Act and was a cause of AremisSoft's violations of Sections 17(a)(2) and (3) of the Securities Act and Sections 13(a) and 13(b)(2)(A) and (B) of the Exchange Act and Rules 12b-20, 13a-1, and 13b2-1 thereunder;
2. PKF engaged in improper professional conduct within the meaning of Rule 102(e)(1)(ii) of the Commission's Rules of Practice in connection with PKF's 2000 audit of AremisSoft's financial statements, which were included in AremisSoft's annual report on Form 10-K and in AremisSoft registration statements filed or in effect for that period;

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<sup>12</sup> "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. See *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000); *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965). There is no requirement that the actor also be aware that he or she is violating one of the Rules or Acts.

3. Mead willfully violated Section 10A(a) of the Exchange Act and was a cause of AremisSoft's violations of Sections 17(a)(2) and (3) of the Securities Act and Sections 13(a) and 13(b)(2)(A) and (B) of the Exchange Act and Rules 12b-20, 13a-1, and 13b2-1 thereunder;

4. Mead engaged in improper professional conduct within the meaning of Rule 102(e)(1)(ii) of the Commission's Rules of Practice in connection with PKF's 2000 audit of AremisSoft's financial statements, which were included in AremisSoft's annual report on Form 10-K and in AremisSoft registration statements filed or in effect for that period;

5. Barnsdall engaged in improper professional conduct within the meaning of Rule 102(e)(1)(ii) of the Commission's Rules of Practice in connection with PKF's 2000 audit of AremisSoft's financial statements, which were included in AremisSoft's annual report on Form 10-K and in AremisSoft registration statements filed or in effect for that period.

#### **F. UNDERTAKINGS BY PKF**

PKF (and its successor PKF (UK) LLP, a limited liability partnership) undertakes and agrees that it will not accept any audit engagements for new Commission registrant audit clients for a period of one year from the date of the issuance of this Order.

PKF further undertakes to:

1. enhance and provide training concerning the proper level of professional skepticism of staff and partners concerning high risk clients;
2. develop and implement enhanced audit procedures concerning the assessment and identification of fraud risk indicators at the planning stage and throughout the audit engagement; and
3. require the involvement of a Quality Control and Compliance Partner in all audit engagements of Commission registrants identified as high risk.

In determining whether to accept PKF's Offer, the Commission has considered these undertakings.

#### **IV.**

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondents' Offers.

Accordingly, IT IS HEREBY ORDERED, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act that:

A. Respondent PKF shall cease and desist from committing any violations and any future violations of Section 10A of the Exchange Act; from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act; and from

causing any violations and any future violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20 and 13a-1 thereunder.

B. Respondent PKF is censured pursuant to Rule 102(e) of the Commission's Rules of Practice.

C. Respondent Mead shall cease and desist from committing any violations and any future violations of Section 10A(a) of the Exchange Act; from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act; and from causing any violations and any future violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20 and 13a-1 thereunder.

D. Respondent Mead is censured pursuant to Rule 102(e) of the Commission's Rules of Practice.

E. It is also Ordered, pursuant to Rule 102(e) of the Commission's Rules of Practice that Respondent Mead is denied the privilege of appearing or practicing before the Commission as an accountant.

F. Respondent Barnsdall is censured pursuant to Rule 102(e) of the Commission's Rules of Practice.

G. It is also Ordered, pursuant to Rule 102(e) of the Commission's Rules of Practice that Respondent Barnsdall is denied the privilege of appearing or practicing before the Commission as an accountant.

H. After two years from the date of this order, Respondent Barnsdall may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent Barnsdall's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Respondent Barnsdall, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Respondent Barnsdall, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify

any criticisms of or potential defects in Respondent's or the firm's quality control system that would indicate that the Respondent will not receive appropriate supervision or, if the Board has not conducted an inspection, has received an unqualified report relating to his, or the firm's, most recent peer review conducted in accordance with the guidelines adopted by the former SEC Practice Section of the American Institute of Certified Public Accountants Division for CPA Firms or an organization providing equivalent oversight and quality control functions;

(c) Respondent Barnsdall has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and

(d) Respondent Barnsdall acknowledges his responsibility, as long as Respondent appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

I. The Commission will consider an application by Barnsdall to resume appearing or practicing before the Commission provided that his practicing certificate is current and he has resolved all other disciplinary issues with the applicable United Kingdom Institute of Chartered Accountants. However, if licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters related to Barnsdall's character, integrity, professional conduct, or qualifications to appear of practice before the Commission.

By the Commission.



Nancy M. Morris  
Secretary

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES ACT OF 1933  
Rel. No. 8678 / April 13, 2006

Admin. Proc. File No. 3-12035

In the Matter of  
  
THE REGISTRATION STATEMENT OF APOLLO PUBLICATION  
CORPORATION

ORDER DISMISSING REVIEW PROCEEDING AND NOTICE OF FINALITY

On December 7, 2005, an administrative law judge issued an initial decision pursuant to Section 8(d) of the Securities Act of 1933 suspending the effectiveness of a registration statement filed by Apollo Publication Corporation ("Apollo" or the "Company"). 1/ The law judge found that the registration statement, which was filed on September 8, 2005, contained no financial statements or any financial information at all. Additionally, the law judge found, the registration statement was not signed by the Company's chief financial officer, comptroller, or authorized representative in the United States. 2/ The law judge found that the inclusion of this information was required by federal securities laws and regulations thereunder, and that the omissions were material. 3/

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1/ The Registration Statement of Apollo Publication Corporation, Initial Decision Rel. No. 302 (Dec. 7, 2005), SEC Docket \_\_\_\_. Securities Act Section 8(d), 15 U.S.C. § 77h(d), in relevant part, authorizes the Commission to issue a stop order suspending the effectiveness of a registration statement, after notice and opportunity for a hearing, if it appears that the registration statement "includes any untrue statement of a material fact or omits to state any material fact required to be stated therein."

2/ The registration statement represents that Apollo is organized under the laws of Ontario, Canada.

3/ The law judge further found that the registration statement contained material misrepresentations regarding the involvement of various world leaders as officers and directors of Apollo and the relationship of Apollo to the Canadian Imperial Bank of Commerce.

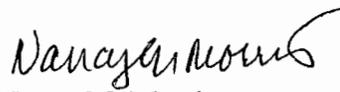
On January 23, 2006, we granted Apollo's petition for review of the law judge's initial decision and issued a schedule requiring that a brief in support of the petition for review be filed by February 22, 2006. 4/ The order stated that, pursuant to Rule 180(c) of our Rules of Practice, 5/ failure to file a brief in support of the petition may result in dismissal of the review proceeding as to that petitioner. Notwithstanding our order, Apollo has filed no brief, extension request, or anything else with respect to its appeal subsequent to its petition for review.

On March 23, 2006, the Division of Enforcement requested that we dismiss the proceeding based on Apollo's failure to file a supporting brief. 6/ Under the circumstances, we find that dismissal is appropriate.

Accordingly, IT IS ORDERED that this proceeding be, and it hereby is, dismissed.

We also hereby give notice that the December 7, 2005 initial decision of the administrative law judge has become the final decision of the Commission with respect to Apollo Publication Corporation. The order contained in that decision suspending the effectiveness of the registration statement of Apollo Publication Corporation is hereby declared effective.

By the Commission.

  
Nancy M. Morris  
Secretary

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4/ See Securities Exchange Act Rel. No. 53065 (Jan. 23, 2006), \_\_\_ SEC Docket \_\_\_. Our order also vacated the notice of finality that had been issued against Apollo on January 6, 2006. The notice of finality had been issued prior to the receipt, by the Commission's Secretary, of Apollo's petition for review, which had been misdirected.

5/ 17 C.F.R. § 201.180(c).

6/ The Division also requested, as an alternative to dismissal, that the decision of the law judge be upheld "because Apollo offered no argument that effectively questions the [law judge's] findings and conclusions." Apollo has not responded to the Division's filing.

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 53651 / April 13, 2006

Admin. Proc. File No. 3-11625

In the Matter of

VLADISLAV STEVEN ZUBKIS  
1590 Continental Street  
Suite 200  
San Diego, California 92154

ORDER DENYING REQUEST FOR CLARIFICATION OF ORDER

On December 2, 2005, the Commission issued its opinion in this proceeding finding that Vladislav Steven Zubkis had been permanently enjoined from violations of the federal securities laws and that the public interest required that he be barred from association with a broker or dealer and from participating in any offering of penny stock ("the Opinion and Order"). <sup>1/</sup> Zubkis has now filed a motion entitled "Request for Clarification of Order Imposing Remedial Sanctions Dated December 2, 2005" ("the Request"). As discussed below, we have determined to deny the Request as untimely.

The Commission's Office of the Secretary served Zubkis with a copy of the Opinion and Order by United States Postal Service certified mail, return receipt requested. <sup>2/</sup> The delivery receipt returned to the Commission indicates that the Postal Service delivered the Opinion and Order to Zubkis on January 5, 2006. <sup>3/</sup> The Request, which was dated January 10, 2006, was postmarked February 24, 2006, <sup>4/</sup> and was received by the Secretary's Office on March 6, 2006.

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<sup>1/</sup> Vladislav Steven Zubkis, Securities Exchange Act Rel. No. 52876 (Dec. 2, 2005), \_\_ SEC Docket \_\_\_\_.

<sup>2/</sup> See Commission Rules of Practice 141(b), 17 C.F.R. § 201.141(b), (service of Commission decisions) and 141(a)(2)(i), 17 C.F.R. § 201.141(a)(2)(i), (methods of service on individuals).

<sup>3/</sup> Zubkis also was sent a copy of the Opinion and Order by facsimile on December 2, 2005.

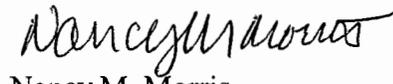
<sup>4/</sup> The postmark on the envelope indicates that it was mailed on either February 24, 2006, or  
(continued...)

Document 14 of 43

Commission Rule of Practice 470(b) provides that a party aggrieved by a decision of the Commission has ten days from the date of service in which to request that the Commission reconsider that decision. 5/ The period between service of the Opinion and Order and Zubkis' filing of the Request was at least a month and a half. Under the circumstances, we believe that Zubkis' motion was not timely.

IT IS ORDERED that the request for clarification filed by Vladislav Steven Zubkis be, and it hereby is, denied.

By the Commission.

  
Nancy M. Morris  
Secretary

- 
- 4/ (...continued)  
February 27, 2006. We have determined to use the earlier of the two possible dates to give Zubkis the benefit of the doubt.
- 5/ 17 C.F.R. § 201.470(b). The Rules of Practice do not provide for requests for clarification. Because Zubkis' motion repeats many of the arguments made in his appeal to the Commission and because of the absence of any other provision of our Rules of Practice that would seem to apply to the Request, we have considered the Request pursuant to Rule 470, which applies to motions for reconsideration.

**UNITED STATES OF AMERICA  
BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION**

**Securities Act of 1933  
Release No. 8677/April 13, 2006**

**Securities Exchange Act of 1934  
Release No. 53642/April 13, 2006**

**ORDER REGARDING REVIEW OF FINANCIAL ACCOUNTING STANDARDS  
BOARD ACCOUNTING SUPPORT FEE FOR 2006 UNDER SECTION 109 OF  
THE SARBANES-OXLEY ACT OF 2002**

The Sarbanes-Oxley Act of 2002 (the "Act") establishes criteria that must be met in order for the accounting standards established by an accounting standard-setting body to be recognized as "generally accepted" for purposes of the federal securities laws. Section 109 of the Act provides that all of the budget of an accounting standard-setting body satisfying these criteria shall be payable from an annual accounting support fee assessed and collected against each issuer, as may be necessary or appropriate to pay for the budget and provide for the expenses of the standard setting body, and to provide for an independent, stable source of funding, subject to review by the Securities and Exchange Commission (the "Commission"). Under Section 109(f), the annual accounting support fee shall not exceed the amount of the standard setter's "recoverable budget expenses." Section 109(h) amends Section 13(b)(2) of the Securities Exchange Act of 1934 to require issuers to pay the allocable share of a reasonable annual accounting support fee or fees, determined in accordance with Section 109 of the Act.

On April 25, 2003, the Commission issued a policy statement concluding that the Financial Accounting Standards Board ("FASB") and its parent organization, the Financial Accounting Foundation ("FAF"), satisfied the criteria for an accounting

*Document 15 of 43*

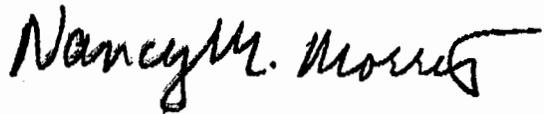
standard-setting body under the Act, and recognizing the FASB's financial accounting and reporting standards as "generally accepted" under Section 108 of the Act.<sup>1</sup> As a consequence of that recognition, the Commission undertook a review of the FASB's accounting support fee for calendar year 2006. In connection with its review, the Commission also reviewed the proposed budget for the FAF and the FASB for calendar year 2006.

Section 109 of the Act also provides that the standard setting body can have additional sources of revenue for its activities, such as earnings from sales of publications, provided that each additional source of revenue shall not jeopardize the actual or perceived independence of the standard setter. In this regard, the Commission also considered the interrelation of the operating budgets of the FAF, the FASB and the Government Accounting Standards Board ("GASB"), the FASB's sister organization, which sets accounting standards used by state and local government entities. The Commission has been advised by the FAF that neither the FAF, the FASB nor the GASB accept contributions from the accounting profession.

After its review, the Commission determined that the 2006 annual accounting support fee for the FASB is consistent with Section 109 of the Act. Accordingly,

IT IS ORDERED, pursuant to Section 109 of the Act, that the FASB may act in accordance with this determination of the Commission.

By the Commission.



Nancy M. Morris  
Secretary

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<sup>1</sup> Financial Reporting Release No. 70.

**UNITED STATES OF AMERICA  
BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION**

**Securities Act of 1933  
Release No. 8676/ April 13, 2006**

**Securities Exchange Act of 1934  
Release No. 53641/ April 13, 2006**

**ORDER APPROVING PUBLIC COMPANY ACCOUNTING OVERSIGHT  
BOARD BUDGET AND ANNUAL ACCOUNTING SUPPORT FEE FOR  
CALENDAR YEAR 2006**

The Sarbanes-Oxley Act of 2002 (the "Act") established the Public Company Accounting Oversight Board ("PCAOB") to oversee the audits of public companies and related matters, to protect investors, and to further the public interest in the preparation of informative, accurate and independent audit reports. The PCAOB is to accomplish these goals through registration of public accounting firms and standard setting, inspection, and disciplinary programs. Section 109 of the Act provides that the PCAOB shall establish a reasonable annual accounting support fee, as may be necessary or appropriate to establish and maintain the PCAOB. Section 109(h) amends Section 13(b)(2) of the Securities Exchange Act of 1934 to require issuers to pay the allocable share of a reasonable annual accounting support fee or fees, determined in accordance with Section 109 of the Act. Under Section 109(f), the aggregate annual accounting support fee shall not exceed the PCAOB's aggregate "recoverable budget expenses," which may include operating, capital and accrued items. Section 109(b) of the Act directs the PCAOB to establish a budget for each fiscal year in accordance with the PCAOB's internal procedures, subject to approval by the Securities and Exchange Commission (the "Commission").

*Document 16 of 43*

The PCAOB adopted a budget for calendar year 2006 on November 22, 2005 and submitted it to the Commission for approval on January 24, 2006. In accordance with its responsibilities to oversee the PCAOB, the Commission reviewed the budget proposed by the PCAOB for 2006 and its aggregate accounting support fee for 2006, which will fund the PCAOB's expenditures.

In an effort to address any issues relating to the PCAOB's proposed budget for 2006 before it was approved by the PCAOB and submitted to the Commission for review and approval, the Commission's review of the PCAOB's proposed budget for 2006 began in August 2005 with a meeting between Commission and PCAOB staffs to discuss the types of supporting information the Commission would need to begin its review of the PCAOB's 2006 budget, including questions to be addressed by the PCAOB regarding its proposed budget and accounting support fee. Also, prior to the PCAOB's final consideration of its 2006 budget estimates and approval of its proposed budget for 2006, the PCAOB board members met, either in person or by phone, with each Commissioner to discuss the PCAOB's development of a strategic plan and other matters impacting the PCAOB's budget. In December, shortly after the PCAOB approved its proposed budget for 2006, the PCAOB briefed the Commission staff on its inspection program for 2005 and its plans for 2006 and provided responses to the staff's questions regarding its inspection program.

Over the course of the Commission's review, staff from the Commission's Offices of the Chief Accountant, Executive Director and Information Technology dedicated a substantial amount of time to the review and analysis of the PCAOB's programs, projects and budget estimates, and attended several meetings with board

members, management and staff of the PCAOB to develop an understanding of the PCAOB's budget and operations. During the course of the Commission's review, the Commission staff relied upon representations and supporting documentation from the PCAOB.

After considering the above, the Commission did not identify any proposed disbursements in the budget that are not properly recoverable through the annual accounting support fee, and the Commission believes that the aggregate proposed 2006 annual accounting support fee does not exceed the PCAOB's aggregate recoverable budget expenses for 2006.

Based on the foregoing, the Commission has determined that the PCAOB's 2006 budget and annual accounting support fee are consistent with Section 109 of the Act.

Accordingly,

IT IS ORDERED, pursuant to Section 109 of the Act, that the PCAOB budget and annual accounting support fee for calendar year 2006 are approved.

By the Commission.

A handwritten signature in black ink that reads "Nancy M. Morris". The signature is written in a cursive style with a long horizontal flourish at the end.

Nancy M. Morris  
Secretary

Commissioner Atkins  
Not Participating

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES ACT OF 1933  
Rel. No. 8679 / April 14, 2006

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 53654 / April 14, 2006

Admin. Proc. File No. 3-11247

In the Matter of  
VLADLEN "LARRY" VINDMAN

OPINION OF THE COMMISSION

PENNY STOCK BAR PROCEEDING

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Antifraud violations

Penny stock promoter engaged in scheme to inflate artificially the demand for and price of penny stock of issuer in violation of antifraud provisions of federal securities laws. Held, it is in the public interest to impose a penny stock bar, cease-and-desist order, and civil money penalty.

APPEARANCES:

Jerome M. Selvers and John A. Rentschler, of Sonnenblick, Parker & Selvers, P.C., for Vladlen "Larry" Vindman.

Alix Biel and Howard S. Kim, for the Division of Enforcement.

Document 17 of 43

Appeal filed: June 14, 2005  
Last brief received: April 7, 2006  
Oral argument: January 30, 2006

## I.

Vladlen "Larry" Vindman ("Vindman" or "Respondent"), a penny stock promoter, and the Division of Enforcement each appeal from the decision of an administrative law judge. The law judge found that between late July and early September 2003, Vindman engaged in a scheme to inflate artificially the demand for and price of the stock of Marx Toys & Entertainment Corp. 1/ This scheme, the law judge found, involved Vindman's own trading and Vindman's orchestration of the trading of a "network" of associates, as well as attempts to gain the assistance of two registered representatives of a broker-dealer in buying Marx stock and soliciting their customers to buy Marx stock. The law judge found that Vindman, through his involvement in this scheme, willfully violated Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. 2/ The law judge barred Vindman from participating in an offering of penny stock and ordered him to cease and desist from committing or causing violations of Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5. Vindman appeals from the law judge's findings of violation and imposition of sanctions. The Division appeals the law judge's order that Vindman pay a third-tier civil money penalty of \$20,000, rather than the larger sum sought by the Division. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal. 3/

## II.

Around 1999, Vladlen "Larry" Vindman became interested in the financial markets and became a day trader. Through Internet chat rooms, Vindman became acquainted with other day traders. These traders included Cal Massaro, a resident of Connecticut; Fred Nader, a resident of Texas; and William Brantley, a resident of Arizona. Through Brantley, Vindman became acquainted with Max Bevins, also a resident of Arizona, another day trader.

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1/ The name of the company originally incorporated as stereoscope.com, inc. was changed to Marx Toys & Entertainment Corp. on March 11, 2003. "Marx" will be used to refer to both Marx Toys & Entertainment Corp. and the predecessor entity. The acts on which the charges against Vindman are based all occurred after March 11, 2003.

2/ 15 U.S.C. §§ 77q, 78j(b); 17 C.F.R. § 240.10b-5.

3/ Rule of Practice 451(d), 17 C.F.R. § 201.451(d), permits a member of the Commission who was not present at oral argument to participate in the decision of the proceeding if that member has reviewed the oral argument transcript prior to such participation. Chairman Cox, who was not present at the oral argument, performed the requisite review.

In late 2000 or early 2001, Vindman began working as a stock promoter for companies to whom he was referred by friends or acquaintances whom he knew through Internet chat rooms. These companies included Datameg Corp., Rocky Mountain Energy Corp., and Enviro-Energy Corporation. Vindman described the services he provided as

just getting exposure for the company, maybe getting on a website to give it more investors to have a look at it, maybe doing an e-mail. Not myself. I knew people that would do e-mail for a company, little stuff like that. You know, just word of mouth, let people know what this company is all about.

In late 2002, Steven Wise, chief executive officer of Marx, contacted Vindman. <sup>4/</sup> Josh Weinfeld, an Internet acquaintance of Vindman, had referred Wise to Vindman, because Weinfeld thought Vindman could assist in promoting and marketing Marx's stock. <sup>5/</sup> Marx had been incorporated in 1988 as a corporate shell. When Wise first contacted Vindman, Marx had only one employee, Wise, and little if any revenue. Moreover, audited financial statements attached to Marx's Form 10-KSB for the year ended December 31, 2002 contained a "going concern" qualification, noting that Marx's net loss of \$1,369,432 and working capital deficiency of approximately \$1,255,982 "raise[d] substantial doubt about the Company's ability to continue as a going concern." Despite these less than promising prospects, Marx hoped for future success through the development and marketing of IM Buddies, a product developed by United Internet Technologies, Inc. ("UIT"). IM Buddies were plush toys in the form of cartoon characters that could be attached to computers and would read incoming instant messages in a voice appropriate to the particular cartoon character.

According to Vindman, in early 2003, he decided that IM Buddies was a sufficiently attractive product to make involvement with Marx a promising opportunity, so he agreed with Wise that he would provide services to Marx for one year in exchange for three million shares of Marx stock. <sup>6/</sup> Vindman testified that, at the time he and Wise reached their agreement, the price of Marx stock was two or three cents per share. In March 2003, Vindman received 1.5 million

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<sup>4/</sup> Wise was named as a respondent in the Order Instituting Proceedings in this matter. Without admitting or denying the findings, he consented to the entry of an order imposing a penny stock bar, an officer and director bar, an order to cease and desist from committing or causing any violation or future violation of Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5, and a civil penalty totaling \$75,000, part of which was payable in installments. See Steven Wise, Securities Exchange Act Rel. No. 51077 (Jan. 25, 2005), 84 SEC Docket 2719, 2721-22.

<sup>5/</sup> Vindman later learned that Weinfeld had helped Wise acquire Marx and that Wise had compensated Weinfeld by giving him stock in Marx.

<sup>6/</sup> In his brief, Vindman states that he accepted stock because Marx had no money. He did not explain how Marx could develop or market IM Buddies with no money, little or no revenue, and a single employee.

shares of Marx common stock pursuant to this oral agreement. Vindman testified that when he received these shares, the price per share was about five cents. <sup>7/</sup> Marx and UIT signed a licensing contract for IM Buddies on April 1, 2003.

Although Vindman had discussions with Wise in 2002 and received 1.5 million shares of Marx stock in March, and although the licensing agreement between Marx and UIT was signed on April 1, Vindman testified that he did not begin "providing services" to Marx under his agreement with Wise until July 2003. Instead, during early 2003, Vindman and a number of his Internet acquaintances were trading in stock of other companies that Vindman was promoting. In February 2003, Nader, Brantley, and Progress, Vindman's Belize corporation, all traded in Enviro-Energy. In February and March 2003, Vindman, Progress, Massaro, Nader, and Brantley all traded in Rocky Mountain Energy. In March and June 2003, Vindman, Progress, Nader, Brantley, and Bevins all traded in Datameg. Vindman was in frequent contact with Massaro, Nader, and Brantley. During the summer of 2003, Vindman testified that he spoke with Massaro two or three times a week. Vindman also stated that he communicated with Nader and Brantley on most trading days, usually by instant message. <sup>8/</sup>

Vindman received an additional 500,000 shares of Marx common stock, valued at approximately \$100,000, in July. <sup>9/</sup> Nader received from Weinfeld 100,000 shares of Marx common stock on July 22, 2003. Massaro also received 100,000 shares of Marx common stock from Weinfeld, on July 24, 2003. Massaro testified that Vindman arranged for Massaro to get the stock and that the shares were deposited in a brokerage account set up for that purpose at Vindman's request, in exchange for Massaro's assistance in what Massaro described as "bring[ing] marketing awareness" to Marx by "call[ing] up several friends and see[ing] if they were interested in investing" in Marx. Vindman's description of the services that he provided to Marx was equally vague: he testified that he "multi-tasked everything," providing "basic full faceted" services, and doing "a little bit of everything" for Marx. Although he was supposed to provide promotional services for Marx, Vindman testified that he reviewed Marx's press releases solely for grammar and spelling.

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<sup>7/</sup> An account statement shows that Vindman received the shares on March 3, 2003. The closing price for Marx shares on the following day was 6 cents per share. These shares were transferred to an offshore account in Belize, maintained in the name of Progress, Inc. ("Progress"), a Belize corporation incorporated by Vindman.

<sup>8/</sup> Vindman had little direct contact with Bevins, but, as noted above, it was Brantley who introduced Bevins to Vindman, and Vindman communicated frequently with Brantley.

<sup>9/</sup> Vindman testified that the stock was worth "about 20 cents per share" when he received it in July. An account statement shows that Vindman received the stock on July 24, 2003. The closing price on that day was 23.4 cents per share.

At around the time that Vindman received his second free allotment of Marx shares and Massaro and Nader each received 100,000 Marx shares from Weinfeld, Vindman and his associates began trading extensively in Marx stock. Vindman testified that he did not direct the trading of Massaro, Nader, and Brantley, but he admitted that he recommended trades to them. Massaro testified that Vindman asked him to buy a specific number of shares of Marx at a specified price several times during the summer of 2003, in addition to recommending Marx generally. 10/

During this period, Marx traded on the OTC Bulletin Board. On July 23, 2003, Vindman made his first two purchases of 15,000 and 30,000 shares of Marx stock at 19 cents per share in the open market, followed by Brantley's friend Bevins, who made three purchases for a total of 29,000 shares at 19 cents per share. 11/ Between July 23, 2003 and early September 2003, Vindman, Massaro, Nader, Brantley, and Bevins made many trades in Marx stock. For example, between July 23 and July 29, Vindman bought 222,000 shares of Marx stock in thirteen transactions; he made only one sale, of 15,000 shares. During the same week, Bevins bought 476,000 shares of Marx, Massaro bought 55,500 shares, and Nader bought 175,000 shares and sold 100,000. Trading by Vindman, Massaro and Bevins on July 23 amounted to 11.5% of the daily volume in Marx shares. 12/ Trading by Vindman, Massaro, Nader, Brantley and Bevins on July 29 accounted for at least 23% of the daily volume. 13/ Vindman and his acquaintances made many relatively small purchases rather than acquiring larger blocks of stock, trading consistent with apparent widespread general market interest in Marx caused by unimpeded forces of supply and demand.

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10/ Massaro was the only one of Vindman's Internet acquaintances who testified at the administrative hearing.

11/ Vindman, like most of his associates, had multiple brokerage accounts. Vindman, for example, traded in Marx in accounts in his name at Ameritrade; Spencer Edwards, Inc.; BMA Securities, Inc.; and Track Data Securities; he also traded in Marx in the Progress account at Westminster Securities Corp.

12/ As of December 31, 2002, Marx had 15,242,432 shares of stock outstanding. The number of outstanding shares rose to 30,473,000 by June 30, 2003, and to 47,653,000 by September 30, 2003, an increase of more than 200% in nine months. Between January 2 and December 31, 2003, Marx's daily trading volume averaged fewer than 650,000 shares.

13/ On July 29, the five named individuals bought 534,000 shares of Marx stock, 30% of the daily trading volume. They also sold 127,900 shares. Even if all sales were to other individuals in the group, the net of 406,100 shares accounted for 23% of the daily volume.

Vindman's purchases of Marx were in lots that were small in relation to his existing two-million-share holding, at increasing prices. On July 24, he bought a total of 62,000 shares of Marx in three transactions at 23 cents per share and 10,000 shares at 24 cents per share. On that date, he sold 15,000 at 25 cents per share. On July 28, he purchased a total of 24,000 shares in two transactions at 24 cents per share and a total of 31,000 shares in two transactions at 25 cents per share. On July 29, he purchased 15,000 shares at 27 cents per share and a total of 35,000 shares in two transactions at 28 cents per share, and on July 31, he purchased 6,000 shares at 28 cents per share and sold 20,000 shares at 32 cents per share.

By July 30, the price of Marx stock, which at the beginning of 2003 was about 2.5 cents per share and which was 19 cents per share when Vindman made his initial purchases on July 23, had reached about 32 cents per share. On August 15, it reached its high closing price of 36.5 cents per share. Vindman continued to trade in Marx stock. He traded in his own name on July 31 and August 4, 12, 13, 14, and 15, purchasing at prices between 30 and 37 cents per share and selling at between 34 and 39 cents per share. These trades involved thirty-five separate transactions. The largest transaction was a sale of 30,000 shares, and five other transactions were for 20,000 or more shares. The smallest of these transactions was a sale of 100 shares, and seven other transactions were for 1,000 or fewer shares. Vindman also bought 50,000 shares at 31 cents per share for the Progress account on August 13 and a total of 80,000 shares in three transactions at 36 cents per share for that account on August 14.

On August 18, UIT announced that it had terminated the licensing agreement with Marx. Wise responded by initiating litigation against UIT. Settlement negotiations between UIT and Marx promptly ensued. On August 18, immediately after the announcement of the termination of the licensing agreement, the closing price of Marx stock dropped to 25 cents per share.

Vindman testified that, after UIT's announcement of the termination of the licensing agreement, he became concerned that the price of Marx stock was falling because market participants were "shorting" the stock, *i.e.*, selling stock that they did not own with the intent of buying it back in the future after the market declined. <sup>14/</sup> Vindman testified that he thought that some of the sellers of Marx stock were "naked" short sellers, in other words, that they were selling stock that they had no realistic prospect of borrowing. Vindman testified that he concluded that, unless the short selling were stopped, Marx would be unable to get financing to develop and market IM Buddies, a project he regarded as key to Marx's success, if and when the

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<sup>14/</sup> In a short sale, the broker borrows the stock that is delivered to the purchaser, and the seller later "covers" by buying the stock needed to pay off the loan. Ideally, from the short seller's standpoint, the stock price will fall to zero, enabling the seller to cover at no cost.

settlement negotiations resulted in a renewed business relationship between the companies. Therefore, he testified, he began "fighting the shorts." 15/

Massaro testified that Vindman "pretty often" discussed with him Vindman's concerns about the short selling of Marx stock. 16/ Vindman told Massaro that he thought that, if the price of Marx stock reached 40 cents per share, the brokers who had lent stock for delivery to buyers would force the short sellers to cover by buying Marx at the market price. 17/

Wise, who was still trying to negotiate a settlement with UIT, sought the assistance of David Stetson and Steven Ingrassia in raising the price of Marx stock. Although Wise made the initial contact, Vindman also became involved in dealing with Stetson and Ingrassia, whom he understood to be stockbrokers. 18/ In a series of telephone conversations, Vindman described what his associates had been doing and attempted to persuade Stetson and Ingrassia to work with them in the effort to raise the price of Marx stock.

In a telephone conversation with Stetson on August 21, Vindman said that his "guys" had been "fighting the shorts," that they "[had] a lot of money in this," and that they were on the verge of breaking the shorts before the news of the termination of the UIT licensing agreement

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15/ The blue sheet data in the record reflect only three short sales during this period: two sales on August 15 for 49,000 shares at 36 cents per share and one on August 20 for 10,000 shares at 31 cents per share.

16/ Massaro testified that Vindman expressed these concerns during the summer of 2003, but he did not provide a more precise date.

17/ The practice Vindman described is commonly termed a "short squeeze." See, e.g., Dean Witter Reynolds, Inc., Exchange Act Rel. No. 46578 (Oct. 1, 2002), 78 SEC Docket 1849, 1853 (settled case).

18/ Stetson and Ingrassia were former representatives of a registered broker-dealer who were cooperating with the Federal Bureau of Investigation (FBI) as witnesses in a fraud case involving their former employer. They informed the FBI that Wise had contacted them about Marx. The FBI then arranged to monitor and record telephone calls between Stetson, Ingrassia, Wise, and Vindman. Transcripts of these conversations are in the record. Vindman testified that Wise first mentioned Stetson and Ingrassia to him in early to mid-August 2003, suggesting that they could help raise money for Marx. Vindman testified that he advised against involving Stetson and Ingrassia with Marx at that time: "I don't think you should be getting anybody involved in this company. The company is doing fine on its own. The stock is trading well. . . . [E]verything is going great."

became public. 19/ Vindman told Stetson, "[I]t's hard . . . when we, I have so much money in, to keep going, so we've just been fighting with them to stabilize it." Vindman suggested to Stetson that, if Stetson and Vindman, working together, could buy three to four million shares, their purchases probably would raise the price of Marx stock to 40 cents a share. He told Stetson that the key was "breaking the shorts," that "40 is the key here," and that Marx needed "some help to break it over some resistance points." 20/ Vindman offered Stetson one million shares of stock if he helped Vindman raise the price to 40 cents per share. Vindman told Stetson that he had a "big network" and that other stocks "we've done," including Datameg, Rocky Mountain Energy, and Enviro-Energy had "gone up" between "an average, 500 to 1,000 percent." Stetson agreed to start buying Marx stock for his own account.

In his August 21 telephone conversations with Stetson, Vindman explained that he needed help from Stetson "right away" because his "guys" were flying into Atlantic City from Arizona, Texas, and Connecticut, among other places. Vindman stated that he had a problem because "like I said, my guys, are all like in transit," and he added, "I just don't want the shorts to take us down." On August 23, two days after this conversation, Vindman, Massaro (of Connecticut), Nader (of Texas), Brantley (of Arizona), and Bevins (also of Arizona) were photographed having dinner together in Atlantic City. The chief executive officer of Datameg was also at the dinner.

In an August 27 telephone conversation with Ingrassia, Vindman reported that he was "battling the shorts another day." Ingrassia urged Vindman to come meet with him in person, but Vindman said that he "can't leave during the market" because if he left "there's nobody watching the stock. That's the problem, and I'm battling shorts here, that any advantage they can they'll just knock it down." Vindman said that he, the "quarterback," could not leave because the guys "can do this and that," but without his guidance, "they don't know like as a team what they are doing together."

No personal meeting between Vindman, Stetson, and Ingrassia ever took place, and the record does not show that either Stetson or Ingrassia ever bought, or persuaded customers to buy, Marx stock. The price per share of Marx stock never reached 40 cents, and Vindman never arranged for Stetson or Ingrassia to receive Marx stock.

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19/ Vindman's statement that his guys were on the verge of breaking the shorts before the news of the termination of the licensing agreement became public appears inconsistent with his testimony (including the testimony quoted above that he told Wise in early to mid-August that the stock was trading well and everything was going great), the dates of the e-mail messages about short sales he introduced into evidence, and the assertion in his opening brief that his concerns about short sales arose only after UIT announced its termination of the licensing agreement.

20/ The closing price of Marx on August 21 was 28 cents per share.

Vindman continued to trade in Marx stock after UIT's termination of the licensing agreement. He made additional purchases in his own name on August 18, 20, 21, 22, 25, and 26, and on September 2, in forty-one total transactions in lots ranging from 5,000 to 39,000 shares. Vindman also sold Marx shares in twenty-one transactions of from 565 to 20,000 shares on August 19, 20, and 21, and he bought shares in the Progress account on August 13 and 14, in four transactions of from 15,000 to 50,000 shares. Vindman's last sale of Marx occurred on August 21, the day of his first taped telephone conversation with Stetson.

On September 5, 2003, Wise and Vindman were arrested and charged criminally with securities fraud based on substantially the same conduct at issue in this proceeding. <sup>21/</sup> Between July 23 and September 4, 2003, the day Vindman first traded in Marx stock and the day before his arrest, both the price of Marx shares and the daily trading volume increased. From July 1 to July 23, 2003, the price per share of Marx stock never exceeded 19 cents; after Vindman's arrest on September 5, the price per share never exceeded 16 cents. Between July 23 and September 4, the closing price ranged from 22 cents per share to 36.5 cents per share. <sup>22/</sup> Although Marx's daily trading volume averaged fewer than 650,000 shares in calendar year 2003, it exceeded one million shares on seventeen of the thirty-one trading days between July 23 and September 4.

### III.

#### A. Section 17(a), Section 10(b), and Rule 10b-5

Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5 prohibit, among other things, the employment of a scheme to defraud in connection with the offer, purchase, or sale of a security. Manipulation of the market in a security violates these provisions. <sup>23/</sup> Manipulation is "intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." <sup>24/</sup> It "strikes at the heart of the pricing process on which all investors rely [and] attacks the very foundation and integrity

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<sup>21/</sup> This administrative proceeding was stayed during the parallel criminal proceeding. A jury found Vindman not guilty of the charges against him.

<sup>22/</sup> The closing price of Marx stock ranged from 2.5 cents to 36.5 cents per share during 2003, attaining its highest closing price on August 15, 2003, the last business day before the announcement by UIT that its contract with Marx was null and void. Between August 18 and September 4, the closing price ranged from 33 cents per share (on August 19) to 22.1 cents per share (on September 4). On September 5, the day Vindman and Wise were arrested, the closing price dropped to 11.5 cents per share.

<sup>23/</sup> E.g., Pagel, Inc., 48 S.E.C. 223, 228 (1985), aff'd, 803 F.2d 942 (8th Cir. 1986).

<sup>24/</sup> Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976).

of the free market system." 25/ Proof of a manipulation usually "depends on inferences drawn from a mass of factual detail," including patterns of behavior, apparent irregularities, and trading data. 26/

Vindman's own trading; the trading of his associates Massaro, Nader, Brantley, and Bevins; and his attempts to orchestrate trading by Stetson and Ingrassia and their customers were all designed for the purpose of raising Marx's trading volume and share price. Vindman's receipt of two million shares of Marx stock in purported compensation for ill-defined, insubstantial "services" provided to Marx; his involvement in arranging for Massaro to receive Marx shares as a reward for equally minimal "services"; his admission that he recommended trades to Massaro, Nader, and Brantley; and Massaro's admission that Vindman repeatedly asked him to make specific purchases of Marx stock at specified prices all support our conclusion that Vindman was attempting to raise the trading volume and the price of Marx stock through his own trading and his orchestration of the trades of others. The concentrated trading by Vindman, Massaro, Nader, Brantley, and Bevins that began on July 23, amounting to as much as 23% of the daily volume in Marx shares, was instrumental in raising the price of Marx shares by more than 66% over the course of one week. The trading by these five persons during the period between July 23 and September 5, the date of Vindman's arrest, similarly contributed to an increase in closing prices over previous and subsequent levels and a marked increase in daily trading volume. 27/

The recordings of Vindman's telephone conversations with Stetson and Ingrassia confirm this circumstantial evidence and demonstrate Vindman's manipulative purpose. 28/ These recordings reveal Vindman's clear intent to raise the price of Marx stock to at least 40 cents per share, purportedly as a technique to "fight" the short sellers who allegedly became active after UIT terminated the licensing agreement. In his telephone conversations with Stetson and Ingrassia, Vindman expressed concerns about the impact of short sales on the price of Marx stock, and he stated that his "guys" had been fighting the short sellers. 29/ Vindman also informed Stetson and Ingrassia of his interest in seeing the price of Marx rise to 40 cents a share, his belief that the coordinated, sustained purchase of three to four million shares would be enough to achieve that goal, and his need as the "quarterback" to avoid leaving "during the market" because the "guys" would not "know like as a team what they are doing together." Such

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25/ L.C. Wegard & Co., 53 S.E.C. 607, 617 (1998), affd., 189 F.3d 461 (2d Cir. 1999) (Table).

26/ Pagel, Inc., 48 S.E.C. at 226.

27/ See supra note 22 and accompanying text.

28/ Markowski v. SEC, 274 F.3d 525, 529 (D.C. Cir. 2001).

29/ Massaro's testimony about the target price of 40 cents per share and the actions to "fight" short sellers is consistent with Vindman's conversations with Stetson and Ingrassia.

attempts to inflate or stabilize the market price represent deliberate interference with market pricing mechanisms; they are by their very nature manipulative.

Vindman admits that he was engaged in what he terms "battling the shorts." Vindman contends, however, that this "battling" consisted of trying to ensure that Marx would become a viable company on the fundamentals. Vindman argues that he believed IM Buddies would be an extremely important product for Marx, and that his remarks about "fighting the shorts" referred to his promotional efforts to support Marx as it struggled to overcome the negative impact of short sales, not to a manipulative scheme to affect the trading price of Marx shares.

We, like the law judge, are not persuaded by Vindman's testimony that he used "fighting the shorts" to refer to something other than coordinated trading. <sup>30/</sup> Vindman offered only vague generalities as to what he did to further his "marketing campaign" for Marx stock. When asked at the hearing what he meant by the term "battling the shorts," Vindman responded: "Part of it

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<sup>30/</sup> Vindman argues that, when Massaro, Nader, Brantley, and Bevins were interviewed by the FBI, they all denied that Vindman was orchestrating their trading activity. The record contains summaries of the FBI's interviews with each of these individuals. Vindman argues that the Division did not call these individuals to testify at the hearing, and he urges us to accept the FBI interviews as proof that the "network" was not engaged in the manipulation charged.

Under appropriate circumstances, we may consider hearsay evidence such as the interview summaries. See Charles D. Tom, 50 S.E.C. 1142, 1145 (1992) (discussing factors used in evaluating hearsay evidence). In this instance, while we have considered the summaries, other record evidence refutes the assertions in them on which Vindman relies.

The trading by the same group of individuals in other stocks that Vindman was "promoting"; the provision of large quantities of Marx shares at no cost to Vindman, Massaro, and Nader; the frequent contacts by telephone and e-mail between Vindman and the other individuals; the admissions that Vindman recommended trades and on occasion asked Massaro to make specific trades; the extensive trading in Marx by Vindman and the other individuals in question during the period at issue; and the statements by Vindman to Stetson and Massaro about his role as "quarterback" in coordinating his "guys" and about the increase in price of other stocks with which he had been involved (including stocks in which he and the other "guys" were trading earlier in 2003) is evidence supporting a finding of manipulation that contradicts and outweighs the assertions contained in the interviews to the effect that Vindman was not orchestrating the trading of the "network."

With regard to Vindman's argument that the Division failed to call Nader, Brantley, and Bevins as witnesses at the hearing, we note that, if Vindman believed that the testimony of the remaining individuals would have aided his defense, he was free to call them as witnesses. He did not.

meant basically the conversations we had. Part was the message board stuff that was going on. Part of it was just, I know, hoping that the company would come around and get the settlement [of the contract termination dispute with UIT] done." In contrast, a conversation with Stetson and Ingrassia is more explicit as to his intent to affect the stock price through coordinated trading:

I know there's a short on the stock that's trying, you know, uh, that's been, we've been fighting, trying to bring the stock down. . . . [T]he way, you know, is to beat them on the bid. . . . I think the key [is] the stock and breaking the shorts. I mean, this stock has a market of its own. It just needs . . . some help to break it over some resistance points . . . . I know 40, 40 is the key here. . . . [W]e could get to 40 and break it . . . my guys could go back in . . . . You have to develop the market like I've been doing, and bring it to 32, and then . . . just stop them on the bid, like I've been doing. I would say probably 3 to 4 million shares that we'd need to buy.

Other portions of Vindman's conversations with Stetson and Ingrassia further demonstrate that "fighting the shorts" was a scheme involving coordinated trading rather than a promotional campaign. On August 21, for example, Vindman explained to Stetson that his "guys are all like in transit," en route to Atlantic City, and that "I just don't want the shorts to take us down," suggesting that the other "network" members were not available to trade Marx. Similarly, in the August 27 conversation with Ingrassia, Vindman explained his reluctance to leave the office during trading hours by saying that if he, the "quarterback," left the office, the members of the "network" "don't know like as a team what they are doing together." We therefore find that Vindman's references to fighting the shorts referred to plans involving purposeful, coordinated stock trading designed to raise the price per share of Marx stock, not a promotional campaign. 31/

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31/ Vindman contends that, in using the word "network," he was referring merely to "a series of contacts and not a criminal conspiracy." Whether the individuals concerned were involved in a criminal conspiracy is not an issue in this proceeding. We reject, however, Vindman's argument that the "network" was merely a collection of individuals who conversed in Internet chat rooms. On the basis of the record, including the patterns of trading in Marx and other stocks, the arrangement by Vindman for Massaro to receive Marx stock, Massaro's admission that Vindman asked him to buy a specific number of shares of Marx at a specified price, and the remarks quoted above about the "problem" caused by the "guys" being in transit and the inability of the "guys" to "know like as a team what they are doing together" if Vindman left the office during trading hours, we find that Vindman coordinated trading in Marx stock by Massaro, Nader, Brantley, and Bevins with the object of increasing the price of that stock.

Vindman contends that the naked short sales that he alleges were threatening Marx's viability were a "short and extort" scheme that was both manipulative and illegal, and that this illegal conduct was the cause of any manipulation that may have occurred. <sup>32/</sup> Although Vindman testified as to his belief that there was significant naked short selling of Marx shares, the record does not support this. <sup>33/</sup> Even if there were such short selling or Vindman had a good faith belief that Marx stock should be priced at 40 cents per share, however, that would not

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<sup>31/</sup> (...continued)

Before Vindman made his initial purchase of Marx stock in the open market on July 23, the record shows that he and various members of his "network" – Massaro, Nader, Brantley, and Bevins – traded in other stocks – Datameg, EnviroEnergy, and Rocky Mountain Energy – at or about the same time. These are stocks that Vindman was allegedly promoting, just as he was allegedly promoting Marx after July 23. Moreover, these were stocks that had risen, Vindman later boasted to Stetson, between 500 and 1000 percent. Thus, the record shows a pattern of coordinated trading by Vindman and his associates.

The law judge found that the record did not support a finding that Vindman was orchestrating Weinfeld's trading. In its petition for review and its brief on appeal, the Division limited its appeal to the law judge's finding that Vindman is unable to pay a penalty of more than \$20,000. Although the Division asserted at oral argument that Weinfeld was a member of the "network," we find that this argument was waived. See Rule of Practice 410(b), 17 C.F.R. § 201.410(b).

<sup>32/</sup> Although "naked short selling" is not a defined term in the federal securities laws, the Commission has taken regulatory action to reduce short selling abuses. See Short Sales, Exchange Act Rel. No. 50103 (Aug. 6, 2004), 83 SEC Docket 1492, 1493 (noting that location and delivery requirements of Regulation SHO "will act as a restriction on so-called 'naked' short selling") (footnote omitted).

<sup>33/</sup> Vindman introduced several copies of postings from an Internet website that purported to support his contentions about short sales of Marx stock. These messages do not establish that short selling of Marx stock, let alone naked short selling, was widespread. Only one of the posters identifies himself as a short seller of Marx stock. The postings do not indicate that any of that seller's sales were naked short sales. Moreover, although that poster advocates short selling, the record does not establish that anyone followed the recommendation.

The Division correctly asserts that the only short sales documented by blue sheet data for cleared trades during the period in question were three transactions executed for two individuals: two sales on August 15 and one on August 20, representing total short sales of 59,000 shares at prices ranging from thirty-one to thirty-six cents, for a net aggregate of \$20,773.85. Vindman points to nothing in the stipulated trading records that would contradict this assertion.

justify Vindman's manipulation. <sup>34/</sup> Manipulation violates the antifraud provisions even when it is employed in an attempt to bring the stock price artificially to a level where the manipulator believes it should rightfully be. <sup>35/</sup> In any event, Vindman's argument that "fighting the shorts" was a justified reaction to naked short sales relates only to the manipulation that occurred during the period following UIT's August 18 announcement of the termination of its licensing agreement with Marx. Vindman's argument does nothing to explain the manipulation by Vindman and his associates, described above, that occurred between late July and mid-August.

Liability under Sections 17(a)(1) and 10(b) and Rule 10b-5 requires scienter, which may be established by a showing of intentional or reckless conduct. <sup>36/</sup> Vindman's own trading and his orchestration of the trading of Massaro, Nader, Brantley, and Bevins manifest an intent to raise the price and volume of Marx stock. His tape-recorded statements confirm his conduct to have been intentional: his stated objective was to move the price per share of Marx stock to 40 cents, an achievement that he would reward with Marx stock. We thus find that Vindman acted with scienter. <sup>37/</sup>

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<sup>34/</sup> Vindman argues that he identified forty cents per share as "an accurate and legitimate value for a healthy stock" by charting Marx stock, and that the figure was therefore not "an arbitrary value set by a manipulator." The way in which Vindman arrived at the forty-cent target figure is irrelevant.

<sup>35/</sup> See, e.g., U.S. v. Hall, 48 F. Supp. 2d 386, 386-87 (S.D.N.Y. 1999); cf. John Gordon Simek, 50 S.E.C. 152, 159 (1989) ("Wrongful conduct by another does not justify a respondent's own [wrongful acts] at the expense of innocent third parties.").

Vindman contends that one of the financial charts presented by the Division was determined to be inaccurate because it combined purchases and sales to arrive at the volume of trades by Vindman and his associates, but used only one side of each trade to calculate the total trading volume. The law judge based no conclusions on this exhibit, nor do we. Vindman does not challenge the accuracy of the trading data on which this and certain other exhibits are based. Brokerage account statements, Bloomberg financial data, and blue sheet data of cleared trades were all admitted by stipulation.

<sup>36/</sup> See, e.g., Robert M. Fuller, Securities Act Rel. No. 8273 (Aug. 25, 2003), 80 SEC Docket 3539, 3546 n.20, pet. denied, No. 03-1334 (D.C. Cir. 2004).

<sup>37/</sup> To the extent that Vindman argues his actions are not willful, he errs. A willful violation of the securities laws means merely the intentional commission of an act that constitutes the violation; there is no requirement that the actor "also be aware that he is violating one of the Rules or Acts." Wonsover v. SEC, 205 F.3d 408, 414 (2000) (quoting Gearhart & Otis, Inc. v. SEC, 348 F.2d 798, 803 (D.C. Cir. 1965)). Vindman's own trading in Marx stock; his coordination of the trading of Massaro, Nader, Brantley, and Bevins; and his

(continued...)

Vindman argues that he cannot be found to have manipulated the market for Marx stock because the record does not show that he exerted domination and control over the market for an extended time, noting that there were millions of shares of Marx stock outstanding. 38/ Manipulative schemes may have many aspects and, although domination and control are often involved, "[a] finding of manipulation does not hinge on the presence or absence of any particular device usually associated with a manipulative scheme." 39/ Indeed, by positing to Stetson that coordinated purchases of three to four million shares of Marx would probably raise the price per share to 40 cents, Vindman effectively conceded that control of that number of shares could be expected to affect the price of the stock. 40/ Similarly, although Vindman argues, citing expert testimony, that the transactions in question were not wash sales, the manipulation charged and found here is not predicated on the existence of such sales, so the absence of proof of such sales does not exonerate Vindman. 41/

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37/ (...continued)

attempts to enlist Stetson and Ingrassia in helping to bid up the price of Marx stock were intentional acts, and his violations of the antifraud provisions charged were therefore willful.

38/ See supra note 12.

39/ Swartwood, Hesse, Inc., 50 S.E.C. 1301, 1307 (1992).

40/ At the hearing, the Division's expert testified that penny stocks are readily susceptible to manipulation because institutions do not buy these stocks and analysts therefore do not follow them. The expert also testified that various types of conduct can artificially affect the price of a stock and that no specific conduct is required. Additionally, the expert testified that the stock of small companies is easier to manipulate than that of large companies, in part because smaller companies typically have less trading and therefore any trading is likely to affect the price.

41/ Vindman additionally argues that the price of Marx stock was affected by the distribution of Marx press releases, not by any alleged manipulation by Vindman. The record does not support Vindman's argument. Vindman introduced into evidence at the hearing only one of the press releases on which he relies (although most if not all of the others had been marked for identification), and there was only very limited testimony about the press releases and any impact they may have had on the price of Marx stock. Thus, the record does not establish that the press releases caused the rise in the price of Marx stock during the period of the manipulation charged. In any event, although Vindman contends that he "did not contribute to the substance of the press releases and cannot be [held responsible for] any misrepresentations that may be contained in the press releases," Vindman's own description of the breadth of the activities he performed while "promoting" Marx suggests that his involvement with the press releases, which may themselves have been manipulative, went beyond the limited role to which he admits.

Finally, Vindman argues that he failed to profit from his alleged manipulation of Marx stock, and that this absence of personal gain demonstrates a lack of manipulative intent. As we have previously found, however, "[w]hile profit is the normal goal of manipulators, their actions are not rendered innocent simply because they fail to achieve the desired result." 42/

For these reasons, we find that Vindman willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act of 1934 and Rule 10b-5 thereunder.

#### IV.

##### A. Civil Penalties and Ability to Pay

Section 21B of the Exchange Act allows the imposition of civil money penalties in certain administrative proceedings where a respondent has willfully violated any provision of the Securities Act, the Exchange Act, or the rules and regulations thereunder, and where such penalties are in the public interest. 43/ For each act or omission involving fraud that "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons," third-tier civil penalties may be warranted.

The law judge imposed a \$20,000 third-tier civil penalty on Vindman, based on her conclusion that he was unable to pay more. The Division has appealed and seeks a civil penalty equal to a multiple of \$120,000, the statutory maximum that may be assessed against an individual for each third-tier violation. 44/

As found above, Vindman's manipulation of the price of Marx stock involved fraud. Through his involvement in raising the price per share of Marx during the period of the manipulation, 45/ Vindman created a significant risk of substantial losses to those who traded in Marx stock. His manipulation adversely affected the integrity of the market and its pricing, causing at least some purchasers to engage in transactions at highly inflated prices. Moreover,

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42/ Michael J. Markowski, 54 S.E.C. 830, 835 (2000) (citation omitted), aff'd, 274 F.3d 525; see also Markowski, 274 F.3d at 529 ("Just because a manipulator loses money doesn't mean he wasn't trying.").

43/ 15 U.S.C. § 78u-2.

44/ See Debt Collection Improvement Act of 1996, Pub. L. 104-134, title III, §31001; 17 C.F.R. § 201.1001. The Division calculated that multiplying \$120,000 by the number of trades Vindman made in Marx would yield a penalty of more than \$13 million, and that multiplying \$120,000 by three (representing the two statutes and one rule Vindman willfully violated) would result in a penalty of \$360,000.

45/ See text accompanying note 22 supra.

Vindman's violations were intentional and involved multiple acts over a period of several months. We therefore conclude that a third-tier penalty is warranted.

The Division sought a civil penalty of at least \$120,000 against Vindman. 46/ Vindman contends that he is unable to pay the amount sought by the Division, or even the lesser amount ordered by the law judge. As the respondent, Vindman had the burden of demonstrating inability to pay. 47/ At the administrative hearing, he introduced a sworn financial statement listing assets of approximately \$118,000, all but approximately \$3,000 of which represented cash and securities, and liabilities of approximately \$117,000. 48/ The liabilities asserted were characterized as \$45,000 in loans from family members for the payment of legal and expert witness fees, \$40,000 in estimated income taxes for 2003 and 2004, and \$32,000 in legal fees.

In March 2006, after the oral argument, both the Division and Vindman sought to introduce new evidence pursuant to Rule of Practice 452. 49/ The Division submitted a consulting agreement showing that on March 30, 2005, Vindman, as President of E Priority Group, Inc. ("E Priority"), entered into a contract to provide consulting services to Royce Biomedical, Inc. ("Royce"), which subsequently assumed the name Smart-Tek Solutions, Inc. ("Smart-Tek"). The agreement provided that, in consideration for services, E Priority was to receive one million restricted shares of the company's stock. 50/ The Division also submitted a brokerage statement showing that 500,000 Smart-Tek shares were received in a brokerage account in the name of E Priority, c/o Vindman, in November 2005, and that Smart-Tek shares from that account were sold between November 22, 2005 and December 6, 2005. Finally, the Division submitted a check (and accompanying check request form) showing that \$225,290.55 from that account was sent to E Priority, c/o Vindman, on January 5, 2006. In response to the

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46/ In the filing before us, the Division asks that we impose on Vindman a total of \$360,000 in civil penalties, a third-tier penalty for each violation of the antifraud provisions at issue here.

47/ Terry T. Steen, 53 S.E.C. 618, 627 (1998).

48/ The statement is dated March 7, 2005, purportedly representing Vindman's financial condition as of February 28, 2005. The financial statement identified interest from securities in the amount of \$10 per month as Vindman's sole source of income.

The instructions for completing the statement of financial condition required Vindman to attach tax returns filed during the years 2002 through 2004. Vindman did not attach any such returns. He represented that he had not yet filed for 2003 and 2004.

49/ 17 C.F.R. § 201.452.

50/ The consulting agreement became publicly available when it was attached as an exhibit to Smart-Tek's Form 10-KSB for the year ended June 30, 2005.

Division's filing, Vindman sought to introduce a notice from the Internal Revenue Service, dated January 30, 2006, showing a liability of \$97,330.11 for the tax period ending December 31, 2003. We grant the motions, and will consider these documents. 51/

In April 2006, Vindman filed an additional Rule 452 motion, seeking to introduce what purports to be a cancelled check, dated February 2, 2006, payable to "State of NJ – TGI," in the amount of \$12,286.00, for "2003 State taxes." We deny Vindman's motion to introduce the cancelled check. He does not provide any grounds for the failure to adduce this document with his initial Rule 452 motion. 52/

Vindman admits that he received more than \$225,000 in proceeds from sales of stock. He argues, however, that his financial predicament "is materially the same" as it was before he received those funds. 53/ He asserts that, although E Priority generated net profits of \$340,000 for the year 2005, the net proceeds to Vindman (after asserted tax liabilities) are \$140,000. He further asserts that, from these net profits, he has paid \$78,000 in taxes that were delinquent for the year 2003 and remains obligated for \$32,000 in interest and penalties. 54/ Deducting \$110,000 for taxes paid and owing, Vindman asserts that he is left with approximately \$30,000, and that the monies he owes his family members and in legal fees and other debts exceeds this amount.

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- 51/ Rule of Practice 452 allows the introduction of new evidence at any time prior to the Commission's issuance of a decision, where that evidence "is material and . . . there were reasonable grounds for failure to adduce such evidence previously." The documents submitted are material because they relate to Vindman's ability to pay a civil penalty. There were reasonable grounds for the failure to adduce the documents previously because they did not exist (or, in the case of the consulting agreement, did not become publicly available) until after the conclusion of the proceeding before the law judge. We find that the documents submitted in March 2006 by both the Division and Vindman satisfy the requirements of Rule 452.
- 52/ Even if we were to admit the check pursuant to Rule 452, however, it would not alter our conclusion as to Vindman's ability to pay a \$120,000 civil penalty. We further note that Vindman did not submit with his motion an affidavit or sworn statement pertaining to the check. Proposed evidence submitted under Rule 452 should be accompanied by such an affidavit or statement, not merely by representations of counsel.
- 53/ We note that in the account opening documents for the brokerage account into which the Smart-Tek shares were received, Vindman represented that his approximate net worth, exclusive of residence, as of November 3, 2005 was between \$50,000 and \$100,000, and that his approximate annual income was between \$65,000 and \$125,000.
- 54/ Vindman asserts that he is seeking to abate the penalties.

As an initial matter, Vindman failed to comply with Rule of Practice 410(c), which requires any person seeking review of an initial decision who asserts inability to pay to file with the opening brief a sworn financial statement. 55/ When asked at oral argument why Vindman had not submitted an updated sworn financial disclosure statement, counsel for Vindman replied that he "was unaware there was an issue until it was raised now." To date, he has failed to submit an updated statement. 56/

Vindman further failed to substantiate the liabilities he asserted before the law judge. He provided no other documentation substantiating his estimate of income taxes owed, nor any substantiation of legal fees due, or of his living expenses, nor any evidence showing that the checks written by relatives for legal or expert witness fees represented loans that he is expected to repay, even though the Division's brief on appeal noted the lack of substantiation of Vindman's claims. With his March 2006 Rule 452 motion, he submitted documentation only of his 2003 federal income tax liability.

Moreover, Vindman fails to substantiate his claims that he will be left with only \$30,000 from the \$225,000 he admittedly received in January 2006. 57/ He did not introduce evidence supporting his contention that \$200,000 of E Priority's 2005 net profits would be assessed as tax (nor that those taxes have been paid). He did not introduce evidence that he paid \$78,000 in delinquent taxes for 2003. 58/ Additionally, because he states that he is seeking to abate penalties owed, such penalties should not be regarded as a liability that will reduce the amount of civil penalty he can pay.

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55/ 17 C.F.R. § 201.410(c). See Terry T. Steen, 53 S.E.C. at 627-28 (applying and construing Rule 410(c)).

56/ With his March 2006 Rule 452 motion, Vindman submitted a two-sentence document in which he purports to "certify . . . that the foregoing statements and figures, although approximate, made by me are true." This document is undated, and there is no explanation as to which "statements and figures" he is referring. (The Rule 452 motion contains no reference to the attached "certification.") The "certification" is neither a statement made under penalty of perjury nor an affidavit. It does not satisfy the Rule 410(c) requirement of a sworn financial statement.

57/ Vindman's undated "certification," which is neither a sworn statement under penalty of perjury nor an affidavit, is not sufficient to substantiate these claims.

58/ As noted above, the cancelled check that Vindman sought to introduce in April 2006, which purported to represent payment for 2003 state taxes, was in the amount of \$12,286.00. Vindman did not attempt to introduce such evidence of federal tax payments for 2003.

We conclude that Vindman has not shown that he is unable to pay a third-tier penalty of \$120,000. Although Section 21B would allow a higher penalty because Vindman committed multiple violations, we find that a penalty in the amount of \$120,000 is warranted.

Vindman contends that the law judge's imposition of the statutory civil penalty was in violation of his Seventh Amendment right to a jury trial. He asserts that the Commission ". . . may impose monetary penalties in administrative proceedings only when the violator is an entity directly regulated by the [Commission] . . . ." Vindman points out that he has never been a registered broker-dealer nor held a securities license of any kind. As a result, he argues that he is not subject to direct regulation by the Commission and, therefore, that the law judge's imposition of a civil penalty on him was unconstitutional.

We reject Vindman's argument. <sup>59/</sup> Vindman does not appear to dispute the Commission's authority to assess civil penalties constitutionally when it is statutorily authorized to do so. <sup>60/</sup> Under the Exchange Act, the Commission has the authority to impose a civil penalty on Vindman in this proceeding. Section 15(b)(6)(A) of the Exchange Act authorizes the Commission to impose sanctions on any person who, at the time of the alleged misconduct, was participating in an offering of a penny stock. <sup>61/</sup> A person participating in an offering of a penny stock is defined in Exchange Act Section 15(b)(6)(C) as "any person acting as any promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer, or issuer for purpose of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock . . . ." <sup>62/</sup>

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<sup>59/</sup> Vindman offers no decisional authority to support his argument. He cites only Exchange Act Section 21B, 15 U.S.C. § 78u-2, which we discuss below, and inapplicable provisions of the Investment Company Act of 1940 and the Investment Advisers Act of 1940.

<sup>60/</sup> See Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 450 (1977), ("[I]n cases . . . in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact . . . the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.").

<sup>61/</sup> 15 U.S.C. § 78o(b)(6)(A).

<sup>62/</sup> Id. § 78o(b)(6)(C).

This definition is not limited to registered or licensed individuals. Vindman's conduct here makes him a person participating in an offering of a penny stock. 63/ In his brief on appeal, Vindman refers to his activities for Marx as those of a "stock promoter" and acknowledges that he "was promoting the Marx Toys stock." After a proceeding finding violations under Exchange Act Section 15(b), as we have done here, Exchange Act Section 21B expressly permits the Commission to impose civil penalties on such a person. 64/

#### B. Penny Stock Bar

Section 15(b)(6)(A) of the Exchange Act authorizes the Commission to bar a person from participating in an offering of penny stock if the person willfully violated federal securities laws while participating in the offering of any penny stock, and the bar is in the public interest. 65/ In determining whether a sanction is in the public interest, we consider the factors articulated in Steadman v. SEC. 66/ These factors include the isolated or recurrent nature of the infraction at issue, the degree of scienter involved, the sincerity of any assurances against future violations, and the likelihood that a respondent's occupation will present opportunities for future violations. 67/

Vindman's manipulation of the price of Marx stock was deliberate and involved the orchestration (and attempted orchestration) of the trading of others as well as Vindman's own trading. The manipulation lasted for weeks. The patterns of trading in Marx by Vindman, Massaro, Nader, Brantley, and Bevins and the taped conversations between Vindman, Stetson, and Ingrassia, with their references to a target price of 40 cents per share, fighting to stabilize the stock price, and Vindman's acting as "quarterback" because otherwise the guys on the "team" "don't know . . . what they are doing together," establish that Vindman's conduct was intentional. The argument that manipulation may be an acceptable technique to counter the effects of alleged short selling suggests that Vindman will not avoid future violations if he believes that

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63/ See Exchange Act Section 3(a)(51)(A), 15 U.S.C. § 78c(a)(51)(A) (defining penny stock); Exchange Act Rule 3a51-1, 17 C.F.R. § 240.3a51-1(d) (defining penny stock to exclude, among other things, stocks priced at or above five dollars per share and stocks of issuers that have substantial net tangible assets). Between July 23 and September 4, 2003, the intra-day price of Marx stock did not exceed 39 cents per share.

64/ 15 U.S.C. § 78u-2. See Robert G. Weeks, Exchange Act Rel. No. 48684 (Oct. 23, 2003), 81 SEC Docket 1319 (imposing \$200,000 civil money penalty pursuant to Exchange Act Section 21B on consultant who participated in penny stock offering).

65/ 15 U.S.C. § 78o(b)(6)(A).

66/ 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

67/ Steadman, 603 F.2d at 1140.

circumstances justify his taking matters into his own hands. Vindman appears to have engaged in similar conduct in the past. Vindman represented to Stetson that the prices of other stocks that he and his "network" had "done" had increased "an average, 500 to 1,000 percent," and trading records show that many of the individuals whose trading in Marx stock is at issue here were previously trading simultaneously in other stocks that Vindman was promoting. Moreover, Vindman's trading and experience as a promoter will give him opportunities for future violations. As noted above with respect to E Priority, Vindman appears to continue his activities as a promoter. Thus, based on our consideration of the Steadman factors, we conclude that sanctions are in the public interest.

We find that Vindman committed repeated significant violations of antifraud provisions of the federal securities laws, as discussed above, while participating in the offering of Marx stock, a penny stock. We further find that Vindman acted willfully, and that a penny stock bar is in the public interest.

#### C. Cease-and-Desist Order

Securities Act Section 8A(a) and Exchange Act Section 21C authorize 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 either of these acts or any rule or regulation thereunder, or against any person who "is, was, or would be a cause of [a] violation, due to an act or omission the person knew or should have known would contribute to such violation." <sup>68/</sup> In determining whether a cease-and-desist order is an appropriate sanction, we look to whether there is some risk of future violations. <sup>69/</sup> The risk of future violations required to support a cease-and-desist order is significantly less than that required for an injunction. <sup>70/</sup> A single violation can be sufficient to indicate some risk of future violation. <sup>71/</sup> We also consider whether other factors demonstrate a risk of future violations. Beyond the seriousness of the violation, these may include the isolated or recurrent nature of the violation, whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, the respondent's state of mind, the sincerity of assurances against future violations, the opportunity to commit future violations, and the remedial function to be served by the cease-and-desist order in the context of any other

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<sup>68/</sup> 15 U.S.C. §§ 77h-1(a), 78u-3.

<sup>69/</sup> KPMG Peat Marwick, 54 S.E.C. 1135, 1185 (2001), reconsideration denied, 74 SEC Docket 1351 (Mar. 8, 2001), pet. denied, 289 F.3d 109 (D.C. Cir. 2002).

<sup>70/</sup> KPMG Peat Marwick, 54 S.E.C. at 1191.

<sup>71/</sup> See Geiger v. SEC, 363 F.3d 481, 489 (D.C. Cir. 2004).

sanctions sought in the proceeding. 72/ Not all of these factors need to be considered, and none of them, by itself, is dispositive.

Vindman engaged in repeated significant violations of the securities laws. The violations were recent, and they involved multiple acts over a period of several months. Although it is difficult to quantify the harm caused by Vindman's manipulation, his interference with the pricing process adversely affected the integrity of the free market system. 73/ The magnitude of the manipulation at issue here is sufficient to indicate some risk of future violation. Moreover, Vindman's contention that "battling the shorts" by attempting to manipulate the stock price, as he did here, was a justified response to alleged naked short selling suggests a readiness to resort to violative conduct again in the future if he perceives such conduct to further his interests. His boasts to Stetson about his "big network" and his successful involvement in increasing the prices of other stocks 500 to 1000 percent also suggest a likelihood of repeated misconduct. 74/ Although we have ordered a penny stock bar and the payment of a civil penalty, the issuance of a cease-and-desist order should serve the remedial purpose of encouraging Vindman to take his responsibilities more seriously in the future, should his involvement with the securities industry continue. 75/

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72/ KPMG Peat Marwick, 54 S.E.C. at 1192.

73/ See L.C. Wegard & Co., 53 S.E.C. at 617 (manipulation "strikes at the heart of the pricing process on which all investors rely [and] attacks the very foundation and integrity of the free market system").

74/ The law judge did not accept Vindman's argument that his representations to Stetson about his past experiences in raising and stabilizing stock prices were mere puffery designed to impress Stetson. We agree that this determination is amply supported by the record.

75/ See McCurdy v. SEC, 396 F.3d 1258, 1265 (D.C. Cir. 2005) (recognizing that order suspending auditor from practice before the Commission for one year had remedial purpose of encouraging more rigorous compliance with generally accepted auditing standards in future).

We find that the record as a whole, especially the evidence with regard to the seriousness, recentness, and repeated nature of the violations, the harm to the marketplace resulting from the violations, and Vindman's state of mind, establishes a sufficient risk that Vindman would commit future violations to warrant imposition of a cease-and-desist order. Based on all of these factors, we find a cease-and-desist order to be in the public interest.

An appropriate order will issue. 76/

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

  
Nancy M. Morris  
Secretary

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76/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933  
Rel. No. 8679 / April 14, 2006

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 53654 / April 14, 2006

Admin. Proc. File No. 3-11247

In the Matter of  
VLADLEN "LARRY" VINDMAN

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Vladlen "Larry" Vindman cease and desist from committing or causing any violations or future violations of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder; and it is further

ORDERED that Vladlen "Larry" Vindman be, and he hereby is, barred from participating in any offering of penny stock, including acting as a promoter, finder, consultant, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance of or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock; and it is further

ORDERED that Vindman pay a civil money penalty of \$120,000.

Payment of the civil money penalty shall be: (i) made by United States postal money order, certified check, bank cashier's 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, Operations Center, 6432 General Green Way, Alexandria, VA 22312; 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 Howard S. Kim, Division of Enforcement, Securities and Exchange Commission, Northeast Regional Office, 3 World Financial Center, Room 4300, New York, NY 10281-1022.

By the Commission.



Nancy M. Morris  
Secretary

*Commissioner Campos  
Not Participating*

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 53661 / April 17, 2006

ACCOUNTING AND AUDITING ENFORCEMENT  
Release No. 2415 / April 17, 2006

ADMINISTRATIVE PROCEEDING  
File No. 3-12263

In the Matter of

DAVID T. LEBOE, CPA,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE  
PROCEEDINGS PURSUANT TO RULE  
102(e) OF THE COMMISSION'S RULES OF  
PRACTICE, MAKING FINDINGS, AND  
IMPOSING REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against David T. Leboe ("Respondent" or "Leboe") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.<sup>1</sup>

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the

<sup>1</sup> Rule 102(e)(3)(i) provides, in relevant part, that:

The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any . . . accountant . . . who has been by name . . . permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

### III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. David T. Leboe, age 38, is and has been a certified public accountant licensed to practice in the State of Texas. He served as an accountant in Enron North America (ENA), a business unit of Enron Corp. (Enron), from 1997 until 2001.

2. Enron was, at all relevant times, an Oregon corporation with its principal place of business in Houston, Texas. Until its bankruptcy filing in December 2001, Enron was the seventh largest corporation in the United States based on reported revenue. In the previous ten years, Enron had evolved from a regional natural gas provider to a commodity trader of natural gas, electricity, and other physical commodities with retail operations in energy and other products. The Company also created and traded financial products. ENA was Enron's largest and most profitable business unit and included Enron's wholesale merchant business related to natural gas and power across North America, including trading, marketing and new asset development activities in that region. At all relevant times, the common stock of Enron was registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act") and traded on the New York Stock Exchange.

3. On March 27, 2006, the Commission filed a complaint against Leboe in Securities and Exchange Commission v. David T. Leboe and Dale G. Rasmussen, Civil Action No. H-06-1020 (S.D. Tex.). On March 28, 2006, the court entered a final judgment permanently enjoining Leboe, by consent, from future violations of Sections 10(b) and 13(b)(5) of the Exchange Act and Rules 10b-5 and 13b2-1 thereunder, and aiding and abetting violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13 thereunder. Leboe was also ordered to pay \$1 in disgorgement and a \$30,000 civil money penalty.

4. The Commission's complaint alleged, among other things, that Leboe engaged in a fraudulent scheme which resulted in Enron filing materially false and misleading financial statements in the company's annual report on Form 10-K for the fiscal year ended December 31, 2000, and in the company's quarterly report on Form 10-Q for the third quarter of fiscal year 2000. The Complaint alleged that Leboe engaged in a number of improper accounting practices that materially increased Enron's annual and quarterly revenue and net income in a departure from generally accepted accounting principles. These practices included, among other things, improperly accelerating the recognition of revenue from the sale of a construction contract, and concealing undocumented side agreements from Enron's independent

auditors. In addition, the complaint alleged that Leboe actively sought to keep others from disclosing information to Enron's independent auditors about these side agreements.

#### IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction agreed to in Respondent Leboe's Offer.

Accordingly, it is hereby ORDERED, effective immediately, that:

A. Leboe is suspended from appearing or practicing before the Commission as an accountant.

B. After five years from the date of this order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Respondent, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Respondent, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify any criticisms of or potential defects in the respondent's or the firm's quality control system that would indicate that the respondent will not receive appropriate supervision;

(c) Respondent has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and

(d) Respondent acknowledges his responsibility, as long as Respondent appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

C. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependant on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Respondent's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Nancy M. Morris  
Secretary

  
By: **Jill M. Peterson**  
**Assistant Secretary**

*Commissioner Campos  
Not Participating*

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 53662 / April 17, 2006

ACCOUNTING AND AUDITING ENFORCEMENT  
Release No. 2416 / April 17, 2006

ADMINISTRATIVE PROCEEDING  
File No. 3-12264

_____	:	
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	:	
<b>In the Matter of</b>	:	<b>ORDER INSTITUTING ADMINISTRATIVE</b>
	:	<b>PROCEEDINGS PURSUANT TO RULE</b>
<b>DALE G. RASMUSSEN, ESQ.,</b>	:	<b>102(e) OF THE COMMISSION'S RULES OF</b>
	:	<b>PRACTICE, MAKING FINDINGS, AND</b>
<b>Respondent.</b>	:	<b>IMPOSING REMEDIAL SANCTIONS</b>
	:	
	:	
_____	:	

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against Dale G. Rasmussen ("Respondent" or "Rasmussen") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.<sup>1</sup>

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the

<sup>1</sup> Rule 102(e)(3)(i) provides, in relevant part, that:

The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any . . . attorney . . . who has been by name . . . permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

### III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Dale G. Rasmussen, age 46, is and has been an attorney licensed to practice in the State of Oregon. He served as a Senior Counsel in Enron North America's (ENA) West Power Origination Legal Group, a business unit of Enron Corp. (Enron), from October 1997 until February 2002.

2. Enron was, at all relevant times, an Oregon corporation with its principal place of business in Houston, Texas. Until its bankruptcy filing in December 2001, Enron was the seventh largest corporation in the United States based on reported revenue. In the previous ten years, Enron had evolved from a regional natural gas provider to a commodity trader of natural gas, electricity, and other physical commodities with retail operations in energy and other products. The Company also created and traded financial products. ENA was Enron's largest and most profitable business unit and included Enron's wholesale merchant business related to natural gas and power across North America, including trading, marketing and new asset development activities in that region. At all relevant times, the common stock of Enron was registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act") and traded on the New York Stock Exchange.

3. On March 27, 2006, the Commission filed a complaint against Rasmussen in Securities and Exchange Commission v. David T. Leboe and Dale G. Rasmussen, Civil Action No. H-06-1020 (S.D. Tex.). On March 28, 2006, the court entered a final judgment permanently enjoining Rasmussen, by consent, from future violations of Sections 10(b) and 13(b)(5) of the Exchange Act and Rules 10b-5 and 13b2-1 thereunder, and aiding and abetting violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13 thereunder. Rasmussen was also ordered to pay \$1 in disgorgement and a \$30,000 civil money penalty.

4. The Commission's complaint alleged, among other things, that Rasmussen engaged in a fraudulent scheme to improperly accelerate the recognition of revenue from the sale of a construction contract which resulted in Enron filing materially false and misleading financial statements in the company's annual report on Form 10-K for the fiscal year ended December 31, 2000, and in the company's quarterly report on Form 10-Q for the third quarter of fiscal year 2000. The Complaint alleged that Rasmussen, the primary Enron in-house attorney working on the sale, negotiated various terms of the transaction and drafted several of the key documents.

While doing this, he worked closely with Enron's accountants to ensure that the wording in the legal documents did not jeopardize ENA's efforts to circumvent Generally Accepted Accounting Principles. In addition, the complaint alleged that Rasmussen knew that undocumented side agreements relating to the sale were being concealed from Enron's independent auditors and that he actively sought to keep others from disclosing information to the auditors about these side agreements.

#### IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction agreed to in Respondent Rasmussen's Offer.

Accordingly, IT IS HEREBY ORDERED, effective immediately, that Rasmussen is suspended from appearing or practicing before the Commission as an attorney for three years. Furthermore, before appearing and resuming practice before the Commission, Rasmussen must submit an affidavit to the Commission's Office of the General Counsel truthfully stating, under penalty of perjury, that he has complied with this Order, that he is not subject to any suspension or disbarment as an attorney by a court of the United States or of any state, territory, district, commonwealth, or possession, and that he has not been convicted of a felony or misdemeanor involving moral turpitude as set forth in Rule 102(e)(2) of the Commission's Rules of Practice.

By the Commission.

Nancy M. Morris  
Secretary

*Jill M. Peterson*  
By: **Jill M. Peterson**  
**Assistant Secretary**

Commissioners Glassman &  
Atkins Disapproved

## SECURITIES AND EXCHANGE COMMISSION

Securities Exchange Act of 1934  
Release No. 34-53667/April 18, 2006

### ORDER EXEMPTING COMPUTERSHARE TRUST COMPANY OF CANADA AND COMPUTERSHARE INVESTOR SERVICES INC. FROM BROKER REGISTRATION

#### I. Introduction

Pursuant to Section 15(a)(2) of the Securities Exchange Act of 1934 ("Exchange Act"), the Securities and Exchange Commission ("Commission") is granting Computershare Trust Company of Canada ("CTCC") and its affiliate Computershare Investor Services Inc. ("CISI," and together with CTCC, "Computershare") a conditional exemption from the broker registration requirement of Section 15(a)(1) of the Exchange Act to the extent Computershare acts, subsequent to the entry of this order, as a "broker" as defined in Section 3(a)(4) of the Exchange Act in connection with its administration of dividend reinvestment and stock purchase plans (collectively, "DRSPPs"), employee stock purchase plans and employee stock option plans (collectively, "Employee Plans"), and odd-lot programs with U.S. resident investors (DRSPPs, Employee Plans, and odd-lot programs collectively referred to as "Stock Plans").

Pursuant to Section 36 of the Exchange Act, the Commission also is granting Computershare a conditional exemption from the reporting and other requirements specifically imposed by the Exchange Act, and the rules and regulations thereunder, on a broker that is not registered with the Commission (e.g., Exchange Act Section 15(c)(3) and the financial responsibility rules adopted under that section) to the extent Computershare acts, subsequent to the entry of this order, as a broker in connection with its administration of Stock Plans with U.S. resident investors. For purposes of this order, a U.S. resident investor is any participant in a Stock Plan who permanently resides in the United States. Computershare shall treat all Stock Plan participants with U.S. mailing addresses as U.S. resident investors unless Computershare has been informed that a participant with a U.S. address is not a permanent U.S. resident.

#### II. Background

Computershare has agreed to consent to the entry of an order, without admitting or denying the findings, in which the Commission finds that it violated Sections 15(a)(1) and 17A(c)(1) of the Exchange Act ("Commission Order"). With respect to Section 15(a)(1), the Commission finds that, since June 2000 to the present, Computershare has acted as a broker in connection with its administration of Stock Plans by engaging in the business of effecting securities transactions in these Stock Plans with U.S. resident investors. With respect to Section 17A(c)(1), the Commission finds that, from June 2000 through April 14, 2004, Computershare acted as a transfer agent, as defined by Section 3(a)(25) of the Exchange Act, for approximately 260 companies that have securities

Document 20 of 43

registered under Section 12 of the Exchange Act. At the time of this activity, Computershare was not registered as a broker or as a transfer agent as required by Sections 15(a)(1) and 17A(c)(1) of the Exchange Act, respectively. Effective April 14, 2004, Computershare registered with the Commission as a transfer agent. Computershare has not registered with the Commission as a broker. Pursuant to the Commission Order, Computershare will be censured and ordered, among other things, to cease-and-desist from future violations of Sections 15(a) and 17A of the Exchange Act.

### III. Discussion

Section 15(a)(1) of the Exchange Act generally requires any broker that makes use of the mails or any instrumentality of interstate commerce to effect transactions in, or to induce the purchase or sale of, any security to register with the Commission. Section 3(a)(4) of the Exchange Act generally defines a broker as any person engaged in the business of effecting transactions in securities for the account of others. The Commission finds that, over the time period at issue, Computershare violated Section 15(a)(1) by, in connection with its administration of Stock Plans, engaging in the business of effecting securities transactions for U.S. resident investors without being a registered broker.<sup>1</sup> Absent an exception or exemption, Computershare would be required to register as a broker with the Commission to continue this activity, and would be in violation of the Commission Order pertaining to Section 15(a) of the Exchange Act by engaging in these activities without being registered as a broker pursuant to Section 15(b) of the Exchange Act.

Section 15(a)(2) of the Exchange Act authorizes the Commission to exempt, either conditionally or unconditionally, from the broker registration requirements of Section 15(a)(1) of the Exchange Act any broker or class of broker, by rule or order, as it considers consistent with the public interest and the protection of investors. Similarly, but more broadly, Section 36 of the Exchange Act authorizes the Commission to exempt, either conditionally or unconditionally, any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

Banks registered as transfer agents are conditionally excepted from broker registration under Section 3(a)(4)(B)(iv) of the Exchange Act for their activities in administering Stock Plans. Computershare, however, is not a bank as defined in Section 3(a)(6) of the Exchange Act. Absent an exemption, Computershare would be required to register with the Commission as a broker to continue to administer Stock Plans with U.S. resident investors.

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<sup>1</sup> As the Commission recognized in addressing the Direct Registration System, some activities in connection with dividend reinvestment and stock purchase plans may require broker-dealer registration under Section 15(a) of the Exchange Act. See Exchange Act Release No. 35038 (Dec. 1, 1994), 59 FR 63652 (Dec. 8, 1994).

The Commission has determined to grant Computershare a limited conditional exemption from broker registration. The Commission finds that a limited exemption from broker registration, subject to the conditions set forth below, is consistent with the public interest and the protection of investors. Computershare's Stock Plan administration activities require Computershare to engage in limited broker activities, as well as transfer agent activities. Computershare represents that in each case it is retained directly by the issuer or its affiliate to provide Stock Plan services to that issuer's employees or shareholders. Computershare will administer DRSPPs and odd-lot programs with U.S. resident investors only for issuers for which it acts as transfer agent. Neither this order nor the conditions set forth herein apply to Stock Plans with no U.S. resident investors.

The Commission believes that granting a limited conditional exemption is warranted because (1) Computershare is engaged in the business of providing transfer agent services for issuers registered under Section 12(g) of the Exchange Act; (2) Computershare is registered with the Commission as a transfer agent; (3) Computershare's broker services will be provided only directly on behalf of the issuer or its affiliate in the securities of the issuer, as part of that issuer's Stock Plan;<sup>2</sup>(4) Computershare's broker activities performed in connection with administering Stock Plans with U.S. resident investors will be limited (e.g., Computershare will be prohibited from engaging in certain activities that it engaged in prior to the issuance of this order, such as netting customer orders to buy and sell issuer plan securities), and its contact with U.S. investors will be limited, which will limit the risk that U.S. investors will be subject to abusive sales practices; and (5) the conditions of the exemption impose appropriate protections designed to safeguard investors' funds and securities. Moreover, the exemption will allow investors that have established relationships with issuers through Stock Plans administered by Computershare to continue those relationships without interruption. Under these circumstances, the Commission believes that it is not necessary to require Computershare to register both as a transfer agent and a broker.

The Commission therefore finds that it is consistent with the public interest and the protection of investors to exempt, subject to the conditions set forth below, Computershare from the broker registration requirement of Section 15(a)(1) of the Exchange Act to the extent that Computershare acts as a broker in connection with administering Stock Plans with U.S. resident investors for issuers.<sup>3</sup> Moreover, in light of the conditional broker exemption and the conditions on that exemption discussed below, including Computershare's continued registration as a transfer agent, the Commission also finds that it is necessary or appropriate in the public interest, and is consistent with the protection of investors, to exempt Computershare, under Section 36 of the Exchange Act, from the reporting and other requirements specifically imposed by the Exchange

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<sup>2</sup> Computershare represents that in each case it will be in direct privity of contract with the issuer or its affiliate.

<sup>3</sup> The Commission notes, however, that this order only addresses broker registration issues with regard to Computershare as a Stock Plan administrator, and that nothing in this order affects prior positions with respect to plans or programs. *See, e.g.*, Exchange Act Release No. 38067 (Dec. 20, 1996), 62 FR 520, 532 at n. 98 (Jan. 3, 1997) (adopting Regulation M governing the activities of underwriters, issuers, selling security holders and others in connection with offerings of securities).

Act, and the rules and regulations thereunder, on a broker that is not registered with the Commission to the extent Computershare acts, subsequent to the entry of this order, as a broker under Section 3(a)(4) of the Exchange Act in connection with its administration of Stock Plans with U.S. resident investors.

IT IS THEREFORE ORDERED, pursuant to Section 15(a)(2) of the Exchange Act, that a conditional exemption for Computershare from the registration requirements of Section 15(a)(1) of the Exchange Act to the extent Computershare is acting as a broker under Section 3(a)(4) of the Exchange Act be, and hereby is, granted. This exemption is limited to administering Stock Plans with U.S. resident investors and subject to the conditions listed below.

IT IS FURTHER ORDERED, pursuant to Section 36 of the Exchange Act, that Computershare shall be exempt, in connection with engaging in Stock Plan administration activities consistent with the conditions set forth below, from the reporting and other requirements specifically imposed by the Exchange Act, and the rules and regulations thereunder, on a broker that is not registered with the Commission to the extent Computershare is acting as a broker under Section 3(a)(4) of the Exchange Act. Computershare remains subject to all other applicable provisions of the federal securities laws, including, without limitation, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

IT IS FURTHER ORDERED, that the exemptions granted herein to Computershare pursuant to Section 15(a)(2) and Section 36 of the Exchange Act shall become effective upon the date the Commission enters the Commission Order, pursuant to which Computershare will, among other things, be ordered to cease-and-desist from future violations of Sections 15(a) and 17A of the Exchange Act.

This order is granted subject to the following conditions:

1. Computershare will maintain its registration as a transfer agent under Section 17A of the Exchange Act as long as it continues to administer Stock Plans with U.S. resident investors.
2. In connection with administering Stock Plans with U.S. resident investors, Computershare will not solicit transactions or provide investment advice to U.S. resident investors with respect to the purchase or sale of securities in connection with the Stock Plan, other than by delivering written or electronic Stock Plan materials to U.S. resident employees of the issuer, U.S. resident shareholders of the issuer, or U.S. resident members of affinity groups of the issuer so long as such materials are comparable in scope or nature to those permitted by the Commission as of the date of enactment of the Gramm-Leach-Bliley Act.<sup>4</sup>

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<sup>4</sup> See Section 3(a)(4)(B)(iv) of the Exchange Act.

In addition, each U.S. resident investor in Stock Plans administered by Computershare will be advised in writing, or electronically, that Computershare is not a registered U.S. broker and that securities held in program accounts are not subject to protection under the Securities Investor Protection Act of 1970. In connection with DRSPPs, each U.S. resident investor also will receive a DRSP plan brochure, prepared by the issuer or its affiliate. Computershare will review the DRSP plan brochures to confirm that they include a description of the DRSP's features, contractual terms, and fee and processing arrangements, but do not contain advice or recommendations concerning the purchase or sale of the issuer's securities. The brochures may discuss the benefits of investing through the DRSP plan itself. Computershare will not provide U.S. resident investors with any written materials encouraging individuals to engage in any particular transactions, whether purchases or sales, and Computershare will not offer advice or recommendations regarding the advisability of any investment in an issuer's securities in any materials accompanying the issuer's DRSP plan brochure (or otherwise during the administration of Stock Plans). Computershare will not prepare or assist in the preparation of Employee Plan materials, and Computershare will not distribute Employee Plan materials to employees. Computershare will not prepare materials relating to odd-lot programs, but it may distribute such materials to employees. With respect to odd-lot program plan materials that Computershare distributes, Computershare will review the company's materials to confirm that they include a description of the program, but do not contain advice or recommendations concerning the purchase or sale of the issuer's securities, other than the benefits of participating in the odd lot program itself. Computershare will not make any recommendations with respect to participation in the odd lot program.

With respect to the Stock Plans for which it acts as administrator, Computershare may provide electronic (e.g., through its website) or telephonic access for its customers to obtain or change account information, sell shares, and obtain enrollment information. Computershare will not recommend any Stock Plans, and any information concerning the individual Stock Plans will be presented in a plain and factual format, in both tone and approach. Computershare will not discuss the advisability of investing in any particular security, or participating in a Stock Plan rather than using the services of a registered broker-dealer. Computershare will not identify to a U.S. resident investor a particular security except as requested by the investor, which request can be made, for example, on Computershare's website through a menu of all plans listed in alphabetical or another neutral order, and then only as necessary to be responsive to the specific inquiry. Any Computershare website (or other means of electronic or telephonic access) will not provide quotations, but may, for example, provide a link to another person's website that provides such information, and may provide market-related information in connection with a specific issuer as requested by the

investor, which request can be made, for example, through a menu of all plans listed in alphabetical or another neutral order.

3. In connection with administering Stock Plans with U.S. resident investors, Computershare will not net customers' buy and sell orders. To the extent that Computershare's administration of Stock Plans with U.S. resident investors results in a trade in the United States, then Computershare will direct such trade to a U.S.-registered broker or dealer for execution.
4. In connection with administering Stock Plans with U.S. resident investors, Computershare will maintain with a bank (or banks) at all times a bank account (or accounts) for the purpose of safeguarding the assets of U.S. resident investors against creditors of Computershare in the event of any bankruptcy. The accounts shall be separate from any other Computershare bank account, and funds in the accounts will not be commingled with those of Computershare. Solely for purposes of this condition, a bank shall have the same meaning as in Exchange Act Rule 15c3-3(a)(7).<sup>5</sup> All customers' funds in Computershare's custody and possession that are related to Stock Plans with U.S. resident investors will be maintained in such account (or accounts) until paid to the customer or the issuer, or used to settle a transaction with or through a broker or dealer.
5. In connection with administering Stock Plans with U.S. resident investors that make periodic purchases, if the specified time intervals for such periodic purchases are quarterly or more frequent, Computershare will send each U.S. resident investor, at least quarterly, a written or electronic account statement containing at a minimum the information in items (a) through (h), below.<sup>6</sup> In connection with administering all other Stock Plans with U.S. resident investors, Computershare will send each U.S. resident investor, not later than four trading days after the date of the last transaction effected in the aggregated batch, a written or electronic transaction notification containing, at a minimum, the following information:
  - (a) The name of Computershare;
  - (b) The name of the customer;
  - (c) The capacity in which Computershare is acting;

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<sup>5</sup> 17 CFR 240.15c3-3(a)(7). Under this rule, with respect to a broker or dealer that maintains its principal place of business in the Dominion of Canada, the term "bank" also means a Canadian bank subject to supervision by an authority of the Dominion of Canada.

<sup>6</sup> Account statements or transaction notifications provided electronically should be done in a manner consistent with the Commission's policies for delivery of account statements through electronic media. See, e.g., Exchange Act Release Nos. 42728 (April 28, 2000) (SEC Interpretation: Use of Electronic Media) and 37182 (May 9, 1996) (Use of Electronic Media by Broker-Dealers, Transfer Agents and Investment Advisers for Delivery of Information).

- (d) The date of each transaction for the account of the customer;
  - (e) The identity, price, and number of shares or units purchased or sold for the customer in each such transaction; and, in a periodic statement, the total number of shares or units of such securities held by the customer at the end of the account period;
  - (f) The aggregate amount of fees that the customer has paid or will pay in connection with the transaction;
  - (g) The source and amount of remuneration Computershare has or will receive from a party other than the customer, unless the written statement or notification discloses whether Computershare has received or will receive remuneration from a party other than the customer, and that Computershare will furnish within a reasonable time the source and amount of this remuneration upon written request of the U.S. resident customer. This election is not available, however, if, with respect to a purchase, Computershare was participating in a distribution of that security or, with respect to a sale, Computershare was participating in a tender offer for that security (Computershare would not be required to disclose any payments it receives from issuers for acting in a transfer agent capacity); and
  - (h) The name of the registered broker-dealer utilized; or where there is no registered broker-dealer, the name of the person from whom the security was purchased or to whom the security was sold, or a statement that Computershare will furnish this information within a reasonable time upon written request of the U.S. resident customer.
6. In connection with administering Stock Plans with U.S. resident investors, personnel at any call center operated by or on behalf of Computershare will be limited to responding to inquiries received from a U.S. resident customer about a Stock Plan, but may not: (a) identify to a U.S. resident investor a particular security except as requested by the investor and then only as necessary to be responsive to the specific inquiry; (b) respond to inquiries from U.S. resident investors concerning the advisability of investing in the particular security or participating in the Stock Plan rather than using the services of a registered broker-dealer; or (c) take verbal orders to buy or sell securities for U.S. resident investors. Call center personnel may provide U.S. resident customers general information about Stock Plan services as described in the Stock Plan brochure and the status of the customer's account, as well as accommodate telephone requests for brochures, account statements, certificated shares and replacement dividend checks. Computershare will be responsible for ensuring that call center personnel are strictly instructed not to provide recommendations or advice to U.S. resident investors and that they will be monitored and supervised closely in this respect.

7. In connection with administering Stock Plans with U.S. resident investors Computershare will effect purchases and sales at least once a day unless orders received produce such a low share volume as to dictate less frequent transaction intervals. For purposes of this condition, consistent with the terms of the Stock Plans, Computershare may regard purchase orders as not having been received until good funds are provided by the customer to pay for the shares to be purchased. Good funds would include certified checks, money orders and bank drafts, as well as personal checks of the customer, that have been cleared through the banking system. In connection with the exercise of stock options through Employee Plans, Computershare will notify the company daily of the receipt of any option exercises to be filled through the issuance of treasury stock. In all cases, purchases and sales will occur at least once a week (assuming an order is received during the week). In the case of odd-lot plans, purchases and sales may occur when sufficient shares have been tendered to constitute a standard unit of trading on the marketplace. In the event that the terms of any Employee Plans with U.S. resident investors do not currently permit Computershare to comply with the terms of this provision, Computershare may continue to offer such Employee Plan services, but in connection with the negotiation of any new agreements, or in the renegotiation of any existing agreements for renewal, to provide Employee Plan services, it will undertake to assure that the investment conditions of the Employee Plans will permit it to comply with the terms of this provision.
8. In connection with administering Stock Plans with U.S. resident investors, Computershare will not receive payment for order flow, as defined in Exchange Act Rule 10b-10.
9. In connection with administering Stock Plans with U.S. resident investors, Computershare will make and keep current all material books and records relating to customers' funds, securities, and orders to purchase or sell securities, including the following:
  - (a) Records reflecting customer ownership in the Stock Plan;
  - (b) Any statement, checkbook, or cancelled check regarding any bank account established pursuant to condition 4 above; and records reflecting funds submitted by Stock Plan customers, funds held on behalf of customers pursuant to condition 4 above, and reconciliation of the funds submitted and the funds held;
  - (c) An original of any communication received by Computershare from a Stock Plan customer or a copy of any materials sent to Stock Plan customers by Computershare;
  - (d) A record of any order by a Stock Plan customer to purchase or sell securities;

- (e) A copy of any transaction notification or statement sent pursuant to condition 5 above;
  - (f) A copy of any supervisory procedures relating to condition 6 above;
  - (g) A copy of any transaction notification received pursuant to condition 5 above; and
  - (h) A copy of any agreement relating to Stock Plans entered into with an affiliated or unaffiliated third party, including agreements with banks, broker-dealers, and entities providing services related to processing and call centers.
10. Any record maintained pursuant to condition 9 will be retained for a period of not less than six years, the first year in a readily accessible place for purposes of examination and inspection by the Commission. Records maintained pursuant to condition 9 may be stored electronically consistent with the requirements of Exchange Act Rule 17Ad-7(f).

Upon the effective date of this order, Computershare shall comply immediately with all conditions of this order, except for condition 5, condition 7, and the terms of condition 3 that do not relate to netting customers' buy and sell orders. Computershare shall comply with condition 5, condition 7, and the terms of condition 3 that do not relate to netting customers' buy and sell orders within 90 days of the effective date of this order.

In finding that this exemption is appropriate in the public interest, we stress that (i) Computershare will provide Stock Plan services to issuers' employees or shareholders only when it is retained directly by the issuer or its affiliate and (ii) Computershare's activities as a registered transfer agent are subject to Commission regulation and inspection. In contrast, the Stock Plan activities that are the subject of the Commission's enforcement order were conducted more broadly and outside any Commission oversight. We also stress that Computershare will administer DRSPPs and odd-lot programs with U.S. resident investors only for issuers for which it acts as transfer agent.

This exemption is subject to modification or revocation at any time the Commission determines that such modification or revocation is consistent with the public interest or the protection of investors.

By the Commission.

A handwritten signature in cursive script that reads "Jill M. Peterson".

Jill M. Peterson  
Assistant Secretary

Commissioners Glassman &  
Atkins Disapproved

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 53668 / April 18, 2006

ADMINISTRATIVE PROCEEDING  
File No. 3-12265

In the Matter of

COMPUTERSHARE TRUST  
COMPANY OF CANADA,

Respondent.

**ORDER INSTITUTING PUBLIC  
ADMINISTRATIVE AND CEASE-AND-  
DESIST PROCEEDINGS PURSUANT TO  
SECTIONS 15(b), 17A(c) AND 21C OF THE  
SECURITIES EXCHANGE ACT OF 1934,  
MAKING FINDINGS AND IMPOSING  
REMEDIAL SANCTIONS**

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b), 17A(c), and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Computershare Trust Company of Canada ("CTCC" or "Respondent").

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over Respondent and the subject matter of these proceedings, Respondent consents to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b), 17A(c) and 21C of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions, as set forth below.

Document 21 of 43

### III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

#### RESPONDENT

1. CTCC is a transfer agent with its principal offices in Toronto, Ontario, Canada. CTCC provides transfer agent services for public companies, specializing in stock transfer, corporate trust and employee plan administration. CTCC acquired its operations in Canada from a third party in approximately June 2000. CTCC is a wholly-owned subsidiary of Computershare Limited, a financial services company headquartered in Australia with offices worldwide, including in the United States and Canada, which provides transfer agent and employee plan administration services, and whose securities are listed on the Australian stock exchange.

#### CTCC Acts as an Unregistered Transfer Agent and Broker

2. CTCC acts as a transfer agent, as defined by Section 3(a)(25) of the Exchange Act, and as a broker, as defined by Section 3(a)(4) of the Exchange Act. Since approximately June 2000, CTCC has acted as a transfer agent for at least 260 companies that had securities registered under Section 12 of the Exchange Act. During that same period, CTCC has acted as a broker by engaging in the business of effecting securities transactions for United States resident investors on behalf of approximately 100 issuers.

3. With respect to each of its clients from June 2000 through April 14, 2004, that had securities registered under Section 12 of the Exchange Act, or that would be required to be registered except for the exemption from registration provided by subsection (g)(2)(B) or (g)(2)(G) of that section, CTCC, alone or with other transfer agents, provided one or more of the following services with respect to such securities:

- Countersigning the securities of these issuers upon issuance of their securities;
- Monitoring the issuance of securities with a view to preventing unauthorized issuance;
- Registering the transfer of these securities;
- Exchanging and converting these securities; or
- Transferring record ownership by bookkeeping entry.

4. From June 2000 through April 14, 2004, CTCC was not registered with the Commission or any other United States agency as a transfer agent pursuant to Section 17A(c)(1) of the Exchange Act.

5. Effective April 14, 2004, CTCC registered with the Commission as a transfer agent.

6. From June 2000 through the present, CTCC has acted as a broker by engaging in the business of effecting securities transactions for U.S. resident investors in connection with its administration of dividend reinvestment and stock purchase plans, employee stock purchase plans, employee stock option plans, and odd-lot programs without registering with the Commission as a broker pursuant to Section 15(a) of the Exchange Act.

### **Violations of Federal Securities Law**

7. Fundamental to the Commission's ability to oversee the securities markets and protect investors is the requirement that brokers and transfer agents register with the Commission. Exchange Act, Sections 15(a), 17A; see also SEC Rel. No. 34-27017 (July 18, 1989) (“[I]t is important to reiterate the fundamental significance of broker-dealer registration within the structure of U.S. securities market regulation. Because of the broker-dealer’s role as an intermediary between customers and the securities markets, broker-dealers have been required to register with the Commission since 1935”); SEC Rel. No. 34-11759 (October 22, 1975) (“Section 17A(c) . . . precludes a person from performing any transfer agent function set forth in Section 3(a)(25) . . . unless such person is registered as a transfer agent” (emphasis added)). Once registered, transfer agents and broker-dealers must conduct their operations in accordance with, among other things, established reporting requirements, record-keeping and record retention practices, and permit the inspection of such records, enabling the Commission and national security exchanges to ensure fairness and the efficient, orderly and open operation of the securities markets. See e.g., Exchange Act, Sections 15, 17, and 17A. A broker-dealer or transfer agent that violates these requirements is subject to a variety of sanctions including an injunction, disgorgement, prejudgment interest, civil penalties and revocation of its registration. Exchange Act, Sections 15 and 21.

8. As a result of the conduct described above, CTCC willfully violated Section 17A of the Exchange Act, which provides that it is unlawful for any transfer agent, unless registered with the Commission or otherwise exempted from such registration, directly or indirectly to make use of the mails or any means or instrumentality of interstate commerce to perform the function of a transfer agent with respect to any security registered under Section 12 of the Exchange Act, or which would be required to be registered except for the exemption from registration provided by Section 12(g)(2)(B) or (g)(2)(G) of the Exchange Act. See e.g., In the Matter of CIBC Mellon Trust Co., Admin. Proc. File No. 3-11839 (March 2, 2005).<sup>1</sup>

9. As a result of the conduct described above, CTCC also willfully violated Section 15(a) of the Exchange Act, under which it is unlawful to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers’ acceptances, or commercial bills) unless such broker is registered with the Commission. See e.g., In the Matter of CIBC Mellon Trust Co., Admin. Proc. File No. 3-11839

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<sup>1</sup> “Willfully” as used in this Order means intentionally committing the act which constitutes the violation, Cf. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965). There is no requirement that the actor also be aware that he is violating one of the Rules or Acts.

(March 2, 2005); SEC v. National Executive Planners, Ltd., 503 F. Supp. 1066, 1073 (M.D.N.C. 1980).

### **Undertakings**

Respondent has undertaken to:

1. within 30 days after the date of the entry of this Order, to retain a qualified independent consultant (the "Consultant"), not unacceptable to the staff of the Commission, to conduct a comprehensive review of all aspects of CTCC's business as a transfer agent for companies with Section 12 registered securities, and as a broker for U.S. resident investors, including, but not limited to, CTCC's level and adequacy of staffing, and its policies and procedures as they relate to CTCC's awareness of, and compliance with, Section 17A of the Exchange Act and the regulations thereunder, and Section 15(a) of the Exchange Act, including the conditions set forth in the Commission's Exemptive Order, exempting CTCC from registering as a broker under Section 15(a) of the Exchange Act;

2. require the Consultant to enter into an agreement that provides that, for the period of engagement and for a period of two years from completion of the engagement, the Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with CTCC, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Consultant in performance of his/her duties under this Order shall not, without prior written consent of the Securities and Exchange Commission's Division of Enforcement, enter into any employment, consultant, attorney-client, auditing or other professional relationship with CTCC, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

3. direct its agents and employees to cooperate fully with the Consultant's review and answer any questions he or she may have;

4. require that, within 120 days of the entry of this Order, the Consultant complete his/her review and submit a written report documenting its findings and making recommendations (the "Report") to CTCC's Board of Directors, a copy of which shall be transmitted contemporaneously to the staff of the Commission. In the event that CTCC is acquired by another company and becomes a wholly-owned subsidiary of the acquiring company before it has fully complied with all of the terms of this Order, CTCC's obligations under this Order shall remain in effect only as to CTCC as a wholly-owned subsidiary and only as to CTCC's Board of Directors as constituted following the acquisition. In the event that CTCC is acquired by another company and ceases to be a wholly-owned subsidiary of such acquiring company before CTCC has fully complied with all of the terms of this Order, CTCC shall have the acquiring company assume CTCC's obligations under this paragraph; and

5. within 90 days after CTCC receives the Consultant's report described above, CTCC shall adopt, implement and maintain any and all policies, procedures and practices recommended by the Consultant and certify to the staff of the Commission, via an affidavit, that it has done so.

#### IV.

In view of the foregoing, the Commission deems it appropriate, in the public interest and for the protection of investors to impose the sanctions agreed to in CTCC's Offer.

Accordingly it is hereby ORDERED that:

A. Pursuant to Sections 15(b)(4)(C) and 17A(c)(3) of the Exchange Act, CTCC is hereby censured.

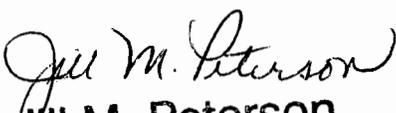
B. Pursuant to Section 21C of the Exchange Act Respondent shall cease and desist from committing or causing any violations and any future violations of Sections 15(a) and 17A of the Exchange Act;

C. Respondent shall, within 10 days of the entry of this Order, pay disgorgement and prejudgment interest in the total amount of \$601,868.71 to the United States Treasury, reflecting disgorgement of \$509,366, and prejudgment interest of \$92,502.71, and pay a civil money penalty in the amount of \$500,000 to the United States Treasury. Such payment, totaling \$1,101,868.71 shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, Stop 0-3, VA 22312; and (D) submitted under cover letter that identifies CTCC as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Paul R. Berger, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Washington, DC 20549-4631.

D. Respondent shall comply with the undertakings enumerated in Section III, above.

By the Commission.

Nancy M. Morris  
Secretary

  
By: **Jill M. Peterson**  
**Assistant Secretary**

**SECURITIES AND EXCHANGE COMMISSION**  
**(Release No. 34-53677; File No. PCAOB-2006-01)**

**April 19, 2006**

**Public Company Accounting Oversight Board; Order Approving Proposed Ethics and Independence Rules Concerning Independence, Tax Services, and Contingent Fees and Notice of Filing and Order Granting Accelerated Approval of the Amendment Delaying Implementation of Certain of these Rules**

**I. Introduction**

On July 26, 2005,<sup>1</sup> the Public Company Accounting Oversight Board (the “Board” or the “PCAOB”) adopted proposed Ethics and Independence Rules Concerning Independence, Tax Services and Contingent Fees,<sup>2</sup> (herein, “the proposed rules”) pursuant to the Sarbanes-Oxley Act of 2002 (the “Act”)<sup>3</sup> and Section 19(b) of the Securities Exchange Act of 1934 (the “Exchange Act”).<sup>4</sup> The proposed rules include general rules with respect to ethics and independence, restrict certain types of tax services a registered public accounting firm may provide to its audit clients, and prohibit contingent fee arrangements for any services a registered public accounting firm provides to its audit clients, in order to maintain its independence. On November 22, 2005, the Board adopted certain technical amendments to Rule 3502, including its title, and Rule 3522.<sup>5</sup>

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<sup>1</sup> On August 2, 2005, the PCAOB submitted its proposed rules to the Commission for approval.

<sup>2</sup> PCAOB Release No. 2005-014.

<sup>3</sup> 15 U.S.C. 7202 *et seq.*

<sup>4</sup> 15 U.S.C. 78s(b).

<sup>5</sup> PCAOB Release No. 2005-020. On November 23, 2005, the PCAOB submitted the technical amendments to the Commission for approval.

Notice of the proposed rules, including the November 22, 2005 technical amendments, was published in the Federal Register on March 7, 2006,<sup>6</sup> and the Securities and Exchange Commission (“Commission”) received eight comment letters. For the reasons discussed below, the Commission is granting approval of the proposed rules.

On March 28, 2006, the PCAOB adopted an additional statement, delaying the implementation schedule for Rules 3523 and 3524 of the proposed rules,<sup>7</sup> and submitted that amendment to the filing to the Commission. The Commission finds there is good cause to approve this amendment prior to the thirtieth day after publication in the Federal Register and, for the reasons discussed below, the Commission is approving the amendment.

## **II. Description**

The Act established the PCAOB to oversee the audits of public companies and related matters, to protect investors, and to further the public interest in the preparation of informative, accurate and independent audit reports.<sup>8</sup> Section 103(a) of the Act directs the PCAOB to establish auditing and related attestation standards, quality control standards, and ethics standards to be used by registered public accounting firms in the preparation and issuance of audit reports as required by the Act or the rules of the Commission.

Overall Framework (Rules 3501 and 3502). Proposed Rules 3501 and 3502 will create an overall framework within the PCAOB’s ethics rules. Proposed Rule 3501 sets forth the requirement for the accounting firm to be independent of its audit client

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<sup>6</sup> Release No. 34-53427; File No. PCAOB-2006-01.

<sup>7</sup> PCAOB Release No. 2006-001.

<sup>8</sup> Section 101(a) of the Act.

throughout the audit and professional engagement period as a fundamental ethical obligation of the auditor. This requirement for the auditor to be independent encompasses the obligation to satisfy the independence criteria set out in the rules and the standards of the PCAOB, but also an obligation to satisfy all other independence criteria applicable to the engagement, including the independence criteria set out in the rules and regulations of the Commission.

Proposed Rule 3502 establishes a standard of ethical conduct for persons associated with registered public accounting firms, indicating that these persons shall not take or omit to take an action knowing, or recklessly not knowing, that the act or omission would directly and substantially contribute to a violation by the accounting firm of the Act, the rules of the Board, or provisions of the securities laws. These two proposed rules would be effective 10 days after the date of this order.

Contingent Fees (Rule 3521). Proposed Rule 3521 would treat registered public accounting firms as not independent if they enter into contingent fee arrangements, directly or indirectly, with audit clients.<sup>9</sup> While the PCAOB's definition of contingent fees was adapted from the Commission's definition, there are two distinct differences. The principal difference is the elimination of the exception in Rule 2-01(c)(5) of Regulation S-X for fees "in tax matters, if determined based on the results of judicial proceedings or the findings of government agencies." The PCAOB found this provision had been misinterpreted and could permit fees that jeopardized the independence of auditors. In addition, the proposed rule would expressly indicate that the contingent fees

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<sup>9</sup> The proposed definition of "contingent fee" includes any fee established for the sale of a product or the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such product or service. However, a fee is not a contingent fee if the amount is fixed by courts or other public authorities and not dependent upon a finding or result.

cannot be received “directly or indirectly” from the audit client. We do not object to the language that has been included in the PCAOB’s proposed rule. The proposed rule would not be applied to contingent fee arrangements that were paid in their entirety, converted to fixed fee arrangements, or otherwise unwound before 60 days after the date of this order.

Tax Transactions (Rule 3522). Proposed Rule 3522 would prohibit auditors from providing any non-audit services to its audit clients related to the marketing, planning or opining in favor of the tax treatment of transactions that are confidential transactions under the Internal Revenue Service’s regulations or transactions that would be considered aggressive tax position transactions.<sup>10</sup> As such, this proposed rule adds to the list of services an audit firm is prohibited from providing its audit clients in order to maintain its independence. While the Board considered a wide-range of tax services, they ultimately determined that these particular types of tax services (confidential transactions or aggressive tax transactions) represented a class of tax-motivated transactions that presented an unacceptable risk of impairing an auditor’s independence. The proposed rule would not be applied to tax services that were completed by the accounting firm by 60 days after the Commission approves the rules.

Tax Services for Persons in a Financial Reporting Oversight Role (Rule 3523). Proposed Rule 3523 adds to the list of services an audit firm is prohibited from providing its audit clients in order to maintain its independence by prohibiting audit firms from providing any tax service to any person who fills a financial reporting oversight role at an

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<sup>10</sup> The PCAOB has defined aggressive tax positions as those that are initially recommended, directly or indirectly, by the auditor and a significant purpose of which is tax avoidance, unless the proposed tax treatment is at least more likely than not to be allowable under applicable tax laws.

audit client,<sup>11</sup> or an immediate family member of such individual, unless such person is in that role solely because he or she is a member of the board of directors or similar management governing body. The proposed rule includes those individuals who are in a financial reporting oversight role at an affiliate of the entity being audited unless that affiliate is either not material to the consolidated entity or the affiliate's financial statements are audited by another auditor. Based on the March 28, 2006 amendment, this proposed rule would not be applied to tax services being provided pursuant to an engagement in process at the time the Commission approves the rules, provided that such services are completed on or before October 31, 2006.<sup>12</sup>

Auditor's Responsibility in Connection with Audit Committee Pre-Approval of Tax Services (Rule 3524). Proposed Rule 3524 would require the auditor seeking pre-approval to perform tax services to provide the audit committee written documentation of the scope of the proposed tax service and the fee structure for the engagement, discuss with the audit committee the potential effects on the firm's independence of performance of the services, and document the firm's discussion with the audit committee.

The Board amended the proposed effective date for this rule as part of its March 28, 2006 statement. As amended, the proposed rule would not be applied to any tax service pre-approval occurring before 60 days after the Commission approves the rules. Additionally, due to considerations of potentially existing audit committee procedures and schedules for pre-approving all audit and non-audit services, in cases where the registrant pre-approves non-audit services via policies and procedures, the rule will not

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<sup>11</sup> The PCAOB's definition of a "financial reporting oversight role" matches the Commission's definition of the same term.

<sup>12</sup> The proposed rule also provides a transition period for those individuals that are hired or promoted into a financial reporting oversight role; this transition period allows for the tax services in process to be completed within 180 days after the hiring or promotion.

apply to any tax service that has started within one year after the Commission approves the rules. The Board provided this longer transition so that most tax services considered within an annual audit committee review process that occurred prior to Commission approval could proceed without the need for additional pre-approval.

### **III. Discussion**

The Commission's comment period on the proposed rules ended on April 3, 2006, and the Commission received eight comment letters. The majority of comment letters came from accounting firms,<sup>13</sup> although one professional organization,<sup>14</sup> one registrant<sup>15</sup> and one individual also responded. In general, the respondents expressed support for the proposed rules, though a number of the commenters requested either revisions or additional clarifying guidance from either the Commission or the PCAOB, as discussed in more detail below.

#### Response to Specific Request for Comment on Proposed Rule 3522

In its public release of the proposed rules for comment, the Commission asked respondents to comment on proposed Rule 3522, specifically as to whether it was clear from the Board's discussion that a subsequent listing of a transaction, while not in and of itself impairing the auditor's independence prior to the listing of the transaction, may impact independence from the date of listing forward. Further, the Commission questioned whether additional guidance was necessary regarding the consideration of an auditor's independence when a transaction planned or opined on by the auditor subsequently becomes listed.

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<sup>13</sup> Deloitte & Touche LLP, Ernst & Young LLP, KPMG, McGladrey & Pullen, and PricewaterhouseCoopers.

<sup>14</sup> American Institute of Certified Public Accountants.

<sup>15</sup> Capital Group Companies.

The accounting firms and the AICPA responded to this question. Some commenters<sup>16</sup> indicated that if the audit committee and the firm, in good faith, reached a conclusion that the proposed transaction was allowable at the time the tax services were provided, the subsequent listing of the transaction should not impair the auditor's independence, as long as the firm is not in a position of defending its original advice. The PCAOB received similar comments during its exposure of the rule and responded by stating that it agreed with commenters that a per se rule that a subsequent listing of a transaction impaired an auditor's independence in either the period of the transaction or subsequent to the listing was not appropriate. The PCAOB stated that firms should be cautious in participating in transactions that could become listed, and that subsequent to the listing the firm and the audit committee should consider the potential impact of defending the transaction on the auditor's independence.

Commenters<sup>17</sup> on the Commission's Notice requested guidance on the subsequent consideration of independence upon the listing of the transaction and made a number of suggestions. Suggestions on this included: clarifying that a subsequent listing of a transaction has no retroactive impact on independence and does not per se impair independence going forward, clarifying that the subsequent determination as to the impact on auditor independence should rest primarily with the audit committee, and clarifying that an audit committee's good faith determination in determining if the subsequent listing impairs independence should be considered conclusive. We agree that listing of a transaction does not result in a per se violation of an auditor's independence in either the period in which the transaction occurred or in subsequent periods. Based on

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<sup>16</sup> KPMG, E&Y, AICPA, PWC.

<sup>17</sup> D&T, PWC, McGladrey.

the large percentage of commenters who felt that additional guidance is necessary regarding the subsequent determination of independence upon the listing of a transaction, we encourage the PCAOB to provide such guidance within a reasonable period of time after the approval of the proposed rules.

#### Rule 3523

A number of commenters raised concerns in relation to the PCAOB's application of the principle of "individuals in a financial reporting oversight role" to its proposed Rule 3523. The PCAOB has proposed a definition of the term "financial reporting oversight role" that matches the way in which the Commission has defined the term in our independence rules. However, while the defined term is identical to the Commission's definition, the proposed application of that term differs from the Commission's application. In the Commission's independence rules pertaining to employment relationships, there are restrictions on the time frame in which a former professional employee of an audit firm can fill a "financial reporting oversight role" at an issuer-client, or significant subsidiary of that issuer, without negatively impacting the independence of the audit firm. In contrast, the PCAOB's proposed rule prohibits the audit firm from providing tax services to a person in a financial reporting oversight role at the audit client or material affiliate of the audit client, with some exceptions (i.e., individuals who serve as directors are not included).

Commenters<sup>18</sup> expressed concerns that the PCAOB's proposed rule extends the definition of "financial reporting oversight role" to a broader group of individuals than the Commission's independence rule, and that application of the rule to such a broad group will make monitoring compliance burdensome. This issue was not raised in the

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<sup>18</sup> AICPA, D&T, E&Y, KPMG, PWC.

PCAOB's comment period because the reference to individuals at material affiliates was added by the PCAOB in response to comments seeking clarification regarding whether the rule applied to immaterial subsidiaries. The PCAOB added language to the rule to make clear that it did not apply to immaterial subsidiaries. However, based on commenters' requests for further clarification, we encourage the PCAOB to issue additional guidance.

#### Additional Comments

The AICPA and one accounting firm commented how the standard for liability in the rule compares to the standard for liability under Section 21C of the Exchange Act. The AICPA also questions whether the PCAOB's standard setting authority encompassed the adoption of rules related to the responsibility of associated persons not to knowingly or recklessly contribute to an accounting firm's violation of rules or applicable law. We believe that the rule is within the scope of the PCAOB's authority, particularly its authority to establish ethical standards.

A number of commenters made requests for additional implementation guidance from the PCAOB upon the approval of the rules. Commenters raised questions regarding certain language in proposed Rule 3522 pertaining to the confidentiality restrictions in the rule and the use of the term "planning" in the rule text. Based on these comments, we recommend the PCAOB provide additional implementation guidance on these topics.

#### **IV. Accelerated Approval of Amendment No. 1; Solicitation of Comments**

The Board's March 28, 2006 amendment to the implementation schedule for certain of the proposed rules (the "March 28, 2006 amendment") would delay the effective date for Rules 3523 and 3524.

Rule 3523 originally had an effective date of the later of June 30, 2006 or 10 days after the date that the Commission approved the rules. The PCAOB acknowledged in its adoption of the rule that the proposed rule would lead to some registered firms terminating recurring engagements to provide tax services and may require certain members of public companies' senior management to find other tax preparers. In order to allow for as smooth a transition as possible, the PCAOB decided to amend the effective date such that Rule 3523 would not apply to tax services that are being provided pursuant to an engagement in process at the time the Commission approves the rules, provided that such services are completed on or before the later of October 31, 2006 or 10 days after the date of this order.

Rule 3524 requires certain disclosure, discussion, and documentation when a registered firm seeks audit committee pre-approval to provide a public company audit client tax services that are not otherwise prohibited by Commission or PCAOB rules. Acknowledging that some companies choose to use pre-approval policies and procedures to approve certain tax services, the original proposed rules provided two different effective dates: 60 days after the date that the Commission approves the rules or, in the case of an issuer that pre-approves non-audit services by policies and procedures, the rule would not apply to any tax service provided by March 31, 2006. Considering the time period since the rules' adoption, the PCAOB decided to amend the effective date with respect to tax services provided to audit clients whose audit committees pre-approve tax services pursuant to policies and procedures. As a result, under the proposed amendment, Rule 3524 would not apply to any such tax service that is begun within one year after the date of this order. This transition period should allow most tax services considered in an

annual audit committee review process that occurred prior to Commission approval to proceed without the need for a firm to seek new pre-approval.

We find good cause to approve the March 28, 2006 amendment prior to the thirtieth day after the date of publication of notice of filing the March 28, 2006 amendment in the Federal Register. The original proposed rules, as noted above, were published in the Federal Register. We believe that the March 28, 2006 amendment, by delaying the effective date for certain of the proposed rules, addresses some of the concerns raised by commenters regarding the time period in which auditors would have to comply with the new rules. The March 28, 2006 amendment does not modify the scope and purpose of the rules as originally proposed but simply extends compliance dates commensurate with the original filing date. Finally, we also find that it is in the public interest to approve the rules as soon as possible to assist accounting firms in making arrangements to efficiently implement the proposed rules.

Accordingly, we believe good cause exists, consistent with Sections 107 and 109 of the Act, and Section 19(b) of the Exchange Act, to approve the March 28, 2006 amendment to the proposed rules on an accelerated basis.

Interested persons are invited to submit written data, views, and arguments concerning the March 28, 2006 amendment, including whether the amendment is consistent with the Act and the securities laws or is necessary or appropriate in the public interest or for the protection of investors. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/pcaob.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number PCAOB-2006-01 on the subject line.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File No. PCAOB-2006-01. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule that are filed with the Commission, and all written communications relating to the proposed rule between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of PCAOB. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should be submitted on or before **[insert date 30 days from publication in the Federal Register]**.

## V. Conclusion

On the basis of the foregoing, the Commission finds that proposed rules, including the March 28, 2006 amendment, are consistent with the requirements of the Act and the securities laws and are necessary and appropriate in the public interest and for the protection of investors. However, to facilitate implementation of the proposed rules, the Commission expects the PCAOB will issue additional implementation guidance as requested by a number of the commenters.

IT IS THEREFORE ORDERED, pursuant to Section 107 of the Act and Section 19(b)(2) of the Exchange Act, that the Proposed Ethics and Independence Rules Concerning Independence, Tax Services, and Contingent Fees (File No. PCAOB-2006-01), as amended, be and hereby are approved.

By the Commission.



Nancy M. Morris  
Secretary

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**INVESTMENT ADVISERS ACT OF 1940**

**Release No. 2511 / April 19, 2006**

**ADMINISTRATIVE PROCEEDING**

**File No. 3-12268**

**In the Matter of**

**KIERAN J. DALE,**

**Respondent.**

**ORDER INSTITUTING  
ADMINISTRATIVE PROCEEDINGS  
PURSUANT TO SECTION 203(f) OF THE  
INVESTMENT ADVISERS ACT OF 1940,  
MAKING FINDINGS, AND IMPOSING  
REMEDIAL SANCTIONS**

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Kiernan J. Dale ("Dale" or "Respondent").

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

Document 23 of 43

### III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Between 1997 and 2001, Dale was a managing director of a private venture capital fund called Keystone Venture V, LP (the "Fund"). During that time, Dale was an investment adviser, and provided investment advice to the Fund through three companies that he and two other individuals controlled. Dale, age 49, resides in the Philadelphia, Pennsylvania area.

2. On April 13, 2006, a final judgment was entered by consent against Dale, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Advisers Act, in the civil action entitled Securities and Exchange Commission v. Keystone V Management Co., Inc., et al., Civil Action Number 2:06-cv-1030-JD, in the United States District Court for the Eastern District of Pennsylvania.

3. The Commission's complaint alleged, among other things, that Dale defrauded the Fund and its investors of more than \$9 million by purportedly investing their funds in companies owned or controlled by an entrepreneur located in New England. The complaint further alleged that Dale diverted these funds to the entrepreneur and other third parties affiliated with him for their personal benefit and that Dale concealed the diversion of funds by creating false and misleading financial statements that were disseminated to existing and prospective investors. These false and misleading financial statements were disseminated in the offer and sale and in connection with the purchase and sale of securities in the form of capital calls to existing investors and defaulted limited partnership interests to new investors.

### IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Dale's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act, Respondent Dale be, and hereby is barred from association with any investment adviser;

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order;

and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Nancy M. Morris  
Secretary

*Jill M. Peterson*  
By: **Jill M. Peterson**  
**Assistant Secretary**

Commissioner Atkins  
Not Participating

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
April 19, 2006

ADMINISTRATIVE PROCEEDING  
File No. 3-12267

In the Matter of

BRADLEY T. SMITH,

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE  
PROCEEDINGS PURSUANT TO SECTION  
203(f) OF THE INVESTMENT ADVISERS  
ACT OF 1940 AND SECTION 15(b)(6) OF  
THE SECURITIES EXCHANGE ACT OF  
1934 AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") and Section 15(b)(6) of the Securities Exchange Act of 1934 ("Exchange Act") against Bradley T. Smith ("Smith" or "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Smith, age 57, is a resident of Columbus, Ohio. In 1998, Smith founded BancShareholders of America, Inc. ("BSA"), which has been a licensed investment adviser in the state of Ohio since 2001. BSA has never been registered with the Commission. Smith was the Chairman, President, Treasurer and sole director of BSA until September 2004. From 2000 to 2004, Smith was also an owner, a registered representative and the President of BancShares First, a NASD-registered broker-dealer located in Dublin, Ohio. BancShares First ceased operations in or around September 2004. During the relevant times, Smith held Series 7, 24 and 63 securities licenses.

Document 24 of 43

B. DISTRICT COURT PROCEEDINGS

2. On August 11, 2004, the Commission filed a Complaint in the United States District Court for the Southern District of Ohio ("Court"), captioned United States Securities and Exchange Commission v. Bradley T. Smith, et al., Case No. C2 04 0739. A Second Amended Complaint was subsequently filed on June 3, 2005.

3. The Second Amended Complaint alleged that Smith violated the antifraud provisions of the federal securities laws by misrepresenting the use of proceeds from private securities offerings for two businesses that he founded and controlled: Continental Midwest Financial, Inc. ("Continental") and Scioto National, Inc. ("Scioto"). The Second Amended Complaint alleged that, from July 2002 until September 2003, Smith held a private offering of Continental common stock that raised \$1,272,665 from 49 investors. Smith represented to investors that Continental would use most of the money raised to buy stock in small and mid-cap community banks, with a small amount designated as working capital to pay Continental's operating expenses. Despite these representations, most of the money raised from the offering was actually used to pay the expenses of Smith's other businesses, as well as Smith's own personal expenses, including his personal credit card charges, house payments and car purchase. Less than 10% of the money raised was ever invested in bank stocks. In January 2004, having nearly exhausted the Continental investor funds, Smith began soliciting investors for a private offering of Scioto common stock that raised \$822,852 from 29 investors. As with the Continental offering, Smith represented to investors that the vast majority of the proceeds would be used to purchase stock in small banks. But Smith did not use the funds in that manner. Instead, he used most of the money raised from the offering to pay expenses of his other businesses and for his own personal benefit. The Second Amended Complaint alleged that Smith's conduct violated Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder. It also alleged that Smith was responsible as a control person for the same violations by Continental and Scioto.

4. On September 27, 2005, the Court granted the Commission's motion for summary judgment. In its corresponding Opinion & Order, the Court found as to Smith:

- a. that in connection with the Continental private offering, Smith prepared a private offering memorandum ("POM") and provided investors with copies of marketing materials, including the Continental Business Plan;
- b. that the Continental POM and Continental Business Plan represented that approximately 80% of the money raised from Continental's private offering would be invested in small bank stocks;
- c. that Smith used only 9% of the proceeds from the Continental offering to purchase small bank stocks;
- d. that Smith used most of the money from the Continental offering to pay the expenses of Smith's other businesses or to cover Smith's personal expenses;

- e. that in connection with the Scioto private offering, Smith prepared a Scioto POM;
- f. that the Scioto POM represented that approximately 70% of the money raised from Scioto's private offering would be used to purchase stock in small banks;
- g. that Smith actually transferred only 21% of the proceeds from the Scioto offering into investment accounts;
- h. that Smith used most of the money raised from the Scioto offering to pay expenses of his other businesses and for his own personal use;
- i. that Smith admits that he did not spend the money raised from the Continental and Scioto private offerings in the manner delineated in the POMs and marketing materials;
- j. that, at the time of the offerings, Smith knew that Continental and Scioto would not be using the proceeds in the manner set forth in the POMs and marketing materials;
- k. that Smith nonetheless distributed the Continental and Scioto offering and marketing materials -- which he drafted and reviewed -- with the misrepresentations to investors;
- l. that Smith made misrepresentations of material facts in connection with the offer, sale or purchase of Continental and Scioto securities, and thereby violated the antifraud provisions of the federal securities laws;
- m. that there was no genuine issue of material fact that Smith's conduct was at least reckless, so as to satisfy the scienter requirement for violations of Section 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; and
- n. that Smith controlled Continental and Scioto and was liable as a control person for their violations of the Exchange Act.
5. On December 6, 2005, a final judgment was entered against Smith, permanently enjoining him from future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

### III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative proceedings be instituted to determine:

A. Whether the allegations set forth in Section II are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 203(f) of the Advisers Act; and

C. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b)(6) of the Exchange Act.

#### IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 210 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Nancy M. Morris  
Secretary

*Jill M. Peterson*  
By: **Jill M. Peterson**  
**Assistant Secretary**

**UNITED STATES OF AMERICA  
BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION**

**Securities Exchange Act of 1934  
Release No. 53684 / April 20, 2006**

**ORDER EXTENDING TERM OF SHORT SALE PILOT**

On June 23, 2004, the Securities and Exchange Commission (“Commission”) approved new and amended short sale regulations in Regulation SHO under the Securities Exchange Act of 1934 (the “Act”).<sup>1</sup> On July 28, 2004, the Commission issued an order (“First Pilot Order”) creating a one year Pilot (“Pilot”) suspending the provisions of Rule 10a-1(a) under the Act<sup>2</sup> and any short sale price test of any exchange or national securities association for short sales<sup>3</sup> of certain securities.<sup>4</sup> The Pilot was created pursuant to Rule 202T of Regulation SHO, which established procedures to allow the Commission to temporarily suspend short sale price tests so that the Commission could study the effectiveness of short sale price tests.<sup>5</sup> The First Pilot Order provided that the

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<sup>1</sup> Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (August 6, 2004) (“Adopting Release”).

<sup>2</sup> 17 CFR 240.10a-1.

<sup>3</sup> “Short sale” is defined in Rule 200 of Regulation SHO, 17 CFR 242.200.

<sup>4</sup> Securities Exchange Act Release No. 50104 (July 28, 2004), 69 FR 48032 (August 6, 2004). Specifically, the First Pilot Order suspended price tests for the following: (1) short sales in the securities identified in Appendix A to the First Pilot Order; (2) short sales in the securities included in the Russell 1000 index effected between 4:15 p.m. EST and the open of the effective transaction reporting plan of the Consolidated Tape Association (“consolidated tape”) on the following day; and (3) short sales in any security not included in paragraphs (1) and (2) effected in the period between the close of the consolidated tape and the open of the consolidated tape on the following day.

<sup>5</sup> 69 FR at 48012-13. We stated in the Adopting Release that conducting a pilot pursuant to Rule 202T would “allow us to obtain data on the impact of short selling in the absence of a price test to assist in determining, among other things, the extent to which a price test is necessary to further the objectives of

Document 25 of 43

Pilot would commence on January 3, 2005 and terminate on December 31, 2005, and that we might issue further orders affecting the operation of the First Pilot Order.<sup>6</sup> On November 29, 2004, we issued an order (“Second Pilot Order”) resetting the Pilot to commence on May 2, 2005 and end on April 28, 2006 to give market participants additional time to make system changes necessary to comply with the Pilot.<sup>7</sup> We are issuing this Order (“Third Pilot Order”) to extend the termination date of the Pilot to August 6, 2007, the date on which temporary Rule 202T expires. Extension of the Pilot termination date will maintain the status quo with regard to price tests for Pilot securities and system designs of market participants while the staff completes its analysis of the Pilot results and the Commission conducts any additional short sale rulemaking. All other terms of the First Pilot Order remain unchanged. We may issue further orders affecting the operation of the Pilot. For the reasons discussed below, the Commission finds that extension of the Pilot is necessary and appropriate in the public interest and consistent with the protection of investors.<sup>8</sup>

#### I. New Pilot Termination Date

We established the Pilot as part of our review of short sale regulation in conjunction with the adoption of Regulation SHO.<sup>9</sup> The Pilot is designed to assist us in

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short sale regulation, to study the effects of relatively unrestricted short selling on market volatility, price efficiency, and liquidity, and to obtain empirical data to help assess whether a short sale price test should be removed, in part or in whole, for some or all securities, or if retained, should be applied to additional securities.” Id. at 48009.

<sup>6</sup> 69 FR at 48033.

<sup>7</sup> Securities Exchange Act Release No. 50747 (November 29, 2004), 69 FR 70480 (December 6, 2004).

<sup>8</sup> See Section 36 of the Act. In addition, pursuant to Section 3(f) of the Act, we considered the impact of this extension on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>9</sup> 69 FR at 48032; See Adopting Release at 48013.

assessing whether changes to short sale regulation are necessary in light of current market practices and the purposes underlying short sale regulation.<sup>10</sup> The Pilot is currently set to terminate on April 28, 2006.

To determine whether additional rulemaking is necessary, our staff will evaluate the results of the Pilot. Although we do not plan to extend the period being studied beyond April 28, 2006, our staff's analysis will help them determine whether to recommend changes to the current short sale regulatory scheme. If we determine that any new or amended rules are necessary, we will commence the rulemaking process. This customarily involves issuing a proposing release soliciting comments on the proposed changes, analyzing such comments and, finally, adopting any final rules. The process of reviewing the data and completing any rulemaking will necessarily continue beyond the study period.

We believe that it is in the interest of the markets and investors to maintain the price test scheme established by the Pilot until any rulemaking resulting from our analysis of the data is complete. Market participants made significant changes in their systems and practices to comply with the Pilot. Absent an extension of the Pilot's end date of April 28, 2006, the pre-Pilot short sale price tests would be restored, and market participants would be required to make changes to their systems and practices to ensure that they comply with these rules. If the Commission thereafter adopts rules that remove or change the nature of price tests for some or all securities, market participants would be required to change their systems and procedures again, which could result in substantial

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<sup>10</sup> 69 FR at 48032.

additional costs. Extending the Pilot ending date would keep the costs of changes to a minimum and help avoid market disruption.

Prior to commencement of the Pilot, some market participants expressed concern about the duration of the Pilot.<sup>11</sup> We do not believe that this concern has borne out. The Second Pilot Order delayed the start of the Pilot period because market participants were not ready to begin the Pilot during the period specified in the First Pilot Order. The Pilot will be in place for slightly more than two years, with this extension. Based on our experience with the Pilot for nearly a year, the concerns regarding a prolonged time span have proven unfounded. Indeed, it would be more disruptive to end the Pilot prior to any Commission action rather than to continue it. Market participants have already undertaken the costs and burdens of systems changes, and have informed us that they would not face any additional burdens or costs from continuing the Pilot. The staff has found no evidence of market disruption during the Pilot thus far, and we do not anticipate that continuing the Pilot will trigger any problems in the future.

In the Regulation SHO adopting release, the Commission stated that it “expects to make information obtained during the pilot publicly available.”<sup>12</sup> Correspondingly, the Commission's staff arranged for the appropriate self-regulatory organizations to make transactional short selling data public on a monthly basis on their internet Web sites.<sup>13</sup> To promote the best quality studies and to encourage transparency, the Commission

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<sup>11</sup> See Adopting Release, 69 FR at 48012 (discussing comment letters regarding the Pilot's duration from the Nasdaq, the NYSE, and the STA).

<sup>12</sup> *Id.* at n. 9.

<sup>13</sup> A list of the internet Web sites making the monthly trading data public is available at <http://www.sec.gov/spotlight/shopilot.htm>.

expects the SROs to continue releasing this transactional data until the end of the Pilot on August 6, 2007.

Based on the forgoing, we believe that it is necessary and appropriate in the public interest and consistent with the protection of investors to extend the termination date of the Pilot to August 6, 2007. Accordingly, the Pilot will now terminate on August 6, 2007, unless otherwise ordered by the Commission.

II. Conclusion

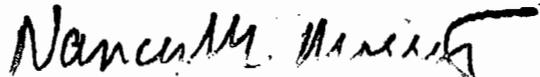
We find that extending the termination date of the Pilot to August 6, 2007, for the reasons stated above, is necessary and appropriate in the public interest and consistent with the protection of investors.

Accordingly,

IT IS HEREBY ORDERED that the suspension of the provisions of Rule 10a-1(a) and any short sale price test of any exchange or national securities association for certain securities and time periods, as set forth in the First and Second Pilot Orders, shall terminate on August 6, 2007, instead of April 28, 2006. The Commission from time to time may issue further orders affecting the operation of the Pilot.

All other provisions of the First Pilot Order and Second Pilot Order shall remain in effect.

By the Commission.



Nancy M. Morris  
Secretary

Commissioner Atkins  
Not Participating

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 53709 / April 24, 2006

ADMINISTRATIVE PROCEEDING  
File No. 3-12269

In the Matter of  
  
THE BANK OF NEW YORK,  
  
Respondent.

ORDER INSTITUTING CEASE-AND-DESIST  
PROCEEDINGS, MAKING FINDINGS, AND  
IMPOSING A CEASE-AND-DESIST ORDER  
PURSUANT TO SECTION 21C OF THE  
SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against The Bank of New York ("Respondent" or "BNY").<sup>1</sup>

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over Respondent and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-

<sup>1</sup> Respondent has also consented to the entry of a final judgment in the United States District Court for the Southern District of New York ordering the payment of a civil penalty for the violations described in this Order.

and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934 (“Order”), as set forth below.

### III.

On the basis of this Order and Respondent’s Offer, the Commission finds that:

#### Nature of the Proceedings

1. This matter arises from BNY’s failure as a transfer agent to exercise reasonable care to ascertain the correct addresses of lost securityholders. Section 17A(d) of the Exchange Act and Rule 17Ad-17 thereunder require transfer agents to use reasonable care in searching for securityholders who are deemed “lost” after correspondence sent to them is returned as undeliverable. Beginning in 1998 and continuing through September 2004, BNY failed to classify certain securityholders as lost despite the return of undeliverable correspondence. In addition, coding errors affecting BNY’s system used for compiling lists of securityholders eligible for mandatory searches prevented BNY’s system from capturing certain securityholders that BNY had classified as lost. These failures caused BNY to omit thousands of securityholders from the required searches and caused approximately \$11.5 million in securityholder assets to escheat to the states. In addition, other securityholders whom BNY omitted from the mandatory searches were required to pay third parties approximately \$743,112 in unnecessary fees to recover their lost assets.

#### Respondent

2. The Bank of New York is a bank providing securities and banking services, and is registered with the Board of Governors of the Federal Reserve System (“Federal Reserve”) as a bank transfer agent.<sup>2</sup> BNY’s issuer-services business segment includes its stock transfer division, which acts as the transfer agent for approximately 1,900 publicly traded companies with over 16 million securityholder accounts. BNY’s principal offices are located in New York, New York.

#### Facts

3. Rule 17Ad-17 requires transfer agents to exercise “reasonable care” to ascertain current addresses of “lost securityholders.” Lost securityholders are those to whom the transfer agent has sent correspondence that the postal service has returned as undeliverable. Under the Rule, in exercising reasonable care, the transfer agent must perform two electronic database searches at specified intervals (subject to certain exceptions). The Rule also sets forth requirements for the scope and coverage of the databases. Transfer agents may not, in performing these two mandatory searches, use any method that results in a charge to the securityholder. However, if the two searches are unsuccessful, the Rule does not restrict the methods that the transfer agent may use or the fees it may charge securityholders if it elects to perform subsequent,

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<sup>2</sup> Although the Federal Reserve is BNY’s appropriate regulatory agency, the Commission has authority, pursuant to Section 17A(d)(3)(B) of the Exchange Act, to enforce a bank transfer agent’s compliance with Section 17A of the Exchange Act and the transfer agent rules promulgated thereunder.

or “deep,” searches for securityholders not located in the two mandatory searches. Transfer agents may hire a vendor to perform both the Rule-mandated searches and the deep searches.

4. BNY identified lost securityholders by electronically culling its master securityholder files based upon an entry into the system of a “lost” code indicating that the post office had returned mail as undeliverable. BNY then provided a list of lost securityholders to a private search firm hired to perform the two searches mandated by Rule 17Ad-17 under the Exchange Act.

5. Several of BNY’s issuer clients also directly engaged the same private search firm to perform deep searches. BNY provided the search firm with lists of lost securityholders for those searches. The search firm did not charge either BNY or the issuers for this service, but collected its fees from securityholders it located in deep searches. In exchange for a fee, the search firm updated the transfer agent’s records with the new address, and, at the direction of the securityholder, either obtained a new stock certificate for the securityholder or sold the security.

6. From January 1998 to September 2004, BNY’s mailroom practices resulted in the improper exclusion of thousands of securityholders from searches required by Rule 17Ad-17. BNY classified as lost only some, but not all, securityholders whose mail had been returned as undeliverable. Specifically, BNY failed to classify as lost approximately 14,159 securityholders and never performed any searches for those securityholders. BNY escheated approximately \$11.5 million in assets belonging to those securityholders pursuant to state law.

7. In addition, from January 1998 to September 2004, BNY’s program used to identify and compile lists of lost securityholders eligible for Rule 17Ad-17 searches contained two coding errors that resulted in BNY’s failure to perform the Rule-mandated searches for thousands of securityholders. The first coding error caused the program to exclude lost securityholders who did not own the last issue of a security of an issuer with multiple issues. Therefore, if a securityholder owned shares in the first issue of a security, but sold shares in the last issue, BNY’s computer program did not capture that securityholder. The second coding error caused the system to fail to capture lost securityholders who no longer owned shares, but continued to own unclaimed property, such as a dividend check. As a result of the two coding errors, BNY did not include certain lost securityholders on the lists provided to the search firm, resulting in its failure to perform the two mandatory searches.

8. Many of the securityholders BNY classified as lost, but for whom BNY did not conduct the two mandatory searches, were subjected to deep searches and many paid fees to recover their lost assets. The system BNY used to compile the deep search list of lost securityholders did not have the coding errors that affected the program used to compile the Rule 17Ad-17 search list. Consequently, the lost securityholders that BNY improperly omitted from the Rule 17Ad-17 search list were subsequently captured during the compilation of the deep search list.

9. From January 1998 to September 2004, BNY subjected approximately 1,101 securityholders to deep searches even though it had not performed the two searches required by

Rule 17Ad-17. Approximately 250 of those securityholders then paid a search firm aggregated fees totaling \$743,112 for recovery of lost assets.

10. Upon discovering the programming errors and flawed mailroom practices in September 2004, BNY implemented corrections and enhanced its procedures.

### **Violations**

11. As a result of the conduct described above, BNY violated Section 17A(d) of the Exchange Act and Rule 17Ad-17 thereunder, which (1) require every recordkeeping transfer agent whose master securityholder file includes accounts of lost securityholders to exercise reasonable care to ascertain the correct addresses of such securityholder and, in exercising reasonable care to ascertain for its master securityholder file such lost securityholders' current addresses, to conduct two database searches using at least one information database service; and (2) prohibit a transfer agent from using a search method or service to establish contact with lost securityholders that results in a charge to a lost securityholder prior to completing the two database searches using at least one information database service.

### **BNY's Remedial Efforts**

12. In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded the Commission staff.

### **Undertakings**

13. BNY undertakes the following:

a. BNY shall retain, within 45 days from the date of entry of the Order, the services of an Independent Consultant who is not unacceptable to the Commission's staff. BNY shall require the Independent Consultant to perform all of the services and tasks as described below. BNY shall exclusively bear all costs, including compensation and expenses, associated with the retention and performance of the Independent Consultant.

b. BNY shall retain and shall require the Independent Consultant to conduct a comprehensive review of the policies and procedures related to: (i) BNY's securityholder searches, including searches made pursuant to Rule 17Ad-17 under the Exchange Act, deep searches, pre-escheatment searches and post-reorganization searches; and (ii) reconciliation of accounts in the handling of issuer reorganizations to ensure that out of proof, out of balance and other record breaks are promptly and accurately resolved. BNY shall retain the Independent Consultant to recommend policies and procedures to ensure compliance with applicable statutory and regulatory requirements in these areas.

c. BNY shall, within 60 days from the date of entry of the Order, provide to the Independent Consultant a list or lists of securityholders who either: (i) paid fees from January 1, 1998 through September 8, 2004 to a vendor to recover a lost asset, but for whom BNY failed to

perform searches required by Rule 17Ad-17 (“Payer Securityholders”); or (ii) owned assets escheated to the states by BNY, but whom BNY improperly failed to classify as lost under the meaning of Rule 17Ad-17 from January 1, 1998 through September 16, 2004, and for whom BNY improperly failed to perform searches pursuant to Rule 17Ad-17 prior to escheatment (“Escheat Securityholders”). The list or lists must include, at a minimum, the securityholders’ names and last-known contact information, or the names and contact information for the securityholders’ heirs or assignees known to BNY, the identity of the asset, the amount, if any, paid by the securityholder to a vendor, and the date of escheatment, if applicable. For Escheat Securityholders, information included on the list or lists shall be gathered from or be a result of database searches using databases that comply with Rule 17Ad-17 and performed by or on behalf of BNY since BNY’s discovery of its failure to perform searches for those securityholders as required by Rule 17Ad-17. If any Securityholder is deceased, BNY shall direct the Independent Consultant to perform reasonable tasks necessary to locate the securityholder’s heirs or assignees.

d. Within 120 days of the date of entry of the Order, BNY shall offer: (i) Payer Securityholders repayment from BNY of monies paid to a vendor for recovery of an asset; and (ii) Escheat Securityholders payment for the value of assets escheated by BNY (the “Settlement Plan”).

e. As part of the Settlement Plan, BNY shall, within 90 days from the date of entry of the Order, submit to the Commission’s staff for review sample letters in plain English addressed to Payer Securityholders: (i) offering Payer Securityholders, their heirs or assignees, the opportunity to make a claim for repayment of fees paid to BNY’s search firm for recovery of the securityholder’s assets; (ii) specifying the amount due from BNY to the Payer Securityholder, their heirs or assignees; and (iii) explaining the reasons that the Payer Securityholder is entitled to repayment. Such letters may include other information that may assist the Payer Securityholder in recognizing the legitimacy of BNY’s offer, and may include details regarding any rights of subrogation to BNY related to the facts described herein. The letter shall not be unacceptable to the Independent Consultant and the Commission’s staff.

f. As part of the Settlement Plan, BNY shall, within 90 days from the date of entry of the Order, submit to the Commission’s staff for review sample letters in plain English: (i) offering Escheat Securityholders, their heirs or assignees, the opportunity to make a claim to recover the greater of (a) the value of the Escheat Securityholders’ asset at the time of its improper escheatment to the states by BNY, the dollar amount to be specified according to each particular asset; or (b) the value of the Escheat Securityholders’ asset as of the date of the letter, the dollar amount to be specified according to each particular asset; (ii) explaining the reasons that the Escheat Securityholder is entitled to recover the value of the escheated asset; (iii) stating that the Escheat Securityholder is entitled to all accrued dividends since BNY’s last contact with the Escheat Securityholder; and (iv) stating that the Escheat Securityholder should consult with a tax advisor to determine the federal, state, or local tax consequences associated with such compensation. Such letters may include other information that may assist the Escheat Securityholder in recognizing the legitimacy of BNY’s offer, and may include details regarding BNY’s rights of subrogation and release from any claims against BNY related to the facts

described herein. The letter shall not be unacceptable to the Independent Consultant and the Commission's staff.

g. To implement the Settlement Plan, BNY shall, within 90 days from the date of entry of the Order, develop a plan not unacceptable to the Independent Consultant or to the Commission's staff to establish and administer a fund from which it will draw monies necessary to compensate securityholders as specified under the Settlement Plan. The plan to establish and administer the fund shall specify, at a minimum: (i) the fund's location, (ii) the identity of individuals with access to the fund; (iii) the method for funding the fund; (iv) safeguards for appropriate use and oversight of the fund; and (v) payment processes. BNY shall, pursuant to the terms of the plan, establish the fund within 120 days from the date of entry of the Order. Any monies remaining in the fund shall not revert back to BNY until the Independent Consultant has executed a sworn certification and provided such certification to the staff that BNY has satisfied the terms of the Order and made all reasonable efforts to locate and compensate securityholders due such compensation from BNY as specified in the Order.

h. In the event that any Escheat Securityholder elects to recover the asset rather than receive compensation from BNY, BNY shall provide to the Escheat Securityholder the identity of the asset, the date of escheatment, the state to which the asset escheated, and any other information that the Escheat Securityholder may reasonably require or request to assist in the recovery of the asset. BNY shall provide all reasonable assistance to the Escheat Securityholder for recovery of the asset, but shall not be required to recover the asset on behalf of the Escheat Securityholder and shall not be required to pay any fees associated with the Escheat Securityholder's efforts to recover the asset.

i. The Settlement Plan shall not be unacceptable to the Independent Consultant and the Commission's staff.

j. BNY shall fully complete execution of the Settlement Plan (*i.e.*, make the payments to Payer Securityholders and Escheat Securityholders in accordance with the offer described in paragraph 13.d) within 360 days from the date of entry of the Order.

k. BNY shall require the Independent Consultant to prepare and submit to the Commission's staff, within 240 days from the date entry of the Order, a report estimating: (i) the number of Payer and Escheat Securityholders entitled to compensation under the Settlement Plan; and (ii) the dollar amount expected to be paid by BNY to Payer and Escheat Securityholders. BNY also shall require the Independent Consultant to prepare and submit to the Commission's staff, within 30 days after complete execution of the Settlement Plan: (i) a report that includes: (a) a detailed description of the efforts made to locate Payer and Escheat Securityholders; (b) the number of Payer and Escheat Securityholders located as a result of implementation of the Settlement Plan; and (c) the number of Payer and Escheat Securityholders who responded to communications sent to them as part of the Settlement Plan; and (ii) a sworn certification detailing the dollar amount paid by BNY to Payer and Escheat Securityholders as a result of implementation of the Settlement Plan.

l. BNY shall further retain and shall require the Independent Consultant to prepare and, within 120 days from the date of entry of the Order, submit to BNY and the Commission's staff an Initial Report. The Initial Report shall address, at a minimum: (i) the adequacy of BNY's policies and procedures regarding lost securityholder searches; (ii) the adequacy of the Settlement Plan, with a goal toward compensating securityholders in the manner detailed above in paragraphs 13(d), 13(e), 13(f), 13(g) and 13(h); and (iii) the adequacy of BNY's policies and procedures related to reconciliation of its issuer reorganization discrepancies.

m. Within 150 days from the date of entry of the Order, BNY shall in writing advise the Independent Consultant and the Commission's staff of the recommendations from the Initial Report that it is adopting and the recommendations that it considers to be unnecessary or inappropriate. With respect to any recommendation that BNY considers unnecessary or inappropriate, BNY shall explain why the objective or purpose of such recommendation is unnecessary or inappropriate and provide in writing an alternative policy, procedure or system designed to achieve the same objective or purpose.

n. With respect to any recommendation with which BNY and the Independent Consultant do not agree, BNY shall attempt in good faith to reach an agreement with the Independent Consultant within 180 days from the date of entry of the Order. In the event the Independent Consultant and BNY are unable to agree on an alternative proposal, BNY shall abide by the recommendation of the Independent Consultant.

o. BNY shall further retain and shall require the Independent Consultant to complete the aforementioned review and submit a written Final Report to BNY and to the Commission's staff within 240 days from the date of entry of the Order. The Final Report must recite the efforts the Independent Consultant undertook to review: (i) the adequacy of BNY's policies and procedures regarding lost securityholder searches; (ii) the adequacy of procedures to administer the Settlement Plan and the completeness of the implementation of the Settlement Plan; and (iii) the adequacy of BNY's policies and procedures regarding reconciliation of discrepancies resulting from issuer reorganizations. The Final Report shall also set forth in detail the Independent Consultant's recommendations and a reasonable time period(s), not to exceed 300 days from the date of entry of the Order, for BNY to implement its recommendations. The Final Report must also describe how BNY proposes to implement those recommendations within the time period(s) set forth in the Final Report.

p. BNY shall take all necessary and appropriate steps to adopt and implement all recommendations and proposals contained in the Independent Consultant's Final Report.

q. To ensure the independence of the Independent Consultant, BNY: (i) shall not have the authority to terminate the Independent Consultant, without the prior written approval of the Commission's staff; (ii) shall compensate the Independent Consultant, and persons engaged to assist the Independent Consultant, for services rendered pursuant to the Order at their reasonable and customary rates; and (iii) shall not be in and shall not have an attorney-client relationship with the Independent Consultant and shall not seek to invoke the attorney-client or any other doctrine or

privilege to prevent the Independent Consultant from transmitting any information, reports or documents to the Commission or the Commission's staff.

r. BNY shall require the Independent Consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with BNY, or any of its present or former affiliates, directors, officers, employees, and agents acting in their capacity as such. The agreement will also provide that the Independent Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Independent Consultant in performance of his/her duties under this Order shall not, without prior written consent of the Philadelphia District Office of the Commission, enter into any employment, consultant, attorney-client, auditing or other professional relationship with BNY, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

s. BNY shall cooperate fully with the Independent Consultant and shall provide the Independent Consultant with prompt access to BNY's books, records and personnel as the Independent Consultant reasonably deems necessary or appropriate in fulfilling any function or completing any task described in these undertakings.

t. For good cause shown, and upon receipt of a timely application from the Independent Consultant or BNY, the Commission's staff may extend or modify any of the procedural dates set forth above. Good cause shall include an inability to comply with any of the above deadlines for reasons not within BNY's control.

In determining whether to accept the Offer, the Commission has considered these undertakings.

#### IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in BNY's Offer.

Accordingly, it is hereby ORDERED that BNY cease and desist from committing or causing any violations and any future violations of Section 17A(d) of the Exchange Act and Rule 17Ad-17 thereunder.

By the Commission.

Nancy M. Morris  
Secretary

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*Jill M. Peterson*  
By: **Jill M. Peterson**  
**Assistant Secretary**

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

April 25, 2006

In the Matter of

Skygivers, Inc.

File No. 500-1

ORDER OF SUSPENSION OF TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Skygivers, Inc. because it has not filed a periodic report since the period ended December 31, 2000.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above-listed company is suspended for the period from 9:30 a.m. EDT on April 25, 2006, through 11:59 p.m. EDT on May 8, 2006.

By the Commission.

Nancy M. Morris  
Secretary

*Jill M. Peterson*  
By: Jill M. Peterson  
Assistant Secretary

Document 27 of 43

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

April 25, 2006

In the Matter of

Bullhide Corp.

File No. 500-1

**ORDER OF SUSPENSION OF  
TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Bullhide Corp (a/k/a Bullhide Liner Corp.) because it has not filed a periodic report since the period ended December 31, 1999.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above-listed company is suspended for the period from 9:30 a.m. EDT on April 25, 2006, through 11:59 p.m. EDT on May 8, 2006.

By the Commission.

Nancy M. Morris  
Secretary

*Jill M. Peterson*  
By: **Jill M. Peterson**  
**Assistant Secretary**

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**  
**April 25, 2006**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-12270**

**In the Matter of**

**Regent Energy Corp. and  
Skygivers, Inc.,**

**Respondents.**

**ORDER INSTITUTING ADMINISTRATIVE  
PROCEEDINGS AND NOTICE OF HEARING  
PURSUANT TO SECTION 12(j) OF THE  
SECURITIES EXCHANGE ACT OF 1934**

**I.**

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act").

**II.**

After an investigation, the Division of Enforcement alleges that:

**A. RESPONDENTS**

1. Regent Energy Corp. ("Regent") (CIK No. 216810) is a Nevada corporation located in Houston, Texas, with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Regent is delinquent in its periodic filings with the Commission, having not filed a periodic report since a Form 10-KSB was filed for the period ended December 31, 2001. Regent has a revoked status with the Nevada Secretary of State. Regent's stock (symbol "RGEY") is traded on the over-the-counter market, but has no market maker and is not eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3).

2. Skygivers, Inc. (n/k/a Spek 10 Corp.) ("Skygivers") (CIK No. 1043860) is a Nevada corporation located in Penn Yan, New York, with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Skygivers is delinquent in its periodic filings with the Commission, having not filed a periodic report since a Form 10-KSB was filed for the period ended December 31, 2000. This last filing reported that Skygivers had a net loss of \$483,938 since its inception. The records of the Nevada Secretary of State show that Skygivers changed its name to Spek 10 Corp. in May 2005, but the company failed to enter this change in the Commission's records.

*Document 29 of 43*

Skygivers' stock was quoted on the Pink Sheets (symbol "SKGV") as of April 18, 2006, had four market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3).

**B. DELINQUENT PERIODIC FILINGS**

3. Both Respondents are delinquent in their periodic filings with the Commission (*see* Chart of Delinquent Filings, attached hereto as Appendix 1), have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission, did not receive such letters. The same individual once served as counsel for both Respondents.

4. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports (Forms 10-K or 10-KSB), and Rule 13a-13 requires issuers to file quarterly reports (Forms 10-Q or 10-QSB).

5. As a result of their failure to file required periodic filings, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

**III.**

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II of this Order are true, and to afford the Respondents an opportunity to establish any defenses to such allegations; and

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months or to revoke the registrations of each class of securities registered pursuant to Exchange Act Section 12 of the Respondents identified in Section II.

**IV.**

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further

order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that each Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If a Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon each Respondent personally, by certified or registered mail, or by any other means permitted by the Commission's Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Nancy M. Morris  
Secretary

Attachment

  
By: **Jill M. Peterson**  
**Assistant Secretary**

Appendix 1

**Chart of Delinquent Filings**

*In the Matter of Regent Energy Corp., et al.*

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
<b>Regent Energy Corp.</b>					
	10-QSB	03/31/02	05/15/02	Not filed	47
	10-QSB	06/30/02	08/14/02	Not filed	44
	10-QSB	09/30/02	11/14/02	Not filed	41
	10-KSB	12/31/02	03/31/03	Not filed	37
	10-QSB	03/31/03	05/15/03	Not filed	35
	10-QSB	06/30/03	08/14/03	Not filed	32
	10-QSB	09/30/03	11/14/03	Not filed	29
	10-KSB	12/31/03	03/30/04	Not filed	25
	10-QSB	03/31/04	05/17/04	Not filed	23
	10-QSB	06/30/04	08/16/04	Not filed	20
	10-QSB	09/30/04	11/15/04	Not filed	17
	10-KSB	12/31/04	03/31/05	Not filed	13
	10-QSB	03/31/05	05/16/05	Not filed	11
	10-QSB	06/30/05	08/15/05	Not filed	8
	10-QSB	09/30/05	11/14/05	Not filed	5
	10-KSB	12/31/05	03/31/06	Not filed	1
Total Filings Delinquent	16				
<b>Skygivers, Inc.</b>					
	10-QSB	03/31/01	05/15/01	Not filed	59
	10-QSB	06/30/01	08/14/01	Not filed	56
	10-QSB	09/30/01	11/14/01	Not filed	53
	10-KSB	12/31/01	04/01/02	Not filed	48
	10-QSB	03/31/02	05/15/02	Not filed	47
	10-QSB	06/30/02	08/14/02	Not filed	44
	10-QSB	09/30/02	11/14/02	Not filed	41
	10-KSB	12/31/02	03/31/03	Not filed	37
	10-QSB	03/31/03	05/15/03	Not filed	35
	10-QSB	06/30/03	08/14/03	Not filed	32
	10-QSB	09/30/03	11/14/03	Not filed	29
	10-KSB	12/31/03	03/30/04	Not filed	25
	10-QSB	03/31/04	05/17/04	Not filed	23
	10-QSB	06/30/04	08/16/04	Not filed	20
	10-QSB	09/30/04	11/15/04	Not filed	17
	10-KSB	12/31/04	03/31/05	Not filed	13
	10-QSB	06/30/05	08/15/05	Not filed	8
	10-QSB	09/30/05	11/14/05	Not filed	5
	10-KSB	12/31/05	03/31/06	Not filed	1
Total Filings Delinquent	19				

*Commissioner Atkins  
Not Participating*

**UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934  
Release No. 53717 / April 25, 2006**

**ACCOUNTING AND AUDITING ENFORCEMENT  
Release No. 2418 / April 25, 2006**

**ADMINISTRATIVE PROCEEDING  
File No. 3-12273**

**In the Matter of  
  
ALLEN BUNTIN,  
  
Respondent.**

**ORDER INSTITUTING CEASE-AND-DESIST  
PROCEEDINGS, MAKING FINDINGS, AND  
IMPOSING A CEASE-AND-DESIST ORDER  
PURSUANT TO SECTION 21C OF THE  
SECURITIES EXCHANGE ACT OF 1934**

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Allen Buntin ("Buntin" or "Respondent").

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

*Document 30 of 43*

### III.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>1</sup> that:

#### A. Facts

Hayes Lemmerz International, Inc. ("Hayes") is a Delaware corporation that is headquartered in Northville, Michigan and has operations throughout the United States, South America, and Europe. The company is a major global supplier of automotive and commercial highway components (including wheels, brakes, powertrains, suspensions, and structural and other lightweight components). During the relevant period, Hayes was a publicly-held company with securities registered with the Commission pursuant to Section 12(b) of the Exchange Act. Hayes' shares traded on the New York Stock Exchange until it was de-listed after the disclosure of the fraudulent accounting scheme described below. Hayes' common stock is now listed on the NASDAQ National Market.

Allen Buntin, age 53, is a resident of Michigan. From May 1992 through October 2001, he was the Business Unit Controller for Hayes' North American Fabricated/Cast Wheel Group ("FWG"), which was a part of Hayes' North American Wheel Group ("NAWG"). Buntin's responsibilities as the Business Unit Controller involved ensuring that the FWG's books and records complied with Generally Accepted Accounting Principles ("GAAP") and Hayes' internal accounting policies.

From at least 1999 through the first quarter of 2001, Hayes, acting through senior officers and employees, engaged in a fraudulent scheme to achieve corporate earnings targets and mask declining operating results. Specifically, the fraudulent accounting scheme was carried out at certain Hayes plants and business units through three primary mechanisms: (1) inappropriately deferring operating expenses to balance sheet accounts, (2) failing to process vendor invoices, and (3) recording certain expenses as assets by improperly classifying expenses as gain contingencies or inaccurately recording customer discounts as receivables. Hayes employees, including senior officers and accounting personnel, directed, ratified and/or knew of the above-listed practices. As a result of Hayes' fraudulent scheme, Hayes made materially false filings with the Commission in fiscal years 1999 and 2000 and for the first quarter of 2001. In December 2001, Hayes restated its results for fiscal years 1999, 2000 and for the first quarter of 2001. On December 5, 2001, Hayes filed for Chapter 11 bankruptcy due, in part, to revelations about its improper accounting practices. Hayes emerged from bankruptcy in June 2003.

As FWG Business Unit Controller, Buntin knew of and participated in at least some of the improper accounting practices described above because he either authorized the action and/or ratified the improper records that resulted from the practices. Buntin was responsible for reconciling various income statements and balance sheet accounts. Specifically, Buntin knew that in 1999, 2000, and the first quarter of 2001, approximately \$.75 million, \$1.9 million, and \$1.8

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<sup>1</sup> The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

million respectively of excessive operating expenses (such as utility costs, freight, and machine repairs) were improperly deferred to FWG plant balance sheet accounts. Beginning in May 2000, Buntin directed at least one FWG plant to meet its earnings targets by deferring expenses to specific plant balance sheet accounts at almost every month-end. He also periodically made the expense deferrals at the FWG business unit level. Also, Buntin knew that the FWG business unit inappropriately deferred approximately \$5.1 million of operating expenses in 1999, \$5.6 million in 2000 and an additional \$1.1 million by the close of the first quarter of 2001. Buntin knew that by deferring operating expenses, the FWG improperly inflated net income. In 2000, Buntin failed to adequately accrue customer discounts on FWG financial statements, causing the FWG's net sales to be overstated. Buntin knew that failing to adequately accrue these discounts resulted in false entries on FWG's balance sheet and income statements. Additionally, Buntin knew that at both the plant and business unit level of FWG, fringe benefit liabilities were purposefully understated in Hayes' books and records.

## **B. Legal Analysis**

As a result of the conduct described above, Buntin violated Section 13(b)(5) of the Exchange Act and Rule 13b2-1 thereunder and caused violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder.

### **1. Record-Keeping Provisions: Section 13(b)(2)(A) of the Exchange Act and Rule 13b2-1 Thereunder**

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Section 13(b)(2)(A) of the Exchange Act requires issuers with securities registered pursuant to Section 12 of the Exchange Act to make and keep books, records, and accounts that accurately and fairly reflect the transactions and dispositions of their assets. Rule 13b2-1 under the Exchange Act prohibits the falsification of any book, record, or account subject to Section 13(b)(2)(A) of the Exchange Act.

As FWG Business Unit Controller, Buntin was responsible for reconciling various income statements and balance sheet accounts and authorized and/or ratified entries in Hayes' books and records that he knew inaccurately reflected transactions and dispositions of the company's assets. Buntin therefore caused Hayes' violation of Section 13(b)(2)(A) of the Exchange Act and violated Rule 13b2-1 under the Exchange Act.

### **2. Internal Controls Provisions: Sections 13(b)(2)(B) and 13(b)(5) of the Exchange Act**

Section 13(b)(2)(B) of the Exchange Act requires issuers with securities registered pursuant to Section 12 of the Exchange Act to devise and maintain a system of internal accounting controls sufficient to reasonably assure, among other things, that transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP. Section 13(b)(5) of the Exchange Act prohibits any person from knowingly circumventing or knowingly failing to implement a system of internal accounting controls or knowingly falsifying any book, record, or account required to be made and kept pursuant to Section 13(b)(2) of the Exchange Act.

As FWG Business Unit Controller, Buntin knew that the inappropriate accounting entries he and others made at the FWG plants would be included in Hayes' books, records, and financial

results. Buntin therefore caused Hayes' books and records to contain inaccurate and incomplete descriptions of the accounting entries, which prevented Hayes from preparing financial statements in conformity with GAAP. Such conduct violated Section 13(b)(5) of the Exchange Act and caused Hayes' violation of Section 13(b)(2)(B) of the Exchange Act.

3. Reporting Provisions: Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13  
Thereunder

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Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder require that issuers with securities registered under Section 12 of the Exchange Act file annual and quarterly reports with the Commission and keep this information current. By engaging in the above-described conduct, Buntin caused Hayes to file inaccurate quarterly and annual reports with the Commission. Accordingly, Buntin caused Hayes' violation of Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent Buntin's Offer.

Accordingly, it is hereby ORDERED that Respondent Allen Buntin cease and desist from (1) committing or causing any violations and any future violations of Section 13(b)(5) of the Exchange Act and Rule 13b2-1 thereunder, and (2) causing any violations and any future violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder.

By the Commission.

Nancy M. Morris  
Secretary

  
By: Jill M. Peterson  
**Assistant Secretary**

Commissioner Atkins  
Not Participating

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 53718 / April 25, 2006

ACCOUNTING AND AUDITING ENFORCEMENT  
Release No. 2419 / April 25, 2006

ADMINISTRATIVE PROCEEDING  
File No. 3-12274

In the Matter of

GREG JONES,

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST  
PROCEEDINGS, MAKING FINDINGS, AND  
IMPOSING A CEASE-AND-DESIST ORDER  
PURSUANT TO SECTION 21C OF THE  
SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Greg Jones ("Jones" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

Document 31 of 43

### III.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>1</sup> that:

#### A. Facts

Hayes Lemmerz International, Inc. ("Hayes") is a Delaware corporation that is headquartered in Northville, Michigan and has operations throughout the United States, South America, and Europe. The company is a major global supplier of automotive and commercial highway components (including wheels, brakes, powertrains, suspensions, and structural and other lightweight components). During the relevant time period, Hayes was a publicly-held company with securities registered with the Commission pursuant to Section 12(b) of the Exchange Act. Hayes' shares traded on the New York Stock Exchange until it was de-listed after the disclosure of the fraudulent accounting scheme described below. Hayes' common stock is now listed on the NASDAQ National Market.

Greg Jones, age 52, is a resident of Georgia. From 1997 through August 2000, he was the Business Unit Controller for Hayes' North American Aluminum Wheel Group ("AWG"), which was a part of Hayes' North American Wheel Group ("NAWG"). Jones' responsibilities as the Business Unit Controller included ensuring that AWG's books and records complied with Generally Accepted Accounting Principles ("GAAP") and Hayes' internal accounting policies. From August 2000 through May 2003, Jones was a plant manager for the Gainesville, Georgia AWG manufacturing plant. Although Jones did not have formal accounting or finance responsibilities in that position, he was aware of various accounting entries that were made.

From at least 1999 through the first quarter of 2001, Hayes, acting through senior officers and employees, engaged in a fraudulent scheme to achieve corporate earnings targets and mask declining operating results. Specifically, the fraudulent accounting scheme was carried out at certain Hayes plants and business units through three primary mechanisms: (1) inappropriately deferring operating expenses to balance sheet accounts, (2) failing to process vendor invoices, and (3) recording certain expenses as assets by improperly classifying expenses as gain contingencies or inaccurately recording customer discounts as receivables. Hayes employees, including senior officers and accounting personnel, directed, ratified and/or knew of the above-listed practices. As a result of Hayes' fraudulent scheme, Hayes made materially false filings with the Commission in fiscal years 1999 and 2000 and for the first quarter of 2001. In December 2001, Hayes restated its results for fiscal years 1999, 2000 and for the first quarter of 2001. On December 5, 2001, Hayes filed for Chapter 11 bankruptcy due, in part, to revelations about its improper accounting practices. Hayes emerged from bankruptcy in June 2003.

As Business Unit Controller of AWG, Jones was responsible for reconciling various income statements and balance sheet accounts and directed, ratified or knew that false entries were being made to Hayes' books and records and were included in Hayes' financial statements.

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<sup>1</sup> The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Specifically, Jones knew that certain AWG plants were not adequately recording payroll and employee benefit accruals to achieve internal earnings targets. In addition, Jones knew that one AWG plant had stopped recording supply invoices to achieve internal earnings targets.

As an AWG plant manager, Jones also knew of -- but took no steps to correct -- inappropriate accounting entries that were made at his plant. For example, in October 2000, Jones knew that his plant inappropriately deferred \$1.2 million of tooling expenses to a balance sheet account. Also, in late 2000 and early 2001, Jones knew that his plant had improperly deferred approximately \$295,000 of operating expenses to a balance sheet account. Finally, in March 2001, Jones knew that his plant had inappropriately deferred approximately \$230,000 of operating expenses to a balance sheet account at the direction of an AWG vice president, to help another plant achieve its earning targets for a particular quarter. Jones knew that these entries were false.

## **B. Legal Analysis**

As a result of the conduct described above, Jones violated Section 13(b)(5) of the Exchange Act and Rule 13b2-1 thereunder and caused violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder.

### **1. Record-Keeping Provisions: Section 13(b)(2)(A) of the Exchange Act and Rule 13b2-1 Thereunder**

Section 13(b)(2)(A) of the Exchange Act requires issuers with securities registered pursuant to Section 12 of the Exchange Act to make and keep books, records, and accounts that accurately and fairly reflect the transactions and dispositions of their assets. Rule 13b2-1 under the Exchange Act prohibits the falsification of any book, record, or account subject to Section 13(b)(2)(A) of the Exchange Act.

As AWG Business Unit Controller and as an AWG plant manager, Jones was responsible for reconciling various income statements and balance sheet accounts and authorized and/or ratified entries in Hayes' books and records that he knew inaccurately reflected transactions and dispositions of the company's assets. Jones therefore caused Hayes' violation of Section 13(b)(2)(A) of the Exchange Act and violated Rule 13b2-1 under the Exchange Act.

### **2. Internal Controls Provisions: Sections 13(b)(2)(B) and 13(b)(5) of the Exchange Act**

Section 13(b)(2)(B) of the Exchange Act requires issuers with securities registered pursuant to Section 12 of the Exchange Act to devise and maintain a system of internal accounting controls sufficient to reasonably assure, among other things, that transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP. Section 13(b)(5) of the Exchange Act prohibits any person from knowingly circumventing or knowingly failing to implement a system of internal accounting controls or knowingly falsifying any book, record, or account required to be made and kept pursuant to Section 13(b)(2) of the Exchange Act.

As AWG Business Unit Controller and as an AWG plant manager, Jones knew that the inappropriate accounting entries he and others made at the AWG plants would be included in Hayes' books, records, and financial results. Jones therefore caused Hayes' books and records to

contain inaccurate and incomplete descriptions of the accounting entries, which prevented Hayes from preparing financial statements in conformity with GAAP. By engaging in such conduct, Jones violated Section 13(b)(5) of the Exchange Act and caused Hayes' violation of Section 13(b)(2)(B) of the Exchange Act.

3. Reporting Provisions: Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 Thereunder

Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder require that issuers with securities registered under Section 12 of the Exchange Act file annual and quarterly reports with the Commission and keep this information current. By engaging in the above-described conduct, Jones caused Hayes to file inaccurate quarterly and annual reports with the Commission. Accordingly, Jones caused Hayes' violation of Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent Jones' Offer.

Accordingly, it is hereby ORDERED that Respondent Greg Jones cease and desist from (1) committing or causing any violations and any future violations of Section 13(b)(5) of the Exchange Act and Rule 13b2-1 thereunder, and (2) causing any violations and any future violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder.

By the Commission.

Nancy M. Morris  
Secretary

*Jill M. Peterson*  
By: **Jill M. Peterson**  
**Assistant Secretary**

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**  
**April 25, 2006**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-12271**

**In the Matter of**

**Bullhide Corp.,  
Fetchomatic Global Internet, Inc.,  
The Flag Group, Inc., and  
The Second Flag Group, Inc.,**

**Respondents.**

**ORDER INSTITUTING  
ADMINISTRATIVE PROCEEDINGS AND  
NOTICE OF HEARING PURSUANT TO  
SECTION 12(j) OF THE SECURITIES  
EXCHANGE ACT OF 1934**

**I.**

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act").

**II.**

After an investigation, the Division of Enforcement alleges that:

**A. RESPONDENTS**

1. Bullhide Corp. ("Bullhide") (CIK No. 1090943) is a Washington state corporation located in Deerfield Beach, Florida, with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Bullhide is delinquent in its periodic filings with the Commission, having not filed a periodic report since a Form 10-QSB was filed for the period ended December 31, 1999. This last filing reported that it had a net loss of \$322,593 for the previous nine months. The company has an inactive status with the Washington Secretary of State. As of April 18, 2006, Bullhide's common stock was quoted on the Pink Sheets (symbol "BULH"), had five market makers, and was eligible for the piggyback exemption under Exchange Act Rule 15c2-11(f)(3). The stock had an average daily trading volume of 3,864 shares during the year ended February 27, 2006.

2. Fetchomatic Global Internet, Inc. ("Fetchomatic") (CIK No. 1070371) is a Nevada corporation located in Delta, British Columbia, Canada, with a class of equity

*Document 32 of 43*

securities registered with the Commission pursuant to Exchange Act Section 12(g). Fetchomatic is delinquent in its periodic filings with the Commission, having not filed a periodic report since a Form 10-QSB was filed for the period ended January 31, 2001, and that filing reported a net loss of \$18 million for the previous six months. Fetchomatic has a revoked status with the Nevada Secretary of State. Fetchomatic's stock (symbol "FTCH") is traded on the over-the-counter markets, but has no market maker and is not eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3).

3. The Flag Group, Inc. ("Flag Group") (CIK No. 1130887) is a Florida corporation located in Fort Lauderdale, Florida, with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Flag Group is delinquent in its periodic filings with the Commission, having not filed a periodic report since a Form 10-KSB for the period ended December 31, 2000, which reported that the company had assets of \$27,202 and liabilities of \$27,761. The company has a dissolved status with the Florida Secretary of State. The company's stock has not publicly traded.

4. The Second Flag Group, Inc. ("Second Flag") (CIK No. 1138450) is a Florida corporation located in Fort Lauderdale, Florida, with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Second Flag is delinquent in its periodic filings with the Commission, having not filed a periodic report since its registration statement was filed on April 16, 2001, and it has a dissolved status with the Florida Secretary of State. The company's stock has not publicly traded.

#### B. DELINQUENT PERIODIC FILINGS

5. All of the Respondents are delinquent in their periodic filings with the Commission (*see* Chart of Delinquent Filings, attached hereto as Appendix 1), shared a common officer or director, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission, did not receive such letters.

6. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports (Forms 10-K or 10-KSB), and Rule 13a-13 requires issuers to file quarterly reports (Forms 10-Q or 10-QSB).

5. As a result of their failure to file required periodic filings, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

### III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II of this Order are true, and to afford the Respondents an opportunity to establish any defenses to such allegations; and

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months or to revoke the registrations of each class of securities registered pursuant to Exchange Act Section 12 of the Respondents identified in Section II.

### IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that each Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If a Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon each Respondent personally, by certified or registered mail, or by any other means permitted by the Commission's Rules of Practice.

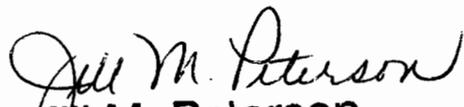
IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Nancy M. Morris  
Secretary

Attachment

  
**By: Jill M. Peterson**  
**Assistant Secretary**

**Appendix 1**

**Chart of Delinquent Filings  
In the Matter of Bullhide Corp., et al.**

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
<b>Bullhide Corp.</b>					
	10-KSB	03/31/00	06/29/00	Not filed	70
	10-QSB	06/30/00	08/14/00	Not filed	68
	10-QSB	09/30/00	11/14/00	Not filed	65
	10-QSB	12/31/00	02/14/01	Not filed	62
	10-KSB	03/31/01	06/29/01	Not filed	58
	10-QSB	06/30/01	08/14/01	Not filed	56
	10-QSB	09/30/01	11/14/01	Not filed	53
	10-QSB	12/31/01	02/14/02	Not filed	50
	10-KSB	03/31/02	07/01/02	Not filed	45
	10-QSB	06/30/02	08/14/02	Not filed	44
	10-QSB	09/30/02	11/14/02	Not filed	41
	10-QSB	12/31/02	02/14/03	Not filed	38
	10-KSB	03/31/03	06/30/03	Not filed	34
	10-QSB	06/30/03	08/14/03	Not filed	32
	10-QSB	09/30/03	11/14/03	Not filed	29
	10-QSB	12/31/03	02/17/04	Not filed	26
	10-KSB	03/31/04	06/29/04	Not filed	22
	10-QSB	06/30/04	08/16/04	Not filed	20
	10-QSB	09/30/04	11/15/04	Not filed	17
	10-QSB	12/31/04	02/14/05	Not filed	14
	10-KSB	03/31/05	06/29/05	Not filed	10
	10-QSB	06/30/05	08/15/05	Not filed	8
	10-QSB	09/30/05	11/15/05	Not filed	5
	10-QSB	12/31/05	02/14/06	Not filed	2
Total Filings Delinquent	24				
<b>Fetchomatic Global Internet, Inc.</b>					
	10-QSB	04/30/01	06/15/01	Not filed	58
	10-KSB	07/31/01	10/29/01	Not filed	54
	10-QSB	10/31/01	12/17/01	Not filed	52
	10-QSB	01/31/02	03/18/02	Not filed	49
	10-QSB	04/30/02	06/14/02	Not filed	46
	10-KSB	07/31/02	10/29/02	Not filed	42
	10-QSB	10/31/02	12/16/02	Not filed	40
	10-QSB	01/31/03	03/17/03	Not filed	37
	10-QSB	04/30/03	06/16/03	Not filed	34
	10-KSB	07/31/03	10/31/03	Not filed	30
	10-QSB	10/31/03	12/15/03	Not filed	28
	10-QSB	01/31/04	03/16/04	Not filed	25
	10-QSB	04/30/04	06/14/04	Not filed	22

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
<b>Fetchomatic Global</b>					
<b>Internet, Inc.</b>	<i>10-KSB</i>	07/31/04	10/29/04	Not filed	18
<b>(continued)</b>	<i>10-QSB</i>	10/31/04	12/17/04	Not filed	16
	<i>10-QSB</i>	01/31/05	03/18/05	Not filed	13
	<i>10-QSB</i>	04/30/05	06/14/05	Not filed	10
	<i>10-KSB</i>	07/31/05	10/31/05	Not filed	6
	<i>10-QSB</i>	10/31/05	12/15/05	Not filed	4
	<i>10-QSB</i>	01/31/06	03/17/06	Not filed	1
Total Filings Delinquent	20				

<b>The Flag Group, Inc.</b>					
	<i>10-QSB</i>	03/31/01	05/15/01	Not filed	59
	<i>10-QSB</i>	06/30/01	08/14/01	Not filed	56
	<i>10-QSB</i>	09/30/01	11/14/01	Not filed	53
	<i>10-KSB</i>	12/31/01	04/01/02	Not filed	48
	<i>10-QSB</i>	03/31/02	05/15/02	Not filed	47
	<i>10-QSB</i>	06/30/02	08/14/02	Not filed	44
	<i>10-QSB</i>	09/30/02	11/14/02	Not filed	41
	<i>10-KSB</i>	12/31/02	03/31/03	Not filed	37
	<i>10-QSB</i>	03/31/03	05/15/03	Not filed	35
	<i>10-QSB</i>	06/30/03	08/14/03	Not filed	32
	<i>10-QSB</i>	09/30/03	11/14/03	Not filed	29
	<i>10-KSB</i>	12/31/03	03/30/04	Not filed	25
	<i>10-QSB</i>	03/31/04	05/17/04	Not filed	23
	<i>10-QSB</i>	06/30/04	08/16/04	Not filed	20
	<i>10-QSB</i>	09/30/04	11/15/04	Not filed	17
	<i>10-KSB</i>	12/31/04	03/31/05	Not filed	13
	<i>10-QSB</i>	03/31/05	05/16/05	Not filed	11
	<i>10-QSB</i>	06/30/05	08/15/05	Not filed	8
	<i>10-QSB</i>	09/30/05	11/15/05	Not filed	5
	<i>10-KSB</i>	12/31/05	03/31/06	Not filed	1
Total Filings Delinquent	20				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
<b>The Second Flag Group, Inc.</b>	10-QSB	03/31/01	05/15/01	Not filed	59
	10-QSB	06/30/01	08/14/01	Not filed	56
	10-QSB	09/30/01	11/14/01	Not filed	53
	10-KSB	12/31/01	04/01/02	Not filed	48
	10-QSB	03/31/02	05/15/02	Not filed	47
	10-QSB	06/30/02	08/14/02	Not filed	44
	10-QSB	09/30/02	11/14/02	Not filed	41
	10-KSB	12/31/02	03/31/03	Not filed	37
	10-QSB	03/31/03	05/15/03	Not filed	35
	10-QSB	06/30/03	08/14/03	Not filed	32
	10-QSB	09/30/03	11/14/03	Not filed	29
	10-KSB	12/31/03	03/30/04	Not filed	25
	10-QSB	03/31/04	05/17/04	Not filed	23
	10-QSB	06/30/04	08/16/04	Not filed	20
	10-QSB	09/30/04	11/15/04	Not filed	17
	10-KSB	12/31/04	03/31/05	Not filed	13
	10-QSB	03/31/05	05/16/05	Not filed	11
	10-QSB	06/30/05	08/15/05	Not filed	8
	10-QSB	09/30/05	11/15/05	Not filed	5
	10-KSB	12/31/05	03/31/06	Not filed	1
<b>Total Filings Delinquent</b>					<b>20</b>

Commissioner Atkins  
Not participating

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 53716 / April 25, 2006

ACCOUNTING AND AUDITING ENFORCEMENT  
Release No. 2417 / April 25, 2006

ADMINISTRATIVE PROCEEDING  
File No. 3-12272

In the Matter of

JAMES JARRETT,

Respondent.

**ORDER INSTITUTING CEASE-AND-DESIST  
PROCEEDINGS, MAKING FINDINGS, AND  
IMPOSING A CEASE-AND-DESIST ORDER  
PURSUANT TO SECTION 21C OF THE  
SECURITIES EXCHANGE ACT OF 1934**

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against James Jarrett ("Jarrett" or "Respondent").

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

Document 33 of 43

### III.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>1</sup> that:

#### A. Facts

Hayes Lemmerz International, Inc. ("Hayes") is a Delaware corporation that is headquartered in Northville, Michigan and has operations throughout the United States, South America, and Europe. The company is a major global supplier of automotive and commercial highway components (including wheels, brakes, powertrains, suspensions, and structural and other lightweight components). During the relevant time period, Hayes was a publicly-held company with securities registered with the Commission pursuant to Section 12(b) of the Exchange Act. Hayes' shares traded on the New York Stock Exchange until it was de-listed after the disclosure of the fraudulent accounting scheme described below. Hayes' common stock is now listed on the NASDAQ National Market.

James Jarrett, age 60, is a resident of Indiana. From May 2000 through October 2001, he was the Business Unit Controller for Hayes' North American Aluminum Wheel Group ("AWG"), which was a part of Hayes' North American Wheel Group ("NAWG"). Jarrett's responsibilities as the Business Unit Controller involved ensuring that AWG's books and records complied with Generally Accepted Accounting Principles ("GAAP") and Hayes' internal accounting policies.

From at least 1999 through the first quarter of 2001, Hayes, acting through senior officers and employees, engaged in a fraudulent scheme to achieve corporate earnings targets and mask declining operating results. Specifically, the fraudulent accounting scheme was carried out at certain Hayes plants and business units through three primary mechanisms: (1) inappropriately deferring operating expenses to balance sheet accounts, (2) failing to process vendor invoices, and (3) recording certain expenses as assets by improperly classifying expenses as gain contingencies or inaccurately recording customer credits as receivables. Hayes employees, including senior officers and accounting personnel, directed, ratified and/or knew of the above-listed practices. As a result of Hayes' fraudulent scheme, Hayes made materially false filings with the Commission in fiscal years 1999 and 2000 and for the first quarter of 2001. In December 2001, Hayes restated its results for fiscal years 1999, 2000 and for the first quarter of 2001. On December 5, 2001, Hayes filed for Chapter 11 bankruptcy due, in part, to revelations about its improper accounting practices. Hayes emerged from bankruptcy in June 2003.

As the AWG Business Unit Controller, Jarrett knew of and participated in at least some of the improper accounting practices described above because he either authorized the action and/or ratified the improper records that resulted from the practices. As the AWG Business Unit Controller, Jarrett was responsible for reconciling various income statements and balance sheet accounts and knew that these entries were false and that they misstated Hayes' financial statements. Specifically, Jarrett knew that in late 2000, approximately \$2.9 million of operating

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<sup>1</sup> The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

expenses (such as utility costs, freight, and machine repairs) were improperly deferred to AWG plant balance sheet accounts. Also, throughout 2000 and 2001, Jarrett failed to adequately accrue customer discounts on AWG financial statements, causing AWG's reported net sales to be overstated. Jarrett knew that failing to adequately accrue these discounts resulted in false entries on AWG's balance sheet. In February 2001, Jarrett knew that approximately \$3 million of operating expenses were inappropriately deferred to an AWG plant balance sheet. Finally, in 2001, Jarrett was present during a meeting in which a Hayes' executive directed an AWG plant controller, for whom Jarrett had oversight as the AWG Business Unit Controller, to stop recording supply invoices in months where the plant was not going to meet its internal earnings forecasts. The controller complied and a significant amount of unrecorded supply invoices accumulated at that plant. Jarrett knew that this directive would cause expenses not to be recorded and the plant's expenses to be understated.

## **B. Legal Analysis**

As a result of the conduct described above, Jarrett violated Section 13(b)(5) of the Exchange Act and Rule 13b2-1 thereunder, and caused violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder.

### **1. Record-Keeping Provisions: Section 13(b)(2)(A) of the Exchange Act and Rule 13b2-1 Thereunder**

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Section 13(b)(2)(A) of the Exchange Act requires issuers with securities registered pursuant to Section 12 of the Exchange Act to make and keep books, records, and accounts that accurately and fairly reflect the transactions and dispositions of their assets. Rule 13b2-1 prohibits the falsification of any book, record, or account subject to Section 13(b)(2)(A) of the Exchange Act.

As AWG Business Unit Controller, Jarrett was responsible for reconciling various income statements and balance sheet accounts and authorized and/or ratified entries in Hayes' books and records that he knew inaccurately reflected transactions and dispositions of the company's assets. Jarrett therefore caused Hayes' violation of Section 13(b)(2)(A) of the Exchange Act and violated Rule 13b2-1 under the Exchange Act.

### **2. Internal Controls Provisions: Sections 13(b)(2)(B) and 13(b)(5) of the Exchange Act**

Section 13(b)(2)(B) of the Exchange Act requires issuers with securities registered pursuant to Section 12 of the Exchange Act to devise and maintain a system of internal accounting controls sufficient to reasonably assure, among other things, that transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP. Section 13(b)(5) of the Exchange Act prohibits any person from knowingly circumventing or knowingly failing to implement a system of internal accounting controls or knowingly falsifying any book, record, or account required to be made and kept pursuant to Section 13(b)(2) of the Exchange Act.

As AWG Business Unit Controller, Jarrett knew that the inappropriate accounting entries he and others made at the AWG plants would be included in Hayes' books, records, and financial results. Jarrett therefore caused Hayes' books and records to contain inaccurate and incomplete

descriptions of the accounting entries, which prevented Hayes from preparing financial statements in conformity with GAAP. By engaging in such conduct, Jarrett violated Section 13(b)(5) of the Exchange Act and caused Hayes' violation Section 13(b)(2)(B) of the Exchange Act.

3. Reporting Provisions: Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 Thereunder

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Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder require that issuers with securities registered under Section 12 of the Exchange Act file annual and quarterly reports with the Commission and keep this information current. By engaging in the above-described conduct, Jarrett caused Hayes to file inaccurate quarterly and annual reports with the Commission. Accordingly, Jarrett caused Hayes' violation of Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder.

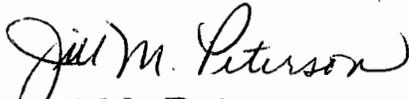
IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent Jarrett's Offer.

Accordingly, it is hereby ORDERED that Respondent James Jarrett cease and desist from (1) committing or causing any violations and any future violations of Section 13(b)(5) of the Exchange Act and Rule 13b2-1 thereunder, and (2) causing any violations and any future violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder.

By the Commission.

Nancy M. Morris  
Secretary

  
By: Jill M. Peterson  
Assistant Secretary



2. On July 16, 2004, the Commission filed a complaint in the United States District Court for the Southern District of Florida captioned SEC v. Michael Morrell, et al., Civil Action No. 04-80664-CIV-MARRA/SELTZER, alleging, among other things, violations of the antifraud provisions of the federal securities laws by Bornstein in connection with his research report. The Complaint further alleges that while he was employed by both companies, Bornstein created a research report on CyberCare that rated CyberCare a "strong buy." The research report, issued by Connecticut Capital in January 2000, failed to disclose Bornstein's conflict of interest and contained, among other things, information released by CyberCare which was materially false. Although Bornstein was not directly compensated by CyberCare for preparation of the research report, the research report failed to fully disclose Sterns & Company's compensation for public relations services Sterns & Company and Bornstein were providing to CyberCare.

3. On March 16, 2006, a Final Judgment was entered by consent against Bornstein. The Judgment permanently enjoined Bornstein from future violations of Sections 17(a) and 17(b) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Exchange Act, and Rule 10b-5, thereunder. Bornstein consented to the entry of the Judgment without admitting or denying the allegations contained in the Commission's Complaint.

#### IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions specified in Respondent Bornstein's Offer.

Accordingly, it is hereby **ORDERED**:

Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Bornstein be, and hereby is barred from association with any broker or dealer with the right to reapply for association after two (2) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

Any reapplication for association by Bornstein will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against Bornstein, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Nancy M. Morris  
Secretary

  
By: Jill M. Peterson  
Assistant Secretary

Commissioner Atkins  
Not Participating

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 53731 / April 26, 2006

Admin. Proc. File No. 3-12057

In the Matter of the Application of

TERRANCE YOSHIKAWA  
3417 West Commodore Way  
Seattle, WA 98199

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION - REVIEW OF DISCIPLINARY  
PROCEEDING

Violations of Securities Laws and Conduct Rules

Manipulation

Registered representative, president, sole owner, and head trader of former member firm of registered securities association engaged in a manipulative trading scheme, by fraudulently entering orders designed to improve the price of certain securities and then rapidly placing larger orders on the opposite side of the market from that of his initial order in order to take advantage of the price change he had caused. Held, association's findings of violations and the sanctions imposed are sustained.

APPEARANCES:

Terrance Yoshikawa, pro se.

Marc Menchel, Alan Lawhead, James S. Wrona, and Brant K. Brown, for NASD.

Appeal filed: September 26, 2005  
Last brief received: December 29, 2005

Document 35 of 43

## I.

Terrance Yoshikawa, formerly a registered representative, president, sole owner, and head trader of Ko Securities, Inc. ("the Firm"), a former NASD member firm, 1/ appeals from NASD disciplinary action. NASD found that, from February through May 1999, Yoshikawa violated antifraud provisions of the federal securities laws, as well as NASD Conduct Rules, by engaging in nineteen instances of manipulation of the prices of the publicly-traded securities of three different companies. 2/ NASD found that Yoshikawa's manipulative trading activities resulted in profits of \$5,375.00 that otherwise would not have been available to him. NASD barred Yoshikawa from association with NASD member firms in any capacity. 3/ Our findings are based on an independent review of the record.

## II.

NASD found that Yoshikawa had engaged in a practice called "auto-execution manipulation" on nineteen occasions from February through May 1999. The central facts concerning the placement of orders by Yoshikawa and the trades at issue are not in dispute; Yoshikawa challenges NASD's conclusion that these facts evidence market manipulation.

In the nineteen instances at issue here, Yoshikawa placed initial limit orders for 100 shares of the stock of three different securities listed on the Nasdaq Market: Anadigics, Inc. ("ANAD"), VSIO Corporation ("VSIO"), and Advanced Digital Information Corp. ("ADIC"). 4/ Yoshikawa personally entered all of the 100-share limit orders through Instinet Corporation, an

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- 1/ Ko Securities withdrew its NASD membership in August 2002. Yoshikawa also submitted his Form U-5, Uniform Termination Notice for Securities Industry Registration, to NASD in August 2002, and he has not worked in the securities industry since then. Yoshikawa testified that the reasons for the Firm's withdrawal from NASD membership and his submission of his Form U-5 were "the cancellation of [the Firm's] clearing arrangement by PaineWebber and the continual barrage of investigations and harassment by the NASD."
- 2/ NASD found that Yoshikawa violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, thereunder (prohibiting fraud in the offer and sale of securities), and NASD Conduct Rules 2110 (requiring adherence to just and equitable principles of trade) and 2120 (prohibiting fraud in the offer and sale of securities).
- 3/ NASD also assessed costs against Yoshikawa in the amount of \$1,456.92.
- 4/ The nineteen instances at issue here involved trades made in a personal IRA account of Yoshikawa, a personal trading account of Yoshikawa, and the proprietary trading account of the Firm. Yoshikawa acknowledges that he was solely responsible for and made all trading decisions for all relevant accounts.

electronic communications network ("ECN"). 5/ Under Exchange Act Rule 11Ac1-4, 6/ exchange specialists and over-the-counter market makers generally are required, subject to certain exceptions, to display as a bid or offer for a security the price and full size of any limit order that improves the bid or offer currently displayed by the specialist or market maker (the "display price"). Paragraph (c)(6) of Rule 11Ac1-4 provides an exception for a limit order that is delivered immediately upon receipt to an ECN that complies with Exchange Act Rule 11Ac1-1(c)(5)(ii), 7/ which requires an ECN to provide the best bids and offers provided by a specialist or market maker to a self-regulatory organization ("SRO") for display in the consolidated quotation system. During the period in question, Instinet met this requirement. Consequently, the best bid or offer provided by Instinet to an SRO became the national best bid or offer ("NBBO") when it was the highest bid or lowest offer for any security displayed in the consolidated quotation stream. 8/

Yoshikawa entered the 100-share limit orders on Instinet at a price between the then-current highest bid price and the lowest offer (or "ask") price in the consolidated quotation stream. Yoshikawa's price then became the new NBBO. Yoshikawa testified that he understood that the price of his 100-share limit orders in these nineteen instances would create a new NBBO for these securities.

In each of these nineteen instances, within seconds after placing the 100-share limit orders, Yoshikawa directed Maxine Yakushijin to place limit orders, ranging in size from 1,000 to 2,500 shares, to buy or sell the same securities on the opposite side of the market at the NBBO

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5/ Yoshikawa and Maxine Yakushijin, an employee of Ko Securities at the time, both testified that Yoshikawa almost always personally entered all orders that the Firm placed on Instinet.

6/ 17 C.F.R. § 240.11Ac1-4. Subsequent to the events at issue in this proceeding, Rule 11Ac1-4, and all other rules adopted under Section 11A of the Exchange Act, were re-designated as part of new Regulation NMS. See Securities Exchange Act Rel. No. 51808 (Jun. 9, 2005), 70 Fed. Reg. 37,496 (Jun. 29, 2005) (adopting Regulation NMS). This opinion will refer to the Section 11A rules by their old designations.

7/ 17 C.F.R. § 240.11Ac1-1(c)(5)(ii).

8/ Under Exchange Act Rule 11Ac1-2, 17 C.F.R. § 240.11Ac1-2, for reported securities, "best bid" or "best offer" are defined as "the highest bid or lowest offer for that security made available by any reporting market center pursuant to [Exchange Act Rule 11Ac1-1]."

Yoshikawa's Instinet order had established. 9/ Yakushijin entered these larger limit orders into the order system of PaineWebber Incorporated ("PaineWebber"). 10/ Ko Securities had an arrangement with Correspondent Services Corporation ("CSC"), a subsidiary of PaineWebber, under which CSC provided clearing services to Ko Securities. Under the clearing arrangement, Ko Securities had access to a PaineWebber terminal that routed orders to buy or sell less than 5,000 shares (including all of the larger limit orders entered by Yakushijin in the nineteen instances at issue here) to market makers in the given securities. 11/ Yoshikawa testified that he would have told Yakushijin of his intent to enter these subsequent larger limit orders into the PaineWebber system prior to his entry of the initial small limit orders into the Instinet system, so that Yakushijin would be ready to enter them promptly upon receiving his instructions.

The PaineWebber terminal routed the trades for the larger limit orders entered by Yakushijin in these nineteen instances to market makers Knight Securities, L.P. or Bear Sterns & Co., Inc. Although PaineWebber did not have automatic execution agreements with Knight Securities or Bear Sterns during the period in question, 12/ both Knight Securities and Bear Sterns provided automatic execution for all the trades in question, at the NBBO established by Yoshikawa's 100-share Instinet orders. Joseph Sorge, an associate director at UBS (the successor entity to PaineWebber), testified that it was common industry practice for market makers to execute automatically, at the NBBO, orders in share amounts greater than the share amounts in the order that set the NBBO, even in the absence of any formal automatic execution agreement between the market maker and the broker, based on what Sorge termed a "business

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9/ For example, if Yoshikawa's initial 100-share limit order was a buy order, he would then follow up, seconds later, with a larger sell order for the same security at the newly-established NBBO, and vice versa. Yoshikawa testified, "If I want to sell something, I put in a buy order. If I want to buy something, I put in a sell order."

10/ After the time of the transactions at issue here, UBS AG acquired PaineWebber, and PaineWebber no longer exists. However, because PaineWebber was the name of the relevant entity at the time of the transactions at issue here, and because the parties have referred to the entity as PaineWebber throughout the entirety of this proceeding, we refer to the entity as "PaineWebber."

Yakushijin testified that, although she almost never entered any of the Firm's Instinet orders, she frequently entered the Firm's orders made through PaineWebber's clearing system, at Yoshikawa's direction.

11/ PaineWebber itself was not a market maker in any of the three relevant securities at the time.

12/ Under an automatic execution agreement, the market maker would guarantee that it would execute orders immediately in the given security at the NBBO, even if the orders were for larger quantities of shares than the order that set the NBBO.

understanding." 13/ Sorge further testified that PaineWebber routed its orders to particular market makers, including Knight Securities and Bear Sterns, in large part because those market makers would provide automatic execution of the transactions. In his investigative testimony prior to the NASD hearing, Yoshikawa stated that he chose to place the larger limit orders through PaineWebber because PaineWebber provided him with better execution "when they give you automatics." 14/ Yoshikawa also acknowledged, in his investigative testimony, that, because his original Instinet orders had moved the NBBO, he had been able to get a better price on the subsequent larger orders. Within seconds of the execution of the larger limit orders by the market makers, Yoshikawa cancelled the initial 100-share limit orders placed through Instinet. 15/ The NBBO then reverted to the price it had been before Yoshikawa made his initial 100-share order.

Yoshikawa's trading activity in the stock of VSIO on April 20, 1999, is illustrative of the pattern followed in the nineteen instances at issue here. At 2:21:23 p.m., the NBBO for VSIO was \$23.0625 bid and \$23.25 offer. At 2:25:25 p.m., Yoshikawa sent a limit order to Instinet to buy 100 shares of VSIO at \$23.1875 for Yoshikawa's Roth IRA account, which changed the NBBO for VSIO to \$23.1875 bid and \$23.25 offer. Three seconds later, at 2:25:28 p.m.,

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13/ Sorge agreed with Yoshikawa that this common practice of market makers automatically executing larger orders at the NBBO was not legally required. Under Exchange Act Rule 11Ac1-1(c), market makers are only obligated to execute orders at a price and size at least as favorable as that market maker's published bid or offer.

14/ Yoshikawa was not immediately forthcoming with this information. When questioned about how he determined where to route his orders, Yoshikawa first answered, "I don't know. You just decide what you think is the best one." He later testified that his decision was a "blind guess" about whether PaineWebber, Instinet, or a market maker would provide best execution. Only after these initial answers did Yoshikawa explain that PaineWebber's ability to provide automatic executions served as the basis for his determination to route the larger limit orders through PaineWebber's system.

15/ The NASD Department of Market Regulation's initial complaint against Yoshikawa involved twenty instances of alleged manipulation, including one instance in which the initial small limit order was executed and was not cancelled by Yoshikawa. NASD did not make findings as to this instance and limited its findings of violations to the nineteen instances at issue here, in which Yoshikawa cancelled the initial small limit order.

Sixteen of Yoshikawa's nineteen cancellations occurred within fifteen seconds of the time that the initial small limit orders were entered into Instinet. The other three cancelled orders were cancelled within forty-three seconds of the time that the initial small limit orders were entered into Instinet. The one order of the original twenty that was not cancelled was executed seventeen seconds after its entry into Instinet, and after the execution, at the NBBO, of Yoshikawa's larger order on the opposite side of the market.

Yakushijin sent a limit order to PaineWebber to sell 1,000 shares of VSIO at \$23.1875, with 500 of the shares coming from Yoshikawa's personal account and 500 shares coming from Yoshikawa's Roth IRA account. At 2:25:28 p.m., Bear Sterns executed the sell order at a price of \$23.1875. Eight seconds after the sell order was executed, at 2:25:36 p.m., Yoshikawa cancelled the Instinet 100-share limit order, which resulted in the NBBO for VSIO returning to \$23.0625 bid and \$23.25 offer. This trading pattern allowed Yoshikawa to receive a price advantage of \$0.125 per share in the eight seconds during which the NBBO moved as a result of his activity in VSIO stock. This series of transactions is representative of the pattern and timing of transactions for the other eighteen instances at issue here.

Yoshikawa acknowledges that all of the relevant trades occurred in accounts that he controlled. He further acknowledges that he was responsible for directing each transaction involved in this proceeding. Yakushijin did not enter any trades into the PaineWebber system without receiving instructions from Yoshikawa to do so, and Yoshikawa personally entered all of the small initial limit orders into Instinet, as well as their later cancellations.

David Chapman, a team leader in NASD's Department of Market Regulation, testified that Yoshikawa's cancellation of his small limit orders after the execution of the larger limit orders concluded a fairly typical pattern of "auto-execution manipulation." Chapman testified that NASD's complaint against Yoshikawa originated when an NASD Department of Market Regulation trading surveillance computer program, designed to detect instances of "auto-execution manipulation," was triggered by the Firm's trading activities.

Throughout the course of the investigation and the disciplinary proceeding, Yoshikawa's explanations of his trading pattern have been inconsistent. During his investigative testimony, Yoshikawa at first stated that he could not recall the specific transactions in question, noting that he had made thousands of transactions during the period from February through May 1999. <sup>16/</sup> Yoshikawa stated that it was very common for him to buy and sell shares of the same security during the same trading day. Yoshikawa explained why he would buy and sell shares of the same security within seconds by saying, "I just think it's okay. I don't know. I mean sometimes you buy and sell . . . Sometimes you change your mind. Maybe you didn't like [the security] again."

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<sup>16/</sup> The Firm's internal compliance procedures stated that, when orders were cancelled, the cancelled order tickets were to be filed along with a written explanation for the cancellation. None of the nineteen instances at issue here included such a written explanation with the cancelled order tickets in the Firm's records. Yakushijin testified that the Firm did not follow the practice of including written explanations of cancellations in its records. Yoshikawa explained that he had simply copied the compliance manual from that of another firm and did not realize that this requirement was included, and he stated, ". . . if there wasn't a note on those tickets, it's because I cancelled them and I think that's the -- was the best thing to do."

He also suggested that it was possible that the initial small limit orders were entered in error. <sup>17/</sup> When asked specifically whether he entered the initial small limit orders in order to move the NBBO, so that he could then buy or sell at a more advantageous price, Yoshikawa responded, "I don't know. I don't remember." At the same time, Yoshikawa acknowledged that his Instinet orders caused the price of the relevant securities to change and allowed him to obtain better prices for his trades on the opposite side of the market.

At his NASD hearing, however, Yoshikawa asserted that the reason why he entered the small limit orders was to test for what he termed "hidden orders." <sup>18/</sup> Yoshikawa stated that he would enter 100-share limit orders at prices between the then-current best bid and offer prices, to test for the existence of "hidden orders." Yoshikawa claimed that, if these 100-share orders executed, he would know that there were "hidden orders" in that security, and this information would impact his decision-making about how to trade in the security going forward.

Yoshikawa's only support for this basis for his actions was his claim that he had spoken to two representatives at Instinet, both of whom, he claims, confirmed his understanding of "hidden orders." However, Yoshikawa never identified these individuals by name or position, and he did not call either of them as a witness at the hearing.

### III.

Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 generally make it unlawful for any person to use any manipulative or fraudulent device in connection with the purchase or sale of any security. This includes trading designed to affect artificially the market

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<sup>17/</sup> Yoshikawa also asserted, without evidence to support the assertion, that certain of the timing information cited by NASD to illustrate the length of time between the initial small limit orders and the larger limit orders and between the execution of the larger limit orders by the market makers and Yoshikawa's cancellation of the small limit orders was incorrect. NASD compiled the timing information after requesting the quotation and transaction data for the relevant securities directly from Instinet, PaineWebber, Knight Securities, and Bear Sterns.

<sup>18/</sup> Yoshikawa explained that what he meant by "hidden orders" was the ability, when entering an order on Instinet, to specify that the order should not be posted. As noted above, Rule 11Ac1-4 includes certain exceptions from the requirement to display customer limit orders, for example, for large block orders. Rule 11Ac1-4 also includes an exception from the display rule when the customer entering the order requests, either at the time that the order is placed or prior thereto pursuant to an individually negotiated agreement with respect to such customer's orders, that the order not be displayed.

price of a security. 19/ Manipulation of the market for a security traded in the over-the-counter market is encompassed within the proscriptions of Rule 10b-5. 20/ NASD Conduct Rule 2120 contains similar prohibitions against engaging in fraudulent acts for NASD members and persons associated with NASD members. 21/

Manipulation is "intentional interference with the free forces of supply and demand." 22/ "Proof of a manipulation almost always depends on inferences drawn from a mass of factual detail. Findings must be gleaned from patterns of behavior, from apparent irregularities, and from trading data. When all of these are considered together, they can emerge as ingredients in a manipulative scheme designed to tamper with free market forces." 23/ A showing that Yoshikawa engaged in fraud or deceit as to the nature of the market for the security, in connection with the purchase or sale of securities, suffices to establish manipulation under Rule 10b-5. 24/ It is not relevant for purposes of a disciplinary proceeding whether investors sustained losses as a result of the manipulative activity. 25/

In order to establish that the manipulative conduct at issue constitutes a violation of Exchange Act Section 10(b) and Exchange Act Rule 10b-5, we must find that Yoshikawa acted with scienter, defined as "a mental state embracing intent to deceive, manipulate, or defraud." 26/ Proof of scienter may be inferred from circumstantial evidence. 27/

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19/ Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976).

20/ See Swartwood, Hesse, Inc., 50 S.E.C. 1301, 1307 n.14 (1992) (and cases cited therein).

21/ NASD also charged Yoshikawa with violating NASD Conduct Rule 2110, which directs registered representatives of NASD member firms to conduct their business in accordance with just and equitable principles of trade.

22/ Pagel, Inc., 48 S.E.C. 223, 226 (1985), aff'd, 803 F.2d 942 (8th Cir. 1986).

23/ Id.

24/ See United States v. Charnay, 537 F.2d 341, 349-50 (9th Cir. 1976).

25/ Edward J. Mawod & Co., 46 S.E.C. 865, 871 (1977) ("The evil sought to be remedied is not victimization but deception. When investors and prospective investors see activity, they are entitled to assume that it is real activity"), aff'd, 591 F.2d 588 (10th Cir. 1979).

26/ Ernst & Ernst, 425 U.S. at 193 n.12.

27/ See, e.g. Herman & MacLean v. Huddleston, 459 U.S. 375, 390-91 n.30 (1983); Pagel, Inc. v. SEC, 803 F.2d 942, 946 (8th Cir. 1986).

We find that the record contains persuasive evidence that Yoshikawa manipulated the market for the relevant securities by entering his initial small limit orders to bring about an artificial change in the NBBO. On nineteen separate occasions, Yoshikawa engaged in a pattern of trading by which he altered the NBBO in the specified securities by entering small limit orders at prices between the then-current best bid and offer prices, took advantage of that price change by trading in larger quantities of shares on the opposite side of the market, and then cancelled the initial NBBO-changing order.

Yoshikawa's testimony shows that he understood before he entered the 100-share limit orders that they would alter the NBBO, as indeed they did, and that the orders were placed without any desire that those trades be executed. 28/ Yakushijin was able to enter the larger limit orders on the opposite side of the market within a matter of seconds after his entry of the initial small limit orders because Yoshikawa informed her before he had entered the small limit orders on Instinet of his intention subsequently to enter the larger limit orders through PaineWebber. This conclusion is supported by the fact that these larger limit orders were entered within seconds after the entry of the small limit orders. Given the length of time it would take for Yoshikawa to communicate the terms of the order to Yakushijin, and the length of time it would have taken Yakushijin to enter the name of the security, the price, and the terms of the order and to check its accuracy, it would have been nearly impossible for the second orders to be entered so soon after the first orders unless preparation of the larger limit orders had occurred prior to the entry of the small limit orders. The repetition of the pattern by Yoshikawa and the short time period in which each set of three transactions (small limit order, larger limit order, cancellation of small limit order) took place leads us to conclude that Yoshikawa's conduct was intentional and coordinated.

Yoshikawa also acknowledged that he routed the larger limit orders through PaineWebber, rather than Instinet or another market maker, because he believed it was likely he would obtain automatic execution of the transactions. Yoshikawa's desire to obtain automatic execution is significant because the automatic execution would occur immediately, within seconds of his initial order, at the new NBBO that his 100-share limit orders had established. Without automatic execution, the 100-share limit order might have been executed, and the NBBO might have moved back to its original level prior to the execution of Yoshikawa's larger limit orders, in which case he would not have been able to benefit from the NBBO change caused by his 100-share limit orders.

Yoshikawa argues that the lack of a formal agreement obligating the market makers to provide PaineWebber with automatic execution or to execute orders in amounts greater than the share amounts at the NBBO shows that any decision by the market makers to execute his larger limit orders automatically was a business decision of the market maker, over which Yoshikawa

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28/ This testimony belies his claim on appeal that his trades cannot constitute manipulation, because they were relatively small trades in securities that were liquid and traded in high volumes, making it impossible for him to influence the market for the securities.

had no influence or control. 29/ Yoshikawa's own testimony, however, as well as that of Sorge and Chapman, indicates that it is common practice for market makers to provide such automatic execution. Yoshikawa's own testimony also made clear that, even though he did not know with absolute certainty the market makers to which PaineWebber would route the larger limit orders, his intent and expectation were that PaineWebber would route the orders to a market maker that would provide automatic execution, allowing him to take immediate advantage of the more advantageous NBBO his initial orders had established. 30/

Yoshikawa contends that there is nothing inherently manipulative or fraudulent in entering orders and cancelling them shortly thereafter. Similarly, he contends that there was nothing inherently fraudulent in the placing of any of his larger orders. He suggests that, because each individual transaction in his scheme, when looked at in isolation, is a legitimate transaction, that NASD has not proved that he was engaged in fraudulent manipulation. However, isolated instances of seemingly innocent conduct can, when viewed as a whole, constitute circumstantial

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29/ The fact that the market makers may have agreed to execute the trades voluntarily does not lessen Yoshikawa's culpability in falsely altering the NBBOs of the relevant securities.

30/ As noted above, Yoshikawa testified that he chose to route the larger orders through the PaineWebber system because he believed that PaineWebber provided best execution "when they give you automatics."

In addition, Yoshikawa repeatedly stated throughout this proceeding his belief that the market makers executed these orders automatically because they sought order flow. This assertion alone contradicts Yoshikawa's contention that he had no way of knowing whether the larger limit orders would receive automatic execution; it indicates that he expected the market makers to behave exactly as they did in automatically executing his larger limit orders, allowing his trading scheme to function properly.

Yoshikawa also explained that he entered the larger limit orders through PaineWebber, rather than through Instinet, because he sought to avoid crossing his trades against each other. This statement evidences an expectation that the PaineWebber-routed orders would execute automatically. If PaineWebber had executed directly against the ECN (in this case Instinet) displaying the NBBO, rather than through market makers providing automatic execution, his orders would have crossed, and Yoshikawa would not have made as much profit as he did.

If nothing else, the repeated automatic execution of the larger limit orders in each of the nineteen instances at issue here over the course of several months of following this trading pattern would have given Yoshikawa a basis for expecting that automatic executions would continue to occur each time he repeated the pattern.

evidence of manipulative activity. 31/ Here, the "mass of factual details" establishes Yoshikawa's coordinated pattern of placing small orders, knowing that they would move the NBBO, and pairing them with larger trades on the opposite side of the market that were advantaged by the change in the NBBO. This repeated pattern leads to the conclusion that Yoshikawa engaged in a manipulative scheme by artificially moving the NBBO in the specified securities and thereby fraudulently affected the nature of the market for these securities. 32/

This evidence also establishes that Yoshikawa acted with the requisite scienter. The timing of the transactions and their repeated occurrence permits us to infer that the transactions were intentionally coordinated. Yoshikawa's testimony makes clear that he knew at the time of the trading that his initial limit order, entered to facilitate his larger transactions on the opposite side of the market, enabled him to buy at a lower price or sell at a higher price than otherwise would have been available. Yoshikawa conceded that he could cancel the initial small limit order once the larger limit order executed because he had accomplished what he wanted to accomplish, which was the execution of a trade on the opposite of the side of the market from that on which the small limit order was entered. We find that Yoshikawa intentionally placed the small limit orders to affect artificially the market price of the securities of ANAD, VSIO, and ADIC.

Yoshikawa's argument that he was not attempting to manipulate the market but merely testing for "hidden orders" is unavailing. The NASD Hearing Panel specifically found that Yoshikawa's explanation that he entered the small limit orders to test for the existence of "hidden orders" lacked credibility. 33/ This credibility determination is supported by the record evidence that, in the early stages of the investigation, Yoshikawa failed to raise his "hidden order" explanation, claiming instead that the orders may have been entered in error, or alternatively that he may have changed his mind about the securities in the few seconds between the initial entry of

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31/ Cf. Keith Springer, Exchange Act Rel. No. 45439 (Feb. 13, 2002), 76 SEC Docket 2726, 2737 (rejecting respondent's argument that pattern of fraudulent post-execution allocation of trades were "isolated instances" with legitimate explanations where record evidence established a pronounced pattern of illegal trades).

32/ Yoshikawa also argues that NASD has selectively crafted its argument based on these nineteen instances without looking at the larger context of his thousands of trades during this period. Yoshikawa, however, does not explain in what context these trades, on these facts, would not be manipulative, other than with his "hidden orders" theory, addressed infra.

33/ As we have held, "credibility determinations of an initial fact finder are entitled to considerable weight." Laurie Jones Canady, 54 S.E.C. 65, 78 n.23 (1999) (citing Anthony Tricarico, 51 S.E.C. 457, 460 (1993)), pet. denied, 230 F.3d 362 (D.C. Cir. 2000); see also Universal Camera v. NLRB, 340 U.S. 474 (1950); Keith L. DeSanto, 52 S.E.C. 316, 319 (1995), aff'd, 101 F.3d 108 (2d Cir. 1996) (table format).

the small orders and their cancellation. It was not until the NASD hearing that Yoshikawa proffered the theory that he was testing for "hidden orders." Moreover, while Rule 11Ac1-4 does include exceptions, discussed in note 17 above, that would permit the non-display of certain orders, Yoshikawa does not explain why there were not other methods by which he could have tested for "hidden orders," without altering the NBBO in the relevant securities. For example, a more efficacious way of testing for "hidden orders" would have been entering the initial small orders with an "immediate or cancel" ("IOC") instruction. <sup>34/</sup> Entering the orders IOC would have removed any risk that Yoshikawa's orders would be executed prior to their cancellation if there were no "hidden orders." However, an IOC order would not have changed the NBBO in the relevant securities because the order would have either executed immediately, leaving the NBBO where it had been, or it would have been cancelled immediately if there were no "hidden orders." Additionally, Yoshikawa does not explain why he would not have avoided any purported harm from the existence of "hidden orders" by his use of limit orders for the second, larger orders on the opposite side of the market.

Even Yoshikawa's asserted purpose of testing for "hidden orders" evidences that his small limit orders were not entered for the purpose of having the transactions executed, but for the purpose of facilitating his larger limit orders. Yoshikawa stated that he would enter a small limit order to buy shares if his intent was to place a larger limit order to sell soon thereafter "for testing purposes," to see if there were "hidden orders." <sup>35/</sup> Yoshikawa testified, "I'm placing the order and then, to see whether I should continue with whatever I was thinking [on the opposite side of the market]." He also agreed that the initial order was put up "for testing purposes." Thus, even under his own explanation of the orders, they were placed only because of Yoshikawa's interest on the opposite side of the market (Yoshikawa's second, larger orders).

In a number of settled matters, we have found activity very similar to Yoshikawa's trading activity here to have violated Exchange Act Section 10(b) and Rule 10b-5 thereunder. <sup>36/</sup> The

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<sup>34/</sup> When a customer enters an order IOC, the order will either be executed immediately or cancelled immediately.

<sup>35/</sup> Throughout this proceeding, Yoshikawa has repeatedly questioned the propriety of the large block order exception to the display rule under Rule 11Ac1-4, discussed above. While Yoshikawa may believe that the Rule, with its exception for large block orders, distorts the transparency of the market in favor of large institutions, this belief does not render his market manipulation any less egregious.

<sup>36/</sup> "Auto-execution manipulation" is also commonly referred to as "spoofing" in these settled matters. See, e.g. Ian Fishman and Laurence Fishman, Exchange Act Rel. No. 40115 (June 24, 1998), 67 SEC Docket 1107 (order accepting offer of settlement and finding violations of Section 10(b) and Rule 10b-5 where respondents entered 100-share limit orders to alter the NBBO, followed with larger limit orders at the new NBBO, then

(continued...)

conduct at issue in these settled matters differed slightly from Yoshikawa's conduct, in that it appears that the settled matters involved situations in which the brokers or market makers that executed the larger limit orders had previously guaranteed that they would execute orders at the NBBO regardless of order size, so that the respondents knew with certainty that the larger limit orders on the opposite side of the market would be executed after the initial 100-share limit orders altered the NBBO. However, as discussed above, in this case, the market makers themselves described their execution of the orders as having been automatic, and testimony at the hearing confirms that such an arrangement, while informal, was quite common at the time.

Yoshikawa argues in his brief that "[his] firm had been targeted by [NASD] Market Surveillance for special scrutiny and . . . [that] NASD was trying to put [his] firm out of business." He also claims that he has been "singled out for prosecution by arbitrary or unjust considerations." Yoshikawa asserted during his testimony, "Mr. Chapman states that this is the first complaint he filed of this type, despite thousands of potential violative trades that have been investigated since 1996. . . The fact is that I am being prosecuted for supposed violations that no one ever else has been. Also, people working in the NASD have told me that the NASD targets firms to put them out of business."

To the extent that Yoshikawa argues that he is the victim of "selective prosecution," he must establish that the action against him was motivated by an unjust motive. <sup>37/</sup> A party seeking to assert such a claim must demonstrate that he or she was singled out for enforcement, while others who were similarly situated were not, and that the prosecution was motivated by arbitrary or unjust considerations such as race, religion, or the desire to prevent the exercise of a

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<sup>36/</sup> (...continued)

entered a new 100-share limit order to change the NBBO again, following again with a larger limit order taking advantage of the second new NBBO respondents had created); Robert J. Monski, Exchange Act Rel. No. 44250 (May 3, 2001), 74 SEC Docket 2494 (order accepting offer of settlement and finding violations of Section 10(b) and Rule 10b-5 where respondent used small limit orders to alter the NBBO and then took advantage of market makers' guarantees to execute larger limit orders at the newly-created NBBO); Israel M. Shenker, Exchange Act Rel. No. 45017 (Nov. 5, 2001), 76 SEC Docket 661 (same); Joseph R. Blackwell, Exchange Act Rel. No. 45018 (Nov. 5, 2001), 76 SEC Docket 665 (same); Jason T. Frazee, Exchange Act Rel. No. 47522 (Mar. 18, 2003), 79 SEC Docket 3310 (same); Leonard Sheehan, Exchange Act Rel. No. 47521 (Mar. 18, 2003), 79 SEC Docket 3310 (same); Cary R. Kahn, Exchange Act Rel. No. 50046 (July 20, 2004), 83 SEC Docket 1270 (same). Although these are settled cases that have limited precedential value, they are consistent with our determination to hold Yoshikawa liable for the misconduct at issue here. See, e.g. SIG Specialists, Inc., Exchange Act Rel. No. 51867 (June 17, 2005), 85 SEC Docket 2679, 2693 n.36.

<sup>37/</sup> See, e.g. Barry C. Wilson, 52 S.E.C. 1070, 1074 (1996); United States v. Huff, 959 F.2d 731, 735 (8th Cir. 1992).

constitutionally protected right. <sup>38/</sup> Yoshikawa's claims are unsubstantiated. As noted above, Chapman testified that NASD initiated this proceeding against Yoshikawa when its market surveillance computer program detected trading activity that led to suspicion of an "auto-execution manipulation" scheme. Chapman testified that, while this matter was the first proceeding initiated by an alert from the surveillance computer system to go to a formal hearing, NASD had settled several other such proceedings before they went to a hearing and had made thirty to forty referrals to the Commission where the person involved was an individual investor not registered with NASD in any capacity.

We conclude that Yoshikawa engaged in a repeated and intentional pattern of market manipulation by entering orders intended to alter the NBBO of the relevant securities and then entering larger limit orders on the opposite side of the market in the same securities, taking advantage of the newly-established NBBO. Accordingly, Yoshikawa violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, as well as NASD Conduct Rule 2120. <sup>39/</sup>

#### IV.

Under Exchange Act Section 19(e)(2), we may reduce or set aside sanctions imposed by NASD if we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary burden on competition. <sup>40/</sup> NASD's decision noted that the NASD Sanction Guidelines do not provide specific guidance for violations involving market manipulation. NASD based its imposition of a bar from association with NASD member firms in all capacities on discussions in Commission precedent regarding the gravity of market manipulation as a violation of the antifraud provisions and general considerations in determining sanctions, as set forth in NASD's Sanction Guidelines. <sup>41/</sup>

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<sup>38/</sup> Ralph W. LeBlanc, Exchange Act Rel. No. 48254 (July 30, 2003), 80 SEC Docket 2750, 2760; Russo Sec., Inc., Exchange Act Rel. No. 44186 (Apr. 17, 2001), 75 SEC Docket 1124A, 1124P; Michael Markowski, 51 S.E.C. 553, 559 n. 23 (1993), aff'd, 34 F.3d 99 (2d Cir. 1994).

<sup>39/</sup> Yoshikawa also violated NASD Conduct Rule 2110. It is well-established that a violation of another Commission or NASD requirement, including Exchange Act Section 10(b), Rule 10b-5 thereunder, and NASD Conduct Rule 2120, also violates NASD Conduct Rule 2110. See, e.g. Stephen J. Gluckman, 54 S.E.C. 175, 185 (1999).

<sup>40/</sup> 15 U.S.C. § 78s(e)(2). Yoshikawa does not claim, and the record does not show, that NASD's action imposed an undue burden on competition.

<sup>41/</sup> NASD cited a number of Commission precedents in its sanctions discussion. John Montelbano et al., Exchange Act Rel. No. 47227 (Jan. 22, 2003), 79 SEC Docket 1474, 1497 ("there are few, if any, more serious offenses than manipulation"); Michael J.

(continued...)

Based on these authorities, NASD noted a number of factors in finding that Yoshikawa's conduct was egregious enough that it warranted the imposition of a bar. For example, Yoshikawa's manipulation directly impacted the integrity of the market in the relevant securities. The investing public and other market participants, including broker-dealers who rely on the integrity of the NBBO, were unaware that the NBBO quotes altered as a result of Yoshikawa's orders reflected not genuine market activity, but Yoshikawa's pre-meditated trading pattern. His conduct throughout this proceeding indicates that, if not barred from the securities industry, he might engage in similar conduct in the future. <sup>42/</sup> On at least nineteen occasions within a three month period, Yoshikawa purposely altered the NBBO of the three securities at issue here. Manipulation "attacks the very foundation and integrity of the free market system" and "runs counter to the basic objectives of the securities laws." <sup>43/</sup> It is true that Yoshikawa's manipulation in these nineteen instances netted him a relatively small amount of profits, \$5,375.00, but the harm of undermining the authority and trustworthiness of the NBBO and the free forces of supply and demand in the securities markets could be considerably greater than this dollar amount. Furthermore, although NASD's Sanction Guidelines do not specifically address manipulation, they do include a provision for violations of NASD Conduct Rule 2120 for Misrepresentations or Material Omissions of Fact. As noted above, we find that Yoshikawa violated NASD Conduct Rule 2120. The Guidelines specify that, for intentional violations, as we have found here, in egregious cases, it is appropriate to consider barring the individual.

Under these circumstances, where Yoshikawa repeatedly entered small limit orders in order to alter the NBBO in the relevant securities, followed within seconds by entering larger limit orders through the PaineWebber system in order to receive automatic execution at the new NBBO he created, and then cancelled the initial small limit orders, we find that the conduct is

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<sup>41/</sup> (...continued)  
Markowski, 54 S.E.C. 830, 839 (2000) (citation omitted) (holding that deliberate manipulation of the market is "serious" misconduct that "strikes at the heart of the pricing process on which all investors rely. It attacks the very foundation and integrity of the free market system. Thus it runs counter to the basic objectives of the securities laws."), aff'd, 274 F.3d 525 (D.C. Cir. 2001); Michael B. Jawitz, Exchange Act Rel. No. 44357 (May 29, 2001), 75 SEC Docket 280, 293 ("Market participants, in making investment decisions, rely on the market as an independent pricing mechanism").

<sup>42/</sup> Although Yoshikawa terminated the registration of Ko Securities in 2002 and has not worked in the securities industry since then, without a bar, there would be nothing to stop him from re-entering the industry.

<sup>43/</sup> Pagel, 48 S.E.C. at 231-32.

sufficiently egregious to warrant a bar against Yoshikawa. We therefore find that the bar NASD imposed against Yoshikawa is neither excessive nor oppressive, and we sustain NASD's findings of violations and its imposition of a bar from association with NASD member firms in all capacities. 44/

An appropriate order will issue.

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

Nancy M. Morris  
Secretary

  
By: **Jill M. Peterson**  
**Assistant Secretary**

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44/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION  
SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 53731 / April 26, 2006  
Admin. Proc. File No. 3-12057

In the Matter of the Application of

TERRANCE YOSHIKAWA  
3417 West Commodore Way  
Seattle, WA 98199

For Review of Disciplinary Action Taken By

NASD

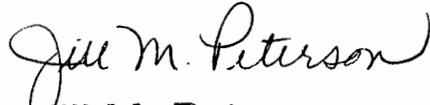
ORDER SUSTAINING DISCIPLINARY ACTION

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

ORDERED that the findings of violation and imposition of sanctions by NASD against Terrance Yoshikawa be, and NASD's assessment of costs be, and they hereby are, sustained.

By the Commission.

Nancy M. Morris  
Secretary

  
By: Jill M. Peterson  
Assistant Secretary

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

Commissioner Atkins  
Not Participating

Commissioner Campos  
Disapproved

SECURITIES EXCHANGE ACT OF 1934  
Release No. 53724 / April 26, 2006

ADMINISTRATIVE PROCEEDING  
File No. 3-12277

In the Matter of  
  
Lumenis Ltd.,  
  
Respondent.

ORDER INSTITUTING  
PROCEEDINGS, MAKING FINDINGS,  
AND REVOKING REGISTRATION  
OF SECURITIES PURSUANT TO  
SECTION 12(j) OF THE SECURITIES  
EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"), against Lumenis Ltd. ("Lumenis" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, Respondent consents to the entry of this Order Instituting Proceedings, Making Findings, and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Lumenis (SEC File No. 0-27572) is an Israeli corporation with its headquarters in Yokneam, Israel. At all times relevant to this proceeding, the common stock of Lumenis has been registered with the

Document 35a of 43

Commission under Exchange Act Section 12(g). The common stock of Lumenis is currently quoted on the Pink Sheets (symbol "LUME.pk").

2. Lumenis has failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder while its securities were registered with the Commission in that it has not filed any completed periodic reports for any fiscal period subsequent to the period ending June 30, 2003.

#### IV.

Section 12(j) of the Exchange Act provides as follows:

The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence.

In view of the foregoing, the Commission finds that it is necessary and appropriate for the protection of investors to impose the sanction specified in Respondent's Offer.

Accordingly, it is hereby ORDERED, pursuant to Section 12(j) of the Exchange Act, that registration of each class of Respondent's securities registered pursuant to Section 12 of the Exchange Act be, and hereby is, revoked.

By the Commission.

Nancy M. Morris  
Secretary

*Jill M. Peterson*  
By: **Jill M. Peterson**  
**Assistant Secretary**

Commissioner Atkins  
Not Participating

Commissioner Campos  
Disapproved

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 53725 / April 26, 2006

ACCOUNTING AND AUDITING ENFORCEMENT  
Release No. 2421 / April 26, 2006

ADMINISTRATIVE PROCEEDING  
File No. 3-12278

In the Matter of  
  
CHAIM SCHWARTZBARD, CPA  
(Israel),  
  
Respondent.

ORDER INSTITUTING PUBLIC  
ADMINISTRATIVE PROCEEDINGS  
PURSUANT TO RULE 102(e) OF THE  
COMMISSION'S RULES OF  
PRACTICE, MAKING FINDINGS, AND  
IMPOSING REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative proceedings be, and hereby are, instituted against Chaim Schwartzbard, CPA ("Respondent" or "Schwartzbard") pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice.<sup>1</sup>

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, Respondent consents to the entry of this Order Instituting Public

<sup>1</sup> Rule 102(e)(1)(ii) provides, in pertinent part, that:

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in unethical or improper professional conduct.

Document 36 of 43

Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

### III.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>2</sup> that:

#### A. SUMMARY

This matter concerns improper professional conduct within the meaning of Rule 102(e)(1)(ii) of the Commission's Rules of Practice by Schwartzbard in connection with two transactions between Lumenis Ltd. ("Lumenis"), an Israeli manufacturer, and its largest U.S. distributor ("the Distributor"). From 1999 to May 2004, Deloitte & Touche Brightman Almagor ("Brightman Almagor") served as Lumenis' outside auditor, and Schwartzbard was the audit engagement partner. In late 2001 and during 2002, Schwartzbard engaged in repeated instances of unreasonable conduct that resulted in violations of applicable professional standards. First, in connection with a transaction in which Lumenis improperly recognized a total of \$1.1 million in revenue in the quarters ended December 31, 2001 and March 31, 2002, Schwartzbard, among other things, failed to make the inquiries or employ the necessary procedures to determine whether Lumenis' revenue recognition comported with generally accepted accounting principles ("GAAP"), and as such violated the applicable generally accepted auditing standards ("GAAS"). Second, in connection with a transaction in mid-2002 that resulted in Lumenis' improper recognition of \$4 million in revenue, Schwartzbard, among other things, negligently failed to exercise due professional care and professional skepticism in reporting on Lumenis' financial statements for the quarter ended June 30, 2002. As a result of his improper professional conduct, the Commission is denying Schwartzbard the privilege of appearing or practicing before the Commission as an accountant, provided that he may apply for reinstatement after three years.

#### B. RESPONDENT

Chaim Schwartzbard, age 50, is an audit partner at Brightman Almagor, an Israeli member firm of Deloitte Touche Tohmatsu. Schwartzbard is a citizen of Israel and an Israeli certified public accountant ("CPA"). From 1999 to May 2004, Brightman Almagor was Lumenis' outside auditor, and Schwartzbard was the audit engagement partner. The services provided by Brightman Almagor included annual audits and quarterly reviews of the Lumenis financial statements to be conducted in accordance with GAAS.

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<sup>2</sup> The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

## C. FACTS

### 1. Background

a. Lumenis is an Israeli corporation with its headquarters in Yokneam, Israel that designs and manufactures laser and light based systems for aesthetic, surgical and other applications. Lumenis maintains manufacturing facilities and other operations in the United States. During the relevant period, Lumenis' stock was registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934. Lumenis' fiscal year ends on December 31.

b. Brightman Almagor is the Israeli member firm of Deloitte Touche Tohmatsu. From 1999 to 2004, Brightman Almagor was engaged by Lumenis to audit Lumenis' operations. During the same time period, Brightman Almagor engaged Deloitte & Touche LLP ("Deloitte USA"), a subsidiary of Deloitte & Touche USA LLP, to audit Lumenis' U.S. operations. Deloitte & Touche USA LLP is the U.S. member firm of Deloitte Touche Tohmatsu.

c. During 1999 through May 2004, Brightman Almagor audited and reviewed financial statements that were included in filings made with the Commission on Forms 10-K and Forms 10-Q by Lumenis.

### 2. The \$1 Million Transaction

a. Lumenis improperly recognized a total of \$1.1 million in revenue in its Form 10-K for the year ended December 31, 2001 filed with the Commission on April 17, 2002 and its Form 10-Q for the quarter ended March 31, 2002 filed with the Commission on May 15, 2002, in connection with a transaction with the Distributor in late 2001.

b. Throughout 1998, 1999 and 2000, the Distributor amassed a large debt to Lumenis. By the beginning of 2001, the Distributor owed Lumenis over \$3.5 million in overdue accounts payable. In February 2001, Lumenis began requiring the Distributor to pay for its orders via credit card. In connection with a new distribution agreement the parties entered "as of" December 31, 2001, Lumenis forgave the entire amount the Distributor owed it. As part of the agreement, Lumenis required the Distributor to place a \$1 million order for Lumenis products. At the same time, Lumenis also agreed to "loan" the Distributor \$1.25 million.

c. The \$1.25 million loan primarily was intended to serve two purposes: \$250,000 was to be used by the Distributor to pay for taxes resulting from the forgiveness of the payables, and the remaining \$1 million permitted the Distributor to purchase \$1 million of Lumenis products in what amounted to a transaction lacking economic substance.

d. Schwartzbard was aware that only \$250,000 of the \$1.25 million loan

was to be used for taxes. A December 20, 2001 document sent to Schwartzbard described the deal as a \$1 million loan to the Distributor with the Distributor required to purchase not less than \$1 million in equipment at closing, and a \$250,000 loan for taxes. In subsequent emails between Schwartzbard and Lumenis, Schwartzbard acknowledged that there was a connection between the loan and the expected \$1 million purchase, and expressed concerns that this may cause a revenue recognition issue.

e. Lumenis took steps in late December 2001 to hide the fact that \$1 million of the loan was provided in connection with the Distributor's purchase of an identical amount of Lumenis products. Lumenis deleted from the distribution agreement references to the requirement that the Distributor purchase \$1 million in products, though the Distributor in fact placed such an order at the time that it entered the agreement. Lumenis also began to claim that the entire \$1.25 million loan, and not just \$250,000 of the loan, was for taxes the Distributor would incur as a result of the forgiveness of the payables. Schwartzbard accepted management's revised representation that the entire loan was to be used for taxes without further inquiry or testing. Notwithstanding the link between the loan and the Distributor order, Lumenis recognized a combined \$1.1 million from this purchase as revenue in the fourth quarter of 2001 and the first quarter of 2002. Schwartzbard did not raise any objection to the revenue recognition.

f. Lumenis' recognition of \$1.1 million in revenue in connection with this transaction was not in conformity with GAAP because, among other things, the transaction lacked economic substance. As a result, the Lumenis financial statements published in its Form 10-K for the year ended December 31, 2001 filed with the Commission on April 17, 2002 and its Form 10-Q for the quarter ended March 31, 2002 filed with the Commission on May 15, 2002 were materially misstated.

### **3. The \$4 Million Transaction**

a. A \$4 million transaction at the close of the quarter ended June 30, 2002 resulted in revenue recognition in Lumenis' Form 10-Q filed with the Commission on August 15, 2002 that did not comport with GAAP.

b. As the second quarter of 2002 was coming to a close, Lumenis contacted the Distributor and requested that it place a \$4 million order under a special arrangement. Instead of requiring the Distributor to pay for the products pursuant to the terms of the new distribution agreement, Lumenis offered the Distributor extended payment terms, including \$2 million being due in 270 days, to facilitate the Distributor's ability to resell the products to pay for the goods. The Distributor agreed to the terms. It was the largest order the Distributor had ever placed with Lumenis.

c. On August 2, 2002, prior to the filing of Lumenis' second quarter 2002 financial statements, Deloitte USA notified Schwartzbard that it needed to consult with the

Deloitte USA national office to determine if a clause in the Distributor's distribution agreement constituted a revenue incentive that would require a reduction in the amount of reported Distributor revenue. On August 3, Schwartzbard, without waiting to learn the results of the consultation between Deloitte USA and its national office, approved the Lumenis' publication of a press release announcing the second quarter 2002 financial results. The release announced revenue of \$92.2 million, including \$4 million from the Distributor transaction, and stated that Lumenis' revenue was in line with previous revenue guidance of \$90-95 million. Lumenis' stock price, which had been declining steadily, more than doubled in the days following the release, jumping from \$3.19 per share on August 5 to \$6.55 per share on August 26, 2002.

d. On August 12, 2002, Deloitte USA informed Schwartzbard of its conclusions that (1) Lumenis needed an independent third party valuation to determine if the clause in the Distributor's distribution agreement constituted a revenue incentive requiring a reduction in revenue and (2) recognition of revenue on sales to the Distributor should be deferred until the Distributor sold the products to end users. With respect to the latter point, Deloitte USA stated that revenue should not be recognized when products were sold to the Distributor because Lumenis had forgiven the Distributor's payables that had been earned in the normal course of business under the previous distribution agreement. Deloitte USA also stated its conclusion to defer sales revenue was based on the fact that the Distributor did not appear to be a viable entity without Lumenis' business.

e. On August 13, 2002, Schwartzbard emailed a senior Lumenis executive and informed him that after discussions with Deloitte USA, both he and Deloitte USA had concerns with respect to the revenue incentive issue, the waiver of debt issue and the viability of the Distributor without Lumenis business. Schwartzbard requested that Lumenis provide him with substantial information to resolve these outstanding issues, and also requested that the issues be discussed with the Lumenis audit committee. By August 15, Lumenis had not provided the requested information to Schwartzbard. Despite this, Schwartzbard authorized the release of a review report signed by him for use in the Form 10-Q Lumenis filed with the Commission that day. The financial statements included with the Form 10-Q improperly recognized the entire \$4 million order as revenue in the second quarter of 2002.

f. Lumenis' recognition of \$4 million in revenue in connection with this transaction violated GAAP because, among other things, collectability from the Distributor was not reasonably assured, and as such Lumenis materially misstated its financial statements published in its Form 10-Q filed with the Commission on August 15, 2002.

4. **Schwartzbard Engaged in Improper Professional Conduct Within the Meaning of Rule 102(e)**

a. Rule 102(e)(1)(ii) of the Commission's Rules of Practice provides, in part, that the Commission may censure or deny, temporarily or permanently, the privilege of appearing or practicing before the Commission to any person who is found by the Commission to have engaged in improper professional conduct. Rule 102(e)(1)(iv) defines improper professional conduct with respect to persons licensed to practice as accountants. As applicable here, improper professional conduct means "[r]epeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission." Rule 102(e)(1)(iv)(B)(2). As stated below, Schwartzbard acted unreasonably in failing to require Lumenis to comply with GAAP and in failing to comply with GAAS during Brightman Almagor's audit and reviews of Lumenis' 2001 and first and second quarter 2002 financial statements.

b. GAAS requires that auditors conducting an audit exercise due professional care and maintain a proper level of professional skepticism. Codification of Statements on Auditing Standards (2001) ("AU") AU § 230.01; AU § 230.07. Auditing standards also require auditors to obtain sufficient competent evidential matter to afford a reasonable basis for an opinion regarding the financial statements under audit. AU § 326.01; AU § 326.21; AU § 326.22. Under GAAS, representations from management are not a substitute for the application of auditing procedures necessary to afford a reasonable basis for the auditor's opinion. AU § 333.02. An auditor has a responsibility to perform an audit to obtain reasonable assurance that material misstatements in financial statements due to fraud are detected. AU § 316.01.

c. GAAS requires that auditors "state whether the financial statements are presented in accordance with generally accepted accounting principles." AU § 410.01. "Generally accepted accounting principles recognize the importance of reporting transactions and events in accordance with their substance. The auditor should consider whether the substance of transactions or events differs materially from their form." AU § 411.06. An auditor can issue an audit report with an unqualified opinion only if he has conducted the audit in accordance with GAAS. AU § 508.07.

d. GAAS also requires an independent accountant to both consider matters that have required adjustments in prior years and quarters and the consistency of management's responses relative to other inquiries and procedures performed. AU § 722.13.

e. In connection with interim reviews of financial statements, if "the accountant becomes aware of information that leads him or her to question whether the interim financial information to be reported conforms with generally accepted accounting principles, the accountant should make additional inquiries or employ other procedures he or she considers appropriate to provide the limited assurance for a review engagement." AU § 722.18.

f. By accepting management's representations regarding the purpose of the \$1 million loan described above without further inquiry, despite knowledge of seemingly contradictory information, Schwartzbard failed to exercise due professional care and maintain a proper level of professional skepticism. Schwartzbard further violated GAAS by failing to make the inquiries or employ the necessary procedures to determine whether Lumenis' \$1.1 million in revenue recognition in connection with this late 2001 transaction comported with GAAP. Schwartzbard failed to obtain sufficient competent evidential matter to afford a reasonable basis for his opinion regarding the financial statements at issue.

g. Schwartzbard's failure to obtain a complete understanding of the \$4 million, end of second quarter of 2002 Distributor sales transaction and failure to properly assess the Distributor revenue incentive, viability and past debt forgiveness issues constituted a failure to exercise due professional care and maintain a proper level of professional skepticism. Schwartzbard violated GAAS when he signed the Brightman Almagor review report and allowed the use of the firm's name to be associated with Lumenis' financial statements for the quarter ended June 30, 2002. Schwartzbard violated GAAS by not exercising due professional care and professional skepticism in reporting on Lumenis' June 30, 2002 financial statements. Finally, Schwartzbard was negligent in not knowing that recognition of the \$4 million did not comport with GAAP and in not knowing that additional procedures were needed to determine whether Lumenis' quarterly financial statements were materially misstated.

## 5. Findings

Based on the foregoing, the Commission finds that Schwartzbard engaged in improper professional conduct pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice by engaging in repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.

## IV.

### A. Ongoing Cooperation Undertakings

In determining to accept the Offer, the Commission further considered the following efforts voluntarily undertaken by Respondent:

Respondent shall cooperate fully with the Commission in any and all investigation, litigation or other proceeding relating to or arising from the matters described in the Order. In connection with such cooperation, Respondent has undertaken:

1. To appear and be interviewed by Commission staff, subject to the privileges and protections available under the attorney-client privilege and attorney work-product

protections, at such reasonable times and places as the staff requests upon reasonable notice;

2. To accept service by mail or facsimile transmission of notices or subpoenas issued by the Commission for documents or testimony at depositions, hearings, or trials, or in connection with any related investigation by Commission staff;

3. To appoint Stephen M. Sacks, Esq. as agent to receive service of such notices and subpoenas;

4. With respect to such notices and subpoenas, to waive the territorial limits on service contained in Rule 45 of the Federal Rules of Civil Procedure and any applicable local rules, provided that the party requesting the testimony reimburses Respondent's travel, lodging, and subsistence expenses at the then-prevailing U.S. Government per diem rates; and

5. To consent to personal jurisdiction over Respondent in any United States District Court for purposes of enforcing any such subpoena.

#### V.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED, effective immediately, that:

A. Schwartzbard is denied the privilege of appearing or practicing before the Commission as an accountant.

B. After three years from the date of this Order, Respondent may request that the Commission consider his reinstatement by submitting an application to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

a. Respondent, or the public accounting firm with which he is

associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

b. Respondent, or the registered public accounting firm with which he is associated, has been inspected by the Board or an equivalent Israeli organization acceptable to the Chief Accountant of the Commission and that inspection did not identify any criticisms of or potential defects in the respondent's or the firm's quality control system that would indicate that the Respondent will not receive appropriate supervision;

c. Respondent has resolved all disciplinary issues with the Board or equivalent Israeli organization, and has complied with all terms and conditions of any sanctions imposed (other than reinstatement by the Commission); and

d. Respondent acknowledges his responsibility, as long as Respondent appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

C. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission provided that his CPA license is current and he has resolved all other disciplinary issues with the applicable boards of accountancy. However, if CPA licensure is dependant on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Respondent's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Nancy M. Morris  
Secretary

*Jill M. Peterson*  
**By: Jill M. Peterson**  
**Assistant Secretary**

*Commissioner Glassman  
Not Participating*

**UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934  
Release No. 53732 / April 27, 2006**

**ACCOUNTING AND AUDITING ENFORCEMENT  
Release No. 2424 / April 27, 2006**

**ADMINISTRATIVE PROCEEDING  
File No. 3-12280**

**In the Matter of**

**OIL STATES  
INTERNATIONAL, INC.**

**Respondent.**

**ORDER INSTITUTING CEASE-AND-DESIST  
PROCEEDINGS, MAKING FINDINGS, AND  
IMPOSING A CEASE-AND-DESIST ORDER  
PURSUANT TO SECTION 21C OF THE  
SECURITIES EXCHANGE ACT OF 1934**

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Oil States International, Inc. ("Oil States" or "Respondent").

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

*Document 37 of 43*

### III.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>1</sup> that:

#### Summary

1. This matter involves Oil States' violations of the books and records and internal controls provisions of the Foreign Corrupt Practices Act ("FCPA") (Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act), arising from certain payments made through its Hydraulic Well Control, LLC ("HWC") subsidiary. Oil States, through certain employees of HWC, provided approximately \$348,350 in improper payments to employees of Petróleos de Venezuela, S.A. ("PDVSA"), an energy company owned by the government of Venezuela. The employees were asked to participate in the scheme by a consultant for HWC, after he was requested to do so by the PDVSA employees. HWC improperly recorded the payments in its accounting books and records as ordinary business expenses, which were consolidated into those of its parent, Oil States. Oil States' internal controls failed to ensure that HWC's books and records accurately reflected the nature and purpose of these payments.

#### Respondent

2. Oil States is a Delaware corporation with its headquarters in Houston, Texas. Oil States is a specialty provider to oil and gas drilling and production companies in the United States and in many of the world's active oil and gas producing regions, including South America. Oil States' common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is traded on the New York Stock Exchange.

#### Relevant Party

3. HWC was a wholly-owned subsidiary of Oil States during the relevant period. HWC operates specially designed rigs and provides well site services, including workover and snubbing services, to oil and gas producers in Venezuela and other countries. HWC has its headquarters in Houma, Louisiana and has a branch office in Eastern Venezuela ("HWC Venezuela"). HWC Venezuela contributed approximately 1% of Oil States' consolidated revenues during the relevant period.

#### Facts

##### A. Background

4. In 2000, HWC hired a Venezuelan consultant (the "Consultant") to interface with employees of PDVSA on behalf of HWC in the field and at the office level. Specifically, the Consultant acted on behalf of HWC to follow up on daily operations, translate

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<sup>1</sup> The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

information into Spanish, write up tickets in accordance with PDVSA requirements and submit HWC invoices to PDVSA for payment. HWC did not investigate the background of the Consultant. The Consultant was not involved in the solicitation to obtain business on behalf of HWC, and only worked on the operational matters referenced above. The Consultant submitted invoices for his services to HWC. HWC had certain FCPA policies in place; however, HWC provided no formal training or education to the Consultant regarding the requirements of the FCPA. Further, a written contract between HWC and the Consultant failed to address compliance with the requirements of U.S. law, including the provisions of the FCPA.

5. In December 2003, the Consultant was approached by three PDVSA employees about a proposed "kickback" scheme. The PDVSA employees proposed that the Consultant submit inflated bills to HWC for his services and kickback the excess to the PDVSA employees. At the same time, HWC would improperly bill PDVSA for "lost rig time" on jobs.<sup>2</sup> If HWC did not comply with the proposed scheme, the PDVSA employees were capable of stopping or delaying HWC's work. After learning of the proposed scheme from the Consultant, three HWC Venezuela employees acceded to and facilitated the improper activity. The Consultant provided inflated invoices for his services and other documents inaccurately reflecting the amount of rig time billable to PDVSA. HWC employees incorporated these documents into HWC's books and records and HWC passed on an undetermined amount of the improper payments in inflated invoices to PDVSA.

#### B. Over-charges for Lost Rig Time

6. On December 10, 2003, the Consultant submitted to HWC an invoice for services that sought payment of B50,000,000 (\$26,041.66), plus taxes.<sup>3</sup> On December 16, 2003, the Consultant submitted to HWC an invoice for services that sought payment of B52,000,000 (\$27,083.33), plus taxes. HWC paid the Consultant. HWC's payment of these invoices resulted in the first improper payments to the PDVSA employees through the consultant. Due to the difficulties in assessing lost rig time and the falsified documentation prepared by the Consultant and approved by the HWC and PDVSA employees, it is not possible to quantify the total amount of "lost rig time," if any, paid for by PDVSA during this time period.<sup>4</sup>

7. On November 12, 2004, HWC received an invoice from the Consultant that sought payment of B296,980,332 (\$154,677.00). Payment of the invoice by HWC resulted in improper payments to the PDVSA employees. On November 17, 2004, HWC billed PDVSA approximately \$400,840.63 for forty-three days of rig time. HWC employees have confirmed that at least some portion of the forty-three days would have been deemed "lost rig time" by the PDVSA employees and therefore not properly chargeable to PDVSA.

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<sup>2</sup> "Lost rig time" is time that PDVSA contends is not properly billable to it.

<sup>3</sup> Calculation of the U.S. dollar value of the payments made in Venezuelan local currency (Bolívar) is based upon an exchange rate calculated as follows: Venezuelan Bolívar amount divided by 1,920.

<sup>4</sup> "Lost rig time" is a frequently disputed calculation because there are varying legitimate but subjective reasons for billing a client for downtime during a job.

### C. Over-charges for Gel

8. In March 2004, the PDVSA employees approached the Consultant with a change in the scheme. The PDVSA employees instructed the Consultant to continue to submit inflated invoices to HWC, this time for the inclusion of "gel" (a mineral-based material that is used in drilling to control viscosity and to protect formations from drilling fluids) that had not actually been used on PDVSA jobs. The Consultant and the HWC employees agreed to continue the improper payments and, between April 2004 and November 2004, participated in five transactions involving over-charges to PDVSA for gel. During this time, HWC paid the Consultant approximately \$412,000, some or all of which was used to make improper payments to the PDVSA employees. During this same time period, HWC charged PDVSA \$348,350 for gel. The amount of gel legitimately charged to PDVSA is unknown.

9. In August 2004, HWC's Vice President of Finance in the U.S. noticed increasing contract labor (including consulting) expenses at HWC Venezuela. When he inquired into the increasing expenses, the controller at HWC Venezuela responded that the expenses were "gel-related." Despite this vague explanation, HWC's Vice President of Finance conducted no additional investigation of the issue and the scheme continued.

10. In December 2004, during a routine review of HWC's results while preparing the budget for the following fiscal year, HWC senior management in the U.S. discovered departures from HWC Venezuela's operating plan. Specifically, HWC management noted an unexplained narrowing of profit margins in the Venezuelan operations, which caused management to make immediate inquiry. As a result of that inquiry, the U.S. management of HWC learned of the kickback scheme. HWC reported the matter to Oil States' management, which, in turn, reported the scheme to the company's audit committee. An internal investigation conducted by Oil States uncovered no evidence that HWC or Oil States employees in the United States were aware of or sanctioned the improper payments. Upon completion of the internal investigation, Oil States terminated its relationship with the Consultant and disciplined the employees responsible for the misconduct (including dismissing two HWC Venezuela employees). Oil States also corrected its books and records, strengthened its regulatory compliance program, and reimbursed PDVSA for the improper charges. Oil States also voluntarily provided their report of investigation to the Commission and the Department of Justice, and disclosed the scheme in its public filings. It then cooperated fully with the investigation conducted by the Commission staff.

### D. Violations

11. The FCPA, enacted in 1977, added Exchange Act Section 13(b)(2)(A) to require public companies to make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer, and added Exchange Act Section 13(b)(2)(B) to require such companies to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that: (i) transactions are executed in accordance with management's general or specific authorization; and (ii) transactions are recorded as necessary to permit preparation of financial statements in

conformity with generally accepted accounting principles or any other criteria applicable to such statements, and to maintain accountability for assets.

12. Because HWC improperly recorded the payments to the PDVSA employees as ordinary business expenses, its books, records and accounts did not, in reasonable detail, accurately and fairly reflect its transactions and dispositions of assets.

13. As a result of the conduct described above, Oil States violated Section 13(b)(2)(A) of the Exchange Act.

14. In addition, HWC failed to take steps to ensure that the Consultant complied with the FCPA and to ensure that the nature and purpose of the payments to the PDVSA employees were accurately reflected in HWC's books and records.

15. As a result of the conduct described above, Oil States violated Section 13(b)(2)(B) of the Exchange Act.

#### **Oil States' Remedial Efforts**

In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded the Commission staff.

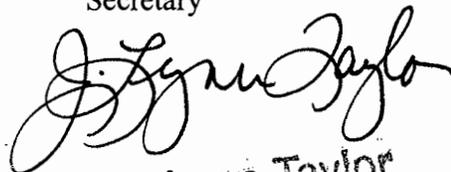
#### **IV.**

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent Oil States' Offer.

Accordingly, it is hereby ORDERED that Respondent Oil States cease and desist from committing or causing any violations and any future violations of Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act.

By the Commission.

Nancy M. Morris  
Secretary



By: J. Lynn Taylor  
Assistant Secretary

# SECURITIES AND EXCHANGE COMMISSION

[Release Nos. 33-8681; 34-53737 / April 28, 2006]

## Order Making Fiscal Year 2007 Annual Adjustments to the Fee Rates Applicable under Section 6(b) of the Securities Act of 1933 and Sections 13(e), 14(g), 31(b), and 31(c) of the Securities Exchange Act of 1934

### I. Background

The Commission collects fees under various provisions of the securities laws. Section 6(b) of the Securities Act of 1933 (“Securities Act”) requires the Commission to collect fees from issuers on the registration of securities.<sup>1</sup> Section 13(e) of the Securities Exchange Act of 1934 (“Exchange Act”) requires the Commission to collect fees on specified repurchases of securities.<sup>2</sup> Section 14(g) of the Exchange Act requires the Commission to collect fees on proxy solicitations and statements in corporate control transactions.<sup>3</sup> Finally, Sections 31(b) and (c) of the Exchange Act require national securities exchanges and national securities associations, respectively, to pay fees to the Commission on transactions in specified securities.<sup>4</sup>

The Investor and Capital Markets Fee Relief Act (“Fee Relief Act”)<sup>5</sup> amended Section 6(b) of the Securities Act and Sections 13(e), 14(g), and 31 of the Exchange Act to require the Commission to make annual adjustments to the fee rates applicable under

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<sup>1</sup> 15 U.S.C. 77f(b).

<sup>2</sup> 15 U.S.C. 78m(e).

<sup>3</sup> 15 U.S.C. 78n(g).

<sup>4</sup> 15 U.S.C. 78ee(b) and (c). In addition, Section 31(d) of the Exchange Act requires the Commission to collect assessments from national securities exchanges and national securities associations for round turn transactions on security futures. 15 U.S.C. 78ee(d).

<sup>5</sup> Pub. L. No. 107-123, 115 Stat. 2390 (2002).

these sections for each of the fiscal years 2003 through 2011, and one final adjustment to fix the fee rates under these sections for fiscal year 2012 and beyond.<sup>6</sup>

**II. Fiscal Year 2007 Annual Adjustment to the Fee Rates Applicable under Section 6(b) of the Securities Act and Sections 13(e) and 14(g) of the Exchange Act**

Section 6(b)(5) of the Securities Act requires the Commission to make an annual adjustment to the fee rate applicable under Section 6(b) of the Securities Act in each of the fiscal years 2003 through 2011.<sup>7</sup> In those same fiscal years, Sections 13(e)(5) and 14(g)(5) of the Exchange Act require the Commission to adjust the fee rates under Sections 13(e) and 14(g) to a rate that is equal to the rate that is applicable under Section 6(b). In other words, the annual adjustment to the fee rate under Section 6(b) of the Securities Act also sets the annual adjustment to the fee rates under Sections 13(e) and 14(g) of the Exchange Act.

Section 6(b)(5) sets forth the method for determining the annual adjustment to the fee rate under Section 6(b) for fiscal year 2007. Specifically, the Commission must adjust the fee rate under Section 6(b) to a “rate that, when applied to the baseline estimate of the aggregate maximum offering prices for [fiscal year 2007], is reasonably likely to produce aggregate fee collections under [Section 6(b)] that are equal to the target offsetting collection amount for [fiscal year 2007].” That is, the adjusted rate is

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<sup>6</sup> See 15 U.S.C. 77f(b)(5), 77f(b)(6), 78m(e)(5), 78m(e)(6), 78n(g)(5), 78n(g)(6), 78ee(j)(1), and 78ee(j)(3). Section 31(j)(2) of the Exchange Act, 15 U.S.C. 78ee(j)(2), also requires the Commission, in specified circumstances, to make a mid-year adjustment to the fee rates under Sections 31(b) and (c) of the Exchange Act in fiscal years 2002 through 2011.

<sup>7</sup> The annual adjustments are designed to adjust the fee rate in a given fiscal year so that, when applied to the aggregate maximum offering price at which securities are proposed to be offered for the fiscal year, it is reasonably likely to produce total fee collections under Section 6(b) equal to the “target offsetting collection amount” specified in Section 6(b)(11)(A) for that fiscal year.

determined by dividing the “target offsetting collection amount” for fiscal year 2007 by the “baseline estimate of the aggregate maximum offering prices” for fiscal year 2007.

Section 6(b)(11)(A) specifies that the “target offsetting collection amount” for fiscal year 2007 is \$214,000,000.<sup>8</sup> Section 6(b)(11)(B) defines the “baseline estimate of the aggregate maximum offering price” for fiscal year 2007 as “the baseline estimate of the aggregate maximum offering price at which securities are proposed to be offered pursuant to registration statements filed with the Commission during [fiscal year 2007] as determined by the Commission, after consultation with the Congressional Budget Office and the Office of Management and Budget . . . .”

To make the baseline estimate of the aggregate maximum offering price for fiscal year 2007, the Commission is using the same methodology it developed in consultation with the Congressional Budget Office (“CBO”) and Office of Management and Budget (“OMB”) to project aggregate offering price for purposes of the fiscal year 2006 annual adjustment. Using this methodology, the Commission determines the “baseline estimate of the aggregate maximum offering price” for fiscal year 2007 to be \$6,974,885,248,909.<sup>9</sup> Based on this estimate, the Commission calculates the annual adjustment for fiscal 2007 to be \$30.70 per million. This adjusted fee rate applies to

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<sup>8</sup> Congress determined the target offsetting collection amounts by applying reduced fee rates to the CBO’s January 2001 projections of the aggregate maximum offering prices for fiscal years 2002 through 2011. In any fiscal year through fiscal year 2011, the annual adjustment mechanism will result in additional fee rate reductions if the CBO’s January 2001 projection of the aggregate maximum offering prices for the fiscal year proves to be too low, and fee rate increases if the CBO’s January 2001 projection of the aggregate maximum offering prices for the fiscal year proves to be too high.

<sup>9</sup> Appendix A explains how we determined the “baseline estimate of the aggregate maximum offering price” for fiscal year 2007 using our methodology, and then shows the purely arithmetical process of calculating the fiscal year 2007 annual adjustment based on that estimate. The appendix includes the data used by the Commission in making its “baseline estimate of the aggregate maximum offering price” for fiscal year 2007.

Section 6(b) of the Securities Act, as well as to Sections 13(e) and 14(g) of the Exchange Act.

**III. Fiscal Year 2007 Annual Adjustment to the Fee Rates Applicable under Sections 31(b) and (c) of the Exchange Act**

Section 31(b) of the Exchange Act requires each national securities exchange to pay the Commission a fee at a rate, as adjusted by our order pursuant to Section 31(j)(2),<sup>10</sup> which currently is \$30.70 per million of the aggregate dollar amount of sales of specified securities transacted on the exchange. Similarly, Section 31(c) requires each national securities association to pay the Commission a fee at the same adjusted rate on the aggregate dollar amount of sales of specified securities transacted by or through any member of the association otherwise than on an exchange. Section 31(j)(1) requires the Commission to make annual adjustments to the fee rates applicable under Sections 31(b) and (c) for each of the fiscal years 2003 through 2011.<sup>11</sup>

Section 31(j)(1) specifies the method for determining the annual adjustment for fiscal year 2007. Specifically, the Commission must adjust the rates under Sections 31(b) and (c) to a “uniform adjusted rate that, when applied to the baseline estimate of the aggregate dollar amount of sales for [fiscal year 2007], is reasonably likely to produce aggregate fee collections under [Section 31] (including assessments collected under

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<sup>10</sup> Order Making Fiscal Year 2006 Annual Adjustments to the Fee Rates Applicable under Section 6(b) of the Securities Act of 1933 and Sections 13(e), 14(g), 31(b) and 31(c) of the Securities Exchange Act of 1934, Rel. No. 33-8572 (April 28, 2005), 70 FR 23271 (May 4, 2005).

<sup>11</sup> The annual adjustments, as well as the mid-year adjustments required in specified circumstances under Section 31(j)(2) in fiscal years 2002 through 2011, are designed to adjust the fee rates in a given fiscal year so that, when applied to the aggregate dollar volume of sales for the fiscal year, they are reasonably likely to produce total fee collections under Section 31 equal to the “target offsetting collection amount” specified in Section 31(l)(1) for that fiscal year.

[Section 31(d)] that are equal to the target offsetting collection amount for [fiscal year 2007].”

Section 31(l)(1) specifies that the “target offsetting collection amount” for fiscal year 2007 is \$881,000,000.<sup>12</sup> Section 31(l)(2) defines the “baseline estimate of the aggregate dollar amount of sales” as “the baseline estimate of the aggregate dollar amount of sales of securities . . . to be transacted on each national securities exchange and by or through any member of each national securities association (otherwise than on a national securities exchange) during [fiscal year 2007] as determined by the Commission, after consultation with the Congressional Budget Office and the Office of Management and Budget . . . .”

To make the baseline estimate of the aggregate dollar amount of sales for fiscal year 2007, the Commission is using the same methodology it developed in consultation with the CBO and OMB to project dollar volume for purposes of prior fee adjustments.<sup>13</sup> Using this methodology, the Commission calculates the baseline estimate of the aggregate dollar amount of sales for fiscal year 2007 to be \$53,460,711,153,955. Based on this estimate, and an estimated collection of \$51,489 in assessments on security

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<sup>12</sup> Congress determined the target offsetting collection amounts by applying reduced fee rates to the CBO’s January 2001 projections of dollar volume for fiscal years 2002 through 2011. In any fiscal year through fiscal year 2011, the annual and, in specified circumstances, mid-year adjustment mechanisms will result in additional fee rate reductions if the CBO’s January 2001 projection of dollar volume for the fiscal year proves to be too low, and fee rate increases if the CBO’s January 2001 projection of dollar volume for the fiscal year proves to be too high.

<sup>13</sup> Appendix B explains how we determined the “baseline estimate of the aggregate dollar amount of sales” for fiscal year 2007 using our methodology, and then shows the purely arithmetical process of calculating the fiscal year 2007 annual adjustment based on that estimate. The appendix also includes the data used by the Commission in making its “baseline estimate of the aggregate dollar amount of sales” for fiscal year 2007.

futures transactions under Section 31(d) in fiscal year 2007, the uniform adjusted rate is \$15.30 per million.<sup>14</sup>

#### **IV. Effective Dates of the Annual Adjustments**

Section 6(b)(8)(A) of the Securities Act provides that the fiscal year 2007 annual adjustment to the fee rate applicable under Section 6(b) of the Securities Act shall take effect on the later of October 1, 2006, or five days after the date on which a regular appropriation to the Commission for fiscal year 2007 is enacted.<sup>15</sup> Section 13(e)(8)(A) and 14(g)(8)(A) of the Exchange Act provide for the same effective date for the annual adjustments to the fee rates applicable under Sections 13(e) and 14(g) of the Exchange Act.<sup>16</sup>

Section 31(j)(4)(A) of the Exchange Act provides that the fiscal year 2007 annual adjustments to the fee rates applicable under Sections 31(b) and (c) of the Exchange Act shall take effect on the later of October 1, 2006, or 30 days after the date on which a regular appropriation to the Commission for fiscal year 2007 is enacted.

#### **V. Conclusion**

Accordingly, pursuant to Section 6(b) of the Securities Act and Sections 13(e), 14(g), and 31 of the Exchange Act,<sup>17</sup>

IT IS HEREBY ORDERED that the fee rates applicable under Section 6(b) of the Securities Act and Sections 13(e) and 14(g) of the Exchange Act shall be \$30.70 per

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<sup>14</sup> The calculation of the adjusted fee rate assumes that the current fee rate of \$30.70 per million will apply through October 31, 2006, due to the operation of the effective date provision contained in Section 31(j)(4)(A) of the Exchange Act.

<sup>15</sup> 15 U.S.C. 77f(b)(8)(A).

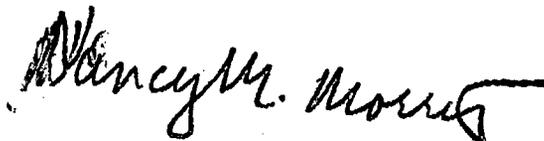
<sup>16</sup> 15 U.S.C. 78m(e)(8)(A) and 78n(g)(8)(A).

<sup>17</sup> 15 U.S.C. 77f(b), 78m(e), 78n(g), and 78ee(j).

million effective on the later of October 1, 2006, or five days after the date on which a regular appropriation to the Commission for fiscal year 2007 is enacted; and

IT IS FURTHER ORDERED that the fee rates applicable under Sections 31(b) and (c) of the Exchange Act shall be \$15.30 per million effective on the later of October 1, 2006, or 30 days after the date on which a regular appropriation to the Commission for fiscal year 2007 is enacted.

By the Commission.

A handwritten signature in black ink that reads "Nancy M. Morris". The signature is written in a cursive style with a long horizontal stroke at the end.

Nancy M. Morris  
Secretary

## APPENDIX A

With the passage of the Investor and Capital Markets Relief Act, Congress has, among other things, established a target amount of monies to be collected from fees charged to issuers based on the value of their registrations. This appendix provides the formula for determining such fees, which the Commission adjusts annually. Congress has mandated that the Commission determine these fees based on the “aggregate maximum offering prices,” which measures the aggregate dollar amount of securities registered with the Commission over the course of the year. In order to maximize the likelihood that the amount of monies targeted by Congress will be collected, the fee rate must be set to reflect projected aggregate maximum offering prices. As a percentage, the fee rate equals the ratio of the target amounts of monies to the projected aggregate maximum offering prices.

For 2007, the Commission has estimated the aggregate maximum offering prices by projecting forward the trend established in the previous decade. More specifically, an ARIMA model was used to forecast the value of the aggregate maximum offering prices for months subsequent to March 2006, the last month for which the Commission has data on the aggregate maximum offering prices.

The following sections describe this process in detail.

### **A. Baseline estimate of the aggregate maximum offering prices for fiscal year 2007.**

First, calculate the aggregate maximum offering prices (AMOP) for each month in the sample (March 1996 - March 2006). Next, calculate the percentage change in the AMOP from month to month.

Model the monthly percentage change in AMOP as a first order moving average process. The moving average approach allows one to model the effect that an exceptionally high (or low) observation of AMOP tends to be followed by a more “typical” value of AMOP.

Use the estimated moving average model to forecast the monthly percent change in AMOP. These percent changes can then be applied to obtain forecasts of the total dollar value of registrations. The following is a more formal (mathematical) description of the procedure:

1. Begin with the monthly data for AMOP. The sample spans ten years, from March 1996 to March 2006.
2. Divide each month’s AMOP (column C) by the number of trading days in that month (column B) to obtain the average daily AMOP (AAMOP, column D).
3. For each month  $t$ , the natural logarithm of AAMOP is reported in column E.
4. Calculate the change in  $\log(\text{AAMOP})$  from the previous month as  $\Delta_t = \log(\text{AAMOP}_t) - \log(\text{AAMOP}_{t-1})$ . This approximates the percentage change.
5. Estimate the first order moving average model  $\Delta_t = \alpha + \beta e_{t-1} + e_t$ , where  $e_t$  denotes the forecast error for month  $t$ . The forecast error is simply the difference between the one-month ahead forecast and the actual realization of  $\Delta_t$ . The forecast error is expressed as  $e_t = \Delta_t - \alpha - \beta e_{t-1}$ . The model can be estimated using standard commercially available software such as SAS or Eviews. Using least squares, the estimated parameter values are  $\alpha=0.01095$  and  $\beta=-0.78845$ .

6. For the month of April 2006, forecast  $\Delta_{t=4/06} = \alpha + \beta e_{t=3/06}$ . For all subsequent months, forecast  $\Delta_t = \alpha$ .
7. Calculate forecasts of  $\log(\text{AAMOP})$ . For example, the forecast of  $\log(\text{AAMOP})$  for June 2006 is given by  $\text{FLAAMOP}_{t=6/06} = \log(\text{AAMOP}_{t=3/06}) + \Delta_{t=4/06} + \Delta_{t=5/06} + \Delta_{t=6/06}$ .
8. Under the assumption that  $e_t$  is normally distributed, the n-step ahead forecast of AAMOP is given by  $\exp(\text{FLAAMOP}_t + \sigma_n^2/2)$ , where  $\sigma_n$  denotes the standard error of the n-step ahead forecast.
9. For June 2007, this gives a forecast AAMOP of \$24.4 Billion (Column I), and a forecast AMOP of \$537.2 Billion (Column J).
10. Iterate this process through September 2007 to obtain a baseline estimate of the aggregate maximum offering prices for fiscal year 2007 of \$6,974,885,248,909.

**B. Using the forecasts from A to calculate the new fee rate.**

1. Using the data from Table A, estimate the aggregate maximum offering prices between 10/1/06 and 9/30/07 to be \$6,974,885,248,909.
2. The rate necessary to collect the target \$214,000,000 in fee revenues set by Congress is then calculated as:  $\$214,000,000 \div \$6,974,885,248,909 = 0.00003068$  (or \$30.70 per million.).

Table A. Estimation of baseline of aggregate maximum offering prices .

Fee rate calculation.

a. Baseline estimate of the aggregate maximum offering prices, 10/1/06 to 9/30/07 (\$Millions)	6,974,885
b. Implied fee rate (\$214 Million / a)	\$30.70

Data

(A) Month	(B) # of Trading Days in Month	(C) Aggregate Maximum Offering Prices, in \$Millions	(D) Average Daily Aggregate Max. Offering Prices (AAMOP) in \$Millions	(E) log(AAMOP)	(F) Change in AAMOP	(G) Forecast log(AAMOP)	(H) Standard Error	(I) Forecast AAMOP, in \$Millions	(J) Forecast Aggregate Maximum Offering Prices, in \$Millions
Mar-96	21	117,780	5,609	22.448					
Apr-96	21	158,005	7,524	22.741	0.294				
May-96	22	142,452	6,475	22.591	-0.150				
Jun-96	20	122,598	6,130	22.536	-0.055				
Jul-96	22	113,637	5,165	22.365	-0.171				
Aug-96	22	128,154	5,825	22.485	0.120				
Sep-96	20	108,763	5,438	22.417	-0.069				
Oct-96	23	171,507	7,457	22.732	0.316				
Nov-96	20	164,574	8,229	22.831	0.098				
Dec-96	21	214,241	10,202	23.046					
Jan-97	22	136,615	6,210	22.549					
Feb-97	19	317,624	16,717	23.540					
Mar-97	20	140,809	7,040	22.675					
Apr-97	22	182,657	8,303	22.840	0.165				
May-97	21	163,702	7,795	22.777	-0.063				
Jun-97	21	162,111	7,720	22.767	-0.010				
Jul-97	22	168,007	7,637	22.756	-0.011				
Aug-97	21	153,705	7,319	22.714	-0.042				
Sep-97	21	179,559	8,550	22.869	0.155				
Oct-97	23	260,719	11,336	23.151	0.282				
Nov-97	19	219,618	11,559	23.171	0.020				
Dec-97	22	228,605	10,391	23.064	-0.106				
Jan-98	20	228,030	11,402	23.157	0.093				
Feb-98	19	250,266	13,172	23.301	0.144				
Mar-98	22	378,185	17,190	23.568	0.266				
Apr-98	21	242,310	11,539	23.169	-0.399				
May-98	20	298,454	14,923	23.426	0.257				

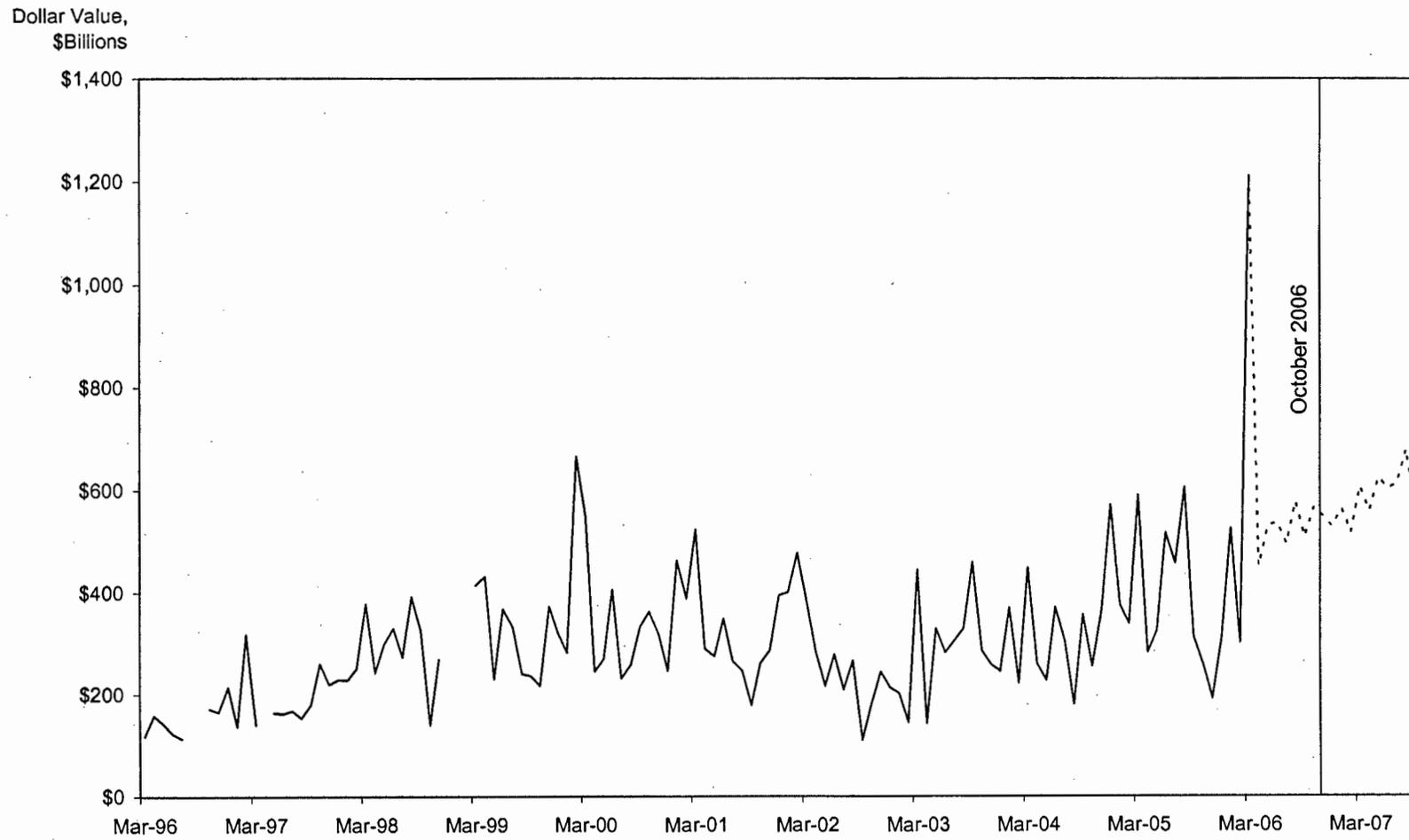
Jun-98	22	328,994	14,954	23.428	0.002				
Jul-98	22	272,957	12,407	23.242	-0.187				
Aug-98	21	392,104	18,672	23.650	0.409				
Sep-98	21	325,144	15,483	23.463	-0.187				
Oct-98	22	139,786	6,354	22.572	-0.891				
Nov-98	20	269,065	13,453	23.322	0.750				
Dec-98	22	248,596	11,300	23.148	-0.174				
Jan-99	19	253,448	13,339	23.314	0.166				
Feb-99	19	217,433	11,444	23.161	-0.153				
Mar-99	23	415,145	18,050	23.616	0.456				
Apr-99	21	431,280	20,537	23.746	0.129				
May-99	20	229,082	11,454	23.162	-0.584				
Jun-99	22	367,943	16,725	23.540	0.379				
Jul-99	21	332,623	15,839	23.486	-0.054				
Aug-99	22	240,157	10,916	23.114	-0.372				
Sep-99	21	236,011	11,239	23.143	0.029				
Oct-99	21	216,883	10,328	23.058	-0.085				
Nov-99	21	372,582	17,742	23.599	0.541				
Dec-99	22	319,846	14,538	23.400	-0.199				
Jan-00	20	282,165	14,108	23.370	-0.030				
Feb-00	20	665,367	33,268	24.228	0.858				
Mar-00	23	550,107	23,918	23.898	-0.330				
Apr-00	19	244,510	12,869	23.278	-0.620				
May-00	22	269,774	12,262	23.230	-0.048				
Jun-00	22	406,409	18,473	23.640	0.410				
Jul-00	20	230,894	11,545	23.169	-0.470				
Aug-00	23	257,797	11,209	23.140	-0.030				
Sep-00	20	332,120	16,606	23.533	0.393				
Oct-00	22	362,493	16,477	23.525	-0.008				
Nov-00	21	317,653	15,126	23.440	-0.086				
Dec-00	20	246,006	12,300	23.233	-0.207				
Jan-01	21	462,726	22,035	23.816	0.583				
Feb-01	19	388,304	20,437	23.741	-0.075				
Mar-01	22	523,443	23,793	23.893	0.152				

Apr-01	20	289,212	14,461	23.395	-0.498				
May-01	22	274,298	12,468	23.246	-0.148				
Jun-01	21	348,268	16,584	23.532	0.285				
Jul-01	21	264,590	12,600	23.257	-0.275				
Aug-01	23	245,591	10,678	23.091	-0.165				
Sep-01	15	178,524	11,902	23.200	0.108				
Oct-01	23	260,719	11,336	23.151	-0.049				
Nov-01	21	286,199	13,629	23.335	0.184				
Dec-01	20	395,230	19,762	23.707	0.372				
Jan-02	21	401,290	19,109	23.673	-0.034				
Feb-02	19	476,837	25,097	23.946	0.273				
Mar-02	20	380,160	19,008	23.668	-0.278				
Apr-02	22	282,947	12,861	23.277	-0.391				
May-02	22	215,645	9,802	23.006	-0.272				
Jun-02	20	277,757	13,888	23.354	0.348				
Jul-02	22	208,638	9,484	22.973	-0.381				
Aug-02	22	265,750	12,080	23.215	0.242				
Sep-02	20	109,565	5,478	22.424	-0.791				
Oct-02	23	179,374	7,799	22.777	0.353				
Nov-02	20	243,590	12,179	23.223	0.446				
Dec-02	21	212,838	10,135	23.039	-0.184				
Jan-03	21	201,839	9,611	22.986	-0.053				
Feb-03	19	144,642	7,613	22.753	-0.233				
Mar-03	21	444,331	21,159	23.775	1.022				
Apr-03	21	142,373	6,780	22.637	-1.138				
May-03	21	328,792	15,657	23.474	0.837				
Jun-03	21	281,580	13,409	23.319	-0.155				
Jul-03	22	304,383	13,836	23.351	0.031				
Aug-03	21	328,351	15,636	23.473	0.122				
Sep-03	21	459,563	21,884	23.809	0.336				
Oct-03	23	285,039	12,393	23.240	-0.569				
Nov-03	19	257,779	13,567	23.331	0.091				
Dec-03	22	244,998	11,136	23.133	-0.197				
Jan-04	20	369,784	18,489	23.640	0.507				

Feb-04	19	221,517	11,659	23.179	-0.461				
Mar-04	23	448,543	19,502	23.694	0.514				
Apr-04	21	260,029	12,382	23.240	-0.454				
May-04	20	227,239	11,362	23.154	-0.086				
Jun-04	21	370,668	17,651	23.594	0.441				
Jul-04	21	305,519	14,549	23.401	-0.193				
Aug-04	22	179,688	8,168	22.823	-0.577				
Sep-04	21	357,007	17,000	23.556	0.733				
Oct-04	21	254,489	12,119	23.218	-0.338				
Nov-04	21	363,406	17,305	23.574	0.356				
Dec-04	22	570,918	25,951	23.979	0.405				
Jan-05	20	375,484	18,774	23.656	-0.324				
Feb-05	19	338,922	17,838	23.605	-0.051				
Mar-05	22	590,862	26,857	24.014	0.409				
Apr-05	21	282,018	13,429	23.321	-0.693				
May-05	21	323,652	15,412	23.458	0.138				
Jun-05	22	517,022	23,501	23.880	0.422				
Jul-05	20	457,487	22,874	23.853	-0.027				
Aug-05	23	605,534	26,328	23.994	0.141				
Sep-05	21	312,281	14,871	23.423	-0.571				
Oct-05	21	258,956	12,331	23.235	-0.187				
Nov-05	21	192,736	9,178	22.940	-0.295				
Dec-05	21	308,134	14,673	23.409	0.469				
Jan-06	20	526,550	26,328	23.994	0.585				
Feb-06	19	301,446	15,866	23.487	-0.506				
Mar-06	23	1,211,344	52,667	24.687	1.200				
Apr-06	19					23.835	0.337	23,768	451,584
May-06	22					23.846	0.345	24,091	529,993
Jun-06	22					23.857	0.352	24,418	537,196
Jul-06	20					23.868	0.359	24,750	494,997
Aug-06	23					23.879	0.366	25,086	576,983
Sep-06	20					23.889	0.373	25,427	508,542
Oct-06	22					23.900	0.380	25,773	566,999
Nov-06	21					23.911	0.387	26,123	548,582

Dec-06	20					23.922	0.393	26,478	529,559
Jan-07	21					23.933	0.399	26,838	563,593
Feb-07	19					23.944	0.406	27,203	516,848
Mar-07	22					23.955	0.412	27,572	606,588
Apr-07	20					23.966	0.418	27,947	558,938
May-07	22					23.977	0.424	28,327	623,188
Jun-07	21					23.988	0.430	28,712	602,945
Jul-07	21					23.999	0.436	29,102	611,139
Aug-07	23					24.010	0.442	29,497	678,439
Sep-07	19					24.021	0.448	29,898	568,067

**Figure A**  
Aggregate Maximum Offering Prices Subject to Securities Act Section 6(b)  
(Dashed Line Indicates Forecast Values)



## APPENDIX B

With the passage of the Investor and Capital Markets Relief Act, Congress has, among other things, established a target amount of monies to be collected from fees charged to investors based on the value of their transactions. This appendix provides the formula for determining such fees, which the Commission adjusts annually, and may adjust semi-annually.<sup>18</sup> In order to maximize the likelihood that the amount of monies targeted by Congress will be collected, the fee rate must be set to reflect projected dollar transaction volume on the securities exchanges and certain over-the-counter markets over the course of the year. As a percentage, the fee rate equals the ratio of the target amounts of monies to the projected dollar transaction volume.

For 2007, the Commission has estimated dollar transaction volume by projecting forward the trend established in the previous decade. More specifically, dollar transaction volume was forecasted for months subsequent to March 2006, the last month for which the Commission has data on transaction volume.

The following sections describe this process in detail.

### **A. Baseline estimate of the aggregate dollar amount of sales for fiscal year 2007.**

First, calculate the average daily dollar amount of sales (ADS) for each month in the sample (March 1996 - March 2006). The monthly aggregate dollar amount of sales (exchange plus certain over-the-counter markets) is presented in column C of Table B.

Next, calculate the change in the natural logarithm of ADS from month to month. The average monthly percentage growth of ADS over the entire sample is 0.013 and the standard deviation 0.117. Assuming the monthly percentage change in ADS follows a random walk,

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<sup>18</sup> Congress requires that the Commission make a mid-year adjustment to the fee rate if four months into the fiscal year it determines that its forecasts of aggregate dollar volume are reasonably likely to be off by 10% or more.

calculating the expected monthly percentage growth rate for the full sample is straightforward. The expected monthly percentage growth rate of ADS is 2.0%.

Now, use the expected monthly percentage growth rate to forecast total dollar volume. For example, one can use the ADS for March 2006 (\$165,519,031,905) to forecast ADS for April 2006 (\$168,860,299,166 = \$165,519,031,905 x 1.020).<sup>19</sup> Multiply by the number of trading days in April 2006 (19) to obtain a forecast of the total dollar volume for the month (\$3,208,345,684,147). Repeat the method to generate forecasts for subsequent months.

The forecasts for total dollar volume are in column G of Table B. The following is a more formal (mathematical) description of the procedure:

1. Divide each month's total dollar volume (column C) by the number of trading days in that month (column B) to obtain the average daily dollar volume (ADS, column D).
2. For each month  $t$ , calculate the change in ADS from the previous month as  $\Delta_t = \log(\text{ADS}_t / \text{ADS}_{t-1})$ , where  $\log(x)$  denotes the natural logarithm of  $x$ .
3. Calculate the mean and standard deviation of the series  $\{\Delta_1, \Delta_2, \dots, \Delta_{120}\}$ . These are given by  $\mu = 0.013$  and  $\sigma = 0.117$ , respectively.
4. Assume that the natural logarithm of ADS follows a random walk, so that  $\Delta_s$  and  $\Delta_t$  are statistically independent for any two months  $s$  and  $t$ .
5. Under the assumption that  $\Delta_t$  is normally distributed, the expected value of  $\text{ADS}_t / \text{ADS}_{t-1}$  is given by  $\exp(\mu + \sigma^2/2)$ , or on average  $\text{ADS}_t = 1.020 \times \text{ADS}_{t-1}$ .

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<sup>19</sup> The value 1.020 has been rounded. All computations are done with the unrounded value.

6. For April 2006, this gives a forecast ADS of  $1.020 \times \$165,519,031,905 = \$168,860,299,166$ .  
Multiply this figure by the 19 trading days in April 2006 to obtain a total dollar volume forecast of \$3,208,345,684,147.
7. For May 2006, multiply the April 2006 ADS forecast by 1.020 to obtain a forecast ADS of \$172,269,015,268. Multiply this figure by the 22 trading days in May 2006 to obtain a total dollar volume forecast of \$3,789,918,335,894.
8. Repeat this procedure for subsequent months.

**B. Using the forecasts from A to calculate the new fee rate.**

1. Use Table B to estimate fees collected for the period 10/1/06 through 10/31/06. The projected aggregate dollar amount of sales for this period is \$4,188,205,050,118. Projected fee collections at the current fee rate of 0.0000307 are \$128,577,895.
2. Estimate the amount of assessments on securities futures products collected during 10/1/06 and 9/30/07 to be \$51,489 by projecting a 2.0% monthly increase from a base of \$3,342 in March 2006.
3. Subtract the amounts \$128,577,895 and \$51,489 from the target offsetting collection amount set by Congress of \$881,000,000 leaving \$752,370,487 to be collected on dollar volume for the period 11/1/06 through 9/30/07.
4. Use Table B to estimate dollar volume for the period 11/1/06 through 9/30/07. The estimate is \$49,272,506,103,837. Finally, compute the fee rate required to produce the additional \$752,370,487 in revenue. This rate is \$752,370,487 divided by \$49,272,506,103,837 or 0.0000152696.

5. Round the result to the seventh decimal point, yielding a rate of .0000153 (or \$15.30 per million).

Table B. Estimation of baseline of the aggregate dollar amount of sales.

Fee rate calculation.

a. Baseline estimate of the aggregate dollar amount of sales, 10/1/06 to 10/31/06 (\$Millions)	4,188,205
b. Baseline estimate of the aggregate dollar amount of sales, 11/1/06 to 9/30/07 (\$Millions)	49,272,506
c. Estimated collections in assessments on securities futures products in FY 2007 (\$Millions)	0.051
d. Implied fee rate $((\$881,000,000 - 0.0000307 \cdot a - c) / b)$	\$15.3

Data

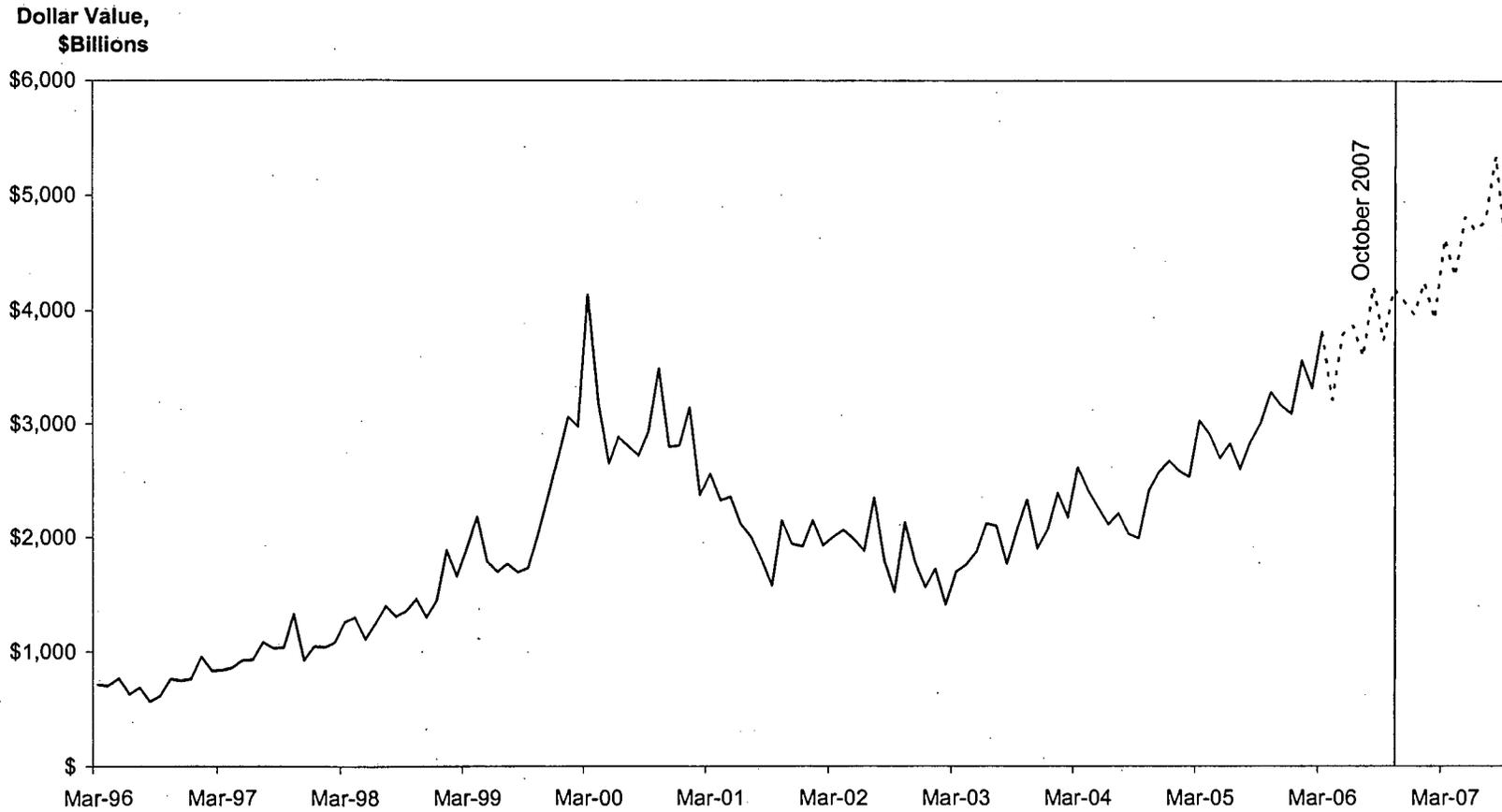
(A) Month	(B) # of Trading Days in Month	(C) Aggregate Dollar Amount of Sales	(D) Average Daily Dollar Amount of Sales (ADS)	(E) Change in LN of ADS	(F) Forecast ADS	(G) Forecast Aggregate Dollar Amount of Sales
Mar-96	21	714,836,120,093	34,039,815,243	-		
Apr-96	21	704,410,318,022	33,543,348,477	-0.015		
May-96	22	768,379,507,489	34,926,341,250	0.040		
Jun-96	20	631,098,780,223	31,554,939,011	-0.102		
Jul-96	22	688,428,728,384	31,292,214,927	-0.008		
Aug-96	22	570,109,772,036	25,914,080,547	-0.189		
Sep-96	20	617,243,881,688	30,862,194,084	0.175		
Oct-96	23	764,269,441,454	33,229,106,150	0.074		
Nov-96	20	748,494,700,419	37,424,735,021	0.119		
Dec-96	21	764,479,496,753	36,403,785,560	-0.028		
Jan-97	22	957,432,637,586	43,519,665,345	0.179		
Feb-97	19	837,174,183,446	44,061,799,129	0.012		
Mar-97	20	839,192,728,788	41,959,636,439	-0.049		
Apr-97	22	862,799,213,315	39,218,146,060	-0.068		
May-97	21	925,733,852,647	44,082,564,412	0.117		
Jun-97	21	930,409,085,859	44,305,194,565	0.005		
Jul-97	22	1,085,682,706,898	49,349,213,950	0.108		
Aug-97	21	1,031,344,138,751	49,111,625,655	-0.005		
Sep-97	21	1,036,460,244,602	49,355,249,743	0.005		
Oct-97	23	1,329,653,432,718	57,811,018,814	0.158		
Nov-97	19	926,017,878,587	48,737,783,084	-0.171		
Dec-97	22	1,046,220,806,199	47,555,491,191	-0.025		
Jan-98	20	1,037,925,292,902	51,896,264,645	0.087		
Feb-98	19	1,081,705,333,396	56,931,859,652	0.093		
Mar-98	22	1,259,994,685,467	57,272,485,703	0.006		
Apr-98	21	1,298,494,359,253	61,833,064,726	0.077		
May-98	20	1,110,221,658,995	55,511,082,950	-0.108		
Jun-98	22	1,243,779,791,913	56,535,445,087	0.018		
Jul-98	22	1,399,011,433,748	63,591,428,807	0.118		
Aug-98	21	1,307,501,463,442	62,261,974,450	-0.021		
Sep-98	21	1,352,428,235,083	64,401,344,528	0.034		
Oct-98	22	1,460,835,397,598	66,401,608,982	0.031		
Nov-98	20	1,298,403,768,065	64,920,188,403	-0.023		
Dec-98	22	1,442,697,787,306	65,577,172,150	0.010		
Jan-99	19	1,884,555,055,910	99,187,108,206	0.414		
Feb-99	19	1,656,058,202,765	87,160,958,040	-0.129		
Mar-99	23	1,908,967,664,074	82,998,594,090	-0.049		
Apr-99	21	2,177,601,770,622	103,695,322,411	0.223		
May-99	20	1,784,400,906,987	89,220,045,349	-0.150		
Jun-99	22	1,697,339,227,503	77,151,783,068	-0.145		
Jul-99	21	1,767,035,098,986	84,144,528,523	0.087		
Aug-99	22	1,692,907,150,726	76,950,325,033	-0.089		
Sep-99	21	1,730,505,881,178	82,405,041,961	0.068		
Oct-99	21	2,017,474,765,542	96,070,226,931	0.153		
Nov-99	21	2,348,374,009,334	111,827,333,778	0.152		
Dec-99	22	2,686,788,531,991	122,126,751,454	0.088		
Jan-00	20	3,057,831,397,113	152,891,569,856	0.225		
Feb-00	20	2,973,119,888,063	148,655,994,403	-0.028		
Mar-00	23	4,135,152,366,234	179,789,233,315	0.190		
Apr-00	19	3,174,694,525,687	167,089,185,562	-0.073		
May-00	22	2,649,273,207,318	120,421,509,424	-0.328		

(A) Month	(B) # of Trading Days in Month	(C) Aggregate Dollar Amount of Sales	(D) Average Daily Dollar Amount of Sales (ADS)	(E) Change in LN of ADS	(F) Forecast ADS	(G) Forecast Aggregate Dollar Amount of Sales
Jun-00	22	2,883,513,997,781	131,068,818,081	0.085		
Jul-00	20	2,804,753,395,361	140,237,669,768	0.068		
Aug-00	23	2,720,788,395,832	118,295,147,645	-0.170		
Sep-00	20	2,930,188,809,012	146,509,440,451	0.214		
Oct-00	22	3,485,926,307,727	158,451,195,806	0.078		
Nov-00	21	2,795,778,876,887	133,132,327,471	-0.174		
Dec-00	20	2,809,917,349,851	140,495,867,493	0.054		
Jan-01	21	3,143,501,125,244	149,690,529,774	0.063		
Feb-01	19	2,372,420,523,286	124,864,238,068	-0.181		
Mar-01	22	2,554,419,085,113	116,109,958,414	-0.073		
Apr-01	20	2,324,349,507,745	116,217,475,387	0.001		
May-01	22	2,353,179,388,303	106,962,699,468	-0.083		
Jun-01	21	2,111,922,113,236	100,567,719,678	-0.062		
Jul-01	21	2,004,384,034,554	95,446,858,788	-0.052		
Aug-01	23	1,803,565,337,795	78,415,884,252	-0.197		
Sep-01	15	1,573,484,946,383	104,898,996,426	0.291		
Oct-01	23	2,147,238,873,044	93,358,211,871	-0.117		
Nov-01	21	1,939,427,217,518	92,353,677,025	-0.011		
Dec-01	20	1,921,098,738,113	96,054,936,906	0.039		
Jan-02	21	2,149,243,312,432	102,344,919,640	0.063		
Feb-02	19	1,928,830,595,585	101,517,399,768	-0.008		
Mar-02	20	2,002,216,374,514	100,110,818,726	-0.014		
Apr-02	22	2,062,101,866,506	93,731,903,023	-0.066		
May-02	22	1,985,859,756,557	90,266,352,571	-0.038		
Jun-02	20	1,882,185,380,609	94,109,269,030	0.042		
Jul-02	22	2,349,564,490,189	106,798,385,918	0.126		
Aug-02	22	1,793,429,904,079	81,519,541,095	-0.270		
Sep-02	20	1,518,944,367,204	75,947,218,360	-0.071		
Oct-02	23	2,127,874,947,972	92,516,302,086	0.197		
Nov-02	20	1,780,816,458,122	89,040,822,906	-0.038		
Dec-02	21	1,561,092,215,646	74,337,724,555	-0.180		
Jan-03	21	1,723,698,830,414	82,080,896,686	0.099		
Feb-03	19	1,411,722,405,357	74,301,179,229	-0.100		
Mar-03	21	1,699,581,267,718	80,932,441,320	0.085		
Apr-03	21	1,759,751,025,279	83,797,667,870	0.035		
May-03	21	1,871,390,985,678	89,113,856,461	0.062		
Jun-03	21	2,122,225,077,345	101,058,337,016	0.126		
Jul-03	22	2,100,812,973,956	95,491,498,816	-0.057		
Aug-03	21	1,766,527,686,224	84,120,366,011	-0.127		
Sep-03	21	2,063,584,421,939	98,265,924,854	0.155		
Oct-03	23	2,331,850,083,022	101,384,786,218	0.031		
Nov-03	19	1,903,726,129,859	100,196,112,098	-0.012		
Dec-03	22	2,066,530,151,383	93,933,188,699	-0.065		
Jan-04	20	2,390,942,905,678	119,547,145,284	0.241		
Feb-04	19	2,177,765,594,701	114,619,241,826	-0.042		
Mar-04	23	2,613,808,754,550	113,643,858,893	-0.009		
Apr-04	21	2,418,663,760,191	115,174,464,771	0.013		
May-04	20	2,259,243,404,459	112,962,170,223	-0.019		
Jun-04	21	2,112,826,072,876	100,610,765,375	-0.116		
Jul-04	21	2,209,808,376,565	105,228,970,313	0.045		
Aug-04	22	2,033,343,354,640	92,424,697,938	-0.130		
Sep-04	21	1,993,803,487,749	94,943,023,226	0.027		
Oct-04	21	2,414,599,088,108	114,980,908,958	0.191		
Nov-04	21	2,577,513,374,160	122,738,732,103	0.065		
Dec-04	22	2,673,532,981,863	121,524,226,448	-0.010		
Jan-05	20	2,581,839,174,160	129,091,958,708	0.060		
Feb-05	19	2,532,202,396,053	133,273,810,319	0.032		

(A) Month	(B) # of Trading Days in Month	(C) Aggregate Dollar Amount of Sales	(D) Average Daily Dollar Amount of Sales (ADS)	(E) Change in LN of ADS	(F) Forecast ADS	(G) Forecast Aggregate Dollar Amount of Sales
Mar-05	22	3,027,678,711,444	137,621,759,611	0.032		
Apr-05	21	2,905,852,920,334	138,373,948,587	0.005		
May-05	21	2,696,918,002,820	128,424,666,801	-0.075		
Jun-05	22	2,825,026,079,840	128,410,276,356	0.000		
Jul-05	20	2,603,497,532,408	130,174,876,620	0.014		
Aug-05	23	2,845,670,391,894	123,724,799,648	-0.051		
Sep-05	21	3,008,993,433,003	143,285,401,572	0.147		
Oct-05	21	3,279,422,103,293	156,162,957,300	0.086		
Nov-05	21	3,162,729,725,215	150,606,177,391	-0.036		
Dec-05	21	3,089,675,315,936	147,127,395,997	-0.023		
Jan-06	20	3,555,274,119,568	177,763,705,978	0.189		
Feb-06	19	3,313,621,122,247	174,401,111,697	-0.019		
Mar-06	23	3,806,937,733,806	165,519,031,905	-0.052		
Apr-06	19				168,860,299,166	3,208,345,684,147
May-06	22				172,269,015,268	3,789,918,335,894
Jun-06	22				175,746,541,775	3,866,423,919,041
Jul-06	20				179,294,267,734	3,585,885,354,680
Aug-06	23				182,913,610,235	4,207,013,035,401
Sep-06	20				186,606,014,972	3,732,120,299,437
Oct-06	22				190,372,956,824	4,188,205,050,118
Nov-06	21				194,215,940,441	4,078,534,749,265
Dec-06	20				198,136,500,850	3,962,730,016,997
Jan-07	21				202,136,204,062	4,244,860,285,292
Feb-07	19				206,216,647,701	3,918,116,306,314
Mar-07	22				210,379,461,642	4,628,348,156,134
Apr-07	20				214,626,308,664	4,292,526,173,271
May-07	22				218,958,885,107	4,817,095,472,343
Jun-07	21				223,378,921,557	4,690,957,352,703
Jul-07	21				227,888,183,536	4,785,651,854,266
Aug-07	23				232,488,472,205	5,347,234,860,705
Sep-07	19				237,181,625,081	4,506,450,876,545

**Figure B.**

Aggregate Dollar Amount of Sales Subject to Exchange Act Sections 31(b) and 31(c)<sup>1</sup>  
Methodology Developed in Consultation With OMB and CBO  
(Dashed Line Indicates Forecast Values)



<sup>1</sup>Forecasted line is not smooth because the number of trading days varies by month.

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 53739 / April 28, 2006

ADMINISTRATIVE PROCEEDING  
File No. 3-12282

-----  
In the Matter of :  
: ORDER INSTITUTING PUBLIC  
: ADMINISTRATIVE PROCEEDINGS  
Philip J. Hourican, :  
: PURSUANT TO SECTION 15(b) OF  
: THE SECURITIES EXCHANGE ACT  
: OF 1934, MAKING FINDINGS, AND  
Respondent. : IMPOSING REMEDIAL SANCTIONS  
-----

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Philip J. Hourican ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Public Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

Document 39 of 43

### III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Hourican, 38 years old, is a resident of North Babylon, New York. Hourican worked at Kimberly Securities, Inc. ("Kimberly Securities"), a broker-dealer formerly registered with the Commission, as a registered representative ("RR") from November 1999 to July 2000 and from April 2001 until August 2002.
2. On April 10, 2006, a final judgment was entered by consent against Hourican, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Kimberly J. Carrella, et al., Civil Action Number 04-CV-3754, in the United States District Court for the Eastern District of New York.
3. The Commission's complaint alleges that, from early 2000 until September 2002, RRs at Kimberly Securities, including Hourican, engaged in a scheme to defraud Kimberly Securities' customers by repeatedly executing unauthorized, unsuitable trades in customer accounts, and churning those accounts. Specifically, Hourican and other RRs misrepresented, and failed to disclose, material information to investors to persuade them to open brokerage accounts at Kimberly Securities and to invest significant amounts of money. Once the customers invested funds, Hourican and other RRs disregarded their customers' investment objectives. Hourican and other RRs repeatedly executed securities transactions that were unauthorized by, and unsuitable for, their customers, and churned their customers' accounts. This frequent trading typically depleted the customers' capital investments through trading losses and commission charges. After there were no remaining funds in the customers' accounts, or the customers closed their accounts, Hourican and other RRs lured new, unsuspecting customers into opening accounts at Kimberly Securities, and repeated the same conduct. Through this scheme, Hourican and other RRs generated substantial commissions, while the customers lost their entire investment.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Philip J. Hourican be, and hereby is, barred from association with any broker or dealer.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Nancy M. Morris  
Secretary

  
By: **Jill M. Peterson**  
**Assistant Secretary**

Commissioner Glassman  
Not Participating

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933  
Release No. 8680 / April 28, 2006

ADMINISTRATIVE PROCEEDING  
File No. 3-12158

In the Matter of  
  
Axum, Incorporated,  
  
Respondent.

ORDER MAKING FINDINGS, STAYING  
PROCEEDINGS, SPECIFYING  
PROCEDURES AND DELEGATING  
AUTHORITY

I.

In these proceedings instituted on February 21, 2006, pursuant to Rule 258 of the General Rules and Regulations under the Securities Act of 1933 ("Securities Act") as to Respondent Axum, Incorporated ("Axum"), Axum has submitted an Offer of Settlement ("Offer") which the Securities and Exchange Commission ("Commission") has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Making Findings, Staying Proceedings, Specifying Procedures and Delegating Authority ("Order"), as set forth below.

II.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>1</sup> that:

- A. Axum is a Colorado Corporation with its principal office in Broomfield, Colorado.
- B. On January 13, 2006, Axum filed with the Commission a document styled "Registration Statement under the Securities Act of 1933" ("Offering Statement"). Although

<sup>1</sup> The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Document 40 of 43

labeled a registration statement, Axum's document was apparently intended as an offering statement on Commission Form 1-A (rather than a registration statement) submitted to obtain an exemption from the registration requirements of the Securities Act pursuant to Regulation A. The Offering Statement was submitted for a proposed offering of 5,000,000 shares of Axum Class B common stock.

C. On January 24, 2006, based upon information reported to it by its staff, the Commission entered an order temporarily suspending Axum's Regulation A exemption pursuant to Rule 258 of the General Rules and Regulations under the Securities Act. The Commission's January 24, 2006 order also gave notice that any person having an interest in the matter could file with the Secretary of the Commission a written request for a hearing to determine whether the suspension should be vacated or made permanent.

D. Axum requested a hearing, and on February 21, 2006, the Commission entered an Order Scheduling Hearing Pursuant to Rule 258 of Regulation A under the Securities Act.

### III.

#### Undertakings

A. Axum has undertaken to file, within twenty-five (25) business days of the date of this Order, an amendment to its Offering Statement ("First Amendment") substantively responding to each of the comments and addressing any deficiencies set forth in the letter from the Division of Corporation Finance to Axum dated January 20, 2006.

B. Axum has undertaken to file the First Amendment and each subsequent amendment of the Offering Statement with the Commission as required by Rule 252 of Regulation A under the Securities Act. In addition to the filing, Axum has undertaken to provide three copies of the Offering Statement, each containing an offering circular marked to show changes from the offering circular contained in the initial Offering Statement or previous amendment. The three copies of the Offering Statement will be accompanied by a cover letter which refers the staff to the location in the Offering Statement where Axum responds to staff comments. The three copies and cover letter will be sent by overnight mail to Assistant Director, Office of Emerging Growth Companies, Division of Corporation Finance, Mail Stop 3516, at the Commission's Washington, DC address, 100 F Street NE, Washington, DC 20549. Upon receipt of the three copies, the Division of Corporation Finance will date stamp the copies. The first business day following receipt by the Division of Corporation Finance of the copies will constitute the first business day of the time period during which the Division of Corporation Finance will review the amendment and issue comments on the amendment.

C. The staff of the Division of Corporation Finance will provide comments upon Axum's First Amendment within twenty-five (25) business days of the date such First Amendment is received by the Division of Corporation Finance.

D. Axum has undertaken to file subsequent amendments of its Offering Statement substantively addressing each of the comments from the Division of Corporation Finance within

twenty-five (25) business days of the date such comments are received by Axum. The date comments are received by Axum will be the date on which the Division of Corporation Finance comments are successfully sent by facsimile to Axum at (303) 410-6534, as evidenced by the successful transmission report produced by the Division of Corporation Finance's facsimile machine. Axum has undertaken to maintain a working facsimile machine capable of receiving facsimile transmissions at the above phone number throughout the comment process.

E. The staff of the Division of Corporation Finance will provide comments upon any subsequent amendment to Axum's Offering Statement (amendments submitted after Axum's First Amendment) to Axum within ten (10) business days of the date such amendment is received by the Division of Corporation Finance.

#### IV.

In view of the foregoing, and based upon Axum's Offer,

It is hereby ORDERED that:

A. This proceeding is stayed until further order of the Commission or the Administrative Law Judge in this proceeding in accordance with the provisions of this Order.

B. The temporary suspension imposed by the Commission pursuant to its January 24, 2006 order in these proceedings ("Temporary Suspension") shall remain in effect until further order of the Commission.

C. Axum shall comply with the undertakings set forth in Section III above. If Axum fails to file its First Amendment or subsequent amendments of its Offering Statement within the time frames provided in Section III of this Order, then an Order Making Findings and Permanently Suspending Regulation A Exemption ("Suspension Order") in the form agreed in the Offer, and attached to the Offer as Exhibit A, shall be entered making the Temporary Suspension permanent. Such Suspension Order will be entered by the Commission upon being notified by the staff of the Division of Enforcement that Axum failed to comply with the time frames provided in Section III of this Order.

D. If the staff of the Division of Corporation Finance fails to provide comments upon Axum's First Amendment or any subsequent amendment to Axum's Offering Statement to Axum within the time frames provided in Section III of this Order, Axum may request that the stay be lifted and a hearing be commenced to determine whether the Temporary Suspension should be vacated or made permanent by filing a written request with the Administrative Law Judge within ten (10) business days of the date such comments were to be provided.

E. In submitting its First Amendment or subsequent amendments of its Offering Statement, Axum shall in good faith attempt to comply with the requirements of Regulation A and Commission Form 1-A under the Securities Act and substantively respond to each of the comments of the Division of Corporation Finance. In the event that the Division of Corporation Finance believes that Axum is not in good faith attempting to comply with the requirements of Regulation A

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 53741 / April 28, 2006

ADMINISTRATIVE PROCEEDING  
File No. 3-12284

-----  
In the Matter of :  
: ORDER INSTITUTING PUBLIC  
: ADMINISTRATIVE PROCEEDINGS  
Kevin J. Barton, : PURSUANT TO SECTION 15(b) OF  
: THE SECURITIES EXCHANGE ACT  
: OF 1934, MAKING FINDINGS, AND  
Respondent. : IMPOSING REMEDIAL SANCTIONS  
-----

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Kevin J. Barton ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Public Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

Document 41 of 43

### III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Barton, 25 years old, is a resident of East Hampton, New York. Barton worked at Kimberly Securities, Inc. ("Kimberly Securities"), a broker-dealer formerly registered with the Commission, as a trainee beginning in March 2001. Barton then worked as a registered representative ("RR") at Kimberly Securities from May 2001 through August 2002.
2. On April 10, 2006, a final judgment was entered by consent against Barton, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Kimberly J. Carrella, et al., Civil Action Number 04-CV-3754, in the United States District Court for the Eastern District of New York.
3. The Commission's complaint alleges that, from early 2000 until September 2002, RRs at Kimberly Securities, including Barton, engaged in a scheme to defraud Kimberly Securities' customers by repeatedly executing unauthorized, unsuitable trades in customer accounts, and churning those accounts. Specifically, Barton and other RRs misrepresented, and failed to disclose, material information to investors to persuade them to open brokerage accounts at Kimberly Securities and to invest significant amounts of money. Once the customers invested funds, Barton and other RRs disregarded their customers' investment objectives. Barton and other RRs repeatedly executed securities transactions that were unauthorized by, and unsuitable for, their customers, and churned their customers' accounts. This frequent trading typically depleted the customers' capital investments through trading losses and commission charges. After there were no remaining funds in the customers' accounts, or the customers closed their accounts, Barton and other RRs lured new, unsuspecting customers into opening accounts at Kimberly Securities, and repeated the same conduct. Through this scheme, Barton and other RRs generated substantial commissions, while the customers lost their entire investment.

### IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

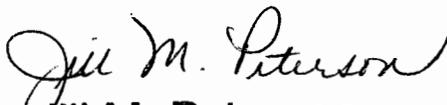
Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Kevin J. Barton be, and hereby is, barred from association with any broker or dealer.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Nancy M. Morris  
Secretary

  
**By: Jill M. Peterson**  
**Assistant Secretary**

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 53740 / April 28, 2006

ADMINISTRATIVE PROCEEDING  
File No. 3-12283

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In the Matter of :  
: :  
: :  
Noel J. Belmonte, :  
: :  
: :  
Respondent. :  
-----

ORDER INSTITUTING PUBLIC  
ADMINISTRATIVE PROCEEDINGS  
PURSUANT TO SECTION 15(b) OF  
THE SECURITIES EXCHANGE ACT  
OF 1934, MAKING FINDINGS, AND  
IMPOSING REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Noel J. Belmonte ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Public Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

Document 42 of 43

### III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Belmonte, 35 years old, is a resident of Wyandanch, New York. Belmonte worked at Kimberly Securities, Inc. ("Kimberly Securities"), a broker-dealer formerly registered with the Commission, as a registered representative ("RR") from March 2000 until November 2000, from March 2001 until August 2001, and from February 2002 until August 2002.
2. On April 10, 2006, a final judgment was entered by consent against Belmonte, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Kimberly J. Carrella, et al., Civil Action Number 04-CV-3754, in the United States District Court for the Eastern District of New York.
3. The Commission's complaint alleges that, from early 2000 until September 2002, RRs at Kimberly Securities, including Belmonte, engaged in a scheme to defraud Kimberly Securities' customers by repeatedly executing unauthorized, unsuitable trades in customer accounts, and churning those accounts. Specifically, Belmonte and other RRs misrepresented, and failed to disclose, material information to investors to persuade them to open brokerage accounts at Kimberly Securities and to invest significant amounts of money. Once the customers invested funds, Belmonte and other RRs disregarded their customers' investment objectives. Belmonte and other RRs repeatedly executed securities transactions that were unauthorized by, and unsuitable for, their customers, and churned their customers' accounts. This frequent trading typically depleted the customers' capital investments through trading losses and commission charges. After there were no remaining funds in the customers' accounts, or the customers closed their accounts, Belmonte and other RRs lured new, unsuspecting customers into opening accounts at Kimberly Securities, and repeated the same conduct. Through this scheme, Belmonte and other RRs generated substantial commissions, while the customers lost their entire investment.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

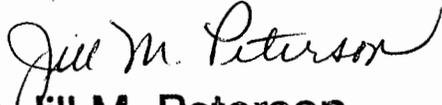
Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Noel J. Belmonte be, and hereby is, barred from association with any broker or dealer.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Nancy M. Morris  
Secretary

  
**By: Jill M. Peterson**  
**Assistant Secretary**

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 53738 / April 28, 2006

ADMINISTRATIVE PROCEEDING  
File No. 3-12281

-----  
In the Matter of :  
: ORDER INSTITUTING PUBLIC  
: ADMINISTRATIVE PROCEEDINGS  
James R. Mancuso, : PURSUANT TO SECTION 15(b) OF  
: THE SECURITIES EXCHANGE ACT  
: OF 1934, MAKING FINDINGS, AND  
Respondent. : IMPOSING REMEDIAL SANCTIONS  
-----

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against James R. Mancuso ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Public Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

Document 43 of 43

### III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Mancuso, 36 years old, is a resident of Patchogue, New York. Mancuso worked at Kimberly Securities, Inc. ("Kimberly Securities"), a broker-dealer formerly registered with the Commission, as a registered representative ("RR") from January 2000 until August 2002.
2. On April 10, 2006, a final judgment was entered by consent against Mancuso, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Kimberly J. Carrella, et al., Civil Action Number 04-CV-3754, in the United States District Court for the Eastern District of New York.
3. The Commission's complaint alleges that, from early 2000 until September 2002, RRs at Kimberly Securities, including Mancuso, engaged in a scheme to defraud Kimberly Securities' customers by repeatedly executing unauthorized, unsuitable trades in customer accounts, and churning those accounts. Specifically, Mancuso and other RRs misrepresented, and failed to disclose, material information to investors to persuade them to open brokerage accounts at Kimberly Securities and to invest significant amounts of money. Once the customers invested funds, Mancuso and other RRs disregarded their customers' investment objectives. Mancuso and other RRs repeatedly executed securities transactions that were unauthorized by, and unsuitable for, their customers, and churned their customers' accounts. This frequent trading typically depleted the customers' capital investments through trading losses and commission charges. After there were no remaining funds in the customers' accounts, or the customers closed their accounts, Mancuso and other RRs lured new, unsuspecting customers into opening accounts at Kimberly Securities, and repeated the same conduct. Through this scheme, Mancuso and other RRs generated substantial commissions, while the customers lost their entire investment.

### IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent James R. Mancuso be, and hereby is, barred from association with any broker or dealer.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Nancy M. Morris  
Secretary

  
By: **Jill M. Peterson**  
**Assistant Secretary**