SECURITIES AND EXCHANGE COMMISSION

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

MARY JO WHITE, CHAIR

LUIS A. AGUILAR, COMMISSIONER

DANIEL M. GALLAGHER, COMMISSIONER

KARA M. STEIN, COMMISSIONER

MICHAEL S. PIWOWAR, COMMISSIONER

(47 DOCUMENTS)

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3709 / November 1, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15381

In the Matter of JOHN HAGENER, Respondent.	ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940

I.

The Securities and Exchange Commission ("Commission") has instituted public administrative proceedings pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against John Hagener ("Respondent").

II.

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 Making Findings and Imposing Remedial Sanctions Pursuant to Section 203(f) of the Investment Advisers Act of 1940, ("Order"), as set forth below.

III.

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

1. Hagener, age 76, resides in Roseville, California, and is the father-in-law of Lawrence "Lee" Loomis, formerly of Granite Bay California. During 2007 and 2008, Hagener managed Lismar Financial Services, LLC ("Lismar") and also managed the Naras Secured Fund, LLC and Naras Secured Fund #2, LLC ("Naras Funds"), for which Lismar, and ultimately Hagener, was paid fees.

2. On April 12, 2013, an order of injunction was entered, by consent, against Hagener, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, and Sections 206(1), 206(2) and 206(4) of the Investment Advisers Act of 1940 ("Advisers Act") [15 U.S.C. §§ 80b-6(1), (2) and (4)] and Rule 206(4)-8 thereunder [17 C.F.R. § 275.206(4)-8], in the civil action entitled Securities and Exchange Commission v. Loomis, et al., Case No. 2:10-cv-00458-KJM-KJN in the United States District Court for the Eastern District of California.

3. The Commission's complaint alleged, among other things, that Hagener is the father-in-law of defendant Lawrence "Lee" Loomis, formerly of Granite Bay California. As part of a fraudulent scheme, Loomis controlled and operated several related entities, including defendant Loomis Wealth Solutions ("Loomis Wealth"). During 2007 and 2008, Loomis and Hagener raised over $10 million from more than 100 investors in the Naras Funds through material misstatements and omissions. The Complaint alleged that Hagener represented to Naras Fund investors that all Fund loans would be secured by second deeds of trust and that the Naras Funds would operate with a high degree of liquidity and provide a constant 12% annual return. In reality, Hagener authorized and/or knew about Naras Fund loans that did not receive any security interest in real estate and that did not receive any promised interest payments from the Loomis entities that received the Naras Fund loans. Hagener therefore deprived the Naras Funds of the promised safety and income from the loans to the various Loomis entities. Additionally, the Complaint alleged that to perpetuate the fraudulent scheme, Hagener prepared and sent through the mail monthly Naras Funds account statements to investors falsely informing them that they had earned 12 % returns by describing "account" balances that misleadingly implied that their principal was intact and that they were earning such returns, when, in truth, the Naras Funds had been misappropriated and were depleted to fund the operations of other companies related to Loomis. The complaint further alleged that Hagener participated in the sale of unregistered securities. The Naras Fund investors allegedly suffered about $10 million in losses. Hagener received about $190,000 in payments from the Naras Funds through management fees paid by the Naras Funds to defendant Lismar.

IV.

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

Accordingly, pursuant to Section 203(f) of the Advisers Act, it is hereby ORDERED that:

A. Respondent Hagener be, and hereby is, barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any application 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.

Elizabeth M. Murphy
Secretary

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

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 70800 / November 4, 2013

Admin. Proc. File No. 3-14581

In the Matter of CHINA-BIOTICS, INC. c/o Jerome S. Fortinsky, Esq. Shearman & Sterling LLP 599 Lexington Avenue New York, NY 10022

OPINION OF THE COMMISSION

SECTION 12(j) PROCEEDING

Grounds for Remedial Action

Failure to Comply with Periodic Filing Requirements

Company failed to file timely periodic reports in violation of Section 13(a) of the Securities Exchange Act of 1934 and Exchange Act Rules 13a-1 and 13a-13. *Held*, it is necessary and appropriate for the protection of investors to revoke the registration of the company's securities.

APPEARANCES:

Jerome S. Fortinsky and *Lindi L. Beaudrealt*, of Shearman & Sterling LLP, for China-Biotics, Inc.

Michael D. Foster and *John J. Kaleba*, for the Division of Enforcement.

Appeal filed: March 14, 2012
Last brief received: June 6, 2012
Oral argument: October 8, 2013

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I.

China-Biotics, Inc., an issuer whose securities are registered under Securities Exchange Act Section 12, appeals from the decision of an administrative law judge. The law judge found that China-Biotics failed to file its annual report for the period ended March 31, 2011 after its auditor identified a number of matters of "grave concern" and then resigned.[1] The company then failed to file its next three consecutive quarterly reports. On this basis, the law judge found that China-Biotics violated Exchange Act Section 13(a) and Rules 13a-1 and 13a-3 and revoked the registration of its securities. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.[2]

II.

A. China-Biotics registered its common stock under the Exchange Act and listed it for trading on NASDAQ.

China-Biotics is a Delaware corporation that manufactures and sells probiotic products containing live microbial food supplements in China. In March 2006, China-Biotics merged its British Virgin Island subsidiary, SinoSmart Group Inc., with Otish Resources, Inc. On July 15, 2008, China-Biotics filed a Form 8-A to register its common stock under Exchange Act Section 12(b)[3] and on October 23, 2008, it listed its common stock for trading on NASDAQ. It then filed multiple registration statements with the Commission registering the offer and sale of millions of shares to the public.

B. Beginning in June 2011, China-Biotics stopped filing its periodic reports.

From the date of the merger until the company's annual report for the period ended March 31, 2011 was due in June 2011, China-Biotics timely filed periodic reports with the Commission. On February 10, 2011, the company filed a Form 12b-25 to report that its Form 10-

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1 Form 8-K filed June 23, 2011, Exhibit 16.1, Annex A.

2 We take official notice of the EDGAR filings cited in this opinion pursuant to Rule of Practice 323, 17 C.F.R. § 201.323. The parties have made multiple unopposed motions to adduce into the record filings made by the company. *See* Division's Mots. for Leave to Adduce Additional Evidence, July 2, 2012, Aug. 17, 2012, and Nov. 16, 2012 (moving to adduce Forms 12b-25 filed on June 29, August 14, and November 14, 2012, respectively); Resp't Mots. for Leave to Adduce Additional Evidence, Sept. 14, 2012, Jan. 11, 2013, Feb. 20, 2013, May 28, 2013 and June 28, 2013 (moving to adduce Form 10-K filed on September 14, 2012; Forms 10-Q filed on December 26, 2012 and January 4, 2013; Form 10-Q filed on February 14, 2013; Form 10-K filed on May 21, 2013; and Forms 10-Q filed on June 24, 2013, respectively). Since we take official notice of these filings, we deny the motions to adduce under Rule 452, 17 C.F.R. § 201.452, as moot.

3 15 U.S.C. § 78l(b).

Q for the period ended December 31, 2010 would be delayed to "finalize the treatment of certain accounting items."[4] Four days later, on February 14, the company filed the report, which described a shareholder class action lawsuit that alleged material misstatements or omissions regarding the company's "financial condition, operations, and future business prospects, and the quality, nature, and quantity of [its] retail outlets and stores."[5] The report also disclosed a derivative lawsuit charging China-Biotics's directors with having "breached their fiduciary duties by disseminating false and misleading financial statements."[6]

On June 15, 2011, China-Biotics filed another Form 12b-25 reporting that its annual report on Form 10-K for the fiscal year ended March 31, 2011 would not be timely filed. The company attributed this delay to a letter dated June 10, 2011 from its auditor, BDO Limited, which described "certain serious issues" and required the company "to take certain actions and provide additional information."[7] The company's Form 12b-25 stated that it could not "predict . . . when it [would] be in a position to take all of the actions and provide all of the information requested by BDO."[8]

Eight days later, on June 23, the company filed a Form 8-K to report that its CFO, Travis Cai, and BDO had both resigned. Attached to this Form 8-K was a letter dated June 22 to the company's audit committee and board of directors from BDO that explained why it resigned (the "BDO Report").[9] BDO concluded that the irregularities it encountered during its audit likely constituted illegal acts that could have a material effect on the company's financial statements and that the

> Board and audit committee have not taken timely and appropriate remedial actions in respect of the illegal acts. Such [] failure renders it impossible for BDO Limited to gather evidence to assess whether the Company's accounting records

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4 Form 12b-25 for the quarter ended Dec. 31, 2010, at 1. *See* Exchange Act Rule 12b-25, 17 C.F.R. § 240.12b-25(a) (requiring issuers to provide notice of inability to file a periodic report, along with supporting reasons, by filing a Form 12b-25 "no later than one business day after the due date" for such report); 17 C.F.R. § 249.322 (Form 12b-25). By filing a timely Form 12b-25, an issuer automatically receives an additional fifteen calendar days to file an annual report and an additional five calendar days to file a quarterly report.

5 Form 10-Q for the period ended Dec. 31, 2010, at 15.

6 *Id.*

7 Form 12b-25 for the fiscal year ended Mar. 31, 2011, at 1.

8 *Id.*

9 Exchange Act Section 10A specifies a process for accounting firms to report when, among other things, "illegal acts . . . have been detected or otherwise come to the attention of the firm in the course of the audit" and requires issuers receiving such reports to "furnish" the Commission with notice of such report within one business day of its receipt. 15 U.S.C. § 78jA(b)(3).

have been falsified and whether there are other issues which could have a material effect on the financial statements of the Company.[10]

BDO also expressed "serious doubt" about whether the company's responses were accurate, reliable, or adequate given, among other things, its refusal to permit the auditor to discuss the irregularities with third parties and the audit committee's failure to formulate a plan to investigate and remediate the irregularities.[11] BDO further criticized management's responses to the allegations of fraud that the company had publicly disclosed. According to the BDO Report, the company hired firms to investigate the fraud charges but declined to publicly describe the investigation, refused to update BDO about the investigation, and denied BDO's requests to communicate with the investigating law firm and forensic accounting firm.

Although the Form 8-K disclosed that Travis Cai had resigned as CFO on June 23, 2011—immediately after BDO's resignation—it did not explain why. Cai had served for about eighteen months and was replaced with an interim CFO who was formerly a financial manager at a China-Biotics subsidiary.

On June 23, China-Biotics filed a second Form 8-K that disclosed it had received a letter from NASDAQ

> asserting that, because the Company has not yet filed its Annual Report on Form 10-K for the fiscal year ended March 31, 2011, and based upon disclosures made by the Company in its recently filed Form 12b-25 and additional information provided to NASDAQ, the Company no longer complies with NASDAQ Listing Rule 5250(c)(1) for continued listing.[12]

In this delisting notification, NASDAQ asked China-Biotics to provide a plan setting forth the steps it would take to regain compliance for continued listing.

On June 28, the company filed another Form 8-K, reporting that the chairman of the audit committee of its board of directors had resigned on June 23 based on the events leading up to BDO's resignation. This Form 8-K also alluded to, but did not specify, other "issues that the [c]ompany must resolve in order to comply with its" 10-K filing obligation.[13]

On June 29, China-Biotics filed yet another Form 8-K, announcing that its board of directors had voted to voluntarily delist its securities instead of responding to NASDAQ's questions. The company said that continued listing would create "difficult burdens," particularly

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10 Form 8-K filed June 23, 2011, Exhibit 16.1, at 5.

11 *Id.* at 3.

12 Form 8-K filed June 23, 2011 (Item 3.01), at 1.

13 Form 8-K filed June 28, 2011, at 1.

given the resignations of its auditor, audit committee chairman, and CFO.[14] It acknowledged that delisting would not relieve it of its obligation under the Exchange Act to file annual and quarterly reports.[15]

On August 10, 2011, the company filed another Form 12b-25, stating that it was unable to file a timely Form 10-Q for the period ended June 30, 2011. It said that BDO's resignation prevented it from providing audited financial statements, that it had not yet retained a new auditor, and that it could not "predict when it would be in a position to file the 10-Q . . . ."[16]

On September 15, 2011, the Division of Enforcement notified China-Biotics of its intent to recommend that the Commission institute administrative proceedings against the company alleging violations of Exchange Act Section 13(a) and gave China-Biotics the opportunity to submit a response.[17] In its response, China-Biotics acknowledged that the Commission was authorized under Exchange Act Section 12(j) to suspend or revoke the registration of its securities for violations of the Exchange Act and its rules, but argued that such a response here would be premature and "a striking departure from the SEC's usual response to similar infractions."[18] It then asked the Commission to "postpone any action for a limited period (perhaps six to nine months)," *i.e.*, until March or June 2012, to give the company additional time to file the required reports.[19]

C. The Commission instituted proceedings pursuant to Exchange Act Section 12(j).

On October 7, 2011, the Commission issued an Order Instituting Proceedings alleging that China-Biotics failed to file timely quarterly and annual reports as required under Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 and instituting proceedings to determine whether

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14 Form 8-K filed June 29, 2011, at 1.

15 *Id.* Since its NASDAQ delisting, the company's common stock has been quoted in the OTCQB marketplace operated by OTC Markets Group Inc. *See* http://www.otcmarkets.com/stock/CHBT/quote (last visited Sept. 26, 2013). OTC Markets Group Inc. operates an electronic quotation system that displays quotes from broker-dealers for many over-the-counter securities.

16 Form 12b-25 for the period ended June 30, 2011, at 1.

17 China-Biotics was given an opportunity to provide a Wells submission, *i.e.*, a "written statement to the Commission setting forth [its] interests and position in regard to the subject matter of the investigation." Rule 5(c) of the Commission's Rules on Informal and Other Procedures, 17 C.F.R. § 202.5(c). *See Procedures Relating to the Commencement of Enforcement Proceedings and Termination of Staff Investigations*, Exchange Act Release No. 9796, 1972 SEC LEXIS 238 (Sept. 27, 1972) ("Wells Release").

18 Letter from Counsel for the Company to Associate Director, Division of Enforcement, dated Sept. 23, 2011, at 1.

19 *Id.* at 4.

revocation or suspension of the registration of the company's securities is necessary or appropriate to protect investors. The OIP ordered that an initial decision be issued no later than 120 days from the date it was served on the parties. On October 31, 2011, the company appointed a new audit committee chairman.[20] On November 3, China-Biotics filed its answer to the OIP, acknowledging its delinquent filings and attributing their delinquency to the resignations of its auditor, CFO, and audit committee chairman.

1. ***China-Biotics sought access to the Division's entire investigative file under Commission Rule of Practice 230.***

The investigation that preceded the OIP was not limited to China-Biotics's failure to file periodic reports. Instead, it was part of a broader investigation that the Division staff continued after the OIP was issued. China-Biotics argued that it was entitled to all documents gathered in the investigation pursuant to Rule 230, which requires the Division to make available "documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings."[21] The Division sought to limit its production to documents relevant to the company's failure to file periodic reports.

The law judge initially ruled that Rule 230 required the Division to make available the entire investigative file. The Division then represented that the investigative file included documents that "were obtained from third parties as part of an ongoing investigation concerning conduct and potential securities law violations distinct from that addressed by the OIP."[22] The Division further represented that the conduct in question involved, among other things, possible false statements or omissions and that "[n]one of the custodians had any ability to affect the company's noncompliance with its periodic filing obligations, nor do the custodians have any ability to remedy [r]espondent's delinquent filings and assure its future compliance."[23] The law judge then reviewed a list categorizing the documents in the investigative file. She ruled that the Division was entitled to withhold several categories of documents pursuant to Rule 230(b)(1)(iv) "as not relevant to the subject matter of the proceeding or otherwise, for good cause shown."[24] But she identified two categories as possibly including relevant documents: (i) those produced by an investor relations firm and two of its employees and (ii) those produced by FINRA. The Division agreed to give China-Biotics access to those documents.

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20 Form 8-K filed Oct. 31, 2011, at 1.

21 17 C.F.R. § 230(a)(1).

22 Letter from the Division of Enforcement to the Admin. Law Judge, Dec. 16, 2011, at 1.

23 *Id.*

24 17 C.F.R. § 201.230(b)(1)(iv); *see* Pre-Hr'g Conference Tr. at 4 (Dec. 19, 2011).

2. *The Division moved for summary disposition under Rule of Practice 250.*

During a pre-hearing conference on December 19, 2011, the law judge considered a request by the Division to file a motion for summary disposition under Rule of Practice 250.[25] China-Biotics opposed the motion, arguing that it was entitled to a hearing to explain its plan for submitting its delinquent reports and its claim that revocation would be extremely unusual when compared with other Section 12(j) cases. After determining that the company's plan could be adequately described in a written affidavit and that a hearing was not required to compare its filing history with that of other issuers, the law judge scheduled briefing.

On January 10, 2012, the Division filed its motion, arguing that this case raised no genuine issue of material fact and merited summary disposition as a matter of law because Exchange Act reporting is mandatory and the company's filing history was undisputed. In support, the Division cited Form 12b-25 filings in which China-Biotics conceded it could not predict when it would file its periodic reports and the BDO Report suggesting that serious issues needed to be resolved before audits could be completed.

On January 17, the company filed its opposition brief, arguing that it "should be permitted the additional month or so until the hearing [*i.e.*, until February 2012] to bring its filings up to date" (without mentioning the 120-day timeframe for the initial decision specified in the OIP) and that any earlier update would amount to premature discovery for the Division.[26] The company also argued that revocation would be punitive because its "lapse is among the least serious of any respondent uncovered by our research or any research cited by the Division."[27] It also renewed its request for access to the entire investigative file under Rule 230, arguing that the description of the BDO Report and the company's financial reports in the Division's motion for summary disposition "put[] . . . the financial reporting allegations" at issue.[28]

On February 9, China-Biotics filed another Form 12b-25, acknowledging that the company had "not yet retained a new auditor" and that it could not predict when it would file the Form 10-Q for the period ended December 31, 2011.[29]

3. *The law judge issued the initial decision.*

The law judge issued the initial decision on February 22, 2012. Finding no genuine issue with regard to any material fact, she granted the Division's motion for summary disposition and found that revocation served the public interest. She observed that the company's failure to file

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25 17 C.F.R. § 201.250.

26 Respt's Br. Opposing Mot. for Summ. Disposition at 4 & 6 (Jan. 17, 2012).

27 *Id.* at 12.

28 *Id.* at 3–4.

29 Form 12b-25 for the quarter ended Dec. 31, 2011, at 1.

timely periodic reports for any period after the quarter ended December 31, 2010 was undisputed and concluded that these violations would continue indefinitely in light of its failure to appoint an auditor or to describe its efforts to meet its reporting obligations. The law judge declined to "reopen any issues related to the investigative file," noting that those issues "have been fully addressed" and that "China-Biotics does not argue that the Division has failed to comply with the disclosure ordered" by the law judge.[30]

4. *The company appealed the initial decision.*

On March 14, 2012, China-Biotics petitioned for review of the initial decision, asking that the proceedings be dismissed without revocation or suspension. In its petition, the company estimated that its annual audits for the years ended March 31, 2011 and 2012 would be completed by the end of June 2012 and that the pending interim reviews would be completed by the end of July 2012.[31] Assuming compliance with this schedule, the company argued that revocation would not be in the public interest. China-Biotics also argued that the 120-day timeframe for the initial decision had been insufficient and that various scheduling errors by the law judge prejudiced its defense. The company further argued that, because the 120-day timeframe was not extended and the discovery dispute "consumed approximately half of the four-month time period," the schedule unfairly "tilted the playing field" in favor of the Division's motion for summary disposition.[32] The company also contended that the law judge erred in permitting the Division to withhold documents from its investigative file.

D. China-Biotics continued to struggle to meet its reporting obligations.

1. *The company appointed a new audit committee chairman and auditor after the initial decision.*

On February 25, 2012, three days after the initial decision, the company's board asked its audit committee chairman to resign after he had served for approximately four months, and the company immediately announced his replacement.[33] The next day, February 26, the newly

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30 The company acknowledged that the Division provided access to the investigative file documents consistent with the law judge's order and stated it had reviewed those documents, including documents produced by BDO. Resp't Br. Opposing Mot. for Summ. Disposition at 5.

31 Pet. for Review of Initial Decision at 18. In its briefs, the company asked for "at least three months from the end of the Commission's briefing schedule [setting a deadline of September 6, 2012] to come into compliance with its reporting obligations." Resp't Br. at 35; Reply Br. at 11.

32 Resp't Br. at 19 & 21.

33 Form 8-K filed Feb. 29, 2012 (Item 5.02), at 1 (stating that "[t]he resignation was not the result of any disagreement with the Company on any matter relating to the Company's operations, policies or practices").

constituted audit committee appointed Weinberg & Company, P.A. as the company's new auditor.[34]

2. *The company's violations continued after it filed its appeal.*

As of the date of the initial decision, four of China-Biotics's periodic reports were delinquent—its annual report for its year ended March 31, 2011 and its quarterly reports for periods ended June 30, September 30, and December 31, 2011. For more than a year after the company filed its petition for review on March 14, 2012, each of these reports was still delinquent.[35] The company also untimely filed its annual report for the year ended March 31, 2012 and its quarterly reports for the periods ended June 30 and September 30, 2012. It filed its Form 10-K for the year ended March 31, 2011 on May 21, 2013—more than two years after the end of the reporting period. It filed its Forms 10-Q for quarterly periods ended June 30, September 30, and December 31, 2011 on June 24, 2013—a year and a half after the last of these periods.

a. *China-Biotics filed a Form 10-K for the fiscal year ended March 31, 2012 in September 2012.*

On June 29, 2012, China-Biotics filed another Form 12b-25 notifying the Commission that it would not timely file its Form 10-K for the fiscal year ended March 31, 2012. China-Biotics stated that Weinberg's "audit of the Company's financial statements for the fiscal years ended March 31, 2012 and March 31, 2011 (and the review by Weinberg of the Company's financial statements for the fiscal year ended March 31, 2010 for comparison purposes) has not yet been completed."[36]

Almost three months later, on September 14, 2012, China-Biotics filed its Form 10-K for the fiscal year ended March 31, 2012. Like the company's Form 10-K for the year ended March 31, 2010, the 2012 Form 10-K stated that management is responsible for establishing and maintaining adequate internal control over financial reporting.[37] But unlike the 2010 Form 10-K, the relevant section of the 2012 Form 10-K did not state that the company's management had evaluated the effectiveness of its internal control over financial reporting as of the end of the fiscal year, did not identify the framework used for the evaluation, and did not include the

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34 Form 8-K filed Feb. 29, 2012 (Item 4.01(b)), at 1.

35 While these events were not covered by the OIP or the initial decision, we take official notice of them as relevant to our analysis of the public interest. *See supra* note 2; *see also Cobalis Corp.*, Exchange Act Release No. 64813, 2011 SEC LEXIS 2313, at *24 n.31 (July 6, 2011); *Nature's Sunshine Products, Inc.*, Exchange Act Release No. 59268, 2009 SEC LEXIS 81, at *22 n.27 (Jan. 21, 2009).

36 Form 12b-25 for the fiscal year ended Mar. 31, 2012, at 2.

37 Form 10-K for the fiscal year ended Mar. 31, 2012, at 73; Form 10-K for the fiscal year ended Mar. 31, 2010 at 80.

management assessment, including an express statement as to whether the internal control was effective as of the last day of the fiscal year.[38] The 2012 Form 10-K did acknowledge "a lack of U.S. GAAP [*i.e.*, Generally Accepted Accounting Principles] experience among [its] senior management personnel, a weakness in efficiency and controls related to the financial statement closing process[,] and inconsistent corporate governance and financial controls."[39] The Form 10-K also acknowledged that these were material weaknesses in the company's disclosure controls and procedures and in its internal controls over financial reporting, which "have affected and could continue to affect [its] ability to ensure timely and reliable financial reports" and "weaken investor confidence in [its] financial reporting."[40]

China-Biotics also acknowledged that the Division of Corporation Finance sent it a letter on January 9, 2012 (before the initial decision) informing it of the Division's conclusion that the company's inexperience with U.S. GAAP was a material weakness in its disclosure controls and

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38 *Compare* Form 10-K for the fiscal year ended Mar. 31, 2012, at 74 (stating that "management is continuing its review") and Form 10-K for the fiscal year ended Mar. 31, 2010, at 80 (stating that "Management conducted its evaluation of the effectiveness of its internal control over financial reporting based on the framework in 'Internal Control-Integrated Framework' issued by the Committee of Sponsoring Organizations of the Treadway Commission ('COSO') as of March 31, 2010" and including an assessment of effectiveness as of the end of the fiscal year). *See infra* notes 81–82 and accompanying text.

39 Form 10-K for the fiscal year ended Mar. 31, 2012, at 17.

40 *Id.* Exchange Act Rule 13a-15(e), 17 C.F.R. § 240.13a-15(e), defines "disclosure controls and procedures" as controls and procedures "designed to ensure that information required to be disclosed by an issuer in [its Exchange Act] reports . . . is recorded, processed, summarized and reported, within the time periods specified in the Commission's rules and forms." Exchange Act Rule 13a-15(f), 17 C.F.R. § 240.13a-15(f), defines "internal control over financial reporting" as

> a process designed by, or under the supervision of, the issuer's principal executive and principal financial officers, or persons performing similar functions, and effected by the issuer's board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and includes those policies and procedures that:
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> (1) Pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer;
>
> (2) Provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the issuer; and
>
> (3) Provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the issuer's assets that could have a material effect on the financial statements.

procedures and in its internal controls over financial reporting. According to China-Biotics, Corporation Finance staff "concluded that those primarily responsible for the preparation of the Company's books and records and financial statements" (including its former and interim CFOs) "d[id] not have the requisite U.S. GAAP experience to prepare financial statements in accordance with U.S. GAAP."[41]

Although the 2012 Form 10-K did not include management's conclusion as to whether the company's internal control over financial reporting was effective as of March 31, 2012, it identified the following material weaknesses in its internal control over financial reporting:

> (i) a lack of senior management personnel who have the requisite U.S. GAAP experience to prepare financial statements in accordance with U.S. GAAP; (ii) the Company did not maintain an adequate financial reporting organizational structure (in part due to the turnover of the executives in the CFO and Interim CFO positions) to support the complexity and operating activities of the Company resulting in a weakness in efficiency and controls related to the financial statement closing process; and (iii) the Company may not have maintained sufficiently consistent corporate governance (including proper recording of minutes of meetings and decisions of the Company's Board of Directors) and financial controls to ensure proper delegation of authority limits and timeliness of Board approval for significant transactions.[42]

b. *The 2012 Form 10-K disclosed significant changes to China-Biotics's financial results and business.*

China-Biotics's Form 10-K for the year ended March 31, 2012 described changes to the company's financial condition and business during the more than two years since it filed its last annual report. According to the report, the company's net income for the fiscal year ended March 31, 2012 was $2.8 million (down from $15.6 million in the fiscal year ended March 31, 2010) and earnings per share for the fiscal year was $0.13 (down from $0.80 in the fiscal year ended March 31, 2010). China-Biotics also described its transformation from a "retail, business-to-consumer model to a wholesale, business-to-business model," including its "clos[ure of] all of its retail outlets by the end of fiscal year 2011" and its expansion into dairy and animal feed.[43] The company disclosed that it paid approximately $3.25 million during the fiscal year ended March

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41 Form 10-K for the fiscal year ended Mar. 31, 2012, at 73. The January 2012 letter directed the company to amend its Form 10-K for its fiscal year ended March 31, 2010 to disclose these material weaknesses. The 2010 Form 10-K had stated that the internal controls over financial reporting and the disclosure controls and procedures were effective. Form 10-K for the fiscal year ended Mar. 31, 2010, at 80. The company never filed an amendment to the 2010 Form 10-K.

42 *Id.* at 74.

43 *Id.* at 35, 36, 7.

31, 2011 to acquire land use rights for a new animal feed additive facility and that it began construction of this facility in June 2012.

c. ***China-Biotics filed, on an untimely basis, its Forms 10-Q for the periods ended September 30, 2012 and June 30, 2012.***

China-Biotics's Form 10-Q for the period ended June 30, 2012 was due on August 14, 2012. Instead of filing it that day, the company filed another Form 12b-25, which confirmed that Weinberg's audits for fiscal years ended March 31, 2012 and 2011 were still not completed. It did not provide any update as to their expected completion. China-Biotics did not file its Form 10-Q for the quarter ended June 30, 2012 until more than four months later, on January 4, 2013.[44]

November 14, 2012 was the deadline for the company's Form 10-Q for the quarter ended September 30, 2012. On that day the company filed yet another Form 12b-25, stating that the company could not predict when it would file the Form 10-Q and that its delinquency resulted from "staffing limitations that have hindered [its] financial statement and report preparation process."[45] It did not file this Form 10-Q until December 26, 2012—more than a month late.

China-Biotics did timely file its Form 10-Q for the period ended December 31, 2012 on February 14, 2013. But this report (like the previous two Forms 10-Q) acknowledged continuing material weaknesses in its disclosure controls and procedures and internal control over financial reporting. Though China-Biotics stated that it had "taken steps" to improve its reporting on a going-forward basis, each of the three Forms 10-Q stated that the company's "Audit Committee and [its] management are still engaged in discussions about how best to rectify fully the material weakness in [its] disclosure controls and procedures" and "material weaknesses in [its] internal control over financial reporting."[46] The Forms 10-Q each acknowledged that the company's disclosure controls and procedures "were not effective and suffered from a material weakness because of the Company's lack of training and/or experience with preparing financial statements in accordance with U.S. GAAP."[47] All three forms acknowledged the same continuing

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44 This Form 10-Q for the period ended June 30, 2012 disclosed that "[d]uring April and June 2012, there was a public health issue relating to so-called 'poison capsules' in China that adversely affected" its sales, and that its retail sales for the three months ended June 30, 2012 "decreased 46% compared with the same period the prior year." Form 10-Q for the quarter ended June 30, 2012, at 21. The company made this disclosure in January 2013—almost six months after the period had ended.

45 Form 12b-25 for the quarter ended Sept. 30, 2012, at 2.

46 Form 10-Q for the quarter ended June 30, 2012, at 33; Form 10-Q for the quarter ended Sept. 30, 2012, at 37; Form 10-Q for the quarter ended Dec. 31. 2012, at 37–38.

47 Form 10-Q for the quarter ended June 30, 2012, at 33; Form 10-Q for the quarter ended Sept. 30, 2012, at 37; Form 10-Q for the quarter ended Dec. 31. 2012, at 38.

weaknesses in internal control over financial reporting that were described in the Form 10-K for the year ended March 31, 2012.[48]

d. China-Biotics filed its Form 10-K for the fiscal year ended March 31, 2011 in May 2013.

On May 21, 2013, China Biotics filed its Form 10-K for the fiscal year ended March 31, 2011. Like the 2012 Form 10-K, the company's 2011 Form 10-K did not state that the company's management had evaluated the effectiveness of its internal control over financial reporting as of the end of the fiscal year, did not identify the framework used for the evaluation, and did not include the management assessment, including an express statement as to whether the internal control over financial reporting was effective as of the last day of the fiscal year.[49]

The 2011 Form 10-K included an attestation report from Weinberg concluding that, as a result of material weaknesses, the company had not maintained effective internal control over financial reporting as of March 31, 2011.[50]

e. China-Biotics filed its Forms 10-Q for periods ended in 2011 in June 2013.

On June 24, 2013, the company filed delinquent Forms 10-Q for the periods ending June 30, 2011; September 30, 2011; and December 31, 2011. All three reports acknowledged continuing weaknesses in internal control over financial reporting and disclosure controls and procedures.

f. China-Biotics filed its Form 10-K for the year ended on March 31, 2013 in July 2013.

On July 12, 2013, after reporting a delay on Form 12b-25, the company filed a Form 10-K for the fiscal year ended March 31, 2013. Like its previous eight periodic reports, this Form 10-K acknowledged weaknesses in China-Biotics's disclosure controls and procedures and internal control over financial reporting. More than a year and a half after staff from the Division of Corporation Finance identified such weaknesses and instructed the company to file an amended 2010 Form 10-K, the company reported ongoing internal discussions about material weaknesses and acknowledged its continuing failure to file the amended 2010 Form 10-K. It reported that it hired a Vice President of Finance and an external consultant in December 2012 and April 2013, respectively, and that its remediation measures have materially improved its

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48 Form 10-Q for the quarter ended June 30, 2012, at 33; Form 10-Q for the quarter ended Sept. 30, 2012, at 38; Form 10-Q for the quarter ended Dec. 31, 2012, at 38.

49 Form 10-K for the fiscal year ended Mar. 31, 2011, at 78 (stating that "management is continuing its review"); *see supra* note 38.

50 *Id.* at 80 (describing material weaknesses).

weaknesses.[51] But the Form 10-K acknowledged that its senior management still do not have the experience to prepare financial statements in accordance with U.S. GAAP and that it did not "maintain an adequate financial reporting organizational structure to support the complexity and operating activities of the company."[52] It reported management's conclusion that its disclosure controls and procedures and internal control over financial reporting were not effective but did not identify the framework used by management to evaluate internal control over financial reporting as required by Item 308 of Regulation S-K.

g. *China Biotics filed its Form 10-Q for the period ended June 30, 2013.*

On August 14, 2013, the company filed its Form 10-Q for the period ended June 30, 2013. The company acknowledged continuing weaknesses in its internal control over financial reporting and management's conclusion that its disclosure controls and procedures were not effective as of June 30, 2013.[53] The company also reported that there had been no change in the company's internal control over financial reporting that "materially affected, or [was] reasonably likely to materially affect, the Company's internal control over financial reporting."[54]

III.

Exchange Act Section 13(a) requires issuers of securities registered under Exchange Act Section 12 to file with the Commission annual and quarterly reports "for the proper protection of investors and to insure fair dealing" in the company's securities.[55] Exchange Act Rules 13a-1 and 13a-13 set forth the requirements for those reports.[56] China-Biotics's common stock is registered under Exchange Act Section 12. The company concedes that, as of the date of the initial decision, it had not filed such reports for any period after December 31, 2010. Its annual report for its year ended March 31, 2011 and its quarterly reports for the periods ended June 30, September 30, and December 31, 2011 were still delinquent when the company filed its petition for review. The company's annual report for the year ended March 31, 2012 and its quarterly reports for the periods ended June 30 and September 30, 2012 were filed late. The company then filed its annual report for the year ended March 31, 2011 almost two years late and its quarterly

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51 Form 10-K for the fiscal year ended Mar. 31, 2013, at 89, 90.

52 *Id.* at 89. These changes do not appear to address the Division of Corporation Finance staff's concern that the company's reliance on a consultant "to assist with the preparation and fulfillment of all [Commission] and U.S. GAAP reporting requirements was further evidence that [its] accounting department does not possess the requisite U.S. GAAP knowledge to prepare financial statements in accordance with U.S. GAAP." *Id.* at 90.

53 Form 10-Q for the quarter ended June 30, 2013, at 35.

54 *Id.*

55 15 U.S.C. § 78m(a).

56 17 C.F.R. §§ 240.13a-1, 13a-13.

reports for the periods ended in 2011 more than a year late. Accordingly, we find that the company violated Exchange Act Section 13(a) and Rules 13a-1 and 13a-13.

Exchange Act Section 12(j) authorizes us, as we deem necessary or appropriate for the protection of investors, to either suspend the registration of a security for a period not exceeding twelve months or to revoke it if an issuer fails to comply with any provision of the Exchange Act or its rules and regulations.[57] In determining the appropriate response under Section 12(j), we are guided by the non-exclusive public interest factors first set forth in *Gateway Int'l Holdings, Inc.*[58] They include (i) the seriousness of the issuer's violations; (ii) the isolated or recurrent nature of the violations; (iii) the degree of culpability involved; (iv) the extent of the issuer's efforts to remedy its past violations and ensure future compliance; and (v) the credibility of its assurances, if any, against further violations.[59] Based on these considerations, revocation is appropriate here.

China-Biotics's violations were serious, recurrent, and demonstrate a high degree of culpability. The company, which has approximately twenty-two million shares of common stock outstanding, did not file a single periodic report for more than a year and a half, depriving existing and prospective holders of current and reliable information about the company's operations and financial condition. And despite multiple warnings and the institution of these proceedings, the company's Form 10-K for the fiscal year ended March 31, 2011 was delinquent for almost two years and its three Forms 10-Q for the quarterly periods ended in 2011 were each more than a year delinquent. China-Biotics also failed to timely file three periodic reports that were due after it appealed the initial decision. China-Biotics's pattern of serious delinquencies strongly weighs in favor of revocation.[60]

The company's 2011 periodic report delinquencies are especially serious because these periods coincided with significant changes to the company's financial results, changes to its business model, turnover in management, and major financial investments.[61] This is precisely the

57 15 U.S.C. § 78*l*(j).

58 Exchange Act Release No. 53907, 2006 SEC LEXIS 1288, at *19–20 (May 31, 2006).

59 *Id.*

60 It is not necessary to find that China-Biotics was aware of, or intentionally ignored, its reporting obligations as scienter is not necessary to establish grounds for revocation. *See Ponce v. SEC*, 345 F.3d 722, 737 n.10 (9th Cir. 2003); *SEC v. McNulty*, 137 F.3d 732, 740–41 (2d Cir. 1998). In any case, the company does not contend that its violations were inadvertent or accidental.

61 *See Citizens Capital Corp.*, Exchange Act Release No. 67313, 2012 SEC LEXIS 2024, at *41 (June 29, 2012) (noting that reporting violations were especially significant when they occurred during a period when the [c]ompany admittedly engaged in various and significant changes in its business").

kind of material information that must be disclosed on a timely basis under Exchange Act Section 13 to ensure fair dealing in a company's securities.[62]

China-Biotics acknowledges these delinquencies but contends that we should overlook them because it claims they are less numerous than those of other issuers who had their stock's registration revoked for delinquent filings. It argues that the seriousness of its violations should be assessed by comparing its missed filings with the number of missed filings in other Exchange Act Section 12(j) proceedings.[63] It further suggests that our analysis should focus on the fact that it had failed to file only two pre-OIP reports and that its Rule 12b-25 notices mitigate its culpability.

Congress enacted the reporting requirements to ensure "the proper protection of investors and to insure fair dealing" in registered securities.[64] Exchange Act reports are "one of the primary sources of information available to guide the decisions of the investing public."[65] As such, the reporting requirements are one of the primary statutory tools for protecting the integrity of the securities marketplace. Rather than comparing the number of delinquent filings in this case to those in other Section 12(j) proceedings, the public interest analysis focuses on investors' access to accurate and timely information about an issuer's operations and financial condition.[66] To comply with Exchange Act Section 13, reports must also be reliable and complete.[67]

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62 *See SC&T Int'l, Inc.*, Exchange Act Release No. 41815, 54 SEC 320, 1999 SEC LEXIS 1755, at *12–13 (Sept. 1, 1999) (stating that investors are "entitled to assume" that listed companies will "promptly and accurately comply with their reporting obligations under the Exchange Act" and that these requirements "ensure[] the maintenance of fair and honest markets in securities").

63 The company provided a chart purporting to list the Section 12(j) proceedings instituted in 2010 and the number of Exchange Act filings each issuer had missed when the proceedings were instituted. It purports to demonstrate that, when the OIP was issued, the company's reporting violations were less recurrent than those of other issuers who had been charged in Section 12(j) proceedings.

64 15 U.S.C. § 78m(a).

65 *United States v. Arthur Young & Co.*, 465 U.S. 805, 810 (1984); *see also Tara Gold Resources Corp. v. SEC*, 678 F.3d 557, 559–60 (7th Cir. 2012) (noting that a respondent's longstanding delinquencies in filing Exchange Act reports constituted a "long-term failure to fulfill its legal duties" and that "[b]oth FINRA and potential market makers could, and should, consider that fact when deciding whether to allow public markets in [the respondent's] stock").

66 *See Impax Labs., Inc.*, Exchange Act Release No. 57864, 2008 SEC LEXIS 1197, at *32, *25 (May 23, 2008) (also stating that repeated missed filings are recurrent and serious regardless of whether they are "due to one or multiple causes").

67 *See Calais Resources, Inc.*, Exchange Act Release No. 67312, 2012 SEC LEXIS 2023, at *22 (June 29, 2012) ("Calais's contention that its reports contain accurate information responds only to one of the concerns addressed by the Exchange Act's reporting requirements.").

Timely filing of each report is statutorily required. Exchange Act Section 12(j) does not require a minimum number of missed filings before an administrative proceeding may be brought or before revocation may be considered. Nor do we agree that only the company's pre-OIP filing record should be considered.[68] Indeed, the company's public filings at the time the OIP was issued gave good reason to believe that its delinquencies might continue indefinitely.[69]

In addition, China-Biotics's Form 12b-25 notices do not mitigate its failures to provide the investing public with timely disclosure about its business and financial results.[70] If an issuer knows it will not be able to meet a periodic reporting deadline, it is required to file a Form 12b-25 notifying the Commission of the reasons for the delay.[71] While not filing a Form 12b-25 may be an aggravating factor, filing a required Form 12b-25 is not mitigating.[72]

In any event, the company's argument fails to take into account the other *Gateway* factors. Although the number of delinquent filings is one of the relevant "facts and

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68 The company's comparison reflects only its pre-OIP filing failures.

69 At that time, the company's longstanding auditor had resigned after concluding it had discovered likely illegal acts and that the board had not appropriately responded. The CFO and audit committee chairman had resigned. The company stated that it could not predict when it would file the delinquent report, voluntarily delisted, and indicated that the continued listing requirements "imposed difficult burdens." Form 8-K filed June 29, 2011, at 1. Two months later, on August 10, 2011, the company filed another Form 12b-25 stating that it had not retained a new auditor and that it "[could not] predict when it will be in a position to file" its report. Form 12b-25 for the period ended June 30, 2011, at 1.

70 *See Am. Stellar Energy, Inc.*, Exchange Act Release No. 64897, 2011 SEC LEXIS 2455, at *30 (July 18, 2011) (revoking registration after multiple Form 12b-25 notices were timely filed); *Nature's Sunshine Products, Inc.*, 2009 SEC LEXIS 81, at *11 (revoking after issuer filed Form 12b-25 stating that the issuer could not predict when it would become compliant).

71 *See supra* note 4.

72 As we have previously held, "[w]hile the presence of any . . . aggravating circumstances justify[] an increase in sanctions, their absence is not mitigating." *Michael Frederick Siegel*, Exchange Act Release No. 58737, 2008 SEC LEXIS 2459, at *43 (Oct. 6, 2008), *vacated in part and remanded on other grounds*, 592 F.3d 147, 157 (D.C. Cir. 2010); *see also Andrew P. Gonchar*, Exchange Act Release No. 60506, 2009 SEC LEXIS 2797, at *54 (Aug. 14, 2009) (rejecting argument that applicants' violations of FINRA rules were mitigated with their general compliance with the rules in other instances), *aff'd*, 409 F. App'x 396 (2d Cir. 2010); *Navistar Int'l Corp.*, Exchange Act Release No. 56769, 2007 SEC LEXIS 2597, at *31–32 (Nov. 8. 2007) (stating that notification to investors that filings are late "is no substitute for the timely reporting of adequate financial information").

circumstances," each *Gateway* factor is non-exclusive and no single factor is dispositive.[73] The remaining *Gateway* factors—the company's efforts, if any, to return to compliance and the credibility of management's assurances against further violations—also support revocation.

Despite the assurances it gave during the investigation, the initial decision proceeding, and this appeal that its filings would be forthcoming, China-Biotics repeatedly failed to adhere to its own proposed timetables for filing its delinquent reports. In response to the Wells notice, China-Biotics asked the Commission to postpone any enforcement action for 6 to 9 months. In its January 2012 opposition to the Division's motion for summary disposition, China-Biotics asked for "an additional month or so" to make its delinquent filings.[74] In its petition for Commission review, the company indicated that its Forms 10-K and Forms 10-Q would be ready in June and July 2012. Then the company filed briefs seeking a further extension until September 2012 to remedy its reporting violations.[75] China-Biotics did not meet any of these deadlines or adequately explain these failures. Moreover, while the company was proposing these successive deadlines as part of these proceedings, China-Biotics was simultaneously representing in multiple Forms 12b-25 that it was unable to predict when it would be in a position to become current.

The company's response to the June 2011 resignation of its auditor, CFO, and audit committee chairman reflected a similar pattern of delay. For instance, China-Biotics took four months to appoint a new audit committee chairman, and it did so only days before filing its answer to the OIP. After the initial decision, it replaced the audit committee chairman yet again and appointed Weinberg as its new auditor. It has not hired a new permanent CFO, has had numerous interim CFOs, and acknowledged that its acting CFOs did not have the necessary experience with GAAP. This pattern contributes to material weaknesses that the company has acknowledged "have affected and could continue to affect [its] ability to ensure timely and reliable financial reports" and "weaken investor confidence in [its] financial reporting."[76]

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73 *Impax Labs., Inc.*, 2008 SEC LEXIS 1197, at *39 &*22; *Gateway Int'l Holdings, Inc.*, 2006 SEC LEXIS 1288, at *19; *cf. Zacharias v. SEC*, 569 F.3d 458, 470 (D.C. Cir. 2009) (noting that the Commission is "not obligated to make its sanctions uniform"); *Geiger v. SEC*, 363 F.3d 481, 488 (D.C. Cir. 2004) (declining to "compare this sanction to those imposed in previous cases"); *see generally Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973) ("The employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.").

74 Resp't Br. Opposing Mot. for Summ. Disposition at 6.

75 Resp't Br. at 35, Reply Br. at 11.

76 Form 10-K for the fiscal year ended Mar. 31, 2012, at 17; Form 10-K for the fiscal year ended March 31, 2011, at 17; *see also Michael C. Pattison*, Exchange Act Release No. 67900, 2012 SEC LEXIS 2973, at *31 (Sept. 20, 2012) (stating that internal controls "are basic indicators of the reliability of the financial statements and the accounting system and records from which financial statements are prepared" (internal quotation omitted)); *Mgmt's Report on Internal Control over Financial Reporting and Certification of Disclosure in Exchange Act*

China-Biotics's purported compliance efforts are further discredited by its "troubling willingness . . . to ignore clear staff directives regarding its reporting obligations under the Exchange Act."[77] The company's prolonged and continuing failure, for more than a year and a half, to follow Corporation Finance staff's direction to amend its 2010 Form 10-K or to explain its longstanding failure to do so offers little assurance of the company's commitment to Exchange Act reporting.

The company moved to adduce its 2011 and 2012 Forms 10-K and Forms 10-Q as additional evidence to "demonstrate[] that China-Biotics is in the process of returning to compliance with its reporting obligations"[78] and that, as of June 28, 2013, it had "come current in its reporting obligations."[79] These filings, however, neither remedy the company's repeated failures to file timely periodic reports nor obviate the public interest in revocation.[80] The company has consistently failed to meaningfully address the need to amend its Form 10-K for the year ended March 31, 2010. Moreover, the company's Forms 10-K for the fiscal years ended March 31, 2011 and March 31, 2012 are materially deficient. They do not satisfy Item 308(a) of Regulation S-K, which requires Forms 10-K to state that management has assessed the effectiveness of internal control over financial reporting as of the end of the fiscal year, identify the framework used by management for this evaluation, and disclose management's assessment as of the end of the fiscal year, "including a statement as to whether or not internal control over financial reporting is effective."[81] As we have previously held, such failures render the Forms

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Periodic Reports, Exchange Act Release No. 47986, 68 Fed. Reg. 36636, 36656 (June 5, 2003) (stating that "[a]n effective system of internal control over financial reporting is necessary to produce reliable financial statements and other financial information used by investors").

77 *Calais Resources, Inc.*, 2012 SEC LEXIS 2023, at *23.

78 Resp't Mot. for Leave to Adduce Additional Evidence, Sept. 14, 2012, at 1; Resp't Second Mot. For Leave to Adduce Additional Evidence, Jan. 10, 2013, at 1; Resp't Third Mot. For Leave to Adduce Additional Evidence, Feb. 20, 2013, at 1; Resp't Fourth Mot. For Leave to Adduce Additional Evidence, May 28, 2013, at 1.

79 Resp't Fifth Mot. for Leave to Adduce Additional Evidence, June 28, 2013, at 2.

80 *See, e.g.*, *Nature's Sunshine Products, Inc.*, 2009 SEC LEXIS 81, at *24 (stating that "last minute filings before oral argument d[id] not alter our conclusion that revocation [was] appropriate"); *Calais Resources, Inc.*, 2012 SEC LEXIS 2023, at *20 (stating that the issuer "remains out of compliance until all of the deficiencies have been resolved"); *Citizens Capital Corp.*, 2012 SEC LEXIS 2024, at *42 (finding that "delinquent and deficient filings and other disclosure failures indicate that [the issuer] still does not appreciate the importance of regulatory compliance").

81 17 C.F.R. § 229.308(a)(2)–(3); *see Mgmt's Report on Internal Control over Fin. Reporting and Cert. of Disclosure in Exch. Act Periodic Reports*, Exchange Act Release No. 47986, 2003 SEC LEXIS 1380, at *135–36 (June 5, 2003), noting that

10-K materially deficient, violate Exchange Act Section 13(a), and demonstrate the public interest in revocation.[82]

China-Biotics further argues that "where a company has become current in its financial reporting, and the investing public has timely information concerning the company's stock, revocation of its registration is disfavored" and would be punitive.[83] This argument is particularly unpersuasive because China-Biotics's delinquent and materially deficient reports do not render it current or compliant with its Exchange Act obligations.[84] And even if an issuer has filed all delinquent periodic reports, revocation can be appropriate, particularly when, as here, the delinquencies continued for an extended period without adequate explanation.[85] Such a filing

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> An effective system of internal control over financial reporting is necessary to produce reliable financial statements and other financial information used by investors. By requiring a report of management stating management's responsibility for the company's financial statements and internal control over financial reporting and management's assessment regarding the effectiveness of such control, investors will be able to better evaluate management's performance of its stewardship responsibilities and the reliability of a company's financial statements and other unaudited financial information.

82 *See Nature's Sunshine Products, Inc.*, 2009 SEC LEXIS 81, at *25 (finding that the "failure of the [c]ompany's management to complete its assessment of internal control over financial reporting . . . renders the 2006 Form 10-K materially deficient and in noncompliance with Exchange Act Section 13(a)"), citing 17 C.F.R. § 229.308(a) and Compliance and Disclosure Interpretation, Question 115.02 (Regulation S-K) available at: www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm (expressing the view that non-accelerated filers' failure to provide management's report on internal control over financial reporting in Form 10-K "renders the annual report materially deficient," and that, as a result, "the company would not be timely or current in its Exchange Act reporting"); *see also Am. Stellar Energy, Inc.*, 2011 SEC LEXIS 2455, at *21; *Calais Resources, Inc.*, 2012 SEC LEXIS 2023, at *20; *Citizens Capital Corp.*, 2012 SEC LEXIS 2024, at *20.

83 Resp't Third Mot. to Adduce Additional Evidence, Feb. 20, 2013, at 1–2.

84 *Calais Resources, Inc.*, 2012 SEC LEXIS 2023, at *20–21 (noting that "filings [that] are not fully compliant with regulatory requirements" do not render the issuer "'current' with respect to its reporting requirements").

85 *See, e.g., Nature's Sunshine Prods., Inc.*, 2009 SEC LEXIS 81, at *34 ("Dismissal . . . would reward those issuers who fail to file required periodic reports when due over an extended period of time, become the subject of Exchange Act Section 12(j) revocation proceedings, and then, on the eve of hearings before the law judge or, in this case, oral argument on appeal, make last-minute filings in an effort to bring themselves current with their reporting obligations, while prolonging indefinitely the period during which public investors would be without accurate, complete, and timely reports (that comply with the requirements of the Exchange Act and its rules and regulations) to make informed investment decisions."); *Am. Stellar Energy, Inc.*, 2011 SEC LEXIS 2455, at *28 (same).

history may ultimately "suggest[] 'a troubling pattern . . . of complying with regulatory requirements only when [the issuer] has concluded that its continued failure to do so will result in significant adverse consequences.'"[86]

Here, the company's recent filings, one of which was almost two years late, neither cure the company's past violations nor provide credible assurances against further violations. Nor do such late filings remedy the harm caused by China-Biotics's delinquencies because the "timeliness of information [in periodic reports] has considerable value to investors and the markets" and "a lengthy delay before that information becomes available makes the information less valuable to investors."[87] Moreover, the company previously acknowledged that "staffing limitations . . . have hindered the Company's financial statement and report preparation process."[88] In its January 10, 2012 motion to adduce additional evidence, the company asserted that these issues have been resolved but we note that the company has not hired a permanent chief financial officer experienced in U.S. GAAP. Its missed deadlines, numerous and lengthy delinquencies, and materially deficient Form 10-K filings also cast doubt on its commitment to its reporting obligations.[89]

In its opening brief, the company asserted that, with the appointment of a new auditor, it was "on the cusp of becoming compliant" because "the only [previous] obstacle to China-Biotics filing its periodic reports was the fact that it did not have an auditor."[90] The company's claim in this regard is especially unpersuasive because the company's 2011 reports remained delinquent for more than a year after Weinberg replaced BDO as its auditor. In fact, the company repeatedly acknowledged material weaknesses in its own disclosure and internal controls and declined opportunities to explain its plan for making its still-delinquent filings in response to NASDAQ's

86 *Calais Resources, Inc.*, 2012 SEC LEXIS 2023, at *27–28.

87 *Acceleration of Periodic Report Filing Dates and Disclosure Concerning Web Site Access to Reports*, Exchange Act Release No. 46464, 67 Fed. Reg. 58,470, 58,483 (Sept. 16, 2002); *see also Calais Resources, Inc.*, 2012 SEC LEXIS 2023, at *22 (explaining that the Exchange Act reporting requirements are designed to assure the investing public of access to "information that is timely as well as accurate" and that late filings do not remedy harm to "investors who would otherwise have had access to current and relevant information about" the issuer but who "had no current quarterly or annual reports . . . to review" while they were making investment decisions).

88 Form 12b-25 for the quarter ended Sept. 30, 2012, at 2.

89 *See Am. Stellar Energy, Inc.*, 2011 SEC LEXIS 2455, at *19 ("In determining whether an issuer's assurances against future violations are credible, one factor we consider is whether the issuer is able to adhere to reasonable schedules that the issuer has proposed for the fulfillment of delinquent filing obligations.").

90 Resp't Br. at 34 & 35.

nquiry, in its answer to the OIP, during conferences with the law judge, in opposition to summary disposition and in its briefs on appeal.[91]

China-Biotics also claims that "[r]evocation is a disfavored result because it deprives investors of a market for their stock" and that its existing investors "are better off if the Company remains subject to Commission scrutiny."[92] But as we held in *Gateway*, "[t]he extent of any harm that may result to existing shareholders [from revocation] cannot be the determining factor in our analysis;" rather, "[i]n evaluating what is necessary or appropriate to protect investors, 'regard must be had not only for existing stockholders of the issuer, but also for potential investors.'"[93] Nor are we persuaded by the company's contention that "prospective investors are well aware of uncertainties associated" with an investment in its securities.[94] All investors in the marketplace, both current and prospective, have been deprived of timely reports that accurately reflect the company's financial situation and material business developments.

We find no basis for crediting China-Biotics for multiple, and materially deficient, reports it filed months and even years after the reporting periods had ended, which is effectively what it is seeking. Contrary to the company's claim that revocation is disfavored under such circumstances, as we held in *Nature's Sunshine Products, Inc.*, dismissing proceedings against issuers with "numerous filing delinquencies and unresolved deficiencies, would significantly detract from the Exchange Act's reporting requirements."[95] Such conduct is "offensive to the central purpose of the periodic reporting system Congress established through the Exchange Act"

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91 Similarly, the BDO Report described the board's failure to "prepare[] a specific plan for investigating and remediating the irregularities [it] identified." BDO Report at 4.

92 Resp't Br. at 34; Reply Br. at 2.

93 *Gateway Int'l Holdings, Inc.*, 2006 SEC LEXIS 1288, at *31; *see also Citizens Capital Corp.*, 2012 SEC LEXIS 2024, at *36 (finding that "[r]evocation is a prospective remedy and is imposed based on our concern about protecting future investors in the company").

94 Reply Br. at 10.

95 2009 SEC LEXIS 81, at *33–34; *see also Calais Resources, Inc.*, 2012 SEC LEXIS 2023, at *18 & 21–22 (explaining that a "repeated failure to file [] periodic reports on time is 'so serious' a violation of the Exchange Act that only a 'strongly compelling showing' regarding the other Gateway factors would justify a sanction less than revocation" and the "mere filing of a past due report" does not "satisf[y] a company's Exchange Act reporting obligations"); *Am. Stellar Energy, Inc.*, 2011 SEC LEXIS 2455, at *18–19 (noting that delinquencies after the date of the initial decision "indicate that [the issuer] has not made the 'strongly compelling showing' necessary under *Gateway* to justify a lesser sanction than revocation"); *Am. Sports Voice*, 2007 SEC LEXIS 1241, at *12 (noting that respondent's request for a ninety-day grace period "reflects a highly troubling attitude towards Commission reporting requirements"). Under such circumstances, the "need for finality in administrative proceedings provides further justification or our conclusion that revocation is necessary to protect the investing public." *Am. Stellar Energy, Inc.*, 2011 SEC LEXIS 2455, at *29.

because "[f]or the system to work properly the information reported must be both current and adequate.'"[96] Revocation serves the public interest in ensuring timely, accurate, and complete Exchange Act reporting.[97]

IV.

China-Biotics also claims it was denied a fair hearing because (i) the Commission's decision to institute proceedings against the company was unfair; (ii) the law judge did not allocate sufficient time for a hearing in light of the 120-day timetable established in the OIP, the investigative file dispute, and the motion for summary disposition; and (iii) the law judge's decision that certain categories of documents in the Division's investigative file were not discoverable prejudiced the company's ability to defend itself. Addressing each of these arguments in turn, we find no basis for relief.

A. China-Biotics has not established that the investigative process was unfair.

The company claims that the institution of these proceedings reflected an unfair and "persistent rush to judgment."[98] It argues that it was given less time than other respondents to respond to the Wells notice, to return to compliance, and to engage in settlement discussions before the proceedings were instituted. These arguments are unpersuasive.

The decision to institute proceedings satisfies due process if, as in this case, the respondent is "afford[ed] full opportunity to justify [its] conduct during the course of the litigation."[99] In any event, the company has conceded that its reporting failures violated the Exchange Act. Investigatory procedures such as the Wells notice process are not meant to delay

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96 *Navistar Int'l Corp.*, Exchange Act Release No. 56769, 2007 SEC LEXIS 2597, at *30–31 (Nov. 8. 2007) (*quoting Beisinger Indus. Corp.*, 421 F. Supp. 691, 695 (D. Mass 1976), *aff'd*, 552 F.2d 15 (1st Cir. 1977) (dismissing application for review by issuer removed from exchange listing for failure to comply with Exchange Act filing requirements); *see also id.* at *30 ("The availability of current financial information is critical to the proper operation of the financial markets"); *id.* at *31 n.30 (citing *SEC v. Savoy Indus. Inc.*, 587 F.2d 1149, 1165 (D.C. Cir. 1978) (stating that the Exchange Act reporting provisions are "clear and unequivocal" and are "satisfied only by the filing of complete, accurate, and timely reports")).

97 The company's characterization of revocation as a corporate "death penalty" is overstated and we have long rejected similar arguments. *See, e.g.*, *Nature's Sunshine Products, Inc.*, 2009 SEC LEXIS 81, at *36. If, after revocation, the company is able to meet the applicable requirements, it may file a Form 10 to re-register its securities under Exchange Act Section 12(g). 15 U.S.C. § 78l(g); *see also Cobalis Corp.*, 2011 SEC LEXIS 2313, at *25 n.33.

98 Resp't Br. at 17.

99 *Kevin Hall*, Exchange Act Release No. 61162, 2009 SEC LEXIS 4165, at *82–83 n.109 (Dec. 14, 2009) (quoting *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 183 (D.C. Cir. 2006)).

our response to clear and ongoing violative activities in the industry.[100] Accordingly, the company has not demonstrated any impropriety in the discretion exercised in instituting this case.

To the extent that China-Biotics claims to be a victim of impermissible selective prosecution, it must establish that it is a member of a constitutionally protected class, that prosecutors acted with bad intent, and that similarly-situated issuers outside of the protected category were not charged.[101] The company has not made these required showings and we find that it was not the victim of improper selective prosecution. The violations were undisputed and the company has provided no evidence that our decision to institute proceedings was constitutionally impermissible.

B. The law judge's procedural rulings did not impair China-Biotics's ability to defend itself.

China-Biotics argues that summary disposition deprived it of its right to "notice and an opportunity for a hearing"[102] by denying it "an opportunity to put on evidence in support of its case, including the chance to present evidence describing the state of its efforts to comply with its reporting obligations."[103] We disagree.

Rule of Practice 250 authorizes summary disposition if "there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law."[104] Contrary to China-Biotics's position, it is well established that the

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100 *See* Wells Release, 1972 SEC LEXIS 238, at *2 & *3 (noting that "where prompt action is necessary for the protection of investors, the establishment of fixed time periods [for the Wells process], after a case is otherwise ready to be brought, . . . would result in delay contrary to the public interest"); *see also Stuart-James Co., Inc.*, Exchange Act Release No. 28819, 50 SEC 468, 1991 SEC LEXIS 168, at *4 (Jan. 23, 1991) (stating that the Commission, "not the staff, [is] ultimately responsible for exercising control over the agency's administrative proceeding docket"); *Marshall v. Jerrico*, 446 U.S. 238, 248 (1980) (stating that the neutrality requirements "designed for officials performing judicial or quasi-judicial functions . . . are not applicable to those acting in a prosecutorial or plaintiff-like capacity"); *Hall*, 2009 SEC LEXIS 4165, at *78 ("Participants in the investigative process are not entitled to an uncritical or even a neutral Division assessment of their asserted defenses" (citing *Marshall v. Jerrico*, 446 U.S. 238, 248 (1980)).

101 *Fog Cutter Capital Group, Inc. v. SEC*, 474 F.3d 822, 826–27 (D.C. Cir. 2007).

102 Resp't Br. at 23.

103 Resp't Br. at 24.

104 17 C.F.R. § 201.250(b).

Commission's summary disposition procedures satisfy the "notice and opportunity for a hearing" requirement in the Commission's administrative proceedings.[105]

Once the moving party has carried its burden of establishing that it is entitled to summary disposition on the factual record, the opposing party may not rely on bare allegations or denials but instead must present specific facts showing a genuine issue of material fact for a hearing.[106] Here, the Division established the company's undisputed filing history and China-Biotics was given the opportunity to produce affidavits or other specific evidence of such a genuine issue but affirmatively declined to do so. It said that "it would be premature for China-Biotics to say what the state of its compliance with its reporting obligations will be at the time of the hearing" and that such a showing would "provide the Division with discovery not provided for by the rules that govern this proceeding."[107] Having chosen not to offer evidence in opposing the Division's

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105 *See Seghers v. SEC,* 548 F.3d 129 (D.C. Cir. 2008) (rejecting due process challenge to summary disposition in Commission proceeding). China-Biotics's reliance on *SEC v. Sloan*, 436 U.S. 103, 112 (1978), is misplaced. There, the Court held that a decision to "summarily suspend trading" was inconsistent with the Commission's obligation to "give some sort of notice and opportunity to be heard." *Id.* at 112. Unlike the suspension proceedings in *Sloan*, summary disposition procedures comply with the notice and hearing requirements in administrative adjudications. *See Kornman v. SEC*, 592 F.3d 173, 182–83 (D.C. Cir. 2010) (finding that the Commission's summary disposition standards satisfy the statutory requirement for decision "on the record after notice and opportunity for hearing" when the respondent was given "an opportunity to set forth all of his evidence, challenges, and defenses in his pleadings" before the law judge and the Commission); *see also Gibson v. SEC*, 561 F.3d 548 (6th Cir. 2009) (affirming summary disposition in administrative proceeding); *Heath v. SEC*, 586 F.3d 122, 141 & n.10 (2d Cir. 2009) (rejecting a challenge to summary disposition in a NYSE proceeding when the respondent failed to point to any specific "evidence that he was precluded from submitting" during the summary disposition phase of the proceeding).

Contrary to China-Biotics's suggestion that cases recognizing our authority to impose summary disposition are limited to follow-on proceedings, Rule 250 has been applied in cases alleging a variety of securities law violations. *See, e.g.*, *Robert L. Burns*, Advisers Act Release No. 3260, 2011 SEC LEXIS 2722 (Aug. 5, 2011) (violation of Section 17(e)(1) of the Investment Company Act of 1940).

106 *Gibson*, 2008 SEC LEXIS 236, at *22 n.26.

107 Resp't Br. Opposing Mot. for Summ. Disposition at 5–6. Rule 250(b) states that "[i]f it appears that a party, for good cause shown, cannot present by affidavit prior to the hearing facts essential to justify opposition to the motion, the hearing officer shall deny or defer the motion." 17 C.F.R. § 201.250(b). Although China-Biotics argues that it was entitled to apply this exception, it did not demonstrate that it was unable to present evidence in its opposition or show "good cause." Nor has it made such a showing in this appeal. *See Burns*, 2011 SEC LEXIS 2722, at *18 (finding summary disposition appropriate when respondent "neither presented the evidence to which he refers nor made a showing why he could not do so, nor does he do so now").

motion for summary disposition, China-Biotics cannot use this appeal to avoid the consequences of that choice.[108]

In any event, China-Biotics still has not identified any evidence demonstrating a genuine issue of material fact regarding the appropriate remedy for its reporting violations. Nor has the company substantiated its claim that it was "denied the opportunity to present its evidence, including evidence about the work of its new auditor."[109] To the contrary, China-Biotics acknowledged during a pre-hearing conference that affidavits describing its reporting plan were functionally equivalent to hearing testimony and that "the issue is not so much whether or not the information should be presented in the form of an affidavit [or at a hearing], so much as what is the most efficient way to manage the case."[110] The law judge properly granted summary disposition after the company failed to present evidence of any genuine issue of material fact and the law judge concluded that the undisputed material facts supported revocation under Exchange Act Section 12(j) precedent.

China-Biotics argues that the law judge erred by not issuing a scheduling order consistent with Rule of Practice 360(a)(2), which sets guideposts for the hearing, briefs, and initial decision under the 120-day timeline.[111] In the alternative, the company argues that the law judge should have sought an extension of the initial decision deadline pursuant to Rule of Practice 360(a)(3).[112] It asserts that the law judge's failure to invoke either provision renders her summary disposition analysis suspect and ultimately "left her with no choice but to grant summary disposition and deny China-Biotics the chance to present evidence at a hearing."[113]

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108 *See Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *60 (Jan. 30, 2009) (explaining that "[p]ublic policy considerations favor the expeditious disposition of litigation, and a respondent cannot be permitted to gamble on one course of action and, upon an unfavorable decision, to try another course of action" (internal citations omitted)).

109 Reply Br. at 4. *See Kornman*, 2009 SEC LEXIS 367, at *46 ("Although Kornman identifies issues that he claims specifically required an in-person hearing, he identifies no fact that we did not accept that, if proved, would have been material to the outcome and identifies no witness, document or other evidence that he might have adduced at an in-person hearing to prove these issues.").

110 Pre-Hr'g Conference Tr. at 13 (Dec. 19, 2011); *see also* text accompanying note 107 *supra* (demonstrating that China-Biotics declined to present evidence to the law judge).

111 17 C.F.R. § 201.360(a)(2) (providing for approximately one month between the OIP and hearing, two months between the hearing and briefing deadlines, and one month between the briefs and initial decision).

112 *Id.* § 201.360(a)(3) (stating that motions for extension "must be filed no later than 30 days prior to the expiration of the time specified in the order for issuance of the initial decision").

113 Pet. for Review at 12.

We find these contentions to be without merit. First, Rule of Practice 360(a)(2) explicitly states that the timelines described in that section "confer[] no substantive rights on respondents."[114] Second, Rule of Practice 111 gives a law judge "the authority to do all things necessary and appropriate to discharge his or her duties," including the authority to "regulat[e] the course of a proceeding."[115] That rule is "'broadly worded' to accommodate a law judge's discretion to manage a case plan within the limits of our Rules of Practice and governing statutes."[116] In scheduling briefing for the motion for summary disposition, the law judge considered the deadline for the initial decision, the standards and procedures for summary disposition, and the parties' arguments in connection with the motion.[117] She asked about the company's planned defenses and considered whether supporting evidence could be presented without a hearing.[118] And contrary to China-Biotics's claim that she "failed to . . . provid[e] it with sufficient time to prepare and present its defense," the OIP provided the company with ample notice of the deadline for the initial decision and the need to prepare its defense before then.[119]

We also note that after the parties and the law judge discussed the briefing schedule at the December 19, 2011 pre-hearing conference, China-Biotics never asked that the 120-day deadline be extended.[120] The company was also given the opportunity to request earlier briefing dates. Rather than doing so, it said that it was "not at the moment . . . pushing to advance the date forward."[121] We find that the law judge's briefing and scheduling decisions did not prejudice the company's ability to present its defense.

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114 17 C.F.R. § 201.360(a)(2).

115 *Id.* § 201.111.

116 *See Seghers*, 2007 SEC LEXIS 2238, at *25; *cf. Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *33 (Jan. 31, 2006) (holding Rule of Practice 111 to be "broadly worded to permit a law judge to exercise discretion as to which witnesses to allow and which ones to exclude from the hearing room").

117 Pre-Hr'g Conference Tr. at 8–17 (Dec. 19, 2011).

118 *Id.* at 11–12.

119 Resp't Br. at 21.

120 And as the Division points out, the briefing dates set by the law judge accommodated the possibility that the company's opposition might identify some material fact meriting a hearing, and allowed time for the law judge to request an extension pursuant to Rule 360 under those circumstances. *See* Division of Enforcement's Br. in Opp'n to Resp't Pet. for Review at 16 n.15.

121 Pre-Hearing Conference Tr., Dec. 19, 2011, at 13; *see also id.* at 12 (showing law judge's offer to provide earlier summary disposition briefing dates so that "if it turns out that a hearing on some material fact is needed there would be some time left"). *Cf. Guy P. Riordan,* Exchange Act Release No. 61153, 2009 SEC LEXIS 4166, at *60 n.72 (Dec. 11, 2009) (finding that respondent "did not object to the admission of [an exhibit as hearsay] before the law judge, and therefore waived his argument regarding this exhibit on appeal"), *petition denied*, 627 F.3d 1230 (D.C. Cir. 2010); *Stuart E. Winkler*, Exchange Act Release No. 48940, 2003 SEC LEXIS 2974,

C. The law judge acted within her discretion in deciding which portions of the Division's investigative file were relevant to the case.

China-Biotics also contends that the law judge improperly granted the Division leave to withhold from production, pursuant to Rule of Practice 230(b)(1)(iv), categories of documents not relevant to the subject matter of the proceeding.[122] The company argues that the law judge's relevance decision lacked sufficient clarity because she did not explicitly find that the withheld documents were irrelevant. The company further asserts that the law judge's analysis was based on a "unilateral relevance determination" by the Division that "deprived the Company of information critical to ensuring that the Company received due process and an adequate opportunity to defend itself."[123]

The record does not support China-Biotics's challenge. Although China-Biotics now questions the clarity of the law judge's ruling, the pre-hearing transcripts and the company's papers confirm that it understood her decision.[124] We note that the law judge originally rejected the Division's attempt to withhold documents and revised her decision only after the Division provided more information about the nature of the ongoing investigation, distinguished it from the pending Section 12(j) proceeding, and furnished a list of the categories of documents it sought to withhold.[125] In so doing, the law judge properly applied the procedure described in Rule 230(c), which allowed her to "require the Division of Enforcement to submit for review a

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at *11 (Dec. 17, 2003) (finding that a respondent waived his argument that he was unable to pay a penalty when he failed to file a financial disclosure statement ordered by the law judge).

122 *See* 17 C.F.R. § 201.230(a). *See, e.g.*, *Thomas C. Bridge*, Exchange Act Release No. 60736, 2009 SEC LEXIS 3367, at *80–81 (Sept. 29, 2009) (finding that the Division was permitted to withhold certain documents pursuant to Rule 230(b)(1) when the "law judge reviewed the Division's list of withheld material and determined that the Division has acted properly").

123 Pet. for Review at 14.

124 *See, e.g.*, Resp't Br. Opposing Mot. for Summ. Disposition at 3 (stating that the Division "successfully . . . persuade[d] the [law judge] to withhold on grounds of relevance the overwhelming majority of the documents listed in its December 16, 2011 submission").

125 The Division indicated that the formal order covering the ongoing investigation covered "among other things, whether China-Biotics, its officers, directors employees and others, may have been or may be making false statements of material fact or failing to disclose material facts concerning the profitability of China-Biotics, and the manufacturing, distribution, and retail capabilities of China-Biotics, in violation of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act of 1934 and Rule 10b-5 thereunder." Letter from the Division of Enforcement to the Admin. Law Judge, Dec. 16, 2011, at 1 n.1. The Division also stated that this formal order was issued on December 7, 2010—before the company's first failure to file the Form 10-K for the year ended March 31, 2011 cited in the OIP.

list of documents or categories of documents" it sought to withhold before "determin[ing] whether any such document should be made available for inspection and copying."[126] She then reviewed the additional information, considered the arguments of both parties, and identified categories of materials on the Division's list to be disclosed. We have reviewed the law judge's decision and see no reason to disagree with her determination.[127]

The company claims that the law judge's rulings, including her decision to allow the Division to withhold documents that had been produced by the company's former CFO Lewis Fan, "deprived [it] of information critical to its defense, including documents containing potentially exculpatory and mitigating information."[128] China-Biotics has not, however, substantiated its claim of prejudice.[129] We reject issuers' attempts to shift responsibility for

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126 *See Bridge*, 2009 SEC LEXIS 3367, at *80–81 ("Rule 230(c) vests the law judge with discretion to determine whether the Division's withholding of documents was appropriate.").

China-Biotics's suggestion that withheld investigative documents prejudiced its ability to defend itself is particularly unconvincing given that evidence of its ability to remedy its past filing failures and plan to meet its compliance responsibilities is uniquely under its control. *See Cobalis Corp.*, 2011 SEC LEXIS 2313, at *20 (noting that we consider an issuer's "explanations for delinquent filings . . . primarily to evaluate the issuer's past efforts to return to compliance and the credibility of any assurances against further violations" but that "we have previously rejected the argument that an issuer cannot be held accountable for filing delinquencies if the delinquencies resulted from the actions of a third party").

127 We have explained that Rule 230(b)(1)(iv)

> provides a mechanism to address a situation where a single investigation involves a discrete segment or segments that are related only indirectly, or not at all, to the recommendations ultimately made to the Commission with respect to the particular respondents in a specific proceeding. To require that documents not relevant to the subject matter of the proceeding be made available, simply because they were obtained as part of a broad investigation, burdens the respondent as well as the Division of Enforcement with unnecessary costs and delay.

Rules of Practice, Exchange Act Release No. 35833, 60 Fed. Reg. 32738, 32762 (June 9, 1995).

128 Resp't Br. at 26.

129 *See* Rule of Practice 230(h), 17 C.F.R. § 201.230(h) ("In the event that a document required to be made available to a respondent pursuant to this rule is not made available by the Division of Enforcement, no rehearing or redecision of a proceeding already heard or decided shall be required, unless the respondent shall establish that the failure to make the document available was not harmless error."); *see Kirlin Sec., Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *82 (Dec. 10, 2009) ("Because Applicants have failed to establish what information they were denied and how that denial prejudiced their case, we reject Applicants' argument that the proceedings against them were procedurally flawed."); *Gateway Stock & Bond, Inc.*, Exchange Act Release No. 8003, 43 SEC 191, 1966 SEC LEXIS 191, at *9 (Dec. 8, 1966) (rejecting due process argument because "applicants have not shown that . . . any

Section 13 violations onto third parties, particularly when, as in this case, the violations are repeated and the record demonstrates the issuer's responsibility for its violations.[130] And the company's claims that documents produced by Fan might contain exculpatory or mitigating information are at best doubtful, since he left the company more than a year before the violations charged in the OIP and after serving for less than a year. In addition, the Division represented that "[n]one of the custodians [of the withheld documents in the investigative file] had any ability to affect the company's noncompliance with its periodic filing obligations, nor do the custodians have any ability to remedy the Respondent's delinquent filings and assure its future compliance."[131] Given these circumstances, China-Biotics has not demonstrated that the law judge's relevance decision prejudiced its defense in this case.

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material evidence was not produced"); *A.S. Goldmen & Co., Inc.*, Exchange Act Release No. 44328, 55 SEC 147, 2001 SEC LEXIS 966, at *36 (May 21, 2001) (rejecting due process challenge based on exclusion of testimony that was "not probative" of the violations charged).

130 *Cobalis Corp.*, 2011 SEC LEXIS 2313, at *5; *see also Calais Resources, Inc.*, 2012 SEC LEXIS 2023, at *19 (stating that "the responsibility for any delay in the preparation of Calais's long overdue reports rests solely with Calais"). We further note that Rule 230(b)(2) states that "[n]othing in this paragraph (b) authorizes the Division of Enforcement in connection with an enforcement or disciplinary proceeding to withhold, contrary to the doctrine of *Brady v. Maryland*, documents that contain material exculpatory evidence." 17 C.F.R. § 201.230(b)(2). There is no evidence in the record that such documents were withheld.

131 Letter from the Division of Enforcement to the Admin. Law Judge, Dec. 16, 2011, at 1. Nor are we persuaded by the company's claim that the Division's subpoena of Lewis Fan after the OIP demonstrated the need for a "wall between the Division staff working on the administrative proceeding and Division staff working on the ongoing investigation" under Rule 230(g). Resp't Br. at 26. As noted above, the law judge allowed the Division to withhold materials (including those produced by Fan) under Rule 230(b)(1)(iv), and China-Biotics has not established that its defense of its Section 12(j) violations was prejudiced. *See* Rule of Practice 230(h), 17 C.F.R. § 201.230(h).

Moreover, China-Biotics's analysis of *Morgan Asset Mgmt., Inc.*, Admin. Proc. Rulings Release No. 656, 2010 SEC LEXIS 2256, at *2 (July 12, 2010), is not persuasive. In that case, the law judge found that "one of the Division's purposes for issuing" the subpoenas was "to assist itself in preparing for the upcoming hearing." *Id.* at *6. Here, the law judge made no such finding, and China-Biotics did not allege or establish that the Division acted with any such intent. *See generally Epstein*, 2009 SEC LEXIS 217, at *61 n.54 (noting that respondent "is not 'entitled to conduct a fishing expedition . . . in an effort to discover something that might assist him in his defense' . . . or 'in the hopes that some evidence will turn up to support an otherwise unsubstantiated theory'" (internal citations omitted)); *Orlando Joseph Jett*, Admin. Proc. Rulings Release No. 514, 52 SEC 830, 1996 SEC LEXIS 1683, at *1–2 (June 17, 1996) (same).

V.

For the foregoing reasons, revocation of the registration of China-Biotics's securities is necessary and appropriate in the public interest.

An appropriate order will issue.[132]

By the Commission (Chair WHITE and Commissioners AGUILAR, GALLAGHER, STEIN and PIWOWAR).

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

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[132] 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
Release No. 70800 / November 4, 2013

Admin. Proc. File No. 3-14581

In the Matter of

CHINA-BIOTICS, INC.
c/o Jerome S. Fortinsky, Esq.
Shearman & Sterling LLP
599 Lexington Avenue
New York, NY 10022

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that the registration of all classes of the registered securities of China-Biotics, Inc. under Section 12(b) of the Securities Exchange Act of 1934 is hereby revoked pursuant to Exchange Act Section 12(j).

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70803 / November 4, 2013

Admin. Proc. File No. 3-15187

In the Matter of LARGO VISTA GROUP, LTD., MONTAVO, INC., OBN HOLDINGS, INC., PREPAYD, INC., READY WELDER CORP., and SNOWDON RESOURCES CORP.	ORDER DISMISSING PROCEEDING WITH RESPECT TO PREPAYD, INC.

On January 25, 2013, we instituted administrative proceedings against PrepaYd, Inc. and five other registrants under Section 12(j) of the Securities Exchange Act of 1934.[1] The Order Instituting Proceedings alleged that PrepaYd violated periodic reporting requirements and ordered a hearing to determine whether the allegations were true and, if so, whether suspension or revocation of the registration of PrepaYd's securities was necessary and appropriate for the protection of investors.

Subsequent to the issuance of the OIP, the Division of Enforcement learned that, on February 8, 2013, PrepaYd had filed a Form 15, pursuant to Exchange Act Rule 12g-4(a),[2] to voluntarily terminate the registration of its securities under Exchange Act Section 12(g).[3] Under Rule 12g-4(a), an issuer's registration is terminated ninety days after filing Form 15, which in this case was May 9, 2013. As a result, the Division moved to dismiss the proceeding against PrepaYd, asserting that because "PrepaYd has no securities registered . . . , there are no securities to be suspended or revoked pursuant to Section 12(j) of the Exchange Act -- the very purpose of

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1 15 U.S.C. § 78l(j). The securities registrations of the other respondents in this proceeding have been revoked. *See Largo Vista Group, Ltd.*, Exchange Act Release No. 68967, 2013 WL 653012 (Feb. 22, 2013) (order revoking registration by default); *Largo Vista Group, Ltd.*, Exchange Act Release No. 69357, 2013 WL 1452729 (Apr. 10, 2013) (order revoking registration upon acceptance of settlement offer); *Largo Vista Group, Ltd.*, Initial Decision Release No. 486, 2013 WL 1856028 (May 3, 2013).

2 17 C.F.R. § 240.12g-4(a) (certification of termination of registration under Exchange Act Section 12(g)).

3 15 U.S.C. § 78l(g).

this administrative proceeding."[4] Given the circumstances, it is appropriate to grant the Division's motion.[5]

Accordingly, IT IS ORDERED that this proceeding be dismissed with respect to PrepaYd, Inc.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Lynn M. Powalski
Deputy Secretary

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4 PrepaYd did not respond to the Division's motion.

5 *See, e.g., The Hartcourt Cos.*, Exchange Act Release No. 69994, 2013 WL 3724986 (July 16, 2013) (granting motion to dismiss Exchange Act Section 12(j) proceeding against respondent that no longer had a class of securities registered with the Commission).

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9471 / November 5, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15602

In the Matter of

The Greater Wenatchee Regional Events Center Public Facilities District, Allison Williams, Global Entertainment Corporation, and Richard Kozuback

Respondents.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), against The Greater Wenatchee Regional Events Center Public Facilities District ("District), Allison Williams ("Williams"), Global Entertainment Corporation ("Global"), and Richard Kozuback ("Kozuback") (collectively "Respondents").

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 Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds[1] that:

Summary

1. In 2011, the Greater Wenatchee Regional Events Center Public Facilities District ("District") defaulted on $41.77 million in Bond Anticipation Notes ("BANs") it had issued in 2008 to finance a multi-use arena and ice hockey rink (the "Regional Center") located in the City of Wenatchee, Washington (the "City"). The Official Statement for the BANs was materially false and misleading.

2. Global Entertainment Corporation ("Global"), led by its President, Richard Kozuback, was hired by the District to develop and operate the Regional Center. Prior to the District, Global was perceived to be a competent operator of events centers, but had limited experience forecasting revenues and had hired a financial consultant to assist with the Regional Center financial projections. Over the course of the development and construction of the Regional Center, Global prepared a series of financial projections for operation of the Regional Center to be used both for budgeting purposes and for inclusion in the District's Official Statement. While the Official Statement contained the most recent version of Global's projections, the District, the District's Contracts Manager Allison Williams, Global, and Kozuback all knew that an independent consultant had been asked to review Global's earlier projections and had raised questions about the Regional Center's economic viability. Despite two separate reviews of Global projections by the independent consultant, the Official Statement presented the most recent version of Global's projections along with a false and misleading statement to the effect that no financial advisor, accounting or other firm had examined those projections to verify the reasonableness of Global's assumptions or its conclusions. The District, Williams, Global, and Kozuback all knew of the independent consultant's reviews, and both Williams and Kozuback nevertheless certified that the Official Statement was accurate.

3. The District, Williams, Global, and Kozuback also knew that the projections in the Official Statement had been revised upward from projections generated a few months earlier after a claim by the City's former Mayor and Williams that Global's projections were inconsistent with its prior projections and not sufficiently optimistic. During a conference call with Kozuback and Global's financial consultant (with Williams' participation), the City's former Mayor made an impassioned argument that they knew the local citizens better than Global, and those citizens would ultimately support the Regional Center even though Global was experiencing weak ticket sales and other troubling indicators regarding anticipated revenue. Global revised its projections

[1] The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

upward and those more optimistic revised projections were included in the Official Statement without disclosing that the City's former Mayor or Williams had questioned assumptions underlying the prior set of projections, or that Global had relied on the former Mayor's verbal assertions of future community support.

4. Prior to the global financial crisis in September 2008, the District and its then underwriter had completed a Preliminary Official Statement for long term bonds which had received an investment grade rating. After the underwriter was unable to complete the financing, the District engaged Piper Jaffray & Co. ("Piper") on October 27, 2008. By the time Piper became the underwriter on the deal, the City and the District were desperate to find financing for the Regional Center within a month because of onerous lease payments being demanded by the construction lender. Piper and Jane Towery, the lead investment banker at Piper on the BANs issuance, suggested several different financing options, although only one, short-term BANs, was considered viable. The District determined to issue three year BANs maturing in 2011, with the principal of the BANs to be repaid solely through the issuance of long-term bonds.

5. The District and Williams knew that the BANs would mature in 2011 and would need to be repaid at that time through the issuance of long term bonds. The District and Williams knew that in the event the Regional Center's revenue was insufficient to support a bond issuance to repay the BANs such that City support became necessary, the City's ability to provide financial assistance to support the long term bonds was limited by the City's debt capacity, which at the time of the BANs issuance was approximately $19.3 million. Nonetheless, a paragraph in the body of the Preliminary Official Statement for the long term bonds that highlighted how the City's low remaining debt capacity constrained its obligations to the District was deleted from the body of the Official Statement for the BANs, thereby misleading BAN purchasers concerning the likelihood of permanent financing.

6. The Regional Center's financial results for 2008 through 2011 were worse than Global's most pessimistic projections, with the Regional Center operating at a significant net operating loss. Moreover, the Chelan County, Washington, Superior Court ruled in 2011 that obligations under a contingent loan agreement constituted "indebtedness" within the meaning of the State constitution and therefore would be limited to the City's remaining debt capacity of $19.3 million, as the deleted disclosure language had warned. Consequently, the District was unable to issue long-term bonds, and the District defaulted on the payment of principal on the BANs in December 2011.

7. The Washington State Legislature subsequently passed legislation to help the District cure its default by allowing the City to impose an additional sales tax without voter approval and further allowing the District to submit to voters a proposition to impose an additional sales tax. The voters of the District later approved an additional sales tax. On September 28, 2012, the District sold long term bonds secured solely by sales tax revenues to refinance the BANs.

8. As a result of the conduct described above, the District, Global, and Kozuback violated Sections 17(a)(2) and (3) of the Securities Act and Williams violated Section 17(a)(3) of the Securities Act.

Respondents

9. The Greater Wenatchee Regional Events Center Public Facilities District is a municipal corporation formed in 2006 pursuant to Washington state law by nine Washington cities and counties in order to fund the Regional Center. The District issued $41.77 million of BANs in 2008 to finance the purchase of the Regional Center. The District defaulted on the BANs in 2011.

10. Allison Williams, age 48, of Wenatchee, Washington, has served as the Executive Services Director of the City of Wenatchee, Washington since 2005. From 1998 to 2005, Williams worked for the City as a community planner in the Department of Community Development. Pursuant to an agreement between the City and the District, and at the direction of the City's former Mayor, Williams served as a senior staff member for the District, with the title "Contracts Manager," from its formation through September 2009. Williams signed the Closing Certificate of the District certifying that "to the best of [her] knowledge and after reasonable investigation," the Official Statement for the BANs was accurate and not misleading.

11. Global Entertainment Corporation is a Nevada corporation headquartered in Arizona. Global served as the developer and initial operator of the Regional Center. At the time the Regional Center was under construction, Global had developed and was managing facilities in Rio Rancho, New Mexico and Prescott Valley, Arizona. Global had also completed development, but did not manage, facilities in Broomfield, Colorado; Youngstown, Ohio; Larimer County, Colorado; and Hidalgo, Texas. Global engaged a financial consultant to assist it on the Regional Center project. From February 2003 through August 2011, Global was a public company that filed various periodic reports with the Commission through its EDGAR system.

12. Richard Kozuback, age 60, of Chelan, Washington, has been the President and CEO of Global since 2001. Kozuback signed the Certificate of Global Entertainment Corporation certifying that certain information relating to the Regional Center, Global, and revenue and tax projections for the Regional Center in the Official Statement for the BANs was accurate.

Related Parties

13. Piper Jaffray & Co. is a Delaware corporation formed on July 28, 1969 that is headquartered in Minneapolis, Minnesota. It has been registered with the Commission as a broker-dealer since 1969. Piper served as the sole underwriter for the BANs.

14. Jane Towery, age 60, of Seattle, Washington, has been a Managing Director at Piper since joining the firm in 2006. She was the lead investment banker on the District's BANs issuance.

Background on the District

15. In the spring and summer of 2005, Kozuback made several presentations about multipurpose event centers and potential funding sources to interested groups in the Wenatchee region. In 2006, the City and eight neighboring municipalities and counties formed the District and the District in turn entered into a development contract with Global.

16. Within the District, the City took on primary responsibility for managing the development and the construction of the Regional Center. Rather than hiring its own employees, the District entered into an agreement with the City that permitted it to use City staff, including, at the direction of the former Mayor, Williams, who served as a senior staff member for the District. As such, Williams served as one of the primary contacts on the Regional Center project for the developer, the attorneys, and underwriters.

17. Williams had no prior experience with public financings, and the City lacked experience with events facilities. The City Council requested that an independent consultant be brought in to review the Regional Center project and the financial projections provided by Global in August 2006 and compare it to other facilities, so as to get an understanding of whether the project could work in the City. Williams served as a primary contact for the independent consultant.

18. On August 23, 2006, the independent consultant submitted its first report. According to the 2006 report, the scope of the independent consultant's work was "to prepare an impartial third party review of the reasonableness of [Global's] financial projections to ensure the financial pro-forma presented to the City is realistic and attainable." In the 2006 report, the independent consultant indicated there could be an operating deficit at the Regional Center. Among other things, the independent consultant concluded Global's projection regarding one key metric, annual net operating income, was possibly overstated by $200,000 to $300,000 or by 16% to 25% in the first year.

19. In September 2006, the City Council approved the execution of an interlocal agreement with the newly formed District pursuant to which the City agreed to provide financial support for all or a portion of the bonds to be issued by the District to finance the Regional Center. The financial support was documented by a contingent loan agreement. Construction on the Regional Center began shortly thereafter.

20. As construction work on the Regional Center progressed, unexpected building costs in late 2006 and early 2007 led to both cost overruns and a redesign to a smaller facility than originally planned. Global changed its projections in March 2007 to take into account that under the redesign the facility was to be smaller with fewer seats, but more luxury suites.

21. The City Council requested that the independent consultant perform a review of the new March 2007 projections for the downsized facility, and Williams asked the independent consultant to review the March 2007 projections in comparison with the independent consultant's 2006 report. In its resulting May 17, 2007 report, the independent consultant identified areas where it saw issues with Global's new projections and posed questions about the projections.

Among other items, the independent consultant questioned the unexpected increases in operations and maintenance costs and management fees and the unexplained "substantial" increase in food and beverage revenue projections. The independent consultant concluded that "[w]hile the [Regional] Center may very well still be economically viable even in a somewhat smaller configuration, the aforementioned anomalies in the new financial projections pose too many questions to be certain. . . . However, further review of the explanations for the referenced expense items and some of the revenue reductions may well still support the reduced size facility." The City provided the independent consultant's revised report to Global for Global's response. However, the independent consultant was never asked to and did not do any further review of any work product by Global.

22. The City Council reviewed the independent consultant's 2007 report and the Global response when it considered entering into a lease agreement required by the construction lender secured by Global. The lease agreement imposed onerous obligations on the District upon completion of the Regional Center. In particular, the District was obligated to purchase the Regional Center once construction was substantially complete, and if it was unable to do so, make substantial lease payments to the lender. The lease agreement obligated the City to back the lease payments in the event the District was unable to make them.

23. On May 24, 2007, the City Council voted to proceed with the Regional Center in a split vote with the City's former Mayor breaking the tie. Shortly thereafter, on May 29, 2007, the Board of the District also authorized the lease agreement. Construction, which had temporarily halted pending finalization of Global's construction loan after the prior contractor was unable to arrange financing, resumed in September 2007.

The Financing of the Regional Center

24. Contemporaneous with the design and construction of the Regional Center, Global, as the future operator of the Regional Center, worked to sell luxury suites and various other forms of premium seating, naming rights, and advertising that together constituted contractually obligated income ("COI"), an important component of the Regional Center's future revenue stream. In addition, Global worked to secure team tenants for the Regional Center.

25. As early as April 2008, Kozuback became concerned because COI sales were not as high as Global had anticipated, and in May 2008, Global began preparing new projections. On June 13, 2008, Global provided these new projections for use in preparing both the official statement for the bonds that the District intended to sell to finance the purchase of the Regional Center and for the budget for the Regional Center. In the June 2008 projections, Global significantly decreased the COI line item primarily due to the lack of sales to date. Global also reduced the projected cumulative net cash flow before taxes line item – the amount projected to be available to the District for debt service – by nearly 70% from the projections presented in 2007.

26. At the time Global presented its June 2008 projections, the District, with the assistance of its bond counsel and its initial underwriter, was working toward issuing bonds to purchase the Regional Center in the fall of 2008. The bond issue needed to be timed so as to have

the funds to purchase the Regional Center available by the time the Regional Center was substantially completed, which was anticipated for September 2008.

27. The District's underwriter at the time of the June 2008 projections advised the District that based upon Global's June 2008 numbers, the District bond issuance might be difficult. Shortly after receiving Global's June 2008 projections, the City's former Mayor and Williams urged Kozuback and Global's financial consultant to provide more optimistic numbers. The former Mayor and Williams held a conference call with Kozuback and Global's financial consultant, during which the former Mayor made an impassioned argument that Global's projections had not been sufficiently optimistic, that they knew the local citizens better than Global, and those citizens would ultimately support the Regional Center even though Global was experiencing weak ticket sales and other troubling indicators regarding anticipated revenue. After the conversation, Williams emailed Kozuback, "[t]o reiterate our conversation this [morning], if we were to recommend the current pro forma as a budget for consideration to the District, staff would not recommend approval. Based on the spreadsheet …sent earlier, there are a number of areas that are considerably out of line with your prior projections, upon which we based our endorsement of the project."

28. Prior to the District, Global was perceived to be a competent operator of events centers, but Global and Kozuback had limited experience forecasting revenues and virtually no experience with municipal offerings. Nonetheless, even though COI continued to be a problem for Global in June and July of 2008, on July 1, 2008 Global provided a set of revised projections in response to the plea for more optimistic numbers. The email from Global that attached the revised projections states, "As you will note the revenues increased significantly throughout the forecast. Yet we still think they are realistic." Upon receipt of the new Global numbers, Williams emailed the team working on the financing, stating, "[h]ere is the revised pro forma. It has been completely redone, so we'll be doing a fresh review on our end, but it looks closer to what is needed." However, the District's further review of the purportedly "realistic" projections was inadequate.

29. Both the June 2008 and the July 2008 projections presented by Global showed less cash flow than the numbers previously presented by Global and reviewed by the independent consultant in August 2006 and May 2007. According to the District, the projected cash available for debt service (cash flow before taxes and debt) changed from May 2007 as follows:

Date of Global projection	Cash Flow Before Taxes and Debt Service in Dollars
May 2007	1,210,207
June 13, 2008	370,245
July 1, 2008	839,365

30. After receiving the July 2008 projections, the District financing team, including Williams, bond counsel, and the District's initial underwriter, pushed forward with the bond issuance. Williams actively participated in the process by supplying information for the Preliminary Official Statement for the proposed bond issuance, participating in due diligence conference calls, and reading and commenting upon drafts of the Preliminary Official Statement.

In early September, the District's initial underwriter, having obtained credit ratings and finalized a Preliminary Official Statement deemed final by the District, attempted to sell the District's long term bonds.

31. However, in September of 2008, the global financial crisis made it impossible for the District to issue bonds as planned. In late September 2008, the District's initial underwriter reported to the City and the District that there was no access to the market and it was unable to underwrite the bonds at that time.

32. In early October 2008, Global's lender on the construction of the facility maintained that the Regional Center was substantially completed and therefore the first lease payment under the lease agreement was due on November 3, 2008.

33. Towery and Piper began working on the project on October 22, 2008, just more than three weeks before the District sold its BANs on November 13. Piper and Towery suggested several financing options, although only one, short-term BANs, was considered viable. BANs are short-term obligations issued by municipal entities that are expected to be repaid at a later time through the issuance of long-term bonds. As underwriter for the BANs, Piper agreed to purchase the BANs from the District and then offer the BANs for sale to investors. In November 2008, the District issued $41.77 million of three year BANs to finance the purchase of the Regional Center. The principal of the BANs was payable on December 1, 2011.

34. By the time Towery and Piper agreed to underwrite the BANs for the District, Piper's predecessor had already completed the Preliminary Official Statement for long term bonds which had received an investment grade rating. The Official Statement for the BANs was based on that Preliminary Official Statement, which included the same financial projections from Global and similar disclosures.

35. The Official Statement for the BANs included a section titled "Projected Regional Center Revenue and District Tax Revenue" which included the following language that was also in the Preliminary Official Statement for the aborted bond issue:

> No feasibility report on the [District] and Global's unaudited projected financial performance of the Regional Center has been prepared and the unaudited projected financial performance of the Regional Center has not been examined by any financial adviser or by any accounting or other firm in order to verify either the reasonableness of the assumptions used by the [District] and Global, the appropriateness of the preparation and presentation of the unaudited projected financial performance of the Regional Center or the conclusions contained in such unaudited projected financial performance of the Regional Center.

36. The Official Statement was materially false and misleading because the projected financial performance of the Regional Center had been examined twice by an independent consultant which raised questions about the Regional Center's economic viability in two separate reports.

37. The Official Statement was materially false and misleading because it failed to inform investors that Williams and the City's former Mayor had questioned the assumptions underlying Global's projections and asserted that the Wenatchee community would support the Regional Center, and that the projections contained within the Official Statement had been made more optimistic based upon the assertions made by Williams and the City's former Mayor.

38. The Official Statement for the BANs was materially false and misleading because the body of the Official Statement made no reference to the fact that the City's obligations under any contingent loan agreement would be limited by the City's remaining debt capacity. An initial draft of the Official Statement for the BANs contained a lightly revised paragraph from the Preliminary Official Statement prepared for the aborted bond offering, entitled "Contingent Loan Agreement - Limitation of Pledge." That paragraph disclosed that the City's obligation to make loans under the contingent loan agreement was limited by its remaining debt capacity of $19.3 million, and explicitly warned that "[s]hould the District encounter financial difficulties causing the District to be unable to pay debt service on the Revenue and Special Tax Notes when due, there is no guarantee that the City will have the capacity to make up the entire shortfall." This paragraph was not included in the body of the final Official Statement for the BANs. Since the BANs were to be paid at the end of December 2011 by bonds, the City's debt limits and potential limits to the City's ability to support a bond issuance designed to repay the notes were material to purchasers of the BANs.

39. The drafters of the Official Statement for the BANs apparently did not notice a second reference to how the obligations of the City under the Contingent Loan Agreement were limited by its debt capacity, hidden on page 5 of Appendix C under the caption "Limits on Amount of General Obligation Indebtedness," an otherwise generic description of the different limits on general obligation indebtedness of the City. This reference was factually inaccurate in that it referred to an obligation under the Contingent Loan Agreement to make loans to pay the principal of the BANs. Moreover, given the context and location of this reference, and the fact that the drafters themselves overlooked it, it did not constitute adequate disclosure to a reasonable investor.

40. At the closing for the BANs, Williams, as the Contracts Manager for the District, executed a Closing Certificate of the District, attesting that the Official Statement, "does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made therein in light of the circumstances under which they were made, not misleading." Under the terms of the Purchase Agreement with Piper, execution of the Closing Certificate of the District was a prerequisite to Piper's obligation to purchase the BANs.

41. The assertions in the Closing Certificate of the District were materially false. As discussed above, the Official Statement for the BANs contained statements of untrue fact and omitted material facts necessary in order to make the statements made therein in light of the circumstances under which they were made, not misleading.

42. At the closing for the BANs, Kozuback signed the Certificate of Global Entertainment Corporation that stated that the information in the Official Statement under the headings "THE GREATER WENATCHEE REGIONAL EVENTS CENTER--Global Entertainment Corporation" and "REVENUE AND TAX PROJECTIONS":

does not, contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements therein, in light of the circumstances under which they were made, not misleading.

43. The assertions in the Certificate of Global Entertainment Corporation were materially false. As discussed above, the Official Statement for the BANs contained statements of untrue fact and omitted material facts necessary in order to make the statements made therein in light of the circumstances under which they were made, not misleading.

44. The Respondents negligently failed to act with reasonable prudence in the issuance of the BANs. The Respondents knew about the independent consultant's reviews of the financial projections and the discussion Williams and the City's former Mayor had with Kozuback that resulted in the more optimistic July 2013 projections. Respondents also knew about the language of the Official Statement relating to the financial projections. The District and Williams knew that in the event the Regional Center's revenue was insufficient to support a bond issuance to take out the BANs and City support became necessary, the City's ability to support the takeout of the BANs was limited by the City's debt capacity. It was thus unreasonable for the District to issue the BANs, for Williams to sign the Closing Certificate of the District, and for Kozuback to sign the Certificate of Global Entertainment Corporation.

Legal Discussion

45. Section 17(a)(2) of the Securities Act makes it unlawful "in the offer or sale of any securities ... to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." Section 17(a)(3) of the Securities Act makes it unlawful "to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." The prohibitions of Sections 17(a)(2) and (a)(3) apply to the offer or sale of municipal securities. In order to establish a cause of action under Sections 17(a)(2) and 17(a)(3), the Commission must establish that: (1) the misrepresentations or omissions were material; and (2) the misrepresentations or omissions were in the offer or sale of securities. Aaron v. SEC, 446 U.S. 680 (1980). No finding of scienter is required to establish a violation of Sections 17(a)(2) and 17(a)(3); negligence is sufficient. Id. at 696-97. Negligence is a failure by an actor to conform conduct to the standard of "a reasonable [person] under like circumstances." See Restatement (Second) of Torts §§ 282 and 283. A misrepresentation or omission is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. See Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988). Industry standards at the time, as evidenced by, among other sources, the Government Finance Officers Association's 1991 "Disclosure Guidelines for State and Local Government Securities," suggest that Official Statements should include disclosure of financial feasibility reports or any other reports or studies known to the issuer that may have a significant bearing on the conclusion of feasibility of the project.

46. There is a substantial likelihood that a reasonable investor determining whether to purchase the BANs would attach importance to the disclosures in the Official Statement regarding

the examinations of and revisions to the financial projections for the Regional Center as well as information relating to the City's financial support for the BANs.

47. As a result of the conduct described above, the District, Global, and Kozuback violated Sections 17(a)(2) and (3) of the Securities Act and Williams violated Section 17(a)(3) of the Securities Act.

Undertakings

The District has undertaken to:

48. Within thirty (30) days of the entry of this Order, establish policies, procedures, and internal controls relating to disclosures in the offering of municipal securities and continuing disclosures pursuant to Rule 15c2-12 of the Securities Exchange Act of 1934 to ensure compliance with the federal securities laws, including the designation of an individual within the District responsible for ensuring compliance by the District of such policies, procedures, and internal controls.

49. Within sixty (60) days of the entry of this Order, implement active and ongoing training on a periodic basis for all personnel involved in municipal offerings or continuing disclosures, including all District Officers, on those newly established policies, procedures, and internal controls to ensure compliance with the federal securities laws.

50. Within ninety (90) days of the entry of this Order, the District shall file an affidavit with the Commission certifying its compliance with the undertakings according to the timelines set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and the District agrees to provide such evidence. The certification and supporting material shall be submitted to Cary S. Robnett, Assistant Director, Municipal Securities and Public Pensions Unit, Division of Enforcement, Securities and Exchange Commission, San Francisco Regional Office, 44 Montgomery Street, Suite 2800, San Francisco, CA 94104 or to her successor in office.

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

IV.

Accordingly, it is hereby ORDERED that:

The District

A. Pursuant to Section 8A of the Securities Act, the District shall cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) of the Securities Act.

B. The District shall comply with the undertakings enumerated in Section III above.

C. The District shall, within thirty (30) days of the entry of this Order, pay a civil money penalty in the amount of $20,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying the District as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Cary S. Robnett, Assistant Director, Municipal Securities and Public Pensions Unit, Division of Enforcement, Securities and Exchange Commission, 44 Montgomery St., Suite 2800, San Francisco, CA 94104.

Allison Williams

A. Pursuant to Section 8A of the Securities Act, Williams shall cease and desist from committing or causing any violations and any future violations of Section 17(a)(3) of the Securities Act.

Global

A. Pursuant to Section 8A of the Securities Act, Global shall cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) of the Securities Act.

B. Global shall, within thirty (30) days of the entry of this Order, pay a civil money penalty in the amount of $10,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Global as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Cary S. Robnett, Assistant Director, Municipal Securities and Public Pensions Unit, Division of Enforcement, Securities and Exchange Commission, 44 Montgomery St., Suite 2800, San Francisco, CA 94104.

Richard Kozuback

A. Pursuant to Section 8A of the Securities Act, Kozuback shall cease and desist from committing or causing any violations and any future violations of Section 17(a)(3) of the Securities Act.

B. Kozuback shall, within thirty (30) days of the entry of this Order, pay a civil money penalty in the amount of $10,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard

Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Kozuback as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Cary S. Robnett, Assistant Director, Municipal Securities and Public Pensions Unit, Division of Enforcement, Securities and Exchange Commission, 44 Montgomery St., Suite 2800, San Francisco, CA 94104.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9472 / November 5, 2013

SECURITIES EXCHANGE ACT OF 1934
Release No. 70804 / November 5, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15603

In the Matter of

Piper Jaffray &Co.
and Jane Towery

Respondents.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTIONS 15(b) AND 15(B)(c) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

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 Section 8A of the Securities Act of 1933 ("Securities Act") and Sections 15(b) and 15(B)(c)(2) of the Securities Exchange Act of 1934 ("Exchange Act") against Piper Jaffray & Co. ("Piper"), and that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act and Sections 15(b) and 15(B)(c)(4) of the Exchange Act against Jane Towery ("Towery").

II.

In anticipation of the institution of these proceedings, Piper and Towery have 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 them and the subject matter of these proceedings, which are admitted, Piper and Towery consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b) and 15(B)(c) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No.

SECURITIES EXCHANGE ACT OF 1934
Release No.

ADMINISTRATIVE PROCEEDING
File No.

In the Matter of Piper Jaffray &Co. and Jane Towery Respondents.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTIONS 15(b) AND 15(B)(c) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

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 Section 8A of the Securities Act of 1933 ("Securities Act") and Sections 15(b) and 15(B)(c)(2) of the Securities Exchange Act of 1934 ("Exchange Act") against Piper Jaffray & Co. ("Piper"), and that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act and Sections 15(b) and 15(B)(c)(4) of the Exchange Act against Jane Towery ("Towery").

II.

In anticipation of the institution of these proceedings, Piper and Towery have 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 them and the subject matter of these proceedings, which are admitted, Piper and Towery consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b) and 15(B)(c) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Piper and Towery's Offer, the Commission finds[1] that:

Summary

1. In 2011, the Greater Wenatchee Regional Events Center Public Facilities District ("District") defaulted on $41.77 million in Bond Anticipation Notes ("BANs") it had issued in November 2008 to finance a multi-use arena and ice hockey rink (the "Regional Center") located in the City of Wenatchee, Washington (the "City"). Piper Jaffray & Co. ("Piper") served as the sole underwriter for the BANs and Jane Towery was the lead investment banker. The Official Statement for the BANs was materially false and misleading.

2. Piper was hired by the District as underwriter as a last minute replacement for a predecessor underwriting firm. The predecessor firm had been working with the District for over a year and had completed a Preliminary Official Statement for long-term bonds which had received an investment grade rating. That predecessor firm withdrew in September 2008 after the global financial crisis prevented access to the bond market and the firm was unable to complete the financing. Piper's engagement with the District started on October 27, 2008. By the time Piper became the underwriter on the deal, the City and the District were desperate to find financing for the Regional Center within a month because of onerous lease payments being demanded by the construction lender. Piper and Towery suggested several financing options, although only one, short-term BANs, was considered viable. The District determined to issue three year BANs that would mature in 2011, with the principal of the BANs to be repaid solely through the issuance of long-term bonds.

3. In this compressed time frame, Piper and Towery conducted inadequate due diligence and, as a result, failed to form a reasonable basis for believing the truthfulness and completeness of material statements in the Official Statement. The Official Statement for the BANs was a lightly revised version of the Preliminary Official Statement prepared by Piper's predecessor and the District's bond counsel that included similar disclosures and relied on the same projections for the Regional Center provided by Global Entertainment Corporation ("Global"), the company hired to develop and manage the Regional Center. Piper and Towery conducted a cursory inquiry into the projections provided by Global, did not inquire about prior projections or revisions, and did not ask to see an independent consultant's review of the projections despite being made aware of its existence, depriving BAN purchasers of material information relating to the revenue projections, the first source of payment for the majority of the BANs.

4. In fact, an independent consultant had been asked to review Global's earlier projections and had raised questions about the Regional Center's economic viability. Despite two

[1] The findings herein are made pursuant to Piper and Towery's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

separate reviews of prior Global projections by the independent consultant, the Official Statement presented the most recent version of Global's projections along with a false and misleading statement to the effect that no financial advisor, accounting or other firm had examined those projections to verify the reasonableness of Global's assumptions or its conclusions.

5. Moreover, Piper and Towery were unaware that the projections in the Official Statement had been revised upward from projections generated a few months earlier after a claim by the City's former Mayor and the District's Contract Manager Allison Williams that Global's projections were inconsistent with its prior projections and not sufficiently optimistic. During a conference call with Global's President Richard Kozuback and Global's financial consultant (with Williams' participation), the City's former Mayor made an impassioned argument that they knew the local citizens better than Global, and those citizens would ultimately support the Regional Center even though Global was experiencing weak ticket sales and other troubling indicators regarding anticipated revenue. Global revised its projections upward and those more optimistic revised projections were included in the Official Statement, without disclosing that the City's former Mayor or Williams had questioned the assumptions underlying the prior set of projections, or that Global had relied on the former Mayor's verbal assertions of future community support.

6. Piper and Towery stated that they focused their due diligence efforts on a contingent loan agreement entered into by the City that operated as a backstop for the payment of the interest (but not the principal) on the BANs and, in particular, the City's ability to make payments if necessary. Under that contingent loan agreement, the City was obligated to loan to the District funds to pay interest on the BANs in the event the District's revenues were insufficient. Nonetheless, a paragraph in the body of the predecessor's Preliminary Official Statement that highlighted how the City's low remaining debt capacity constrained its obligations under that contingent loan agreement was deleted from the body of the Official Statement for the BANs, thereby misleading BAN purchasers concerning the likelihood of permanent financing.

7. The Regional Center's financial results for 2008 through 2011 were worse than Global's most pessimistic projections, with the Regional Center operating at a significant net operating loss. Moreover, after the City filed a validation proceeding, the Chelan County, Washington, Superior Court ruled in 2011 that obligations under a contingent loan agreement constituted "indebtedness" within the meaning of the State constitution and therefore would be limited to the City's remaining debt capacity of $19.3 million, as the deleted disclosure language had warned. Consequently, the District was unable to issue long-term bonds, and the District defaulted on the payment of principal on the BANs in December 2011.

8. The Washington State Legislature subsequently passed legislation to help the District cure its default by allowing the City to impose an additional sales tax without voter approval and further allowing the District to submit to voters a proposition to impose an additional sales tax. The voters of the District later approved an additional sales tax. On September 28, 2012, the District sold long-term bonds secured solely by sales tax revenues to refinance the BANs.

9. As a result of the negligent conduct described herein Piper and Towery willfully violated Sections 17(a)(2) and (3) of the Securities Act.[2]

Respondents

10. Piper Jaffray & Co. is a Delaware corporation formed on July 28, 1969 that is headquartered in Minneapolis, Minnesota. It has been registered with the Commission as a broker-dealer since 1969. Piper served as the sole underwriter for the BANs.

11. Jane Towery, age 60, of Seattle, Washington, has been a public finance investment banker and Managing Director at Piper since joining the firm in 2006, and had previously worked in a similar capacity at another firm for over twenty years. Towery received an M.B.A. from the University of Washington in 1981. She possesses Series 7 and 63 FINRA licenses.

Other Relevant Entities

12. The Greater Wenatchee Regional Events Center Public Facilities District is a municipal corporation formed in 2006 pursuant to Washington state law by nine Washington cities and counties in order to fund the Regional Center. The District issued $41.77 million of BANs in November 2008 to finance the purchase of the Regional Center. The District defaulted on the BANs in 2011.

13. Allison Williams, age 48, of Wenatchee, Washington, has served as the Executive Services Director of the City of Wenatchee, Washington since 2005. From 1998 to 2005, Williams worked for the City as a community planner in the Department of Community Development. Pursuant to an agreement between the City and the District, and at the direction of the City's former Mayor, Williams served as a senior staff member for the District, with the title "Contracts Manager," from its formation through September 2009.

14. Global Entertainment Corporation is a Nevada corporation headquartered in Arizona. Global served as the developer and initial operator of the Regional Center. At the time the Regional Center was under construction, Global had developed and was managing facilities in Rio Rancho, New Mexico and Prescott Valley, Arizona. Global had also completed development of, but did not manage, facilities in Broomfield , Colorado; Youngstown, Ohio; Larimer County, Colorado; and Hidalgo, Texas. Global engaged a financial consultant to assist it in preparing financial projections for the Regional Center project.

15. Richard Kozuback, age 60, of Chelan, Washington, has been the President and CEO of Global since 2001.

[2] A willful violation of the securities laws means merely "'that the person charged with the duty knows what he is doing.'" Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "'also be aware that he is violating one of the Rules or Acts.'" Id. (quoting Gearhart & Otis, Inc. v. SEC, 348 F.2d 798, 803 (D.C. Cir. 1965)).

Background on the District

16. In 2006, the City and eight neighboring municipalities and counties formed the District and the District in turn entered into a contract with Global to develop the Regional Center.

17. Within the District, the City took on primary responsibility for managing the development and the construction of the Regional Center. The City Council requested that an independent consultant be brought in to review the Regional Center project and the financial projections provided by Global in August 2006 and compare it to other facilities, so as to get an understanding of whether the project could work in the City.

18. On August 23, 2006, the independent consultant submitted its first report. According to the 2006 report, the scope of the independent consultant's work was "to prepare an impartial third party review of the reasonableness of [Global's] financial projections to ensure the financial pro-forma presented to the City is realistic and attainable." In the 2006 report, the independent consultant indicated there could be an operating deficit at the Regional Center. Among other things, the independent consultant concluded Global's projection regarding one key metric, annual net operating income, was possibly overstated by $200,000 to $300,000 or by 16% to 25% in the first year.

19. In September 2006, the City Council approved the execution of an interlocal agreement with the newly formed District pursuant to which the City agreed to provide financial support for all or a portion of the bonds to be issued by the District to finance the Regional Center. The financial support was documented by a contingent loan agreement. Construction on the Regional Center began shortly thereafter.

20. As construction work on the Regional Center progressed, unexpected building costs in late 2006 and early 2007 led to both cost overruns and a redesign to a smaller facility than originally planned. Global changed its projections in March 2007 to take into account that under the redesign the facility was to be smaller with fewer seats, but more luxury suites.

21. The City Council requested that the independent consultant perform a review of the new March 2007 projections for the downsized facility in comparison with the independent consultant's 2006 report. In its resulting May 17, 2007 report, the independent consultant identified areas where it saw issues with Global's new projections and posed questions about the projections. Among other items, the independent consultant questioned the unexpected increases in operations and maintenance costs and management fees and the unexplained "substantial" increase in food and beverage revenue projections. The independent consultant concluded that "[w]hile the [Regional] Center may very well still be economically viable even in a somewhat smaller configuration, the aforementioned anomalies in the new financial projections pose too many questions to be certain. . . . . However, further review of the explanations for the referenced expense items and some of the revenue reductions may well still support the reduced size facility." The City provided the independent consultant's revised report to Global for Global's response. However, the independent consultant was never asked to and did not do any further review of any work product by Global.

22. The City Council reviewed the independent consultant's 2007 report and the Global response when it considered entering into a lease agreement required by the construction lender secured by Global. The lease agreement imposed onerous obligations on the District upon completion of the Regional Center. In particular, the District was obligated to purchase the Regional Center once construction was substantially complete, and if it was unable to do so, make substantial lease payments to the lender. The lease agreement obligated the City to back the lease payments in the event the District was unable to make them.

23. On May 24, 2007, the City Council voted to proceed with the Regional Center in a split vote with the City's former Mayor breaking the tie. Shortly thereafter, on May 29, 2007, the Board of the District also authorized the lease agreement. Construction, which had temporarily halted pending finalization of Global's construction loan after the prior contractor was unable to arrange financing, resumed in September 2007.

The Financing of the Regional Center

24. Contemporaneous with the design and construction of the Regional Center, Global, as the future operator of the Regional Center, worked to sell luxury suites and various other forms of premium seating, naming rights, and advertising that together constituted contractually obligated income ("COI"), an important component of the Regional Center's future revenue stream. In addition, Global worked to secure team tenants for the Regional Center.

25. As early as April 2008, Kozuback became concerned because COI sales were not as high as Global had anticipated, and in May 2008, Global began preparing new projections. On June 13, 2008, Global provided these new projections for use in preparing both the official statement for the bonds that the District intended to sell to finance the purchase of the Regional Center and for the budget for the Regional Center. In the June 2008 projections, Global significantly decreased the COI line item primarily due to the lack of sales to date. Global also reduced the projected cumulative net cash flow before taxes line item – the amount projected to be available to the District for debt service – by nearly 70% from the projections presented in 2007.

26. At the time Global presented its June 2008 projections, the District, with the assistance of its bond counsel and its initial underwriter, was working toward issuing bonds to purchase the Regional Center in the fall of 2008. The bond issue needed to be timed so as to have the funds to purchase the Regional Center available by the time the Regional Center was substantially completed, which was anticipated for September 2008.

27. The District's underwriter at the time of the June 2008 projections advised the District that based upon Global's June 2008 numbers, the District bond issuance might be difficult. Shortly after receiving Global's June 2008 projections, the City's former Mayor and Williams urged Kozuback and Global's financial consultant to provide more optimistic numbers. The former Mayor and Williams held a conference call with Kozuback and Global's financial consultant, during which the former Mayor made an impassioned argument that Global's projections had not been sufficiently optimistic, that they knew the local citizens better than Global, and those citizens would ultimately support the Regional Center even though Global was experiencing weak ticket sales and other troubling indicators regarding anticipated revenue. After

the conversation, Williams emailed Kozuback, "[t]o reiterate our conversation this [morning], if we were to recommend the current pro forma as a budget for consideration to the District, staff would not recommend approval. Based on the spreadsheet ... sent earlier, there are a number of areas that are considerably out of line with your prior projections, upon which we based our endorsement of the project."

28. Prior to the District, Global was perceived to be a competent operator of events centers, but Global and Kozuback had limited experience forecasting revenues and virtually no experience with municipal offerings. Nonetheless, even though COI continued to be a problem for Global in June and July of 2008, on July 1, 2008 Global provided a set of revised projections in response to the plea for more optimistic numbers. The email from Global that attached the revised projections states, "As you will note the revenues increased significantly throughout the forecast. Yet we still think they are realistic." Upon receipt of the new Global numbers, Williams emailed the team working on the financing, stating, "[h]ere is the revised pro forma. It has been completely redone, so we'll be doing a fresh review on our end, but it looks closer to what is needed." However, the District's further review of the purportedly "realistic" projections was inadequate.

29. Both the June 2008 and the July 2008 projections presented by Global showed less cash flow than the numbers previously presented by Global and reviewed by the independent consultant in August 2006 and May 2007. According to the District, the projected cash available for debt service (cash flow before taxes and debt) changed from May 2007 as follows:

Date of Global projection	Cash Flow Before Taxes and Debt Service in Dollars
May 2007	1,210,207
June 13, 2008	370,245
July 1, 2008	839,365

30. After receiving the July 2008 projections, the District financing team, including Williams, bond counsel, and the District's initial underwriter, pushed forward with the bond issuance. In early September, the District's initial underwriter, having obtained credit ratings and finalized a Preliminary Official Statement deemed near final by the District, attempted to sell the District's long-term bonds.

31. However, in September of 2008, the global financial crisis made it impossible for the District to issue bonds as planned. In late September 2008, the District's initial underwriter reported to the City and the District that there was no access to the market and it was unable to underwrite the bonds at that time.

32. In early October 2008, Global's lender on the construction of the facility maintained that the Regional Center was substantially completed and therefore the first lease payment under the lease agreement was due on November 3, 2008.

33. Towery and Piper began working on the project on October 22, 2008, just more n three weeks before the District sold its BANs on November 13. Piper and Towery suggested

several financing options, although only one, short-term BANs, was considered viable. BANs are short-term obligations issued by municipal entities that are expected to be repaid at a later time through the issuance of long-term bonds. As underwriter for the BANs, Piper agreed to purchase the BANs from the District and then offer the BANs for sale to investors. In November 2008, the District issued $41.77 million of three year BANs to finance the purchase of the Regional Center. The principal of the BANs was payable on December 1, 2011.

34. By the time Towery and Piper agreed to underwrite the BANs for the District, Piper's predecessor had already completed the Preliminary Official Statement for long-term bonds which had received an investment grade rating. The Official Statement for the BANs was based on that Preliminary Official Statement, which included the same financial projections from Global and similar disclosures. Piper incorporated all modifications from the Preliminary Official Statement for the long-term bonds to the Official Statement for the BANs, including modifications submitted by other parties, as it maintained the master electronic version of the document after being hired by the District. Towery and Piper did little to verify significant portions of the content, implicitly relying on the efforts of others. Nevertheless, Towery and Piper never contacted the other underwriter and never determined the extent of its due diligence activities.

35. In 2008, Piper's due diligence policies and procedures provided limited guidance to its bankers relating to due diligence. Piper's Fixed Income Policy and Procedure Manual contained a short section on the evaluation of issuers and a short section on due diligence documentation. Both sections left the banker on a particular transaction to decide on an appropriate due diligence plan and did not require a written plan or a supervisory review. Piper's policies and procedures in 2008 required that a form entitled Public Finance Closed File Checklist be completed and signed by the senior banker on a transaction after the transaction was complete. According to Towery, Piper's due diligence policies and procedures required that she review the documents listed on the form, including feasibility reports and pro formas, but Towery was not aware of any additional due diligence requirements under Piper's policies. Towery did not ask for or review all the required documents, including the independent consultant's report that she believed at the time was a feasibility report and the various pro formas prepared by Global. Piper did not have policies and procedures reasonably designed to ensure that Towery's due diligence was appropriate or that she followed Piper's policies and procedures.

36. Although the Official Statement listed Regional Center revenues as the first source of payment for the majority of the BANs, Piper and Towery stated that they focused their due diligence on a contingent loan agreement entered into by the City and the District that operated as a backstop for the payment of interest on the BANs and, in particular, the City's ability to make payments if necessary. Towery conducted only a cursory inquiry into the projections provided by Global. Towery had no contact with Global. She did not review the Global projections that were used for the drafting of the Preliminary Official Statement for the failed bond offering to check for accuracy; she simply read what was in the Preliminary Official Statement that she requested from Williams. Towery did not check with Global to see if the projections or the financials underlying the projections had changed since the drafting of the Preliminary Official Statement. She was not aware of the various changes in Global's projections from May 2007 to June 2008 to July 2008. She was not aware of the June 2008 discussion between the former Mayor and Williams and

Kozuback and Global's financial consultant that prompted the more optimistic July 2008 projections.

37. Towery conducted no due diligence regarding Global's business. Towery failed to review Global's SEC filings; she failed to investigate other current and past projects Global worked on; she failed to ascertain whether Global was involved in any lawsuits; and she did not determine whether Global was a profitable company.

38. Towery disregarded the work performed by the independent consultant. Although Towery learned of at least one of the independent consultant's reports from Williams, she did not ask to see the studies to determine their relevance or their impact on the adequacy of the Official Statement.

39. Towery's due diligence consisted of reviewing the following documents: the Preliminary Official Statement, the contingent loan agreement and various agreements among members of the District and between the City and the District, the City's financial statements, sales tax collection histories received from the City, and rating reports on the unissued bonds. Towery also researched the City's most recent bond offering and financial statements. Towery and Piper spoke to bond counsel, Williams, and another City employee performing services for the District about the documents reviewed by Towery. Towery's only substantive changes to the Preliminary Official Statement were changes to reflect the issuance of BANs rather than bonds. Although bond counsel was involved in making changes to the Preliminary Official Statement, Piper never asked for, nor received, an opinion from bond counsel as to the accuracy or completeness of the Official Statement for the BANs.

40. According to Towery, the City's ability to loan money to the District in the event of a District shortfall was the most important aspect of the offering and this is where she focused her due diligence. But Towery failed to realize that the Official Statement for the BANs was materially false and misleading because the body of the Official Statement did not disclose that the City's obligations under a contingent loan agreement for any future long-term bonds could be limited by the City's remaining debt capacity. An initial draft of the Official Statement for the BANs contained a lightly revised paragraph from the Preliminary Official Statement prepared for the aborted long-term bond offering, entitled "Contingent Loan Agreement - Limitation of Pledge." That paragraph disclosed that the City's obligation to make loans under the contingent loan agreement was limited by its remaining debt capacity of $19.3 million, and explicitly warned that "[s]hould the District encounter financial difficulties causing the District to be unable to pay debt service on the Revenue and Special Tax Notes when due, there is no guarantee that the City will have the capacity to make up the entire shortfall." This paragraph was not included in the body of the final Official Statement for the BANs. Since the BANs were to be paid at the end of December 2011 by bonds, the City's debt limits and potential limits to the City's ability to support a bond issuance designed to repay the notes were material to purchasers of the BANs.

41. The drafters of the Official Statement for the BANs apparently did not notice a second reference to how the obligations of the City under the Contingent Loan Agreement were limited by its debt capacity, hidden on page 5 of Appendix C under the caption "Limits on Amount General Obligation Indebtedness," an otherwise generic description of the different limits on

general obligation indebtedness of the City. This reference was factually inaccurate in that it referred to an obligation under the Contingent Loan Agreement to make loans to pay the principal of the BANs. Moreover, given the context and location of this reference, it did not constitute adequate disclosure to a reasonable investor.

42. The Official Statement for the BANs included a section titled "Projected Regional Center Revenue and District Tax Revenue" which included the following language that was also in the Preliminary Official Statement for the aborted bond issue:

> No feasibility report on the [District] and Global's unaudited projected financial performance of the Regional Center has been prepared and the unaudited projected financial performance of the Regional Center has not been examined by any financial adviser or by any accounting or other firm in order to verify either the reasonableness of the assumptions used by the [District] and Global, the appropriateness of the preparation and presentation of the unaudited projected financial performance of the Regional Center or the conclusions contained in such unaudited projected financial performance of the Regional Center.

43. The Official Statement was materially false and misleading because the projected financial performance of the Regional Center had been examined twice by an independent consultant which raised questions about the Regional Center's economic viability in two separate reports.

44. The Official Statement was materially false and misleading because it failed to inform investors that Williams and the City's former Mayor had questioned the assumptions underlying Global's projections and asserted that the Wenatchee community would support the Regional Center, and that the projections contained within the Official Statement had been made more optimistic based upon the assertions made by Williams and the City's former Mayor.

45. Piper, which received $146,195 for underwriting the BANs, negligently recommended and sold the BANs to its customers notwithstanding its failure to form a reasonable basis for believing the truthfulness of key statements contained in the Official Statement for the BANs.

Legal Discussion

46. Section 17(a)(2) of the Securities Act makes it unlawful "in the offer or sale of any securities ... to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." Section 17(a)(3) of the Securities Act makes it unlawful "to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." The prohibitions of Sections 17(a)(2) and (a)(3) apply to the offer or sale of municipal securities. In order to establish a cause of action under Sections 17(a)(2) and 17(a)(3), the Commission must establish that: (1) the misrepresentations or omissions were material; and (2) the misrepresentations or omissions were in

the offer or sale of securities. Aaron v. SEC, 446 U.S. 680 (1980). No finding of scienter is required to establish a violation of Sections 17(a)(2) and 17(a)(3); negligence is sufficient. Id. at 696-97. Negligence is a failure by an actor to conform conduct to the standard of "a reasonable [person] under like circumstances." See Restatement (Second) of Torts §§ 282 and 283. A misrepresentation or omission is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. See Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988).

47. "By participating in an offering, an underwriter makes an implied recommendation about the securities [that it] . . . has a reasonable basis for belief in the truthfulness and completeness of the key representations made in any disclosure documents used in the offerings." Dolphin and Bradbury, Inc. v. SEC, 512 F.3d 634, 641 (D.C. Cir. 2008) (quoting Municipal Securities Disclosure, Exchange Act Rel. No. 26100, 1988 SEC LEXIS 2619 at *53 (Sept. 22, 1988), 53 Fed. Reg. 37778 (Sept. 28, 1988) ("1988 Proposing Release")). An underwriter "occupies a vital position" in a securities offering because investors rely on its reputation, integrity, independence, and expertise. Id. at 641-2 (rejecting underwriter's argument that he would have disclosed the information "to investors if they had only asked him the right questions" and stating that "underwriters have a 'heightened obligation' to ensure adequate disclosure . . ."); see also 1988 Proposing Release, 53 Fed. Reg. at 37787.

48. In negotiated municipal offerings, where the underwriter is involved in the preparation of the official statement, development of a reasonable basis for belief in the accuracy and completeness of the statements therein should involve an inquiry into its key representations. 53 Fed. Reg. at 37789. "Sole reliance on the representations of the issuer [will] not suffice." Id. An underwriter must investigate and disclose material facts that are known or "reasonably ascertainable." Id. at 37787. While broker-dealers must have a reasonable basis for recommending securities to customers, underwriters have a "heightened obligation" to take steps to ensure adequate disclosure. Id. at 37788 n.74; Dolphin and Bradbury, Inc., 512 F.3d at 642; see also SEC v. GLT Dain Rauscher, Inc., 254 F.3d 852, 858 (9th Cir. 2001) (holding that municipal underwriter "had a duty to make an investigation that would provide him with a reasonable basis for a belief that the key representations in the statements provided to the investors were truthful and complete"). Industry standards at the time, as evidenced by, among other sources, the Government Finance Officers Association's 1991 "Disclosure Guidelines for State and Local Government Securities," suggest that Official Statements should include disclosure of financial feasibility reports or any other reports or studies known to the issuer that may have a significant bearing on the conclusion of feasibility of the project.

49. There is a substantial likelihood that a reasonable investor determining whether to purchase the BANs would attach importance to the disclosures in the Official Statement regarding the examinations of and revisions to the financial projections for the Regional Center as well as information relating to the City's financial support for the BANs, including support for the issuance of long-term bonds to repay the BANs.

50. Based on the conduct described above, Piper and Towery willfully violated Sections 17(a)(2) and (3) of the Securities Act.

Piper's Remedial Efforts

51. In September 2012, the District issued long-term bonds to retire the BANs, including principal along with interest from the date of default. Prior to the sale of the long-term bonds to refinance the BANs, on September 10, 2012, Piper entered into a settlement agreement with the District and others pursuant to which Piper underwrote the 2012 bonds at a reduced underwriting discount and made a settlement payment to the District.

52. In December 2012, Piper revised its due diligence policies and procedures, including various due diligence checklists, and conducted training of Piper's banking personnel, including Towery.

53. In determining to accept Respondents' Offer, the Commission considered remedial acts undertaken by Piper.

Undertakings

Towery has undertaken to:

54. Limit her activities as an associated person of a broker-dealer or municipal advisor for twelve months, commencing immediately upon entry of this Order, by refraining from:

(i) any contact with any existing or prospective municipal issuer client or customer, either directly or indirectly through any such issuer representative, agent, or counsel, for the purpose, in whole or in part, of conducting, maintaining, or developing business; and

(ii) making decisions on behalf of a broker-dealer in connection with any due diligence activities.

Piper has undertaken to:

55. Retain at its expense and within thirty (30) days of the entry of this order, an independent consultant (the "Consultant") not unacceptable to the staff of the Division of Enforcement ("Commission Staff") to (1) review Piper's municipal underwriting due diligence policies and procedures to ensure compliance with the federal securities laws; and (2) review Piper's supervisory policies and procedures relating to municipal underwriting due diligence to ensure compliance with the federal securities laws.

56. Require the Consultant to complete its review and submit a written report (the "Report") to Piper and the Commission Staff within ninety (90) days of the issuance of this Order. Piper shall require that the Report describe the review performed, the conclusions reached, and recommendations for any changes in or improvements to Piper's municipal underwriting due diligence and/or supervisory policies and procedures, including but not limited to policies and procedures related to written due diligence plans, training, record-keeping, monitoring, rification, and the adequacy of the time budgeted to conduct due diligence.

57. Within thirty (30) days of receiving the Report, adopt and implement all recommendations contained in the Report; provided, however, that as to any recommendation that Piper considers to be, in whole or in part, unduly burdensome or impractical, Piper may submit in writing to the Consultant, within thirty (30) days of receiving the Report, an alternative policy, practice, or procedure designed to achieve the same objective or purpose. Within forty-five (45) days of receiving the Report, Piper and the Consultant shall attempt in good faith to reach an agreement relating to each recommendation that Piper considers to be unduly burdensome or impractical. Piper shall ultimately abide by the determination of the Consultant.

58. Require the Consultant to enter into an agreement that provides that for the period of the 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 Piper, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. The agreement will also provide that the Consultant will require that any firm with which the Consultant is affiliated or of which the Consultant is a member, and any person engaged to assist the Consultant in performance of the Consultant's duties under this Order shall not, without prior written consent of Commission Staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Piper, 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.

59. To ensure the independence of the Consultant, Piper shall not have the authority to terminate the Consultant without prior written approval of Commission Staff and shall compensate the Consultant and persons engaged to assist the Consultant for services rendered pursuant to this Order at their reasonable and customary rates.

60. To certify, in writing, compliance with the undertakings according to the timelines set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission Staff may make reasonable requests for further evidence of compliance, and Piper agrees to provide such evidence. The certification and supporting material shall be submitted to Cary S. Robnett, Assistant Director, Municipal Securities and Public Pensions Unit, Division of Enforcement, Securities and Exchange Commission, San Francisco Regional Office, 44 Montgomery Street, Suite 2800, San Francisco, CA 94104 or to her successor in office no later than sixty (60) days from the receipt of the Consultant's report. Piper would certify continued compliance with all of the undertakings on the one year and two year anniversaries of Piper's initial compliance certification. Each of the certifications will address Piper's adherence to the Independent Consultant's recommendations regarding due diligence and due diligence supervision.

61. Preserve, for a period of not less than five (5) years from the date of the Order, the first two years in an easily accessible place, any record of their compliance with the undertakings set forth herein.

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 Respondents' Offer.

Accordingly, pursuant Section 8A of the Securities Act and Sections 15(b) and 15(B)(c) of the Exchange Act, it is hereby ORDERED that:

Piper

A. Piper shall cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and (3) of the Securities Act.

B. Piper is censured.

C. Piper shall, within (10) days of the entry of this Order, pay a civil money penalty in the amount of $300,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Piper as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Cary S. Robnett, Assistant Director, Municipal Securities and Public Pensions Unit, Division of Enforcement, Securities and Exchange Commission, San Francisco Regional Office, 44 Montgomery Street, Suite 2800, San Francisco, CA 94104.

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

Towery

A. Towery shall cease and desist from committing or causing any violations and any ure violations of Sections 17(a)(2) and (3) of the Securities Act.

B. Towery is censured.

C. Towery shall, within (10) days of the entry of this Order, pay a civil money penalty in the amount of $25,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Towery as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Cary S. Robnett, Assistant Director, Municipal Securities and Public Pensions Unit, Division of Enforcement, Securities and Exchange Commission, San Francisco Regional Office, 44 Montgomery Street, Suite 2800, San Francisco, CA 94104.

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3710 / November 5, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15604

In the Matter of **RESOURCES PLANNING GROUP, INC.,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(e) 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(e) of the Investment Advisers Act of 1940 ("Advisers Act") against Resources Planning Group, Inc. ("Respondent" or "Respondent RPG").

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 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(e) of the Investment Advisers Act of 1940, 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. Respondent RPG is an investment adviser registered with the Commission since 2001 with its principal place of business in Chicago, Illinois.

2. On September 16, 2013, a judgment was entered by consent against Respondent RPG, permanently enjoining it from future violations of Sections 206(1) and 206(2) of the Advisers Act, in the civil action entitled Securities and Exchange Commission v. Resources Planning Group, Inc. and Joseph J. Hennessy, Civil Action Number 12-CV-9509, in the United States District Court for the Northern District of Illinois.

3. The Commission's complaint alleges that between at least February 2007 and April 2012, RPG engaged in a fraudulent scheme and violated its fiduciary duty to its clients in connection with the sale of promissory notes and units in the Midwest Opportunity Fund, LLC ("MOF"), a private equity fund that Joseph J. Hennessy ("Hennessy"), an RPG co-owner and principal, co-founded in 2004. The complaint further alleges that Hennessy made misrepresentations about the nature and prospects of the MOF investment and failed to inform investors about the existence of MOF promissory notes that Hennessy had personally guaranteed. The complaint also alleges that Hennessy misappropriated investor funds to make MOF debt payments, and otherwise engaged in a variety of conduct which operated as a fraud and deceit on 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 RPG's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(e) of the Advisers Act that the registration of Respondent RPG be, and hereby is, revoked.

By the Commission.

Elizabeth M. Murphy
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. 70814 / November 5, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15606

In the Matter of

JOSEPH SORBARA

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 Joseph Sorbara ("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, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and 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.

III.

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

1. Sorbara, age 53, is a resident of New York. From 1993 to 2008, Sorbara was a principal owner and registered representative associated with Joseph Stevens & Company, Inc. ("Joseph Stevens"), a broker-dealer formerly registered with the Commission. Sorbara has held Series 7, 24 and 63 securities licenses.

2. On September 23, 2011, Sorbara was criminally convicted of Attempted Enterprise Corruption in violation of Section 460.20(1)(a) of the New York Penal Law, Grand Larceny in the Third Degree in violation of Section 155.35 of the New York Penal Law, Criminal Possession of Stolen Property in the Third Degree in violation Section 165.50 of the New York Penal Law and Securities Fraud in violation of Sections 352-c(5) and (6) of the New York General Business Law, upon the entry of his guilty plea by the Supreme Court of the State of New York in The State of New York v. Joseph Sorbara et. al., Indictment No. 2394/2009. Sorbara was sentenced to 363 days in prison and ordered to pay $1 million in restitution.

3. According to the plea allocution upon which the criminal conviction was based, Sorbara, acting as a principal owner of Joseph Stevens, and others, engaged in a pattern of criminal activity involving buying and selling over-the-counter stocks on behalf of the firm's retail customers that included: (1) providing blocks of stock to the firms traders; (2) the accumulation of blocks of stock by the firm traders for the purposes of generating extra commissions on stocks in which the firm made markets; and (3) not disclosing to firm customers the relevant trading information and true price of the stocks.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Sorbara be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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.

Elizabeth M. Murphy
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. 70815 / November 5, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15607

In the Matter of **STEVEN MARKOWITZ,** **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 Steven Markowitz ("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, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and 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.

III.

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

1. Markowitz, age 51, is a resident of New York. From 1993 to 2008, Markowitz was a principal owner and registered representative associated with Joseph Stevens & Company, Inc. ("Joseph Stevens"), a broker-dealer formerly registered with the Commission. Markowitz has held Series 7, 24 and 63 securities licenses.

2. On October 12, 2011, Markowitz was criminally convicted of Attempted Enterprise Corruption in violation of Section 460.20(1)(a) of the New York Penal Law, Grand Larceny in the Third Degree in violation of Section 155.35 of the New York Penal Law, Criminal Possession of Stolen Property in the Third Degree in violation of Section 165.50 of the New York Penal Law, Securities Fraud in violation of Sections 352-c(5) and (6) of the New York General Business Law and Falsifying Business Records in the First Degree in violation of Section 175.10 of the New York Penal Law, upon the entry of his guilty plea by the Supreme Court of the State of New York in The State of New York v. Steven Markowitz et. al., Indictment Nos. 2394/2009 and 4804/2011. Markowitz was sentenced to 6 months in prison and ordered to pay $1 million in restitution.

3. According to the plea allocution upon which the criminal conviction was based, Markowitz, acting as a principal owner of Joseph Stevens, and others engaged in a pattern of criminal activity involving buying and selling over-the-counter stocks on behalf of the firm's retail customers. Specifically, Markowitz provided blocks of stock to firm traders so that traders could manipulate the price of the shares higher before selling them to firm customers. Markowitz was aware that relevant trading information and the true price of the stock was not disclosed to the customer and that the trades were being executed solely for the purpose of generating profits for the firm and undisclosed commissions for its traders. In addition, Markowitz was criminally convicted of falsifying business records in violation of his court-ordered temporary restraining order.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Markowitz be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Ch. II

[Release Nos. 33-9475, 34-70819, IA-3711, IC-30775, File No. S7-10-13]

Regulatory Flexibility Agenda

AGENCY: Securities and Exchange Commission.

ACTION: Notice of semiannual regulatory agenda.

SUMMARY: The Securities and Exchange Commission approved the publication of an agenda of its rulemaking actions pursuant to the Regulatory Flexibility Act. The agenda, which is not a part of or attached to this document, was submitted by the Commission to the Regulatory Information Service Center for inclusion in the Unified Agenda of Federal Regulatory and Deregulatory Actions, which is scheduled for publication in its entirety on www.reginfo.gov in fall 2013. The version of the Unified Agenda to be published in the Federal Register will include only those rules for which the agency has indicated that preparation of an analysis under the Regulatory Flexibility Act is required. Information in the Commission's agenda was accurate on November 5, 2013, the date on which the Commission's staff completed compilation of the data. To the extent possible, rulemaking actions by the Commission after that date will be reflected in the agenda. The Commission invites questions and public comment on the agenda and on the individual agenda entries.

DATES: Comments should be received on or before [30 days after publication in the Federal Register].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/other.shtml); or

- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-10-13 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper comments:

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

All submissions should refer to File Number S7-10-13. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/other.shtml). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. 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.

FOR FURTHER INFORMATION CONTACT: Anne Sullivan, Office of the General Counsel, 202-551-5019.

SUPPLEMENTARY INFORMATION: The Regulatory Flexibility Act ("RFA"), (Pub. L. No. 96-354, 94 Stat. 1164 (September 19, 1980), requires each federal agency in April and October of each year to publish in the Federal Register an agenda identifying rules that the agency expects to consider in the next twelve months that are likely to have a significant economic impact on a substantial number of small entities (5 U.S.C. 602(a)). The RFA specifically provides that publication of the agenda does not preclude an agency from considering or acting on any matter not included in the agenda, and that an agency is not required to consider or act on any matter that is included in the agenda (5 U.S.C. 602(d)). The Commission may consider or act on any matter earlier or later than the estimated date provided on the agenda. While the agenda reflects the current intent to complete a number of rulemakings in the next year, the precise dates for each rulemaking at this point are uncertain. Actions that do not have an estimated date are placed in the long term category; the Commission may nevertheless act on items in that category within the next twelve months. The agenda includes new entries, entries carried over from previous publications, and rulemaking actions that have been completed (or withdrawn) since publication of the last agenda. The Commission invites public comment on the agenda and on the individual agenda entries.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: November 6, 2013

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70813 / November 5, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15605

In the Matter of CHARLES M. RASPA, 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 Charles M. Raspa ("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, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and 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.

III.

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

1. Raspa, age 49, is a resident of New York. From 1993 to 2011, Raspa was a registered representative associated with Joseph Stevens & Company, Inc. ("Joseph Stevens"), a broker-dealer formerly registered with the Commission. From 2008 to 2009, Raspa was associated with another broker-dealer registered with the Commission. Raspa has held Series 7, 9, 10, 24 and 63 securities licenses.

2. On March 5, 2012, Raspa was found guilty by jury verdict of Enterprise Corruption in violation of Section 460.20(1)(a) of the New York Penal Law ("Penal Law"), two counts of Grand Larceny in the Second Degree in violation of Section 155.40 of the Penal Law, Grand Larceny in the Third Degree in violation of Section 155.35 of the Penal Law, two counts of Criminal Possession of Stolen Property in the Third Degree in violation of Section 165.50 of the Penal Law, five counts of Criminal Possession of Stolen Property in the Fourth Degree in violation of Section 165.45(1) of the Penal Law, eight counts of Securities Fraud in violation of Sections 352-c(5) of the New York General Business Law and six counts of Securities Fraud in violation of Sections 352-c(6) of the New York General Business Law by the Supreme Court of the State of New York in The State of New York v. Charles Raspa et. al., Indictment No. 2394/2009. Raspa was sentenced, and is presently serving, a prison term of 3 ½ to 10 ½ years and was ordered to pay $253,169 in restitution, jointly and severally, with another individual charged in the Joseph Stevens criminal case.

3. The indictment underlying Raspa's criminal conviction charged, among other things, that Raspa, acting as a registered representative of Joseph Stevens, and others, engaged in a pattern of criminal activity involving buying and selling over-the-counter stocks on behalf of the firm's retail customers. Specifically, the indictment states that Raspa provided blocks of stock to firm traders so that traders could manipulate the price of the shares higher before selling them to firm customers. According to the indictment, Raspa was aware that relevant trading information and the true price of the stock was not disclosed to the customer and that the trades were being executed solely for the purpose of generating profits for the firm and undisclosed commissions for its traders.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Raspa be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3712 / November 6, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15608

In the Matter of **ANTHONY J. KLATCH, II** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940 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") against Anthony J. Klatch, II ("Klatch" or "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Klatch, age 29, is incarcerated at FCI Talladega Federal Correctional Facility in Talladega, Alabama. Klatch served as portfolio manager of TASK Capital Partners, LP ("TASK Fund"), a hedge fund, and made investment decisions concerning the fund's assets, from the fund's inception in January 2009 to its demise in March 2010. Klatch never registered with the Commission, but he acted as an unregistered investment adviser during the time in which he engaged in the conduct underlying the order of criminal conviction and order of permanent injunction described below.

2. As the TASK Fund's sole portfolio manager, Klatch directed transactions in equities, tions, equity and index options, and futures. In fact, Klatch was the only authorized trader on the d's brokerage accounts.

3. Klatch also provided investment advice to at least one individual. Specifically, in June 2009, Klatch presented a written analysis to a then-potential investor in which he outlined the investor's financial needs and retirement goals, and recommended that the investor liquidate about $1.85 million worth of stock he owned and invest the after-tax proceeds in the TASK Fund. In September 2009, the investor followed the advice, liquidated his stock and invested $1.48 million in the TASK Fund.

4. In the first couple of weeks of October 2009, the TASK Fund lost over $1 million, with Klatch at the helm as portfolio manager directing risky trading strategies.

5. Klatch compensated himself for investment services he provided to the TASK Fund and the investor by misappropriating fund assets for personal expenses and purported performance fees. The fund's bank records show, for example, that Klatch took over $66,955 for purported expenses, such as tickets to a professional hockey game costing $15,400, as well as over $44,000 for "performance" fees on returns the TASK Fund supposedly generated during the second quarter of 2009. In reality, the TASK Fund did not generate profits in any month or quarter; the rates of return for each of the three months comprising the fund's second quarter of 2009 were negative 68.80 percent, negative 96.29 percent, and 0 percent, respectively. Nothing in the investment management agreement or any other TASK fund document concerning Klatch's investment management activities entitled Klatch to performance fees where, as here, the fund did not perform.

B. RESPONDENT'S CRIMINAL CONVICTION

6. On October 28, 2011, Klatch entered a guilty plea to one count of conspiracy in violation of Title 18, United States Code, Section 371; one count of securities fraud in violation of Title 15, United States Code, Section 77q (Section 17 of the Securities Act of 1933); one count of wire fraud in violation of Title 18, United States Code, Section 1343; and one count of money laundering in violation of Title 18, United States Code, Section 1956(a)(1)(B)(i), before the United States District Court for the Southern District of Alabama, in *United States v. Anthony J. Klatch, II*, Crim. Indictment No. 11 Cr. 202 (WS). On August 24, 2012, the District Court sentenced Klatch to five years in prison based on his guilty plea and ordered him to make restitution of the total proceeds invested in the TASK Fund, or slightly more than $2.3 million.

7. The counts of the criminal indictment to which Klatch pleaded guilty alleged, among other things, that in or about and between January 2009 and January 2010, Klatch knowingly and willfully made materially false statements to TASK Fund investors and misappropriated a portion of the fund's assets. In connection with his plea, Klatch admitted that:

a. In January 2009, Klatch and his partner formed the TASK Fund. Klatch served as the fund's Senior Managing Director and Chief Investment Officer.

b. After creating the TASK Fund, Klatch and others solicited individuals to invest in the fund through various means, including prospectuses containing material misrepresentations and materially misleading omissions.

c. From April to October 2009, seven investors invested, through interstate wire transfers, about $2.3 million in the TASK Fund. Klatch and his partner managed the $2.3 million invested in the fund.

d. The TASK Fund invested only about 60% of the proceeds, which Klatch and his partner lost over a period of eight months through a series of investments.

e. In December 2009 and January 2010, Klatch and others falsely told TASK Fund investors that a single bad trade wiped out their entire investment.

f. Klatch and his partner used the remaining 40% of investors' proceeds for non-investment related expenditures. Of this amount, $180,592.45 ended up in Klatch's personal bank account through a series of transactions, which Klatch knew were designed to conceal the nature, location, source, ownership, or control of the proceeds.

8. Klatch's plea agreement contains admissions showing that Klatch acted as an investment adviser for purposes of Section 203(f). Klatch admitted in his plea agreement that, while serving as the TASK Fund's Senior Managing Director and Chief Investment Officer, he: (1) committed securities fraud and other offenses while co-managing slightly more than $2.3 million of TASK Fund assets; (2) made false and misleading statements to investors in soliciting their TASK Fund investments and in connection with the fund's trading activities; and (3) improperly obtained approximately $180,000 from the TASK Fund, which he diverted for personal benefit.

C. <u>ENTRY OF THE INJUNCTION</u>

9. On March 28, 2012, the CFTC obtained a default judgment against Klatch in *CFTC v. Anthony J. Klatch II, et al.*, No. 11 Civ. 5191 (S.D.N.Y.), a civil injunctive action, relating to charges stemming from Klatch's solicitation of investors and the operation of certain commodity pools, including the TASK Fund. In addition to enjoining Klatch from violating certain provisions of the Commodity Exchange Act, the judgment entered by the United States District Court for the Southern District of New York prohibited Klatch from entering into transactions involving futures, options, commodity options, security futures products, and foreign currency. Additionally, the judgment prohibits Klatch from applying for registration or claiming exemption from registration with the CFTC in any capacity and from acting as a principal, agent, or any other officer or employee of any person registered, exempted from registration, or required to be registered with the CFTC.

10. For purposes of entering the default judgment, the district court accepted the CFTC's allegations as true, including that Klatch: served as the Managing Director and Chief Investment Officer of the Commodity Pool Operator (CPO) of the TASK Fund; misappropriated TASK Fund monies; and made material misrepresentations to TASK Fund investors or pool participants about historical performance and risk controls. The district court determined that Klatch was a control person because he exercised control over the fund's bank and trading accounts, personally solicited investors, and acted as the Managing Director and Chief Investment Officer of the fund's CPO. The district court also found that Klatch knew of, and participated in, the fraud and knew he obtained fund money in excess of earned fees.

11. Finally, the district court relied on Klatch's criminal plea agreement, described above, finding that the facts to which Klatch admitted sufficed to establish violations of the Commodity Exchange Act.

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 hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations; and

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

Elizabeth M. Murphy
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. 70823 / November 6, 2013

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3512 / November 6, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15609

In the Matter of **SHERB & CO., LLP, STEVEN J. SHERB, CPA, CHRISTOPHER A. VALLEAU, CPA, MARK MYCIO, CPA, and STEVEN N. EPSTEIN, CPA** **Respondents.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 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 CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 4C[1] of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(ii) of the

[1] Section 4C provides, in relevant part, that:

"The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . (1) not to possess the requisite qualifications to represent others . . . (2) to be lacking in character or integrity. or to have engaged in unethical or improper professional conduct; or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder."

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Commission's Rules of Practice[2] against Sherb & Co., LLP, Steven J. Sherb, CPA, Christopher A. Valleau, CPA, Mark Mycio,CPA, and Steven N. Epstein, CPA (collectively, "Respondents"), and pursuant to Section 21C of the Exchange Act against Sherb & Co., LLP and Mark Mycio.

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 Sections 4C and 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 Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds[3] that:

A. SUMMARY

1. Sherb & Co., LLP ("Sherb LLP"), three of its partners, Steven J. Sherb ("Sherb"), Christopher A. Valleau ("Valleau") and Mark Mycio ("Mycio"), and an audit manager, Steven N. Epstein ("Epstein"), engaged in improper professional conduct within the meaning of Rule 102(e) of the Commission's Rules of Practice. Sherb LLP, Sherb, Valleau and Epstein engaged in improper professional conduct in connection with the audit of the 2007 year-end financial statements of China Sky One Medical, Inc. ("CSKI"); Sherb LLP, Valleau, Mycio and Epstein engaged in improper professional conduct in connection with the audit of the 2010 year-end financial statements of China Education Alliance, Inc. ("CEU"); and Sherb LLP, Sherb, Valleau, Mycio and Epstein engaged in improper professional conduct with respect to some or all of the audits of the financial statements of Wowjoint Holdings Ltd. ("Wowjoint") for the years ended August 31, 2008 and 2009, a four-month transition period ended December 31, 2009, and the years ended December 31, 2010 and 2011.

2. Sherb LLP and Mycio also violated Section 10A(b)(1) in connection with the CEU audit.

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2 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."

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

B. RESPONDENTS

3. Sherb & Co., LLP is a certified public accountancy partnership licensed in the State of New York, and has been registered with the Public Company Accounting Oversight Board (the "PCAOB") since 2003. Sherb LLP audited and reviewed the financial statements of CSKI for the 2007 year-end, and issued an unqualified audit report for CSKI's 2007 financial statements that was included in CSKI's 2007 Form 10-K filed on March 31, 2008. Sherb LLP ceased to be CSKI's auditor effective May 21, 2008. Sherb LLP also audited CEU's financial statements for fiscal years 2007 through 2010. Sherb LLP issued an unqualified audit report for CEU's 2010 financial statements that was included in CEU's 2010 Form 10-K filed on April 15, 2011. Sherb LLP ceased to be CEU's auditor effective March 12, 2012. Sherb LLP audited Wowjoint's financial statements for the years ended August 31, 2008 and 2009, a four-month transition period ended December 31, 2009, and the years ended December 31, 2010 and 2011. Sherb LLP issued unqualified audit reports on these financial statements that were included by Wowjoint in its Form F-1 registration statements on May 3, 2010, its ten subsequent amendments, and three Forms 20-F filed on November 12, 2010, June 30, 2011, and April 20, 2012. Sherb LLP resigned as Wowjoint's auditor in April 2013.

4. Steven J. Sherb, CPA is the managing partner and sole equity partner of Sherb LLP, and is also responsible for Sherb LLP's quality assurance and controls for all audits. He is a certified public accountant licensed in New York, California, Florida, Georgia and Texas. Sherb served as the concurring partner for the audit of CSKI's 2007 year-end financial statements, and as the concurring partner for audits of Wowjoint's financial statements for the years ended August 31, 2008 and 2009, a four-month transition period ended December 31, 2009, and as engagement quality review partner for audits of the years ended December 31, 2010 and 2011.

5. Christopher A. Valleau, CPA is a non-equity partner of Sherb LLP and is a certified public accountant licensed in New York and Florida. During the time relevant to this proceeding, Valleau served as the engagement partner for the audit of CSKI's 2007 year-end financial statements. Valleau served as the engagement quality review partner for the audit of CEU's 2010 year-end financial statements. Valleau was the engagement partner for the audits of Wowjoint's financial statements for the years ended August 31, 2008 and 2009, a four-month transition period ended December 31, 2009, and the year ended December 31, 2010.

6. Mark Mycio, CPA is a certified public accountant licensed in New York, and was a non-equity partner with Sherb LLP in 2011 and 2012. Mycio served as the engagement partner for the audit of CEU's 2010 year-end financial statements, and was also assigned to be the engagement partner for the audits of Wowjoint's 2010 and 2011 year-end financial statements. From 2009 through 2011, Mycio served as Chair of the Financial Accounting Standards Committee of the New York State Society of Certified Public Accountants.

7. Steven N. Epstein, CPA is a certified public accountant who has been licensed in New York since 1991. Epstein joined Sherb LLP in January 2005. Epstein served as the engagement manager for the audit of CSKI's 2007 year-end financial statements and the audits

of Wowjoint's financial statements for the years ended August 31, 2008 and 2009, a four-month transition period ended December 31, 2009, and the year ended December 31, 2010. Epstein, in his capacity as a Sherb LLP senior audit manager, also performed key services in connection with the audit of CEU's 2010 year-end financial statements.

C. FACTS

2007 AUDIT OF CHINA SKY ONE MEDICAL, INC.

BACKGROUND

8. CSKI was at all relevant times a Nevada corporation headquartered in Harbin, Heilongjiang Province, China. CSKI's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act until June 12, 2012, and continues to be registered with the Commission pursuant to Section 12(g). The company's stock traded on the Nasdaq Global Market under the symbol "CSKI" from September 14, 2008 through February 15, 2012, and currently trades on the OTC market. At all relevant times, CSKI purported to manufacture and sell medicinal and diagnostic products, and all of its operations were carried out in China.

9. Sherb LLP audited CSKI's financial statements for the 2007 year-end, and issued an unqualified audit report for CSKI's 2007 financial statements that was included in CSKI's 2007 Form 10-K filed on March 31, 2008 (the "2007 CSKI Audit").

10. Valleau served as the engagement partner for the 2007 CSKI Audit.

11. Sherb served as the concurring partner for the 2007 CSKI Audit.

12. Epstein served as the engagement manager, assisting the engagement partner for the 2007 CSKI Audit.

CSKI AUDIT FACTS

The Commission Filed an Injunctive Action Against CSKI Based Upon Alleged Misstatements of Revenue and Net Income in Its 2007 Form 10-K

13. In 2007, CSKI reported in its filings with the Commission that it had entered into a strategic distribution agreement with a Malaysian distributor, pursuant to which the Malaysian distributor was appointed as CSKI's "exclusive" distributor in Malaysia and undertook to generate $1 million per month in sales. In its public filings, CSKI reported export sales to

Malaysia of over $12.2 million for 2007 (constituting 25% of its total revenues), all of which were for one product, CSKI's slim patch weight loss product.[4]

14. CSKI's Form 10-K for 2007 also identified its top two purported customers, Customer A and Customer B, which together accounted for 25% of CSKI's total revenues for 2007. CSKI claimed Customer A and Customer B were sales agents for the Malaysian distributor, and that all of CSKI's sales to Customer A and Customer B were export sales to Malaysia via the Malaysian distributor.

15. In fact, the Malaysian distributor only purchased a total of $167,542 in slim patches from CSKI for 2007, a small fraction of what was reported in CSKI's public filings. Moreover, the Malaysian distributor never entered into any distribution agreement with CSKI and never had any relationship with, or purchased any goods through, Customer A or Customer B.

16. On September 4, 2012, the Commission filed an injunctive action in federal court against CSKI and its CEO for, among other things, fabricating export sales of its slim patch product and materially misstating its revenues and net income for fiscal year 2007. The Commission's complaint alleges that $12.2 million in revenue for CSKI's purported export sales in 2007 were fabricated and should not have been recorded. The case against CSKI and its CEO is pending.

<u>Valleau, Epstein, and Sherb LLP Failed to Adequately Plan the 2007 CSKI Audit</u>

17. Under PCAOB Standard AU Section 311 (*Planning and Supervision*), an auditor must adequately plan the audit. This standard requires that the auditor obtain a level of knowledge of the entity's business that will enable him to plan and perform his audit in accordance with PCAOB Standards. That level of knowledge should enable the auditor to obtain an understanding of the events, transactions, and practices that, in his judgment, may have a significant effect on the financial statements. Knowledge of the entity's business helps the auditor to identify areas that may need special consideration, assess conditions under which accounting data are produced, processed, reviewed and accumulated within the organization, and evaluate the reasonableness of management representations, among others. (AU § 311.06) In planning the audit, among other considerations, an auditor should consider matters such as the entity's business, accounting policies and procedures and assessed level of control risk. (AU § 311.03)

18. As the engagement partner and manager of the 2007 CSKI Audit, respectively, Valleau and Epstein failed to adequately plan the audit. They failed to obtain a proper understanding of CSKI's business and environment, including its accounting policies and

[4] CSKI reported extraordinary growth for fiscal year 2007, including increasing its revenues 148% from 2006's $19.9 million to 2007's $49.3 million. CSKI's slim patch sales purportedly increased from 2006's $1.2 million to 2007's $12.3 million.

procedures and internal controls. Sherb LLP's work papers for the planning phase of the audit process were inadequate and incomplete.

19. Sherb LLP's work papers required for the planning phase of the audit consist of only a few forms with generic checklists, and even these were not properly completed. Moreover, the work papers made no reference to CSKI's significant distribution agreement with the Malaysian distributor, which purportedly accounted for 25% of CSKI's total sales for 2007 and was one of the main reasons CSKI's revenues increased by 148% from 2006. Valleau's and Epstein's inadequate understanding of CSKI's business hampered their ability to identify the agreement with the Malaysian distributor as a contract possessing audit significance, and requiring additional or extended audit procedures. Valleau and Epstein failed to inquire about or review the agreement with the Malaysian distributor, severely handicapping their chances of discovering that the agreement was not even signed by the Malaysian distributor, and that it did not mention Customer A and Customer B as the Malaysian distributor's sales agents.

20. Under PCAOB Standard AU Section 316 (*Consideration of Fraud in a Financial Statement Audit*), an auditor is required to plan an audit "to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud." Pursuant to this standard, the auditor should discuss among engagement personnel the risk of material misstatement due to fraud, and obtain information needed to identify such risk, including making inquiries of management and others within the company regarding such risk. (AU § 316, at .14-.27) The auditor also should ordinarily presume that there is a risk of material misstatement due to fraud relating to revenue recognition. (AU § 316.41)

21. Valleau and Epstein did not adequately consider the risks of material misstatement due to fraud at CSKI in planning the 2007 CSKI Audit. For example, there is no evidence in the work papers that they ever met to discuss the susceptibility of CSKI's financial statements to material misstatement due to fraud, or that they ever inquired of CSKI management or its employees about fraud, and revenue recognition was not recognized as a fraud risk. As a result, Valleau and Epstein failed to identify any fraud risks specific to CSKI, and did not design sufficient procedures to address the risks of fraud.

Sherb LLP Engaged a Contract Auditor to Perform Most of the 2007 CSKI Audit Work, but Valleau and Epstein Did Not Adequately Supervise Her

22. PCAOB Standard AU Section 311 (*Planning and Supervision*) requires that assistants be properly supervised. This standard states that supervision involves directing the efforts of assistants who are involved in accomplishing the objectives of the audit and determining whether those objectives are accomplished. Elements of supervision include instructing assistants, keeping informed of significant problems encountered, and reviewing the work performed, among others. The extent of supervision appropriate in a given instance depends on many factors, including the complexity of the subject matter and the qualifications of persons performing the work. (AU § 311.11-.13)

23. Sherb LLP engaged a Hong Kong-based auditor ("contract auditor") and her three-person staff to perform all of the audit fieldwork for CSKI's Chinese operations, which consisted of over 98% of CSKI's total assets. The contract auditor was the person who had introduced Sherb LLP to CSKI. The contract auditor and her firm were not registered with the PCAOB.

24. Valleau and Epstein did not have a complete understanding of the contract auditor's qualifications. The only inquiry Valleau and Epstein made into the contract auditor and her firm was to have a senior auditor from Sherb LLP, who spoke Chinese, call and question the contract auditor regarding her background. There is no evidence that anyone from Sherb LLP verified the qualifications of the contract auditor, her firm, or her staff, to ensure they possessed adequate technical training and proficiency to work on the audit. As a result, Valleau's and Epstein's supervision of the contract auditor and her staff was inadequate. Since Valleau and Epstein never worked with the contract auditor and did not have an understanding of her background and qualifications, they should have closely supervised her to ensure the audit was executed properly. Valleau did not adequately supervise the contract auditor and only reviewed the work papers she prepared at the end of the audit. Although Epstein purportedly was the primary contact with the contract auditor, there is no audit documentation evidencing the contract auditor's communication with Epstein or participation in any meetings with the engagement team except for a single email between Epstein and the contract auditor.

25. The work papers purportedly completed by the contract auditor and her staff contained numerous obvious errors and were incomplete. In particular, the work papers showed instances of audit programs not being followed. Additionally, the work papers were not correctly signed off by the contract auditor and the contract auditor failed to document her procedures in sufficient detail to provide a clear understanding of their purposes, sources, and the conclusions reached. Valleau and Epstein signed off on all the deficient work papers prepared by the contract auditor and her staff.

<u>The Audit Work Performed by the Contract Auditor, and Signed Off by Valleau and Epstein, Raised Red Flags that Valleau and Epstein Did Not Properly Investigate</u>

26. Under PCAOB Standard AU Section 326 (*Evidential Matter*), an auditor is required to obtain sufficient competent evidential matter through inspection, observation, inquiries, and confirmations to afford a reasonable basis for an opinion regarding the financial statements under audit. In developing his opinion, an auditor should consider relevant evidential matter regardless of whether it appears to corroborate or to contradict the assertions in the financial statements. (AU § 326.25) PCAOB Standards also state that evidential matter obtained from independent sources outside the entity provides greater assurance of reliability than information obtained solely within the entity. (AU § 326.21) In addressing an identified risk of material misstatement due to fraud, an auditor may need to change the nature, timing and extent of auditing procedures to obtain evidence that is more reliable or to obtain additional corroborative information. For example, more evidential matter may be needed from independent sources outside the audited entity, such as information from public records about the existence and nature of key customers, vendors, or counterparties in a major transaction. (AU § 316.52)

27. Valleau and Epstein failed to obtain sufficient competent evidence to support Sherb LLP's audit report for the 2007 CSKI Audit. The contract auditor performed transaction testing of CSKI's sales. Over 80% of the sales transaction samples tested by the contract auditor were sales made to Customer A and Customer B. Despite this, Valleau, Epstein and the contract auditor did not make any inquiries about Customer A or Customer B, did not attempt to identify their purported relationship with the Malaysian distributor, and did not ask to review the agreement between CSKI and the Malaysian distributor.

28. During the sales testing, the auditors discovered that CSKI did not have any value-added tax ("VAT") sales invoices in its records for its sales to Customer A and Customer B. There were VAT invoices for other CSKI customers. VAT invoices are one of the main documents Chinese companies use to record and track sales revenues.[5] The VAT invoices would have been a way for the auditors to substantiate the purported significant sales to Customer A and Customer B.

29. When the contract auditor discovered that there were no VAT sales invoices for CSKI's sales to Customers A and B, she made an inquiry with CSKI. A CSKI manager told the contract auditor that there were no VAT sales invoices because Customer A and Customer B were sales agents for overseas customers and that those customers did not request VAT sales invoices. This explanation is highly suspect because VAT invoices are one of the main ways in which an overseas customer would have been able to claim a credit for or refunds of VAT from the Chinese government. Because Customer A and Customer B would have been entitled to a VAT refund of over $2 million, CSKI's explanation that Customer A and Customer B never requested VAT invoices was a significant red flag warranting further inquiry. Furthermore, the audit team's VAT payable testing indicated that VAT was paid by all customers including Customer A and Customer B. Valleau and Epstein nonetheless accepted the explanation given by the CSKI manager that the overseas customers did not request VAT invoices, and included that explanation in Sherb LLP's work papers without expressing any concerns about that unlikely explanation.

30. The contract auditor performed additional audit procedures for sales made to Customer A and Customer B by inspecting CSKI's "goods delivery notes" and bank statements. However, such procedures did not produce sufficient competent evidence that the purported sales were actually made and revenues were earned. According to the audit work papers, the "goods delivery notes" the contract auditor inspected appeared to be generated internally by CSKI. These basic forms reflected the product name, unit, and sales price, but did not evidence that the goods were actually sold, shipped to or accepted by Customer A and Customer B. In fact, there is not even a customer address printed on the notes. The contract auditor also traced sales amounts to bank statements. Yet this testing was insufficient because the bank statements did not identify payor information, and the contract auditor did not review any documents to determine whether the deposits shown on the bank statements actually reflected cash collected for sales made to Customer A and Customer B. Indeed, the sales proceeds purportedly deposited by Customer A and Customer B took place before the purchases (sometimes over 20 days prior

[5] In China, a standard VAT of 17% is imposed on all sales of goods, imports and certain services. Exports outside China are entitled to refunds of VAT.

to the purchase), which is inconsistent with both CSKI's credit policy and its agreement with the Malaysian distributor.

31. Valleau and Epstein signed off on the contract auditor's sales testing, without properly inquiring about the red flags identified by the lack of VAT invoices and CSKI's problematic explanation, and without properly evaluating the additional procedures performed and evidence reviewed by the contract auditor. Valleau and Epstein should have heightened their professional skepticism when presented with these red flags, because sales had been identified as a high risk area for the CSKI audit.

Valleau and Epstein Failed to Exercise Due Professional Care

32. Under PCAOB Standard AU Section 230 (*Due Professional Care in the Performance of Work*), auditors are required to exercise due professional care throughout the audit. Due professional care requires that the auditor exercise professional skepticism. Under this standard, "[p]rofessional skepticism is an attitude that includes a questioning mind and a critical assessment of audit evidence."

33. Valleau and Epstein failed to exercise due professional care when planning the 2007 CSKI Audit and reviewing the audit procedures with respect to sales revenues and the preparation of the audit report. Valleau and Epstein failed to plan and perform the audit properly to provide reasonable assurance of detecting material errors or irregularities in the financial statements, and failed to exercise sufficient professional skepticism. Valleau and Epstein also failed to be skeptical about the sales testing and CSKI's explanation for the missing VAT invoices, and failed to probe how sales made to Customer A and Customer B were processed, approved, and recorded, and ignored the inconsistencies presented in the evidence and explanations obtained.

Sherb Failed to Perform an Adequate Concurring Partner Review

34. Sherb served as concurring partner on the CSKI audit engagement, including the 2007 CSKI Audit. As such, he was required to perform an objective review of significant auditing, accounting, and financial reporting matters and to conclude, based on all the relevant facts and circumstances of which he had knowledge, that no matters had come to his attention that would cause him to believe that CSKI's financial statements were not in conformity with GAAP in all material respects or that the audit was not performed in accordance with PCAOB Standards.[6]

35. Sherb did not perform the required review. Sherb did not participate in any meetings or discussions with Valleau or the engagement team about the identification and audit of high-risk transactions and account balances. Even though Sherb signed off on two concurring review checklists, he did not note the extremely inadequate planning and risk assessment

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[6] *See* Interim Quality Control Standards, AICPA SEC Practice Section ("SECPS") § 1000.08(f) and Appendix E of SECPS § 1000.39. These standards were adopted by the PCAOB in April 2003. Sherb LLP was a member of the AICPA SEC Practice Section. Therefore, these standards were applicable at the time of the relevant conduct.

process, and did not raise concerns about the quality and documentation of the process. As a result, Sherb failed to review or obtain sufficient information necessary for him to perform a meaningful concurring partner review.

Valleau, Epstein and Sherb LLP Failed to Prepare and Retain Adequate Audit Work Papers

36. Under PCAOB Standard No. 3 (*Audit Documentation*), "[a]udit documentation must contain sufficient information to enable an experienced auditor, having no previous connection with the engagement: (a) to understand the nature, timing, extent, and results of the procedures performed, evidence obtained, and conclusions reached, and (b) to determine who performed the work and the date such work was completed as well as the person who reviewed the work and the date of such review."

37. Valleau, Epstein and Sherb LLP failed to ensure that the audit team documented the work they performed in a manner consistent with PCAOB Standard No. 3. For example, Valleau and Epstein repeatedly claimed they had performed planning and risk assessment procedures for the 2007 CSKI Audit, but no audit documentation regarding their claimed work exists in the work papers of Sherb LLP. They were also unable to explain or understand certain evidence and conclusions documented by the contract auditor and her staff.

Sherb LLP Failed to Issue an Accurate Audit Report

38. PCAOB Standards require 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. Under PCAOB Standard AU Section 508 (*Reports on Audited Financial Statements*), 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 PCAOB Standards.

39. As the engagement partner with final responsibility for the CSKI audit, Valleau approved the issuance of the unqualified audit report that falsely stated that the auditors conducted their audit in accordance with PCAOB Standards, when in reality they had not.

Valleau and Sherb LLP Failed to Communicate with CSKI's Predecessor Auditors

40. Under PCAOB Standard AU Section 315 (*Communications Between Predecessor and Successor Auditors*), an auditor should not accept an engagement until certain communications have been evaluated. Those communications include inquiries of the predecessor auditors about the integrity of management, disagreements with management regarding accounting principles or auditing procedures, communications with the audit committee regarding client fraud or illegal acts, and the reason for the change of auditors.

41. Valleau and Sherb LLP failed to timely undertake this "necessary procedure". They did not communicate with CSKI's former auditors before agreeing to the audit engagement with CSKI. Only after Sherb LLP accepted CSKI as a client did the firm send inquiry letters to the

former auditors. Moreover, Valleau did not properly follow up with their inquiries. One of the former auditors responded to the inquiries on March 24, 2008, and the other responded on March 31, 2008 - the same day CSKI filed its Form 10-K.

2010 AUDIT OF CHINA EDUCATION ALLIANCE, INC.

BACKGROUND

42. China Eduation Alliance, Inc. ("CEU") is a North Carolina corporation with headquarters and operations in Harbin, China. CEU claims that it provides educational products and tutoring services to primary school students online and through training centers located in China. CEU has never had any business operations in the United States. CEU's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act. The company's stock was traded on the New York Stock Exchange from January 27, 2010 through December 28, 2011, and currently trades on the OTC market.

43. Sherb LLP issued an unqualified audit report for CEU's 2010 financial statements that were included in CEU's 2010 Form 10-K filed on April 15, 2011.

44. Mycio served as the engagement partner and supervised and conducted Sherb LLP's audit of CEU's 2010 financial statements (hereinafter, the "2010 CEU Audit"). As the engagement partner, Mycio was responsible for the issuance of Sherb LLP's unqualified audit report for CEU's 2010 financial statements, and was responsible for ensuring that the audit was conducted in accordance with PCAOB Standards.

45. Epstein, in his capacity as a Sherb LLP senior audit manager, performed key services in connection with the audit of CEU's 2010 year-end financial statements.

46. Valleau served as the engagement quality review partner for the 2010 CEU Audit.

CEU AUDIT FACTS

Mycio and Sherb LLP Failed to Adequately Plan and Supervise the Audit

47. Under PCAOB Standard AU Section 311 (*Planning and Supervision*), an auditor must adequately plan and supervise the audit. This standard provides guidance on the considerations and procedures applicable to planning and supervision, including preparing an audit program, obtaining knowledge of the entity's business, and dealing with differences of opinion among firm personnel.

48. Mycio failed to conduct any formal audit planning meetings or to formulate an audit plan before commencing work on the 2010 CEU Audit. Mycio also failed to conduct sufficient inquiry into CEU's business developments and public filings both prior to and during the 2010 CEU Audit. Further, although Sherb LLP engaged a Hong Kong-based contract auditor to

perform much of the audit fieldwork, Mycio failed to provide adequate instructions to the contract auditor prior to the commencement of her fieldwork.

49. Mycio also failed to adequately supervise the Sherb LLP staff auditors working on the 2010 CEU Audit. In particular, Mycio did not provide these staff auditors with specific guidance on the performance of audit procedures to be conducted to verify CEU's bank account balances and revenue. Mycio also failed to adequately review the work performed by his staff. For example, Mycio assigned Epstein to perform certain procedures for the verification of CEU's fixed assets, but never communicated with him to confirm that those procedures had been performed. In fact, Epstein did not perform the assigned asset verification.

50. PCAOB Standard AU Section 316 (*Consideration of Fraud in a Financial Statement Audit*) provide that an auditor is required to plan an audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud. (AU § 316.01.)

51. Mycio failed to conduct an adequate assessment of audit risks prior to the 2010 CEU Audit fieldwork. Mycio photocopied a fraud risk assessment memorandum from a prior audit of CEU in which he had not been involved, changed several dates, crossed out the name of the prior engagement partner, and inserted his own name. In that memorandum, Mycio purported that he conducted audit risk interviews with members of CEU's management, a member of CEU's audit committee, and a CEU employee. In fact, Mycio did not conduct any audit risk interviews. Mycio also failed to complete a risk assessment summary form, which is intended to document specific audit risks and planned responses. The 2010 CEU Audit work papers contained a risk assessment summary form that Mycio had initialed but otherwise left blank.

Mycio, Epstein, and Sherb LLP Failed to Obtain Sufficient Evidential Matter

52. Under PCAOB Standard AU Section 326 (*Evidential Matter* at .01), an auditor is required to obtain sufficient competent evidential matter through inspection, observation, inquiries, and confirmations to afford a reasonable basis for an opinion regarding the financial statements under audit. Under PCAOB Standard AU Section 330 (*The Confirmation Process* at .28), an auditor performing confirmation procedures should establish direct communication between the intended recipient and the auditor to minimize the possibility that the results will be biased because of interception and alteration of the confirmation requests or responses.

53. Mycio and the engagement team failed to obtain sufficient competent evidence through confirmation of CEU's bank account balances. CEU reported that a vast majority of its assets at year-end 2010 were held as cash deposits at a number of banks. CEU also purported that it conducted a significant amount of business activities in cash throughout the year. These factors posed significant audit risks and required specific audit procedures to address those risks. Moreover, by early 2011, Mycio and Epstein had become aware of information that warranted heightened audit scrutiny of CEU's bank account cash balances, including media reports of fraud involving China-based issuers and specific public allegations of fraud at CEU.

54. On several occasions in connection with the 2010 CEU Audit, Mycio, Epstein and the audit team failed to obtain adequate verification of CEU's bank account balances. During a field visit to Harbin in early March 2011, a Sherb LLP staff auditor attempted unsuccessfully to obtain bank statements directly from the banks where CEU claimed that it held its accounts. At one bank, a bank employee told the staff auditor that the bank could not print out CEU's bank statements, even though the staff auditor had called that same bank anonymously beforehand and had been told that statements could be printed for a small fee. In late March 2011, another team under Mycio's supervision attempted to obtain bank statements directly from the banks. The banks refused to provide bank statements to this team as well.

55. In April 2011, days before Sherb LLP issued an unqualified report for CEU's 2010 financial statements, Epstein, at Mycio's direction, visited Harbin to make a third and final attempt to obtain bank statements directly from the banks. Prior to his visit, Epstein specifically requested CEU management that he personally obtain CEU's bank statements from branch managers at the banks. Despite these instructions, a CEU employee went to the first bank prior to Epstein's arrival and purportedly obtained the bank statements from the bank. The CEU employee then gave the purported bank statements to Epstein in the lobby of the bank when he arrived. Epstein was unable to meet with any bank official at that bank nor did he witness the procurement of the bank statements. At the second bank, Epstein was given a set of bank statements by a purported bank teller who refused to provide her name. A purported manager at that bank refused to give Epstein her business card and declined to authenticate the bank statements. Despite his inability to obtain the account statements directly from the banks as called for by the planned audit procedures, Epstein drafted a memorandum for the audit engagement team expressing the conclusion that the bank statements he obtained were authentic. Thus, despite multiple field visits to Harbin in March and April 2011, Mycio, Epstein and the audit team failed to complete audit procedures and obtain sufficient competent evidence for the verification of CEU's bank account balances.

56. Mycio and the engagement team also failed to obtain sufficient competent evidence to confirm CEU's reported training center revenue. In March 2011, Sherb LLP staff auditors under Mycio's supervision attempted to visit various training centers operated by CEU, and to review student records at those training centers. The Sherb LLP staff auditors allowed CEU management to select the training center locations they would visit, and kept no records of the training centers that they visited. When the audit team asked the staff at one of the training centers to allow them to review student application records, the CEU manager accompanying the audit team asserted that those records were confidential and the audit team was not allowed to review them. Moreover, at one training center purportedly operated by CEU, the center's staff demanded to know the identities of the CEU managers and the Sherb LLP auditors and the purpose of their visit. According to the Sherb LLP staff auditor, the CEU managers then hastily exited from that training center with the Sherb LLP staff auditors, who concluded based on the unusual encounter that the training center did not belong to CEU. Despite receiving a report from a staff auditor expressing concern regarding these irregularities, Mycio did not undertake any further procedures to obtain the necessary information or to address the concerns raised by the suspicious encounters at the training centers. During his visit to Harbin in April 2011, Epstein visited certain purported CEU training centers. Epstein, however, did not select which training centers he was taken to and

then only walked through the training centers, but did not perform any substantive audit procedures regarding CEU's reported training center revenue.

57. Mycio and the engagement team also failed to obtain sufficient competent evidence regarding CEU's fixed assets. CEU reported a 51% increase in its fixed assets at year-end 2010 from the prior year. Despite this, Mycio did not conduct any physical inspection of fixed assets or undertake any analytical procedures to evaluate whether the quantity and type of those fixed assets were reasonable for the nature and scale of CEU's purported business operations. In April 2011, Mycio directed Epstein to perform certain limited procedures to verify CEU's fixed assets during Epstein's visit to Harbin. However, Epstein accepted questionable explanations from CEU and did not perform those limited procedures. Finally, Mycio failed to communicate with Epstein about whether the limited procedures were appropriately completed and the results of those procedures.

Mycio, Epstein, and Sherb LLP Failed to Exercise Due Professional Care

58. Under PCAOB Standard AU Section 230 (*Due Professional Care in the Performance of Work*), auditors are required to exercise due professional care throughout the audit. Due professional care requires that the auditor exercise professional skepticism. Under this standard, professional skepticism is an attitude that includes a questioning mind and a critical assessment of audit evidence. (AU § 230, at .01-.02, .07-.08.) Mycio failed to exercise due professional care when planning and supervising the audit; Mycio and Epstein failed to exercise due professional care when verifying CEU's bank account balances and when performing procedures on training center revenue and fixed assets.

Sherb LLP and Mycio Failed to Investigate and Report a Potentially Illegal Act

59. In March 2011, at the end of a field visit during which Sherb LLP staff auditors under Mycio's supervision had been unable to obtain bank statements and had been taken to a training center that apparently did not belong to CEU, a Sherb LLP staff auditor reported to Mycio that a CEU manager offered him an apparent bribe in an attempt to influence the 2010 CEU Audit. Mycio failed to investigate this reported bribe, and he did not address the reported bribe with any member of CEU's management or board of directors.

Mycio, Epstein, and Sherb LLP Failed to Prepare and Retain Adequate Audit Work Papers

60. Under PCAOB Standard No. 3 (*Audit Documentation* at .6), audit documentation must contain sufficient information to enable an experienced auditor, having no previous connection with the engagement to (a) understand the nature, timing, extent, and results of the procedures performed, evidence obtained, and conclusions reached; and (b) determine who performed the work and the date such work was completed as well as the person who reviewed the work and the date of such review. The audit documentation also must include information the auditor has identified relating to significant findings or issues that is inconsistent with or contradicts the auditor's final conclusions. (AS No.3 at .8.)

61. Mycio and Epstein failed to prepare and retain adequate audit documentation. Mycio signed audit work papers that were left completely blank or that were photocopied from the prior year's audit work papers and purported to reflect audit work that was not actually performed during the 2010 CEU Audit. Moreover, the audit work papers did not contain any information other than the memorandum prepared by Epstein about the failed attempt to perform bank statement verification procedures in late March 2011, the irregularities encountered during the audit team's attempts to visit training center locations in March 2011, or the attempted bribe reported by a staff auditor.

<u>Mycio and Sherb LLP Were Responsible for the Issuance of an Inaccurate Audit Report</u>

62. PCAOB Standard AU Section 508 (*Reports on Audited Financial Statements* at .04 and .07) 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. 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 PCAOB Standards.

63. As the engagement partner with final responsibility for the CEU audit, Mycio approved the issuance of the unqualified audit report that falsely stated that the audit was conducted in accordance with PCAOB Standards.

<u>Valleau Was Disqualified to Serve As the Engagement Quality Reviewer</u>

64. PCAOB Auditing Standard No. 7 (*Engagement Quality Review* at .8) provides that the person who served as the engagement partner during either of the two audits preceding the audit subject to the engagement quality review may not be the engagement quality reviewer.

65. Valleau served as the engagement partner for Sherb LLP's audit of CEU's 2008 financial statements. Valleau thus was disqualified from serving as the engagement quality reviewer for the 2010 Audit because he had served as the engagement partner during one of the two preceding audits. Sherb LLP assigned Valleau as the engagement quality reviewer even though he was disqualified from serving in that role.

<u>Valleau Failed to Conduct an Adequate Engagement Quality Review</u>

66. PCAOB Auditing Standard No. 7 (at .10-.11) provides that an engagement quality reviewer should evaluate the engagement team's significant judgments and related conclusions, including its assessment of and responses to significant risks, and, for the documentation reviewed by the engagement quality reviewer when performing the engagement quality review, that the documentation indicates that the engagement team responded appropriately to significant risks, and supports the conclusions reached by the engagement team with respect to the matters reviewed.

67. Prior to and during the audit, Valleau became aware of information that indicated a need for heightened audit scrutiny, including media reports of fraud involving China-based issuers

and specific public allegations of fraud at CEU. Valleau also became aware that the audit engagement team had failed repeatedly to perform procedures sufficient to verify CEU's bank account balances, and that the engagement team had encountered irregularities and red flags when attempting to verify CEU's training center revenue. Valleau further became aware of a staff auditor's report that a CEU manager had attempted to bribe him.

68. Despite this, Valleau failed to properly evaluate the audit team's significant judgments and its responses to significant risks. Specifically, Valleau failed to perform his own evaluation of the audit engagement team's conclusions with respect to the auditing of CEU's bank account balances and training center revenue. Valleau also failed to conduct a reasonable and appropriate evaluation and follow-up of the field auditor's allegation of an attempted bribe.

69. Valleau also failed to assess the engagement team's audit documentation that he reviewed when performing the engagement quality review. Even though he was aware of numerous red flags and troubling irregularities encountered by the engagement team, Valleau did not ensure that the audit work papers documented those red flags and how they were addressed by the audit team. Valleau also signed off on forms and checklists, including a Fraud Risk Information Form and Risk Assessment Summary Form, which were left blank or were copied from a prior audit.

WOWJOINT AUDITS

BACKGROUND

70. Wowjoint is a Cayman Islands company with headquarters and operations in and around Beijing, China. Wowjoint claims that its operating subsidiary, Beijing Wowjoint, designs, engineers, and manufactures large, customized industrial equipment used in construction of Chinese transportation infrastructure, including roads, railroads, subways, bridges, and viaducts. Wowjoint's ordinary shares, warrants, and units are registered with the Commission pursuant to Section 12(b) of the Exchange Act. The company's securities (symbols "BWOWF" and "BWOWU") were traded on Nasdaq in 2010, but were delisted in 2011, and currently trade on the OTC market.

71. Sherb LLP issued audit reports for Wowjoint's financial statements for the years ended August 31, 2008 and 2009, a four-month transition period ended December 31, 2009, and the years ended December 31, 2010 and 2011 that were included in Wowjoint's Forms 20-F filed on November 12, 2010, June 30, 2011 and April 30, 2012, respectively, and a registration statement on Form F-1 first filed on May 3, 2010, with ten subsequent amendments filed through December 12, 2011.

WOWJOINT AUDITS FACTS

Valleau and Epstein Failed to Adequately Plan and Supervise the Audits

72. PCAOB Standards require an auditor to adequately plan the audit and properly ervise assistants. AU Section 150.02 *(Generally Accepted Auditing Standards)* and AU

Section 311.01 *(Planning and Supervision)*. PCAOB Standard AU 311 at .06 requires that the auditor obtain a level of knowledge of the entity's business that will enable him to plan and perform his audit in accordance with PCAOB Standards. Valleau failed to properly plan the audit and properly supervise his assistants, and failed to obtain sufficient knowledge about Wowjoint's business, including its accounting policies and procedures and its internal controls. Although Valleau was the engagement partner for the 2008-2010 audits, he had minimal involvement, if any, in these audits. Valleau was not even copied on most email communications concerning audit issues. Valleau also did not charge any time to this client until May 2011. Valleau's lack of involvement left Epstein to provide most, if not all, of the day to day supervision and management of the audits. Epstein reviewed the work papers prepared by the audit team, including those of other audit managers. Epstein dealt directly with Wowjoint senior management and Wowjoint's SEC counsel. Epstein also primarily communicated Sherb LLP's consents and approvals to Wowjoint's SEC counsel. Valleau's supervision of the audit and his review of the audit work papers were grossly deficient.

73. PCAOB Quality Control Standards require that "[Audit firms should] have in place internal quality-control procedures to ensure that services are competently delivered and adequately supervised." (QC § 20.02) They also require that audit firms establish policies and procedures "to provide the firm with reasonable assurance that...work is assigned to personnel having the degree of technical training and proficiency required in the circumstances." (QC § 40.02) Wowjoint's use of the Percentage of Completion ("POC") accounting method to compute its contract revenue for U.S. reporting purposes, and its specialized heavy equipment manufacturing business, requires an auditor with sufficient knowledge of that accounting method and industry, respectively. Sherb LLP, and its managing partner Sherb, in particular, failed to assign staff with the requisite technical training and proficiency necessary to perform the audits as required under QC § 20.13(b). Prior to the Wowjoint engagement, Epstein had never worked on an audit of a heavy machinery manufacturer that used the POC method to calculate revenue to be recognized, and had an inadequate understanding of the POC method. Although Sherb LLP assigned one staff member with experience with the POC accounting method used in Taiwan for the audits of the periods ended August 31, 2008 and 2009, he had no experience in the audit of the POC accounting method used in the U.S. In planning for the 2008-2010 audits, Epstein claimed he researched and studied the POC accounting method to determine revenue for contracts, but he could neither explain the fundamentals of the POC accounting method,[7] nor how Sherb LLP performed its testing of Wowjoint's revenue computation.

74. PCAOB Standard AU Section 342 (*Auditing Accounting Estimates* at .04) states, "The auditor is responsible for evaluating the reasonableness of accounting estimates made by management in the context of the financial statements taken as a whole." It also requires the auditor to use one or a combination of the following approaches to evaluate the reasonableness of management's accounting estimates: (a) review and test the process used by management to

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[7] While there may be complexities in determining the costs incurred to date, total estimated costs and total estimated project revenue, the simple arithmetic for the percentage of completion for a project is total cost incurred divided by total estimated costs for that project.

develop the estimate; (b) develop an independent expectation of the estimate to corroborate the reasonableness of management's estimate; (c) review subsequent events or transactions occurring prior to the date of the auditor's report. (AU § 342.10.) Sherb LLP failed to plan and design adequate audit procedures to test the reasonableness of Wowjoint's estimates of revenue under each contract. Valleau and Epstein failed to plan adequate procedures to test two critical components used in the POC computation, the total estimated costs for each project and the total costs already incurred on that project. This planning failure is especially problematic in light of Sherb LLP's assessment during the client acceptance process that Wowjoint's financial reporting system appeared to be "insufficient to provide evidence to support that transactions have occurred and that all the transactions that should be recorded are, in fact, recorded." Sherb LLP's failure to properly test those two components allowed Wowjoint's omission of certain costs to go undetected for the first two financial periods that Sherb LLP audited.

75. Valleau and Epstein also failed to recognize and adequately address the audit and accounting issues related to certain contracts with unusual payment structures involving a third party ("Wowjoint's contract co-party"). Wowjoint's contract co-party was a co-party with Wowjoint on several of Wowjoint's machinery contracts whereby Wowjoint's customers are required to make payments to Wowjoint's contract co-party instead of Wowjoint. Wowjoint's contract co-party collected the payments for those contracts, and was supposed to reimburse Wowjoint promptly after deductions for commissions and other fees. Wowjoint's contract co-party, however, withheld a significant amount of such funds, leaving Wowjoint with a large accounts receivable balance. As of December 31, 2009, the largest outstanding receivable was due from Wowjoint's contract co-party, which constituted 43% of all outstanding accounts receivable. Sherb LLP failed to evaluate the reasonableness of this unusual business arrangement, the related accounting disclosure requirements, and how it ultimately affected the collectability of its receivables.

<u>The Audit Team Failed to Test Wowjoint's Revenue Computations</u>

76. Valleau and Epstein's lack of proper audit planning, failure to design and perform adequate audit procedures to test the critical components of the POC formula, lack of knowledge of common Chinese business practices and accounting, and Epstein's inadequate understanding of the POC method, resulted in their failure to verify that Wowjoint correctly computed and recorded its contract-based revenue. Due to the lack of adequate audit procedures, Valleau and Epstein failed to detect Wowjoint's errors in converting from cash basis accounting, a common Chinese GAAP practice, to accrual accounting for U.S. reporting purposes.

77. U.S. GAAP requires an accrual basis of accounting. The revenue computed by Wowjoint was purported to be based on a POC method, which generally calculates revenue to be recognized by dividing the costs incurred as of the measurement date on an individual project into the projected total costs for the completed project. Costs incurred but not recorded must be accrued under U.S. GAAP. Projected total costs for a project also requires periodic updating to reflect changes in costs and quantity of materials, inflation, and other unforeseen costs. The quotient of costs incurred into projected total costs is factored against the projected revenue for a project to determine the revenue to be recognized during that fiscal period (after subtracting

revenue already recognized in prior periods) for that project. Accordingly, the numerator and denominator in that formula are integral to revenue recognition and should have been subject to audit procedures. The evidence gathered from the work papers prepared by the audit team and reviewed by Valleau and Epstein, however, suggests that the projected total costs (the denominator in the POC formula) for the individual projects, and their updates, were not subject to audit procedures. Valleau and Epstein simply accepted Wowjoint's estimates at face value. Valleau and Epstein also failed to adequately test the completeness and existence of costs allegedly incurred by Wowjoint for each project (the numerator in the POC formula), and to adequately test the proper allocation of costs amongst the various projects and financial periods.

78. Valleau's and Epstein's failure to perform adequate audit procedures to test contract costs resulted in Sherb LLP taking the numbers at face value from Wowjoint. Wowjoint, meanwhile, did not properly compute and update its projected total costs and failed to properly accrue and allocate costs incurred, including the cost of goods sold ("COGS"), to the correct periods for the fiscal years ended August 31, 2008 and August 31, 2009. Valleau's and Epstein's failure enabled Wowjoint to incorrectly report that its net income increased rapidly from $3.9 million in 2008 to $9.8 million in 2009.

Epstein and Sherb LLP Failed to Conduct Sufficient Inquiry and Procedures Following Wowjoint's Admission of Cash Basis Accounting

79. Under PCAOB Standard AU Section 561 (*Subsequent Discovery of Facts Existing at the Date of the Auditor's Report* at .04-.08), when an auditor becomes aware of information which relates to financial statements previously reported on by him, but which was not known to him at the date of his report and which is of such a nature and from such a source that he would have investigated it had it come to his attention during the course of the audit, he is required, as soon as practicable, to undertake to determine whether the information is reliable and whether the facts existed at the date of his report. If the information is found to be reliable and would have affected his report, he is required to take certain actions, including actions to prevent future reliance on his report.

80. After the two fiscal years ended August 31, 2008 and August 31, 2009, Wowjoint filed a Form F-1, which included the comparative financial statements and consent from Sherb LLP to include its audit reports for those two fiscal years. After filing the Form F-1, Wowjoint changed its fiscal year end to December 31 and prepared to file financial statements for that four-month transition period on Form 20-F, and also to include in an amendment to its Form F-1. Wowjoint engaged Sherb LLP to audit the transition period financial statements. Wowjoint's financial statements for the transition period ended December 31, 2009 disclosed a dramatic swing from profitability to a historic $6 million loss in just that four-month transition period. The swing in profitability stemmed from a large topside journal entry. The entry recorded approximately RMB 43 million in costs that were incurred in prior periods into COGS during the transition period, which Epstein has acknowledged was a material amount. As part of his review of audit work papers prepared by the audit team, Epstein sent an email to Wowjoint's controller at the time, raising concerns about the journal entry:

This is an interesting situation. We have costs for contracts that have been fully completed in prior period included in COGS for the 4 months ended December 31, 2009. Are these costs for equipment that needed additional expenses after they were completed? Perhaps there were problems in these equipment order, filled in the previous years, which need fixing that was not to be offset by future revenue. Or is it costs on old contracts that were not known at the time the contracts concluded and came about in the four months ended December 31, 2009. Please advise. [*Sic*s omitted.]

Wowjoint's controller responded in an email which was copied to Epstein and Sherb:

Prior to December 2009, the company's accounting book is in ***cash basis****. They never accrue liabilities for those inventories received or expenses incurred, but not paid. Despite we finished equipment and we delivered to our customers, certain amount of raw materials expenses are omitted to be recorded because we did not pay to suppliers. Even though those raw materials are used already, their costs did not go to cost of sales because of cash basis. As a result,* ***underestimate of liabilities lead to understatement of cost of sales and then overstatement of profit****.* [Emphasis added; *sic*s omitted.]

81. Wowjoint's controller plainly informed Epstein and Sherb that the company had been using the cash basis method of accounting for its revenue, which fails to comply with U.S. GAAP. Moreover, Wowjoint's controller disclosed that the use of the cash basis method, and incorrect recordation of COGS, caused misstatements of prior financial statements. Nevertheless, Epstein and Sherb LLP simply wrote in their work papers that "the production cost is reasonable" without any testing or further inquiry.

82. Wowjoint's controller's email should have triggered immediate alarm bells for Epstein, Sherb, and Sherb LLP. Wowjoint's controller's statement to Epstein and Sherb was a clear admission that the company's prior period financial statements were not in accordance with U.S. GAAP and that the December 31, 2009 numbers would also be incorrect. Therefore, Epstein, Sherb, and Sherb LLP were on notice that not only the financial statements for the transition period were inaccurate, but that the financial statements for the two prior fiscal years, for which Sherb LLP had already issued unqualified audit reports, were also inaccurate. Despite this information having been provided to Epstein and Sherb, and subsequently brought to the attention of Valleau, Sherb LLP performed no further audit procedures to analyze and verify these allegedly omitted prior period costs or to determine the proper reallocation of these costs to the correct periods, made no assessment of the materiality of these costs to the prior period financial statements, and did not appear to have assessed the need to withdraw its audit reports for the prior periods. Instead, Sherb LLP issued another unqualified audit report for the December 31, 2009 transition period. Those financial statements were then used in Wowjoint's Form 20-F for the transition period and in an amended Form F-1, with Sherb LLP's consent.

Epstein and the Sherb LLP Audit Team Failed to Perform Adequate Auditing Procedures to Determine Collectability of Wowjoint's Large and Long-Outstanding Accounts Receivable Balance

83. Under PCAOB Standard AU Section 326 (*Evidential Matter* at .01), an auditor is required to obtain sufficient competent evidential matter through inspection, observation, inquiries, and confirmations to afford a reasonable basis for an opinion regarding the financial statements under audit.

84. Accounts receivable comprised the majority of Wowjoint's current assets listed on its balance sheets as of August 31, 2008, August 31, 2009, and December 31, 2009. A substantial portion of those accounts receivable were greater than one year delinquent, raising concerns about collectability of those purported assets. Epstein inquired about the large, outstanding receivables for contracts finished several years earlier and asked whether Wowjoint's allowance for uncollectible debt was adequate. Wowjoint informed Epstein that historical records of payment from its customers, though delayed, were sufficient to support collectability. Wowjoint also explained that because most of its clients were Chinese government owned entities, payment was likely, despite their slow remuneration. From these representations, Epstein accepted Wowjoint's conclusory rationale and representations concerning the collectability of all the receivables. This is despite Epstein and Sherb LLP's knowledge that Wowjoint's largest receivable was not, in fact, from a Chinese government owned entity.

85. A private entity that was a co-party with Wowjoint on several contracts with unusual payment structures held the largest outstanding accounts receivable for the first three fiscal periods audited by Sherb LLP, and most of those balances stretched back several years. The unusual relationship between Wowjoint's contract co-party and Wowjoint was apparent based upon a cursory review of contracts for each of the contracts involving Wowjoint's contract co-party. Wowjoint's contract co-party was a co-party on most of Wowjoint's early contracts, not an end-user customer. Instead, Wowjoint would produce the equipment and deliver it to the end-user customers, and those customers would pay Wowjoint's contract co-party, rather than Wowjoint. According to agreements between Wowjoint and Wowjoint's contract co-party, the payment for the equipment would be promptly forwarded by Wowjoint's contract co-party to Wowjoint, with Wowjoint's contract co-party collecting a service fee from that payment. Because the arrangement was unlike that of an ordinary customer and manufacturer relationship, and that Wowjoint allowed the co-party to fail to make timely payments as required by their arrangements, it warranted further procedures to determine whether the accounts receivable recordation and classification by Wowjoint was appropriate.

86. After some prodding by Epstein for evidence that Wowjoint's contract co-party would pay its long outstanding bills, Wowjoint provided Epstein with Wowjoint's contract co-party's balance sheet showing its asset levels. Wowjoint asserted this as sufficient proof of Wowjoint's contract co-party's ability to pay. Wowjoint also provided a bank statement for Wowjoint's contract co-party, showing its cash balance at that particular time, again asserted as evidence that Wowjoint's contract co-party was capable of paying Wowjoint. At most, these

documents proved only Wowjoint's contract co-party's financial position, not its inclination to pay. Furthermore, the validity of the cash balance shown on the bank statement was questionable because it had been recently substantially increased by a large cash deposit just days before the date of the statement. Prior to that date, the cash balance had been significantly lower.

87. PCAOB Standard AU Section 230 (*Due Professional Care in the Performance of Work* at .01-.02, .07-.08) requires auditors to exercise due professional care and professional skepticism throughout the audit. Epstein and Sherb LLP failed to evaluate the unusual arrangements between Wowjoint and its contract co-party that should have heightened their sensitivity regarding Wowjoint's contract co-party's inclination to pay its debts. Additional audit procedures should have, accordingly, been planned to test whether the transactions between Wowjoint's contract co-party and Wowjoint were at arm's length and whether there were unusual payment terms that would affect the collectability and valuation of this receivable.

88. An audit procedure commonly used to assess collectability of accounts receivable is to monitor subsequent collection following the fiscal period being audited. The audit team claimed to have reviewed subsequent collections as a basis for measuring the adequacy of collectability and allowance for bad debt for accounts receivable. Sherb LLP's audit work papers, however, did not reflect any such review of the subsequent collections. In the work papers for accounts receivable, Sherb LLP had created two columns to document their subsequent collection testing. These two columns were left blank. Nevertheless, the audit staff claimed it was done and wrote, "[s]ubsequent collection test. Auditor's field work till January 2010, and auditor check all the subsequent collection to supporting document."[*sic* omitted] Both Epstein and Valleau affixed their initials to that work paper, indicating their review.

<u>Valleau, Epstein and Sherb LLP Failed to Retain Adequate Audit Documentation</u>

89. Under PCAOB Standard No. 3 (*Audit Documentation* at .6), "[a]udit documentation must contain sufficient information to enable an experienced auditor, having no previous connection with the engagement: (a) to understand the nature, timing, extent, and results of the procedures performed, evidence obtained, and conclusions reached, and (b) to determine who performed the work and the date such work was completed as well as the person who reviewed the work and the date of such review."

90. The audit documentation retained by Valleau, Epstein and Sherb LLP is deficient. To begin with, it cannot be determined from the work papers who comprised the engagement teams for the August 31, 2008, August 31, 2009, and December 31, 2009 Wowjoint audits. The finalized work papers include only illegible initialing by various staff members and partners. Many work papers do not reflect the name of the preparer nor the date they were prepared.

91. The revenue section for the December 31, 2009 transition period audit provides an example of Valleau, Epstein and Sherb LLP's deficient audit documentation. The revenue work papers provide only conclusory findings with no documented support for those findings. Epstein was unable to identify what procedures were performed to verify the profit and loss figures

provided by Wowjoint even when he was given the opportunity to review the work papers that he approved.

92. The audit documentation also must include information the auditor has identified relating to significant findings or issues that is inconsistent with or contradicts the auditor's final conclusions. (AS No.3 at .8.) The auditor must also document significant findings or issues, actions taken to address them (including additional evidence obtained), and the basis for conclusions reached in connection with each engagement. (AS No. 3 at .12) Sherb LLP's work papers failed to document the audit issues raised by the discovery of the omitted prior period costs during the transition period audit and how Sherb LLP resolved that issue, as required by PCAOB Auditing Standard No. 3.

Valleau's and Epstein's Reviews of the Work Papers were Inadequate

93. PCAOB Standards AU Section 150 *(Generally Accepted Auditing Standards)* and AU Section 311 *(Planning and Supervision)* require an auditor to properly supervise assistants. PCAOB Standard AU Section 230 (*Due Professional Care in the Performance of Work* at .01-.02, and .07-.08) also requires auditors to exercise due professional care and professional skepticism throughout the audit. The reviews by Valleau and Epstein, for Wowjoint's fiscal periods ended August 31, 2008, August 31, 2009, and December 31, 2009, were inadequate. Valleau and Epstein aggregately initialed most pages of the work papers, indicating that they had reviewed them to ensure their accuracy and sufficiency. Many of the pages are, however, written in full or in part in Chinese. Neither Valleau nor Epstein speak or read Chinese. Epstein could not identify a single line in Chinese that he understood and was unable to distinguish between Wowjoint's different customers in the revenue section. Epstein also signed off on work papers that reflected audit procedures that were not completed, as well as many work papers that contained obvious errors, demonstrating his lack of due professional care in his review of work papers.

The 2010 Wowjoint Audit was Deficient

94. PCAOB Standards AU Section 150 *(Generally Accepted Auditing Standards)* and AU Section 311 *(Planning and Supervision)* require an auditor to properly supervise assistants. PCAOB Standard AU Section 230 (*Due Professional Care in the Performance of Work* at .01-.02, .07-.08) also requires auditors to exercise due professional care and professional skepticism throughout the audit. Despite their knowledge of the earlier deficient audits and Wowjoint's failure to record costs incurred in the proper periods, Valleau and Epstein failed to implement additional audit procedures or exercise due professional care in the 2010 audit (the "2010 Wowjoint Audit") to ensure that these mistakes did not occur again. Despite their knowledge of Wowjoint's failure to accurately estimate and update the total costs for its projects, Valleau and Epstein did not object to the continued incorrect application of the POC method to compute its revenue. The 2010 Wowjoint Audit performed by Sherb LLP was recklessly managed, supervised, and performed.

95. Mycio was initially assigned to be the engagement partner for this audit. He visited Wowjoint in China for one week to get familiar with the client, and allegedly performed some

audit planning and answered some technical questions. However, Mycio inexplicably and recklessly failed to continue his supervision of the 2010 Wowjoint Audit after he returned to the U.S., without first transferring his responsibilities to another audit partner. He did not even follow up to ascertain whether the audit was completed and whether any other audit partner was ever assigned to the audit. Mycio failed to exercise due professional care and properly supervise assistants as required by PCAOB Standards AU Section 230 and AU Section 311. The audit work papers do not reflect any work performed by Mycio.

96. PCAOB Interim Quality Control Standards Section 20, *System of Quality Control for a CPA Firm's Accounting and Auditing Practice* at .02 requires that "[Audit firms should] have in place internal quality-control procedures to ensure that services are competently delivered and adequately supervised." PCAOB Interim Quality Control Standards Section 40, *The Personnel Management Element of a Firm's System of Quality Control-Competencies Required by a Practitioner-in-Charge of an Attest Engagement* at .02 requires that audit firms establish policies and procedures "to provide the firm with reasonable assurance that...work is assigned to personnel having the degree of technical training and proficiency required in the circumstances." Sherb LLP failed to ensure that the assigned personnel properly performed their duties. It is unclear when Valleau took over this audit. Valleau signed the audit completion form and dated his signature in March 2011. Sherb also signed off as engagement quality reviewer and dated his initials in March 2011. However, the audit work papers reflect that the audit was still in progress in May 2011. While Valleau's initials appear on some work papers, they were all dated May 2011. Alarmingly, many key audit work papers did not reflect the identity of the preparer as required under PCAOB Auditing Standard No. 3 at .06. They only reflected Epstein's initials.

97. Valleau stated that he had no recollection of being assigned to be the engagement partner for the 2010 Wowjoint Audit, and stated that he was only asked by Epstein to help out on a few work papers in May 2011. However, Valleau was not able to explain an audit completion form bearing his signature dated March 2011. At a minimum, this indicated the audit was recklessly supervised and managed. Nevertheless, an unqualified audit report was issued by Sherb LLP, signed by Epstein, who for all practical purposes, was functioning as if he was the audit partner. The approval to file was communicated to Wowjoint's outside counsel by Epstein.

98. The audit work papers, similar to prior periods, contained many errors and forms that were incomplete. They also reflected that Wowjoint continued to record during this audit year costs for projects that were allegedly completed in prior periods. One work paper which purportedly demonstrated that Sherb LLP had performed audit procedures to test costs of service revenue was evidently just copied from a prior audit, as it reflected costs identical to a prior period that had no relationship to service revenue earned in 2010. It was nevertheless reviewed and approved by Epstein.

The 2011 Wowjoint Audit was Deficient

99. PCAOB Auditing Standard No. 9 *Audit Planning* at .4-.5 requires an auditor to properly plan an audit and to develop an audit plan which includes planned risk assessment procedures and planned responses to the risks of material misstatement. PCAOB Auditing

Standard AU Section 230 (*Due Professional Care in the Performance of Work* at .01-.02, .07-.08) also requires auditors to exercise due professional care and professional skepticism throughout the audit. Mycio returned as the engagement partner for the 2011 audit. As with the earlier audits, this audit failed to test the key components for Wowjoint's revenue computation. Sherb LLP again accepted Wowjoint's numbers and computation at face value. Sherb LLP failed to notice obvious errors in Wowjoint's revenue computation worksheet, such as one project incorrectly computed as 50% complete when it should have been only 40% complete. Sherb LLP also raised no objection where Wowjoint apparently accelerated its revenue recognition on a number of projects simply by accruing for costs that had not yet been incurred. This allowed Wowjoint to recognize 100% of the revenue on those projects even though the underlying machines had not been completed. This is not in accordance with U.S. GAAP. Sherb LLP also failed to properly test the actual costs allegedly incurred.

100. Under PCAOB Auditing Standard No. 15 (*Audit Evidence* at .4), an auditor is required to plan and perform audit procedures to obtain sufficient appropriate audit evidence to provide a reasonable basis for his or her opinion. To be appropriate, audit evidence must be both relevant and reliable. (AS No. 15.6) Mycio violated this standard by accepting Wowjoint's numbers for the total estimated costs and total costs incurred for each project at face value, without performing procedures to verify that the cost estimates calculated by Wowjoint were reliable.

101. Under PCAOB Standard AU Section 230 (*Due Professional Care in the Performance of Work* at .01-.02, .07 and .08), auditors are required to exercise due professional care throughout the audit. Due professional care requires that the auditor exercise professional skepticism. Under this standard, professional skepticism is an attitude that includes a questioning mind and a critical assessment of audit evidence. Mycio failed to design adequate audit procedures to verify the costs estimated and recorded for each project, and failed to notice that Wowjoint had accelerated revenue recognition on certain projects by accruing for costs that had not been incurred.

102. Under PCAOB Auditing Standard No. 3 (*Audit Documentation* at .6), audit documentation must contain sufficient information to enable an experienced auditor, having no previous connection with the engagement to (a) understand the nature, timing, extent, and results of the procedures performed, evidence obtained, and conclusions reached; and (b) determine who performed the work and the date such work was completed as well as the person who reviewed the work and the date of such review. Mycio failed to prepare and retain adequate audit documentation, as many key audit work papers did not identify the names of the preparers and the dates the relevant work was completed. The audit documentation also did not accurately reflect the date the engagement quality review was purportedly performed, and any work papers reviewed by the engagement quality reviewer.

Sherb Failed to Perform Adequate Concurring Partner and Engagement Quality Reviews

103. Sherb was the concurring partner for the first three audits under the superseded standards (SECPS § 1000.08(f) and Appendix E of SECPS § 1000.39) and was the engagement quality reviewer for the last two audits pursuant to the current standard (Auditing Standard No. 7). Given the audit team's clearly inadequate planning, failure to properly identify and audit high-risk transactions and account balances, and the many obvious errors in the audit work papers, Sherb's concurring and engagement quality reviews were obviously deficient.

104. As concurring partner and engagement quality reviewer for the five audits, Sherb failed to properly document what significant audit issues he had discussed with the audit team, what audit work papers he had reviewed, and his evaluation of the audit team's judgment and resolution on significant audit issues as required under Paras. b and c of Appendix E of SECPS § 1000.39 and AS No. 7.19. The only documentation of Sherb's concurring partner review and engagement quality review were a few generic checklists where he simply checked off each item and placed his initials at the end. He did not provide any reference to audit work papers he reviewed as the checklists requested. He signed his engagement quality review approval two months before the completion of the 2010 audit.

105. There is no evidence that Sherb actually reviewed any audit planning work papers for the initial audits. Had he done so, he would have realized that the initial client acceptance form clearly indicated the audit team's assessment that Wowjoint's financial reporting system appeared to be "insufficient to provide evidence to support that transactions have occurred and that all the transactions that should be recorded are, in fact, recorded." This is an alarming deficiency that an auditor needs to compensate and address through properly designed substantive audit procedures. Instead, the audit planning documents did not reflect any audit procedures designed to address this risk. Sherb LLP did not even obtain and properly document its understanding of Wowjoint's internal control system. During the transition period audit, Sherb was copied on the email exchanges between Epstein and Wowjoint's controller regarding the posting of material costs omitted from prior periods into the transition period. Sherb was instrumental in convincing Valleau to allow Wowjoint to do so. Sherb should have ensured that the audit work papers reflected how the audit team evaluated this important audit issue, how it resolved the issue, and the basis of the audit team's determination. Sherb failed to do so.

Sherb's Overall Responsibility for Quality Control

106. Sherb is the sole equity partner and managing partner of Sherb LLP and as such has overall and ultimate responsibilities for the firm-wide quality control policies and practices required by PCAOB Interim Quality Control Standards Section 20 and Section 40. The deficiencies noted above clearly demonstrated that there is a complete failure in the firm's quality control policies and system in actual practice. These failures include Sherb's failures to assign competent staff to each audit, to properly perform each audit, to properly take corrective actions when errors were brought to his attention, to modify Sherb LLP audit approaches when they learned of their own audit deficiencies, to ensure each engagement was clearly assigned to a

particular partner, and the quality control deficiency which allowed the issuance of an audit report by Epstein with partner approvals granted two months prior to the completion of the 2010 audit.

Valleau and Mycio Failed to Issue Accurate Audit Reports

107. PCAOB Standard AU Section 508 (*Reports on Audited Financial Statements* at .04) requires that the auditor's report contain an opinion on the financial statements taken as a whole and a clear indication of the character of the auditor's work. 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 PCAOB Standards (at .07). Here, the audit reports for which Valleau and Mycio were responsible falsely stated that they conducted their audits in accordance with PCAOB Standards.

D. VIOLATIONS

108. Section 4C of the Exchange Act and Rule 102(e)(1)(iv) of the Commission's Rules of Practice define improper professional conduct with respect to persons licensed to practice as accountants. Section 4C of the Exchange Act and Rule 102(e)(1)(iv)(B)(2) of the Commission's Rules of Practice provide that improper professional conduct includes "[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."

109. As a result of the conduct described above, Sherb LLP engaged in improper professional conduct within the meaning of Section 4C of the Exchange Act and Rule 102(e)(1)(iv)(B)(2) of the Commission's Rules of Practice. Sherb LLP's unreasonable conduct included the failures of Sherb, Valleau, Mycio, and Epstein with respect to the 2007 CSKI Audit, 2010 CEU Audit, and the Wowjoint audits. These repeated instances of unreasonable conduct resulted in violations of PCAOB Standards AU Section 150, AU Section 230, AU Section 311, AU Section 315, AU Section 316, AU Section 326, AU Section 330, AU Section 342, AU Section 508, AU Section 561, Auditing Standard No. 3, Auditing Standard No. 7, Auditing Standard No. 9, Auditing Standard No. 15, AICPA SECPS § 1000.08(f) and Appendix E of SECPS § 1000.39, PCAOB Interim Quality Control Standard Section 20, and PCAOB Interim Quality Control Standard Section 40.

110. As a result of the conduct described above, Sherb engaged in improper professional conduct within the meaning of Section 4C of the Exchange Act and Rule 102(e)(1)(iv)(B)(2) of the Commission's Rules of Practice. Sherb repeatedly engaged in unreasonable conduct with respect to the 2007 CSKI Audit and the Wowjoint audits, which resulted in violation of Interim Quality Control Standards, AICPA SECPS § 1000.08(f) and Appendix E of SECPS § 1000.39 and Auditing Standard No. 7, PCAOB Interim Quality Control Standard Section 20, and PCAOB Interim Quality Control Standard Section 40.

111. As a result of the conduct described above, Valleau engaged in improper professional conduct within the meaning of Section 4C of the Exchange Act and Rule

102(e)(1)(iv)(B)(2) of the Commission's Rules of Practice. Valleau repeatedly engaged in unreasonable conduct with respect to the 2007 CSKI Audit, 2010 CEU Audit and the Wowjoint audits, which resulted in violations of PCAOB Standards, AU Section 150, AU Section 230, AU Section 311, AU Section 315, AU Section 316, AU Section 326, AU Section 342, AU Section 508, AU Section 561, Auditing Standard No. 3, and Auditing Standard No. 7.

112. As a result of the conduct described above, Mycio engaged in improper professional conduct within the meaning of Section 4C of the Exchange Act and Rule 102(e)(1)(iv)(B)(2) of the Commission's Rules of Practice. Mycio repeatedly engaged in unreasonable conduct with respect to the 2010 CEU Audit and the 2011 Wowjoint audit that resulted in violations of PCAOB Standards AU Section 230, AU Section 311, AU Section 316, AU Section 326, AU Section 330, AU Section 342, AU Section 508, Auditing Standard No. 3, and Auditing Standard No. 9 and Auditing Standard No. 15.

113. As a result of the conduct described above, Epstein engaged in improper professional conduct within the meaning of Section 4C of the Exchange Act and Rule 102(e)(1)(iv)(B)(2) of the Commission's Rules of Practice. Epstein repeatedly engaged in unreasonable conduct with respect to the 2007 CSKI Audit, 2010 CEU audit, and the 2008 to 2010 Wowjoint audits that resulted in violations of PCAOB Standards AU Section 230, and AU Section 311, AU Section 316, AU Section 326, AU Section 330, AU Section 561, and Auditing Standard No. 3.

114. Section 10A(b)(1) of the Exchange Act provides that if "the registered public accounting firm detects or otherwise becomes aware of information indicating that an illegal act (whether or not perceived to have a material effect on the financial statements of the issuer) has or may have occurred, the firm shall . . . determine whether it is likely that an illegal act has occurred; and . . . if so, determine and consider the possible effect of the illegal act on the financial statements of the issuer . . . .and . . . as soon as practicable, inform the appropriate level of the management of the issuer and assure that the audit committee of the issuer, or the board of directors of the issuer in the absence of such a committee, is adequately informed with respect to illegal acts that have been detected . . . ."

115. As a result of the conduct described above, Mycio and Sherb LLP willfully violated Section 10A(b)(1) of the Exchange Act. During the performance of the audit, Mycio became aware of a report by a Sherb LLP staff auditor that a CEU senior management official had attempted to bribe him in an effort to influence the performance of the audit, in potential violation of Rule 13b2-2(b)(1) under the Exchange Act. Mycio and Sherb LLP failed to undertake an appropriate investigation to determine whether it was likely that an illegal act had occurred, failed to consider the possible effect of the illegal act on the company's financial statements, and failed to inform the company's management or board of directors as required under Section 10A(b)(1) of the Exchange Act.

E. FINDINGS

116. Based on the foregoing, the Commission finds that Sherb LLP, Sherb, Valleau, Mycio and Epstein engaged in improper professional conduct pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice.

117. Based on the foregoing, the Commission finds that Sherb LLP and Mycio violated Section 10A(b)(1) of the Exchange Act.

IV.

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

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

Sherb LLP

A. Sherb LLP shall cease and desist from committing or causing any violations and any future violations of Section 10A(b)(1) of the Exchange Act.

B. Sherb LLP is denied the privilege of appearing or practicing before the Commission as an accountant.

C. Sherb LLP shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of $75,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Payment must be made in one of the following ways:

> (1) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
>
> (2) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:
>
> > Enterprise Services Center
> > Accounts Receivable Branch
> > HQ Bldg., Room 181, AMZ-341
> > 6500 South MacArthur Boulevard
> > Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Sherb LLP as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Yuri B. Zelinsky, Assistant Director, Division of Enforcement,, Securities and Exchange Commission, 100 F Street, N.E. Washington, DC 20549-5041.

Sherb

A. Sherb is denied the privilege of appearing or practicing before the Commission as an accountant.

B. After five years from the date of this order, Sherb 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 Sherb'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) Sherb, 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) Sherb, 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 Sherb's or the firm's quality control system that would indicate that the respondent will not receive appropriate supervision;

(c) Sherb 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) Sherb acknowledges his responsibility, as long as Sherb 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 Sherb 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 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 relating to Sherb's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

Valleau

A. Valleau is denied the privilege of appearing or practicing before the Commission as an accountant.

B. After five years from the date of this order, Valleau 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 Valleau'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) Valleau, 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) Valleau, 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 Valleau's or the firm's quality control system that would indicate that the respondent will not receive appropriate supervision;

(c) Valleau 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) Valleau acknowledges his responsibility, as long as Valleau 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 Valleau 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 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 relating to Valleau's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

Mycio

A. Mycio shall cease and desist from committing or causing any violations and any future violations of Section 10A(b)(1) of the Exchange Act.

B. Mycio is denied the privilege of appearing or practicing before the Commission as an accountant.

C. After five years from the date of this order, Mycio 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 Mycio'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) Mycio, 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) Mycio, 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 Mycio's or the firm's quality control system that would indicate that the respondent will not receive appropriate supervision;

(c) Mycio 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) Mycio acknowledges his responsibility, as long as Mycio 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.

D. The Commission will consider an application by Mycio 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 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 relating to Mycio's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

Epstein

A. Epstein is denied the privilege of appearing or practicing before the Commission as an accountant.

B. After three years from the date of this order, Epstein 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 Epstein's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company or 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) Epstein, 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) Epstein, 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 Epstein's or the firm's quality control system that would indicate that the respondent will not receive appropriate supervision;

(c) Epstein 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) Epstein acknowledges his responsibility, as long as Epstein 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 Epstein 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 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 relating to Epstein's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chair White
Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70825 / November 6, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-11701

In the Matter of INVESCO FUNDS GROUP, INC., Respondent.	**ORDER AUTHORIZING TRANSFER OF REMAINING FUNDS AND ANY FUTURE FUNDS RECEIVED BY THE FAIR FUND TO THE U.S. TREASURY, DISCHARGING THE FUND ADMINISTRATOR, AND TERMINATING THE FAIR FUND**

On October 8, 2004, the United States Securities and Exchange Commission (the "Commission") issued an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (the "Order") against Invesco Funds Group, Inc. ("IFG"), which directed, among other things, that IFG pay disgorgement of $215 million and a civil penalty of $110 million (Exchange Act Release No. 50506 (Oct. 8, 2004)). The Order further established a fair fund to provide for the distribution of these payments (the "Fair Fund") and ordered IFG to comply with undertakings to retain an independent distribution consultant ("IDC") to develop a plan for distribution of the $325 million to shareholders in the mutual funds affected by market timing.

On July 6, 2007, the Commission issued a Notice of Proposed Distribution Plan and Opportunity for Comment (Exchange Act Release No. 56025A (July 6, 2007)) pursuant to Rule 1103 of the Commission's Rules on Fair Fund and Disgorgement Plans, 17 C.F.R. §201.1103. The Commission received comments, and on May 23, 2008, the Commission issued an Order Approving a Modified Distribution Plan ("IFG Plan") and Transferring Funds to Treasury ("Plan") (Exchange Act Release No. 57860 (May 23, 2008)). The Plan provided for the distribution of the Fair Fund to harmed investors according to the methodology set forth in the Plan.

On November 20, 2009, the Commission issued an Amended Order Directing Disbursement of Fair Fund that authorized the disbursement of $418,127,632.34 to injured investors (Exchange Act Release No. 60292A (Nov. 20, 2009)). That amount consisted of: (1) the Fair Fund payments of $325 million, plus interest of $38,572,500.16; and (2) other plan payments from the Banc of America Capital Management, LLC, BACAP Distributors, LLC, and Banc of America Securities, LLC Fair Fund ($45,830,186.05) and the Bear, Stearns & Co., Inc. and Bear, Stearns Securities Corp. Fair Fund ($8,724,946.13). On December 11, 2009, the IDC and the Fund Administrator for the Fair Fund distributed $418,127,632.34 to investors. On May 11, 2011, the Commission issued an Order Amending Distribution Plan and Directing Disbursement that authorized the distribution of any monies not distributed directly to investors (the "Residual") to the mutual funds affected by market timing in the same proportion as the amount of harm calculated on a fund-by-fund basis (Exchange Act Release No. 64472 (May 11, 2011)). The amount distributed as the Residual to the affected mutual funds was $57,821,352.37. A balance of $5,433,979.05 remains.

Step Twenty-Six (26) of the IFG Modified Plan provides that the Fair Fund is eligible for termination after the final accounting has been submitted by the Fund Administrator and approved by the Commission and all taxes and fees have been paid. A final accounting, which the Fund Administrator submitted to the Commission for approval as required by Rule 1105(f) of the Commission's Rules on Fair Fund and Disgorgement Plans has been approved. The staff of the Commission has verified that all taxes and fees have been paid and that the Commission is in possession of the remaining funds.

Accordingly, it is ORDERED that:

1. The remaining funds of $5,433,979.05 in the Fair Fund shall be transferred to the U.S. Treasury, and any future funds received by the Fair Fund shall also be transferred to the U.S. Treasury;

2. The Fund Administrator is discharged; and

3. The Fair Fund is terminated.

By the Commission.

Elizabeth M. Murphy
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3713 / November 7, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15610

In the Matter of **VICTORIA A. HUNT,** **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 Victoria A. Hunt ("Hunt" 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, Respondent consents to the Commission's jurisdiction over her and the subject matter of these proceedings and 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.

III.

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

1. Hunt was the CEO, managing member, and majority owner of Prestige Capital Advisors, LLC ("Prestige"), an investment adviser registered with the Commission. Hunt, 36 years old, is a resident of Charlotte, North Carolina.

2. On January 11, 2013, Hunt pled guilty to one count of racketeering conspiracy in violation of Title 18 United States Code, Section 1962(d); one count of securities fraud in violation of Title 15 United States Code, Sections 78j(b) and 78ff; one count of mortgage fraud in violation of Title 18 United States Code, Section 1344; one count of wire fraud in violation of Title 18 United States Code, Section 1343; and one count of money laundering in violation of Title 18 United States Code, Section 1956(h) before the United States District Court for the Western District of North Carolina, in United States v. Victoria Hunt, Crim. No. 3:12-CR-00239-FDW-5.

3. The counts of the criminal indictment to which Hunt pled guilty alleged, inter alia, that in connection with Prestige, Hunt and others defrauded investors and obtained money from them by means of materially false and fraudulent representations, and that Hunt did so by use of the means and instrumentalities of interstate commerce. Hunt executed the scheme and artifice to defraud by making material misrepresentations concerning, among other things, her relevant experience, Prestige's past performance, and the use of investor funds.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Hunt be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

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.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 70833 / November 7, 2013

Admin. Proc. File No. 3-14146

In the Matter of the Application of

ROBERT CONWAY
20 Blackmore Lane
East Islip, NY 11730

and

KAKIT NG
2260 Powell Ave.
Bronx, NY 10462

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF DISCIPLINARY PROCEEDING

Conduct Inconsistent with Just and Equitable Principles of Trade

Registered securities association found that registered representatives, while associated with member firms, engaged in conduct inconsistent with just and equitable principles of trade by using deceptive market timing practices and executing late trades in mutual fund shares. *Held*, association's findings of violations and sanctions imposed are *sustained*.

APPEARANCES:

Robert Conway, pro se.

Kakit Ng, pro se.

Marc Menchel, *Alan Lawhead*, and *Gary Dernelle*, for Financial Industry Regulatory uthority, Inc.

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Appeal filed: November 29, 2010
Last brief received: March 4, 2011

I.

Robert Conway and Kakit Ng appeal from FINRA disciplinary action.[1] FINRA found that Conway and Ng, while registered with FINRA through FINRA members A.B. Watley, Inc. ("Watley Inc.") and A.B. Watley Direct, Inc. ("Watley Direct"; together with "Watley Inc.," the "Watley firms"), engaged in unethical conduct, in violation of NASD Conduct Rule 2110,[2] by using deceptive market timing practices and executing late trades in mutual fund shares. FINRA fined Conway and Ng, suspended them from association with a FINRA member in any capacity for eighteen months and nine months, respectively, and ordered the payment of hearing costs.

Based on our independent review of the record, we agree with FINRA that Conway and Ng acted unethically. We find that their conduct reflects negatively on their ability to comply with regulatory and business standards necessary for the proper functioning of the securities industry and protection of public investors, and therefore is inconsistent with high standards of commercial honor and just and equitable principles of trade.[3] Accordingly, for the reasons set forth below, FINRA's disciplinary action against Conway and Ng is sustained.

II.

In January 2007, FINRA's Department of Enforcement ("Enforcement") filed an amended five-cause complaint against Conway, Ng, and three others.[4] As relevant here, Cause

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1 In July 2007, the National Association of Securities Dealers, Inc. ("NASD") was consolidated with the regulatory arm of the New York Stock Exchange ("NYSE"), resulting in the formation of the Financial Industry Regulatory Authority, Inc. ("FINRA"). *See* Securities Exchange Act Rel. No. 56146, 2007 WL 5185331 (July 26, 2007) (approving proposed rule change to reflect NASD's name change to FINRA). Because FINRA's review of this matter occurred after the consolidation, all references to FINRA will include references to NASD.

2 NASD Conduct Rule 2110 (now FINRA Rule 2010) requires members to "observe high standards of commercial honor and just and equitable principles of trade." This Rule applies to Conway and Ng through NASD General Rule 115 (now FINRA Rule 140), which extends the applicability of NASD rules governing members to their associated persons.

3 *See Daniel D. Manoff*, Exchange Act Rel. No. 46708, 55 SEC 1155, 2002 WL 31769236, at *4 (Oct. 23, 2002) (holding that conduct that reflects negatively on an associated person's ability to comply with fundamental regulatory requirements is inconsistent with "high standards of commercial honor and just and equitable principles of trade").

4 The other respondents were Watley Direct; Watley firms' president, Robert Malin; and Watley firms' chief compliance officer, Linus Nwaigwe. Prior to the hearing, each of these

One alleged that in at least 145 instances from approximately October 2002 to September 2003, Conway and Ng engaged in unlawful late trading in mutual fund shares by processing orders that they received from their clients after 4:00 p.m. Eastern Standard Time ("EST"),[5] and executing those orders at the same trading day's price or net asset value ("NAV"),[6] instead of the next trading day's NAV. Cause Three alleged that in at least 210 instances from approximately August 2002 to September 2003, Conway and Ng deceptively used multiple client accounts and different branch office and registered representative codes to circumvent mutual fund companies' efforts to restrict Conway's and Ng's market timing trading. Both causes charged violations of NASD Conduct Rule 2110.

In April 2008, a FINRA Hearing Panel ("Panel") determined that Conway and Ng violated NASD Conduct Rule 2110.[7] The Panel fined Conway $50,000 per cause, for a total of $100,000; ordered him to disgorge $78,720; and imposed consecutive suspensions (six months for unlawful late trading and twelve months for deceptive market timing practices) totaling eighteen months. The Panel fined Ng $10,000 per cause, for a total of $20,000, and imposed

(...continued)
respondents entered into settlements with FINRA to resolve any claims relating to their alleged misconduct.

5 All times noted in the opinion are EST.

6 A mutual fund's NAV "reflects the current market value of the fund's total assets minus its total liabilities." *VanCook v. SEC*, 653 F.3d 130, 133 n.1 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1582 (2012).

7 With respect to Cause One, the Panel also found that Conway and Ng's late trading "violated both a legal rule [Rule 22c-1(a) of the Investment Company Act of 1940] and an ethical standard applicable to registered representatives." Investment Company Act Rule 22c-1(a) generally requires that mutual fund shares be priced at the NAV "next computed" by the mutual fund after the receipt of an order for the mutual fund's shares. Decisions interpreting Rule 22c-1(a) have read it to prohibit mutual fund investors from trading a mutual fund's shares after 4:00 p.m. while still receiving that day's NAV. *See Gregory O. Trautman*, Exchange Act Rel. No. 61167A, 2009 WL 6761741, at *2 n.10 (Dec. 15, 2009) (collecting cases); *see also VanCook,* 653 F.3d at 133 (stating that "late trading violates the forward pricing rule of SEC Rule 22c-1").

FINRA's National Adjudicatory Council ("NAC"), however, disagreed with the Panel's finding that Conway and Ng violated Rule 22c-1. As the NAC properly found, Conway and Ng could not directly violate Rule 22c-1 because they were not within the class of persons subject to its provisions. *Trautman*, 2009 WL 6761741, at *1 n.5; *see* 17 C.F.R. § 270.22c-1 (limiting Rule 22c-1's application to registered investment companies, persons designated in investment companies' prospectuses to consummate transactions in their securities, principal underwriters, and dealers of mutual fund shares).

consecutive suspensions (three months for unlawful late trading and six months for deceptive market timing practices) totaling nine months. The Panel further ordered Conway and Ng, jointly and severally, to pay hearing costs of $11,519.81.

Conway and Ng timely appealed the Panel's decision to FINRA's National Adjudicatory Council ("NAC"). In an amended decision issued in October 2010, the NAC agreed with the Panel that Conway and Ng acted unethically. It fined Conway $100,000 and suspended him for eighteen months, and fined Ng $20,000 and suspended him for nine months. While recognizing that its sanctions were "ostensibly on par" with those imposed by the Panel, the NAC stated that it had determined to impose "unitary" sanctions, rather than sanctions per cause, because it found that Conway's and Ng's conduct stemmed from a single systemic problem.[8] The NAC affirmed the Panel's order that Conway and Ng pay hearing costs, but vacated its disgorgement order because the $78,720 figure was unreliable and not causally connected to Conway's conduct.

III.

Conway and Ng entered the securities industry in 1993 and 1996, respectively.[9] Conway and Ng met at Prudential Securities, Inc. ("Prudential") in 1999 and started working together in 2000. While at Prudential, Conway and Ng executed mutual fund transactions for hedge funds that employed market timing trading strategies. "Market timing" refers to the practice of frequent buying and selling of mutual fund shares in order to exploit inefficiencies in mutual fund pricing. Market timing, while not itself illegal, can harm long-term mutual fund shareholders by, among other things, diluting the value of their shares, increasing a mutual fund's transaction costs, and disrupting the management of a fund's investment portfolio.[10] When Conway left Prudential, Ng followed him to other broker-dealers.

In July 2002, the Watley firms hired Conway to establish a mutual fund market timing business. Conway became registered with Watley Inc. on July 3, 2002, and with Watley Direct

[8] FINRA Sanction Guidelines authorize the aggregation or "batching" of violations for purposes of determining sanctions if, among other things, the violations result from a single systemic problem or cause. FINRA Sanctions Guidelines, General Principles Applicable to All Sanction Determinations, No. 4.

[9] Neither Conway nor Ng is currently registered with FINRA.

[10] *See* Trautman, 2009 WL 6761741, at *2. & nn.13-14 (collecting cases).

on July 23, 2002.[11] Shortly thereafter, Conway hired Ng as his assistant. Ng became registered with Watley Inc. on October 28, 2002, and with Watley Direct on January 16, 2003.[12]

At the Watley firms, Conway and Ng serviced the accounts of four hedge funds that traded in mutual fund shares: Chronos Asset Management, Inc. ("Chronos"); Nettcorp Group ("Nettcorp"); Parametric Capital Management ("Parametric"); and Simpson Capital Management, Inc. ("Simpson"). All four hedge funds engaged in market timing of mutual funds and were known as market timers. Conway and Ng knew that their clients were market timers.[13]

Conway's responsibilities included communicating with clients, developing new business, and making sure "things were running smoothly." Conway earned compensation equal to 82% of the net revenues generated by his mutual fund business.[14] Between July 2002 and December 2003, Conway's gross earnings at the Watley firms exceeded $850,000. While Conway was the registered representative responsible for customer accounts, it was Ng, the self-described "worker bee," who was the primary point of contact for the four hedge fund clients

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[11] Watley Inc. and Watley Direct were subsidiaries of A.B. Watley Group, Inc., a publicly traded company, and shared common supervisory, compliance, and operations staff, as well as the same office space. In July 2004, Watley Inc. was expelled from FINRA membership for failure to pay fines in connection with two unrelated settlements.

[12] Although Ng did not first register with a Watley firm until October 2002, he began working there in July 2002. Between July and October 2002, Ng opened new customer accounts for Conway's clients, executed mutual fund trades through those accounts, and reviewed correspondence from mutual fund companies. Ng's conduct during this period was not charged in FINRA's amended complaint, and we do not consider it in determining liability or the appropriate sanctions. Nevertheless, we note that NASD Membership and Registration Rules 1021(a) and 1031(a) require that all persons who act as a principal or representative of an NASD member firm be properly registered as a principal or representative, respectively, with FINRA. NASD Membership and Registration Rule IM-1000-3 provides that the failure of any member to register an employee who should be so registered may be conduct inconsistent with just and equitable principles of trade, and therefore a violation of NASD Conduct Rule 2110.

[13] For example, in a March 19, 2003 email to a friend, Ng wrote, "[H]ere is an idea of what I do for clients," and attached a Forbes.com story titled "Looting Mutual Funds." The story discussed the problem of arbitrageurs trading mutual fund shares at outdated NAVs at the expense of long-term mutual fund shareholders. Ng's friend responded, "[Y]our [sic] going to SEC hell with your client clowns." Ng replied, "[I]ts [sic] not illegal, its [sic] frowned upon."

[14] These revenues consisted of "wrap" fees. "Wrap" fees are based on the value of assets under management in clients' accounts, transaction charges, and "12b-1" fees, *i.e.*, fees paid out of mutual fund assets in accordance with a distribution plan adopted pursuant to Rule 12b-1 of the Investment Company Act of 1940.

and performed most of the day-to-day work, including answering the telephones, processing and executing clients' mutual fund orders, and interacting with the Watley firms' clearing firm, Penson Financial Services, Inc. ("Penson"). The Watley firms paid Ng a monthly salary of $4,000 to $5,000.

A. Deceptive Market Timing Practices

1. Facts

While market timing itself is not unlawful, mutual fund companies generally discuss in their funds' prospectuses the harmful effects of market timing on the funds and long-term shareholders, discourage the frequent buying and selling of fund shares, and reserve the right to restrict or prohibit trading in circumstances where an investor exhibits a pattern of abusive trades made for short-term considerations.[15] When a mutual fund company detects market timing activities, it often sends brokers "stop" notices, or restriction letters, stating its objections to market timing and placing restrictions on future trading, including prohibiting purchases or exchanges of shares by certain customer accounts or particular brokers or branch offices.

Between August 2002 and September 2003, Conway and Ng received through Penson copies of approximately 150 "stop" notices from mutual fund companies that detected market timing trades by their clients.[16] Conway or Ng then contacted the appropriate client to inform it of the restrictions imposed by the particular mutual fund. Ng compiled a spreadsheet of the "stop" notices and kept copies of the notices in a file. Conway and Ng also received from Penson lists summarizing the customer account numbers and registered representative and branch office codes "stopped" by the various mutual fund companies. Ng testified that he alerted Conway whenever he received "stop" notices and that Conway read them. Conway confirmed that he was aware of and read the "stop" notices.[17] Nevertheless, Conway and Ng disregarded the "stop" notices and used various means to evade the trading restrictions imposed by mutual funds.[18]

Conway and Ng opened multiple accounts for Chronos, Nettcorp, and Parametric and shifted the execution of trades from one account to another when a mutual fund company

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15 Conway testified that he was "somewhat aware" that mutual fund prospectuses addressed mutual fund companies' market timing policies.

16 Penson also notified Conway and Ng by telephone when it received mutual fund "stop" notices.

17 Both Conway and Ng admitted to having received "stop" notices while working at other firms.

18 Conway's counsel stated at the hearing that Conway was "not denying trades were done in funds after restriction letters [were] sent."

imposed restrictions on a particular client's account.[19] Although each client had multiple accounts with different names or account numbers, the accounts often shared mailing addresses, authorized agents, traders, and officers and directors, and were under common control and ownership.[20] A former Chronos trader, Zachary Apoian, testified that Chronos maintained multiple "cloned" accounts with the Watley firms for the specific purpose of evading the efforts of mutual funds to restrict its market timing trading.[21]

For example, on March 3, 2002, the Alger Fund sent a "stop" notice through Penson to Conway and Ng prohibiting a number of their clients from executing further exchanges in any equity fund operated by the Alger Fund. One account the Alger Fund identified was Chronos's Standard Atlantic account. Notwithstanding this prohibition, within days, Conway and Ng executed several short-term exchanges of shares in Alger Fund equity funds through Chronos's other accounts at the Watley firms.

Likewise, in January 2003, Conway and Ng executed several short-term trades in three ARK Funds portfolios through Nettcorp's Boston Pipes account. On January 29, 2003, Penson forwarded to Conway and Ng a "stop" notice from ARK Funds, which stated that ARK Funds did not permit market timing trading and that a registered representative was market timing at least three ARK Funds portfolios. The notice further stated that ARK Funds was prohibiting the Boston Pipes account from making future purchases of shares in its funds. Notwithstanding this prohibition, Conway and Ng began executing Nettcorp's trades in mutual funds operated by ARK Funds through Nettcorp's NettFund Inc. (Portfolio 7) account. The trading continued until ARK Funds discovered what Conway and Ng were doing and sent Penson a second "stop" notice. In the second "stop" notice, which Penson forwarded to Conway and Ng, ARK Funds stated that the registered representative whose trading precipitated the first "stop" notice

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19 Chronos opened a total of six accounts, four accounts through Watley Inc. and two accounts through Watley Direct. Four of the six Chronos accounts were opened in the name of Standard Atlantic Ltd. ("Standard Atlantic"), and two were opened in the name of Hutchkins, LLC ("Hutchkins"). Standard Atlantic and Hutchkins were both owned by Chronos Offshore, Inc. Nettcorp opened two accounts through Watley Direct, one in the name of Boston Pipes, LLC, and the other in the name of Nettfund, Inc. (Portfolio 7). Parametric opened six accounts through Watley Inc., one each in the names of Troybilt, LLC; Doublecut Capital, LLC; Pine Brook Investors, LLC; Allencord Investments, LLC; Green Brook Investors, LLC; and Bluecrab, LLC. Each of these entities was owned by Vinship, LLC. Parametric also opened two accounts through Watley Direct, but the accounts were never funded.

20 Mutual fund prospectuses often cautioned that trading conducted in multiple accounts under common ownership or control would be considered when imposing limitations on excessive, short-term mutual fund trading. Mutual fund "stop" notices often highlighted this policy.

21 Conway affirmed that he "cloned" accounts but denied that he did so to evade mutual fund market timing restrictions.

continued to market time by opening new accounts under new account numbers. ARK Funds therefore stated that "[d]ue to this ongoing market timing activity" it was "going to shut down all trading" for the branch code from which the trades originated.

Conway and Ng also used multiple branch office and registered representative codes to help their clients evade market timing restrictions. Each customer account that cleared through Penson had a two-letter branch code and two-digit registered representative code identifying the branch and registered representative associated with the account. During the relevant period, Conway and Ng used six different code combinations for their clients' accounts.[22]

Penson sent numerous emails to Conway and Ng complaining that their and their clients' continued market timing activities after "stop" notices were sent were causing "severe relationship problems" between Penson and mutual fund companies. On May 6, 2003, Penson's Stephaney Robinson wrote:

> We received a stop letter today from Credit Suisse. Your Rep code was shut down a while back, but you're still trading these funds. . . . kindly quit it. Once a fund is added to your *Market Timing Fund Company List*, please liquidate all shares asap and get out of it. Holding them, then continuing to trade some 2 weeks later or so, just angers the Fund Cos. and makes it look like Penson never passed the stop info on to you.

On June 19, 2003, Robinson's superior, James McGrath, wrote:

> [E]ffective immediately when any of your accounts is stopped due to market timing in a fund family all of your accounts will be frozen. In the past you were notified on an account basis. As you know once the fund flags you they will stop all subsequent accounts. To allow subsequent exchanges only increases our rejects, alienates the fund and puts Penson at risk of having our dealer agreements revoked by the fund. We cannot and will not allow activity that jeopardizes our ability to transact business with fund companies.

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22 Parametric's Allencord, Green Brook, and Pine Brook accounts were alternately coded WD50, WB50, and WB99, while its Doublecut and Troybilt accounts were first coded WD50 and then WB50. Chronos's Watley Inc. accounts used two codes, WZ50 and WB50, and its Watley Direct accounts used yet a third code, IQ00. The code on Simpson's account at Watley Direct was changed from IQ00 to IQ01. After receiving several "stop" notices concerning trading through Parametric's accounts coded WD50 and WB50, Ng asked Watley personnel about the procedure for changing codes. Ng then requested that he and Conway be granted use of code WZ50 for a new Parametric account. When this account was funded and started trading, it used code WZ50.

On July 23, 2003, yet a third Penson employee wrote, "I need you to stop all trading in the Blackrock Funds due to market timing. It is very important this happens today – our dealer agreement is in jeopardy. The exchanges that you put through yesterday are in question." Ng affirmed that he and Conway knew that the continued market timing was causing problems for Penson, but that they did not stop the trading.

In September 2003, news reports surfaced about an investigation by the New York Attorney General's Office into the market timing of mutual funds. Conway testified that after September 2003 his mutual fund business "substantially" declined. Conway and Ng left the Watley firms in 2004.

2. NASD Conduct Rule 2110 Violations

NASD Conduct Rule 2110 states broad ethical principles and encompasses a "wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace."[23] The Rule focuses on a securities professional's conduct, rather than a subjective inquiry into the professional's intent or state of mind.[24] Thus, proof of scienter is not required to establish a violation,[25] but we may consider it when imposing sanctions.[26]

Between August 2002 and September 2003, numerous mutual funds determined that Conway's and Ng's clients were market timing and stopped trading under certain account numbers and branch office and registered representative codes associated with their trades. Conway and Ng received dozens of mutual fund "stop" notices stating that their clients were engaged in market timing of mutual funds, that market timing was contrary to fund policies and detrimental to long-term shareholders, and that the relevant funds were restricting Conway's and Ng's activities. Conway and Ng admitted that they read the "stop" notices, informed their clients of the trading restrictions, and kept track of those restrictions through lists from Penson and Ng's spreadsheet. Conway and Ng thus were made aware that mutual funds both deemed market timing to be improper and sought to prevent it.

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23 *Thomas W. Heath, III*, Exchange Act Rel. No. 59223, 2009 WL 56755, at *5 (Jan. 9, 2009) (quoting *Daniel Joseph Alderman*, Exchange Act Rel. No. 35997, 52 SEC 366, 1995 WL 442069, at *2 (July 20, 1995), *petition denied*, 104 F.3d 285 (9th Cir. 1997)), *petition denied*, 586 F.3d 122 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 2351 (2010).

24 *Id.*

25 *Id.*; *but see* NASD Notice to Members 03-50 (stating that members and associated persons who "knowingly or recklessly" engage in late trading or certain market timing activities violate NASD Rule 2110), 2003 WL 22095887, at *1 & 2 (Sept. 5, 2003).

26 *See infra* Section IV.

Although not required for a violation of NASD Conduct Rule 2110, we believe Conway's and Ng's conduct was at least reckless, if not intentional.[27] Despite knowing of the "stop" notices, Conway and Ng recklessly or intentionally perpetuated their clients' market timing by creating multiple accounts under different names for the same clients and by using different branch office and registered representative codes to conceal the trading and avoid detection by the mutual funds. Courts, as well as the Commission, have found such practices to be deceptive under antifraud provisions of the federal securities laws.[28] The record shows that in 210 instances during the relevant period, Conway and Ng executed trades in restricted mutual funds using deceptive market timing practices. These deceptive practices enabled them and their clients to circumvent market timing restrictions and caused mutual funds to process transactions they otherwise would have rejected. There can be no doubt that Conway's and Ng's use of deceptive market timing practices constituted conduct inconsistent with just and equitable principles of trade, in violation of NASD Conduct Rule 2110.

3. Applicants' Arguments

Conway and Ng argue that they had no notice that their trading activities violated NASD Conduct Rule 2110. But "[p]articipants in the securities industry must take responsibility for compliance with regulatory requirements and cannot be excused for lack of knowledge, understanding, or appreciation of these requirements."[29] As experienced securities professionals, Conway and Ng fairly can be charged with notice that their trading practices, which amounted to

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27 "Recklessness" means "an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the [respondent] or so obvious that the [respondent] must have been aware of it." *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 704 (7th Cir. 2008) (quoting *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 76 (2d Cir. 2001)).

28 *See, e.g., SEC v. Ficken*, 546 F.3d 45, 52-53 (1st Cir. 2008) (finding defendant's use of duplicative financial advisor and customer account numbers in order to deceive mutual funds met the scienter requirement of the securities laws' antifraud provisions); *SEC v. Gann*, No. Civ. A. 305CV0063L, 2006 WL 616005, at *5-6 (N.D. Tex. Mar. 13, 2006) (denying motion to dismiss complaint for securities fraud where defendants engaged in mutual fund market timing scheme using deceptive practices to avoid detection by mutual funds; deceptive practices included using multiple accounts, multiple registered representative numbers, and multiple branch office codes, and dividing trades into smaller dollar amounts); *Trautman*, 2009 WL 6761741, at *6 n.28 (finding the use of multiple accounts and representative and branch office codes to be deceptive market timing practices) (collecting cases).

29 *Thomas C. Kocherhans*, Exchange Act Rel. No. 36556, 52 SEC 528, 1995 WL 723989, at *3 (Dec. 6, 1995).

deceptions that helped circumvent industry norms meant to protect mutual funds and their long-term shareholders, were unethical.[30]

Additionally, Conway and Ng had actual notice that their activities were improper. The dozens of "stop" notices that they received alerted them to the relevant mutual funds' anti-market timing policies and the harmful effects of market timing on the funds and their long-term shareholders. Emails from Penson further informed them of the harmful effects of their activities, not only on mutual funds, but on Penson as well.

Conway and Ng argue that their conduct was consistent with industry norms, and that this disciplinary proceeding makes them "scapegoats" for abuses for which other individuals have not been prosecuted. But "[FINRA] disciplinary proceedings are treated as an exercise of prosecutorial discretion."[31] We have stated that "it is no defense that others in the industry may have been operating in a similarly illegal or improper manner."[32]

Conway attempts to justify the multiple accounts by claiming that they were opened because of accounting problems that were preventing the Watley firms from paying him. He said that when he first opened accounts at Watley Inc., he was not paid on a timely basis because senior management told him that they could not separate the fees generated by his mutual fund business from the fees generated by the firms' other businesses. According to Conway, Watley's president Robert Malin and others came up with the idea of using Watley Direct, whose FINRA membership they had originally determined to cancel, to house Conway's mutual fund business. FINRA generally did not credit Conway's testimony,[33] which was undercut by Malin's testimony

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30 *See Thomas W. Heath, III*, 586 F.3d 122, 140-41 (2d Cir. 2009) (stating that "the J & E [just and equitable principles of trade] Rule's standard of unethical conduct does not fail to provide Petitioner with adequate notice that the conduct in question was sanctionable"), *cert. denied*, 130 S. Ct. 2351 (2010); *cf. Trautman*, 2009 WL 6761741, at *18 n.69 (rejecting respondent's argument that he lacked fair notice that late trading and market timing violated antifraud provisions).

31 *Schellenbach v. SEC*, 989 F.2d 907, 912 (7th Cir. 1993). Insofar as Conway and Ng argue they were selectively prosecuted, they failed to show that they were singled out for discipline while others similarly situated were not, and that this selection was motivated by unjustifiable considerations such as race, religion, national origin, or the exercise of constitutionally protected rights. *See Scott Mathis*, Exchange Act Rel. No. 61120, 2009 WL 4611423, at *12 (Dec. 7, 2009).

32 *Patricia H. Smith*, Exchange Act Rel. No. 35898, 52 SEC 346, 1995 WL 394145, at *2 n.8 (June 27, 1995).

33 We typically defer to a fact-finder's credibility determinations absent substantial evidence to the contrary. *See Manoff*, 2002 WL 31769236, at *4 & n.6. Conway and Ng do not point to, nor do we find, substantial evidence contradicting FINRA's credibility determinations.

that he intended to use Watley Inc., not Watley Direct, to house Conway's mutual fund business. Malin, moreover, did not recall any problems paying Conway that resulted in shifting client accounts from Watley Inc. to Watley Direct.

To the extent that Ng argues he is less at fault than Conway because he was Conway's assistant and acted at Conway's direction, the facts of his active and substantial involvement in Conway's market timing business undercut his argument. Ng, the "worker bee" of the operation, was the primary point of contact for Conway's hedge fund clients, answering clients' telephone calls, processing and executing clients' orders, and interacting with the clearing firm. Ng's central role in the misconduct is reflected by the email he sent a friend in which he described his work on clients' behalf by attaching an online article, "Looting Mutual Funds."[34]

B. Late Trading

1. Facts

"Late trading" refers to the unlawful practice of placing orders to buy, sell, or exchange U.S. mutual fund shares after 4:00 p.m., the time when mutual funds calculate their NAV, but receiving the price based on the NAV already determined as of 4:00 p.m. that day. Late trading enables the trader to profit from market events that occur after 4:00 p.m. but are not reflected in the current day's NAV.[35]

The prospectuses of mutual funds traded by Conway's and Ng's clients typically disclosed that the funds calculated NAV "at" or "as of" the NYSE's 4:00 p.m. close of trading. The prospectuses made clear that customers had to submit their orders no later than 4:00 p.m. to receive that day's NAV. A number of prospectuses stated that the time at which an order was received by the broker, rather than the mutual fund itself, was the time for determining the NAV to be assigned for the order's execution. Although Conway and Ng testified that they did not read the prospectuses of the mutual funds traded by their clients, both were aware of the 4:00 p.m. cut-off time for accepting client orders.

Penson's procedures for processing mutual fund orders also required that correspondent broker-dealers receive a client's mutual fund order by 4:00 p.m. for pricing at the current day's NAV. Penson's mutual fund operations department manager, Stephaney Robinson, provided on-the-record testimony that she informed Conway and Ng of this requirement.[36] Penson permitted correspondents to enter and process a mutual fund order through its online order entry

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34 *See supra* note 13.

35 *See VanCook*, 653 F.3d at 133; *Trautman*, 2009 WL 6761741, at *2 & n.9 (collecting cases).

36 Robinson did not testify at the hearing.

system until at least 5:00 p.m., but only if the order was received by the correspondent from the customer no later than 4:00 p.m. Penson's online order entry system had no mechanism for correspondents to indicate the time at which they received a client's mutual fund order. As a result, Penson did not know whether a client's order actually had been received by 4:00 p.m., as required. Conway admitted that he knew of this weakness in Penson's system.

Conway and Ng stipulated that their usual process for executing trades in mutual fund shares began with a client sending an email containing an "indication of interest" to engage in certain trades. Conway and Ng typically received from a client a single "indication of interest" listing all of the proposed trades for the client's accounts.[37] An "indication of interest," however, was a proposed order only. Conway and Ng generally required clients later to verbally confirm by telephone the trades that were the subject of their "indication of interest." The verbal confirmation typically indicated that a client wanted Conway and Ng either to execute or to cancel all of the trades proposed in the "indication of interest" and constituted the client's actual order.[38] Conway and Ng initially processed orders by faxing a client's "indication of interest" to Penson. Then, in or about October 2002, Conway and Ng started using Penson's online order entry system.

However, between October 2002 and September 2003, Chronos, Simpson, and Nettcorp transmitted fifteen "indication of interest" emails to Conway and Ng after 4:00 p.m. Despite the fact that the trades proposed in the fifteen "indications of interest" originated after the equity markets had closed, Conway and Ng processed them through Penson's online order entry system as if they had received the orders before 4:00 p.m. They executed at least 145 late trades based on these fifteen "indications of interest."[39] Each trade received the NAV determined as of 4:00 p.m. that trading day, rather than the next trading day.

2. NASD Conduct Rule 2110 Violations

Conway's and Ng's mutual fund order submissions were contrary to provisions in the relevant mutual fund prospectuses and Penson's procedures requiring that registered representatives receive clients' orders by 4:00 p.m. for pricing at that day's NAV. While Penson provided an administrative grace period that permitted orders to be processed until at least 5:00 p.m., neither Penson nor the relevant fund prospectuses gave brokers additional time after the equity markets had closed to accept new orders or to confirm, modify, or cancel orders received

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[37] Conway and Ng dealt with the same one or two traders acting on behalf of each client.

[38] Conway testified that it was understood that clients' orders were to be entered on the same trading day that they were received. Conway further testified that he did not believe he ever waited until the following trading day to execute a client's order.

[39] Of the 145 trades, 132 trades were executed for Chronos, seven trades were executed for Simpson, and six trades were executed for Nettcorp.

before 4:00 p.m. By knowingly processing and executing trades received after 4:00 p.m. as if they actually were received before 4:00 p.m., Conway and Ng recklessly or intentionally deceived mutual fund companies into providing improper prices for the trades.[40] Their clients thus obtained an advantage, at the expense of long-term mutual fund shareholders, when they were given the opportunity to trade mutual fund shares at NAVs set before the release of market-moving information.[41] Conway's and Ng' s execution of late mutual fund trades violated NASD Conduct Rule 2110.

At the hearing, Conway and Ng generally denied that they accepted mutual fund orders after 4:00 p.m. Rather, they testified that, due to "technology issues," *i.e.*, issues with the Watley firms' computers, they sometimes received clients' telephone orders before 4:00 p.m., followed by "indication of interest" emails after 4:00 p.m. FINRA generally found that Conway and Ng were not credible witnesses,[42] and that their testimony regarding "technology issues" was "speculative." Neither Conway nor Ng could recall a specific instance in which he accepted a client's mutual fund order by telephone before 4:00 p.m., only to receive the "indication of interest" email later that day. Similarly, Apoian, the former Chronos trader, could not recall a single instance in which he telephoned Conway or Ng with a mutual fund order before 4:00 p.m., but sent the "indication of interest" email after 4:00 p.m. FINRA found Apoian to be a credible witness.

In addition, FINRA investigative technical examiner Patrick Hendry testified that he reviewed the metadata (data about data), known as internet headers, embedded in the fifteen "indication of interest" emails. The internet headers identified the times automatically recorded for each step in the transmission of an email from the sender's to the recipient's computer. Based on his analysis of the internet headers, Hendry testified that the times on each "indication of interest" email were recorded by the particular client's computer and not by the Watley firms' computers. Hendry's unrebutted testimony established that all fifteen "indication of interest" emails were sent after 4:00 p.m., and that any "technology issues" with the Watley firms' computers had no effect on the times recorded on those emails.[43]

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40 *See Trautman*, 2009 WL 6761741, at *14.

41 *Id.* at *16.

42 *See supra* note 33.

43 FINRA staff also searched for possible "back-up" or duplicate emails and found only one instance in which an "indication of interest" sent before 4:00 p.m. contained substantially similar information to an "indication of interest" sent after 4:00 p.m. The record thus fails to support Conway's claim that, in five instances, identical "indication of interest" emails preceded the fifteen "indication of interest" emails at issue.

Furthermore, Conway's and Ng's testimony that they received telephone confirmations first, followed by "indication of interest" emails, was contrary to their usual practice, which required clients to submit "indication of interest" emails first, followed by confirming telephone calls, before mutual fund orders would be processed. Both Conway and Ng stipulated that they typically followed this practice.[44]

3. Applicants' Arguments

Conway and Ng argue that Apoian's testimony refuted the finding that they engaged in late trading. They point to Apoian's statement that up until February 2003, Chronos's mutual fund trading did not depend on the ability to execute trades after 4:00 p.m. While it is true that the ability to execute post-4:00 p.m. trades was not a component of Chronos's trading strategy before February 2003, Apoian testified that from the outset Conway and Ng gave Chronos the "luxury" of being able to confirm or cancel proposed trades after the equity markets had closed. Apoian stated that knowing Conway and Ng accepted trades after 4:00 p.m. helped Chronos manage its order flow on busy days when it was having difficulty transmitting orders to other brokers that required mutual fund orders to be received by 4:00 p.m. Apoian also testified that both Conway and Ng told him it was acceptable to call and place actual orders confirming or cancelling proposed trades between 4:00 and 4:15 or 4:30 p.m. Indeed, Conway's and Ng's willingness to process and execute orders received after 4:00 p.m. distinguished them from other brokers and led Apoian, in February 2003, to develop a trading strategy based on their ability to execute post-4:00 p.m. trades. Apoian stated that several months later Chronos added millions of dollars to its accounts at the Watley firms to implement this strategy.

Conway and Ng argue that the number of late trades at issue represents a small amount of trades in light of the overall number of trades executed for the hedge fund clients and proves that their actions were unintentional. As discussed, proof of scienter is not required to establish a Rule 2110 violation. Conway and Ng further argue that their clients did not always profit, and Ng argues that he did not benefit, from the late trading. Even if true, Conway and Ng's conduct still flouted ethical principles to which they were required to adhere.[45]

IV.

Based on the above violations, FINRA found that it would be in the public interest to fine Conway $100,000 and suspend him for eighteen months, and fine Ng $20,000 and suspend him for nine months. Section 19(e)(2) of the Securities Exchange Act of 1934 directs us to sustain

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44 Apoian's testimony that he understood a proposed mutual fund order would not become a "live" trade until it was confirmed in a follow-up telephone call provided further corroboration.

45 *See Perpetual Sec., Inc.*, Exchange Act Rel. No. 56613, 2007 WL 2892696, at *7 & n.27 (Oct. 4, 2007), *reconsideration denied*, Exchange Act Rel. No. 56962, 2007 WL 4372765 (Dec. 13, 2007).

FINRA's sanctions unless we find, having due regard for the public interest and protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.[46] Applying that standard, we conclude that FINRA's sanctions are not excessive or oppressive and do not impose an unnecessary or inappropriate burden on competition.

In assessing the appropriate sanctions to impose on Conway and Ng, FINRA looked to its Sanction Guidelines ("Guidelines"). We are not bound by the Guidelines, but we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2).[47] Although the Guidelines contain no specific guideline for late trading and market timing, FINRA concluded that the most closely analogous guideline was for misrepresentations and material omissions of fact.[48] The Guidelines recommend, for intentional or reckless misconduct, a fine of $10,000 to $100,000, a suspension of ten business days to two years, and, in egregious cases, a bar. The Guidelines also recommend considering such factors as whether the applicants engaged in numerous acts or a pattern of misconduct; whether they engaged in the misconduct over an extended period of time; whether the misconduct was the result of an intentional act, recklessness, or negligence; whether the misconduct resulted in the potential for their monetary or other gain; and whether they accepted responsibility for the misconduct.[49] We find that the sanctions imposed by FINRA were consistent with the Guidelines.

Based on the record, we agree with FINRA's findings that Conway and Ng engaged in egregious misconduct. Conway and Ng engaged in numerous deceptive acts that continued over an extended period of time. Their misconduct was at least reckless, if not intentional. Conway and Ng knew that their clients were market timers. Between August 2002 and September 2003, they received and kept track of dozens of mutual fund "stop" notices stating that their clients were engaged in market timing and placing restrictions on the trading. Conway and Ng systematically disregarded the "stop" notices and circumvented trading restrictions by opening multiple client accounts and using different registered representative and branch office codes.

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46 15 U.S.C. § 78s(e)(2). Neither Conway nor Ng argues that the sanctions impose an undue burden on competition, and our de novo review of the record does not indicate there is any such burden.

47 *PAZ Sec., Inc.*, Exchange Act Rel. No. 57656, 2008 WL 1697153, at *3 (April 11, 2008), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009).

48 The Guidelines make clear that they "are not intended to be absolute," and "[f]or violations that are not addressed specifically, [a]djudicators are encouraged to look to the guidelines for analogous violations." FINRA Sanction Guidelines, Overview.

49 *See* FINRA Sanction Guidelines, Principle Considerations in Determining Sanctions, Nos. 8, 9, 13, 17, 18.

Penson's warnings that Conway and Ng "quit" market timing in restricted mutual funds were ignored.

Apoian's credible testimony also established that Conway and Ng accommodated Chronos's late trading and routinely accepted Apoian's verbal confirmation of orders after 4:00 p.m. Although Conway and Ng were aware of the 4:00 p.m. cut-off for accepting mutual fund orders, they nevertheless exploited weaknesses in Penson's order entry system to their and their clients' advantage and executed trades received after 4:00 p.m. at the current trading day's NAV. Conway's and Ng's deceptive conduct belies any suggestion that their actions were either negligent or inadvertent.[50]

We also agree with FINRA's finding that Conway stood to gain financially from his misconduct. His compensation was tied to the amount of assets hedge funds placed with him for trading. Conway's willingness to execute trades that benefitted his clients had the potential to lead to their placing more money in their Watley firms' accounts.[51] In fact, Chronos added millions of dollars to pursue its late trading strategy.

Further, Conway and Ng have not accepted responsibility for their conduct. They continue to blame others, including the mutual funds they deceived, for their misconduct. The securities industry "presents a great many opportunities for abuse and overreaching and depends very heavily upon the integrity of its participants."[52] Conway's and Ng's continued refusal to acknowledge any wrongdoing is a troubling indication that they either misunderstand their regulatory obligations or hold those obligations in contempt.[53] Although Ng contends that he poses no threat of recidivism, Conway's and Ng's actions reveal a fundamental misunderstanding

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50 That Conway and Ng may have acted lawfully in executing other trades for their clients is not a mitigating factor. *See Andrew P. Gonchar*, Exchange Act Rel. No. 60506, 2009 WL 2488067, at *13 & n.69 (Aug. 14, 2009), *petition denied*, 409 F. App'x 396 (2d Cir. 2010).

51 *See Janet Gurley Katz*, Exchange Act Rel. No. 61449, 2010 WL 358737, at *26 (Feb. 1, 2010) (stating that "Katz may not have profited directly from misappropriating some of her clients' funds, but she did benefit from keeping her clients happy and retaining their business") & n.66 (collecting cases), *petition denied*, 647 F.3d 1156 (D.C. Cir. 2011).

52 *Bernard D. Gorniak*, Exchange Act Rel. No. 35996, 52 SEC 371, 1995 WL 442063, at *2 & n.10 (July 20, 1995) (quoting *Richard D. Earl*, Exchange Act Rel. No. 22535, 48 SEC 334, 1985 WL 548312, at *2 (Oct. 16, 1985), *aff'd*, 798 F.2d 472 (9th Cir. 1986)).

53 *See The Barr Fin. Group, Inc.*, Investment Advisers Act Rel. No. 2179, 56 SEC 1243, 2003 WL 22258489, at *7 (Oct. 2, 2003). Because our review of sanctions imposed by FINRA is limited to a determination of whether they are excessive or oppressive, we do not examine whether a longer suspension or bar might provide even greater protection against further wrongdoing.

of their duties as security industry professionals and present a significant likelihood that they will commit similar violations in the future.[54] We find that Conway's and Ng's widespread deceptive conduct, coupled with their insistence that their conduct was not wrong, indicates that they pose a continuing threat to the public.

Conway and Ng argue that FINRA singled them out for discipline. However, "the appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken [or not] in other cases."[55] Conway and Ng highlight hardships they have suffered as a result of this proceeding, but those hardships do not render the sanctions either excessive or oppressive.[56] Ng cites his "junior" position to Conway and argues that it is unfair to sanction him for his wrongdoing. FINRA accounted for this when it determined to impose lesser sanctions against Ng. We find nothing in the record that supports further mitigation of sanctions.

Because we agree with FINRA that Conway's and Ng's conduct was egregious and that the relevant factors weighed in favor of the sanctions, we find that the fines and suspensions that FINRA imposed on Conway and Ng are neither excessive nor oppressive. FINRA's sanctions are justified under the Guidelines, result from a thoughtful weighing of the relevant facts, and are

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54 *See Scott B. Gann*, Exchange Act Rel. No. 59729, 2009 WL 938033, at *6 (Apr. 8, 2009), *aff'd*, 361 F. App'x 556 (5th Cir. 2010). Conway's and Ng's lack of disciplinary history is not a mitigating factor. *Id.*

55 *Scott Epstein*, Exchange Act Rel. No. 59328, 2009 WL 223611, at *21 n.75 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010).

56 *See Ashton Noshir Gowadia*, Exchange Act Rel. No. 40410, 53 SEC 786, 1998 WL 564575, at *4 (Sept. 8, 1998) (holding that economic harm, standing alone, does not make NASD's sanction excessive or oppressive).

appropriately remedial because they will serve as a reminder that Conway and Ng must comply with fundamental regulatory requirements and deter others from engaging in similar misconduct.[57]

An appropriate order will issue.[58]

By the Commission (Chair WHITE and Commissioners AGUILAR, GALLAGHER, STEIN and PIWOWAR).

Elizabeth M. Murphy
Secretary

By: Lynn M. Powalski
Deputy Secretary

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[57] *See McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005) (stating that, "[a]lthough general deterrence is not, by itself, sufficient justification for expulsion or suspension, we recognize that it may be considered as part of the overall remedial inquiry").

[58] We have considered all of the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70833 / November 7, 2013

Admin. Proc. File No. 3-14146

In the Matter of the Application of

ROBERT CONWAY
20 Blackmore Lane
East Islip, NY 11730

and

KAKIT NG
2260 Powell Ave.
Bronx, NY 10462

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY FINRA

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

ORDERED that the disciplinary action taken by the Financial Industry Regulation Authority against Robert Conway and Kakit Ng be, and it hereby is, sustained.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Lynn M. Powalski
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3714 / November 7, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15611

In the Matter of **PRESTIGE CAPITAL ADVISORS, LLC** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(e) 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(e) of the Investment Advisers Act of 1940 ("Advisers Act") against Prestige Capital Advisors, LLC ("Prestige" 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, Respondent consents to the Commission's jurisdiction over it and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(e) of the Investment Advisers Act of 1940, 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. Prestige is a Delaware Limited Liability Company with its principal place of business in Charlotte, North Carolina. Prestige is an investment adviser registered with the Commission, and is majority owned by Victoria A. Hunt ("Hunt"). Hunt is the CEO, managing member, and majority owner of Prestige. Prestige and Hunt provided investment advice to clients for compensation, and raised money from investors and advisory clients by offering and selling a variety of securities.

2. On January 11, 2013, Hunt pled guilty to one count of racketeering conspiracy in violation of Title 18 United States Code, Section 1962(d); one count of securities fraud in violation of Title 15 United States Code, Sections 78j(b) and 78ff; one count of mortgage fraud in violation of Title 18 United States Code, Section 1344; one count of wire fraud in violation of Title 18 United States Code, Section 1343; and one count of money laundering in violation of Title 18 United States Code, Section 1956(h) before the United States District Court for the Western District of North Carolina, in United States v. Victoria Hunt, Crim. No. 3:12-CR-00239-FDW-5.

3. The counts of the criminal indictment to which Hunt pled guilty alleged, inter alia, that in connection with Prestige, Hunt and others defrauded investors and obtained money from them by means of materially false and fraudulent representations, and that Hunt did so by use of the means and instrumentalities of interstate commerce. Hunt executed the scheme and artifice to defraud by making material misrepresentations concerning, among other things, her relevant experience, Prestige's past performance, and the use of investor funds.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 203(e) of the Advisers Act that the investment adviser registration of Respondent Prestige be, and hereby is, revoked.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9477 / November 13, 2013

SECURITIES EXCHANGE ACT OF 1934
Release No. 70868 / November 13, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30783 / November 13, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15613

In the Matter of **JULIEANN PALMER MARTIN,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940 AND NOTICE OF HEARING**

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 Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Julieann Palmer Martin ("Respondent" or "Martin").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

Julieann Palmer Martin ("Martin"), 44, resides in South Jordan, Utah. She worked for National Note of Utah, LC ("National Note") from 1995 until 2012 when a federal judge appointed a receiver to manage it. Martin is currently employed as a bookkeeper. Martin has never held a securities license and is not registered with the Commission as a broker or dealer or associated with a registered broker or dealer.

B. OTHER RELEVANT ENTITIES

1. **National Note of Utah, LC** ("National Note") is a Utah limited liability company formerly with its principal place of business in West Jordan, Utah. National Note claimed to purchase, manage, and sell real property and also buy and sell loans backed by real property interests. From at least 2004 to mid-2012, National Note sold over $100 million in promissory notes to approximately 600 investors in a purported Regulation D offering. National Note's securities were not registered with the Commission. National Note promised investors a guaranteed return of 12% a year, paid quarterly from the company's profits from real estate investments and lending. It raised these new investor funds, however, by means of a private placement memorandum ("PPM") and sales materials that contained material misstatements and omissions.

By the fall of 2010, National Note was having difficulty making some payments to investors. By approximately September 2011, it was no longer able to make payments on a timely basis, and within a few months it had ceased making payments altogether. On June 25, 2012, the Commission filed an emergency action against National Note and its principal in federal district court, alleging that National Note was a widespread offering fraud and Ponzi scheme.[1] On August 17, 2012, National Note and its principal consented to a preliminary injunction in that case. The assets of both continue to be subject to a freeze, and a receiver is in control of the company's business.

C. FACTS

1. Martin worked at National Note for 17 years, handling a variety of responsibilities. Although Martin did not have a title, she appears to have functioned as an office manager and assistant to Wayne Palmer ("Palmer"), National Note's principal and her cousin. Martin was employed at National Note beginning in 1995 as a bookkeeper. From 2006 until February 2012, Martin was compensated, in the form of salary and commissions.

2. Martin was solely responsible for investor funds at National Note. She personally handled all deposits from investors. She also handled all interest and principal payments to investors, preparing the wires and checks to be distributed each month with the assistance of National Note's receptionist. Martin logged the payments made to investors in both National Note's Peachtree accounting records and in its NoteSmith database ("NoteSmith"). Martin also used NoteSmith to generate the statements of account that National Note sent to investors. In fact, Martin was the person responsible for managing all the NoteSmith data, meaning every penny that came in or went out on a particular note, notes receivable and notes payable.

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[1] SEC v. National Note of Utah, LC, Civil Action No. 2:12-cv-00591 (D. Utah).

3. Martin and Palmer were the only signatories on the two bank accounts National Note used to handle investor funds at Chase and at Wells Fargo. She also had online access to both of these accounts and checked the balances daily.

4. Martin also monitored and collected National Note's income from real estate investments. She kept track of these payments in the NoteSmith system, notified Palmer if any were late, and sent out demand letters as needed. She also paid all the operating expenses of the business, such as utility payments. At any given time, therefore, Martin knew whether National Note's income was sufficient to pay its obligations.

5. Martin appears to have been investors' primary, and in some cases only, contact at National Note. Beginning in approximately 2009, when Palmer began to travel more, responsibility for investor calls and inquiries shifted to Martin in Palmer's absence.

6. Martin provided investors with substantive information about the investment and National Note's business and even convinced investors to invest with National Note.

7. From 2006 until February 2012, Martin was compensated, in the form of salary and commissions, for bringing in National Note investors. From 2006 through August 2010, Martin received commissions from National Note totaling $366,500.00.

8. As early as October 2010, Martin became aware that National Note was having difficulty making investor payments. Problems appear to have first manifested themselves when investors requested the return of their principal at maturity, and National Note was unable to return the principal.

9. In October 2010, Martin participated in a telephone call with an investor whose note had matured and, consequently, who wanted his $500,000 principal returned. Also on the call was the sales agent who had referred the investor to National Note. Martin told that investor and his sales agent that National Note could not return the principal at that time. Over the next several months, Martin and the investor's sales agent exchanged e-mails in which Martin reassured the sales agent that Palmer was "working on a deal" to raise the funds for the investor. The investor never received even a partial return of his principal. He did, however, receive a renewal note, unsolicited.

10. In fact, whenever an investor requested the return of his or her principal and when National Note did not have sufficient funds to repay the principal, National Note had a practice of simply sending the investor a renewal note in lieu of the principal.

11. Subsequently, beginning in July 2011 and continuing through the fall, Martin's e-mail correspondence shows that National Note was in financial trouble. She e-mailed Palmer each day asking him to transfer funds to meet the company's obligations. On a few occasions, she notified him that the company was overdrawn at its bank; that funds were needed for payroll and health insurance; and, that National Note was not able to return principal to investors at maturity.

12. In September 2011, National Note began falling behind in investor interest payments, in addition to principal payments. After National Note was several months delinquent, Palmer and Martin asked National Note's receptionist to prepare a spreadsheet reflecting all the late investor payments. For each individual investor payment, the spreadsheet shows, by investor name, the date the payment was supposed to have been made and the date, if any, when it was actually made. It evidences that all the September 2011 payments were late, and most went out in mid-October. Most of October's payments went out at the end of the month rather than the first, but in addition a very large number appear on the spreadsheet as "voided," indicating that the checks were not paid at all. Most of the payments for November and the months following were also voided.

13. Additionally, by the end of 2011 and into 2012, National Note's payroll was frequently late and Palmer was using credit cards to pay for National Note's operating expenses.

14. During the time that National Note was having difficulty paying its operating expenses and making investor payments, Martin was corresponding by e-mail with new investors who were transferring funds, often IRA funds, to National Note. Between October 2011 and February 2012, Martin personally spoke to a number of investors at the time of their investment. Martin answered their questions and handled their paperwork for these investments.

15. Martin did not disclose or otherwise discuss National Note's financial problems with any new investors in late 2011 or early 2012. One investor, who was placing his aunt's money at National Note between December 2011 and February 2012, spoke to Martin on the phone and specifically asked her if National Note had ever missed any interest payments. Martin answered that it had not, and made no mention of any financial problems at the company.

16. Another investor, who spoke to both Palmer and Martin before making her investment on February 14, 2012, said that Martin confirmed Palmer's rosy picture of the company's business and prospects, and made no mention of any financial problems. By this time, National Note had been unable to make any payments for months.

17. Martin knew that Palmer was using new investor funds to pay returns to existing investors at National Note. Because she monitored incoming revenue from National Note's business, Martin knew that its projects were not generating enough to pay operating expenses and investor returns. She also handled the deposits of investor funds into the Chase bank account and the payment of investor returns from the Wells Fargo account.

18. Martin acted with scienter. Despite knowing about National Note's inability to pay investors, Martin continued to tell investors that National Note's 12% return was guaranteed and that National Note was paying investors returns from its real estate investments.

19. Martin's misrepresentations were material. Martin acted as an unregistered broker by conducting broker-related activity. She solicited investors, provided copies of National Note's private placement memorandum and other substantive information relating to the investment, facilitated IRA transfers and received transaction-based compensation.

D. VIOLATIONS

1. As a result of the conduct described above, Respondent willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in the offer and sale of securities and in connection with the purchase or sale of securities.

2. As a result of the conduct described above, Respondent willfully violated Sections 5(a) and 5(c) of the Securities Act, which prohibits the sale of unregistered securities.

3. As a result of the conduct described above, Respondent willfully violated Section 15(a) of the Exchange Act, which prohibits acting as an unregistered broker.

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 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 15(b) of the Exchange Act including, but not limited to, disgorgement and prejudgment interest, and civil penalties pursuant to Section 21B of the Exchange Act;

C. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 9(b) of the Investment Company Act including, but not limited to, disgorgement and civil penalties pursuant to Section 9 of the Investment Company Act; and,

C. Whether, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Respondent should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 5(a), 5(c) and 17(a) of the Securities Act and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, and whether Respondent should be ordered to pay disgorgement and prejudgment interest pursuant to Section 8A(e) of the Securities Act and Section 21C(e) 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 not earlier than 30 days and not later than 60 days from the 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 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 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.

Elizabeth M. Murphy
Secretary

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

Commissioner Gallagher
Commissioner Piwowar
not participating

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. IA-3715; November 13, 2013

In the Matter of	:
	:
Davidson Kempner Capital Management LLC	:
65 East 55th Street, 19th Floor	:
New York, New York 10022	:
	:
(803-00215)	:
	:

ORDER UNDER SECTION 206A OF THE INVESTMENT ADVISERS ACT OF 1940 AND RULE 206(4)-5(e) THEREUNDER GRANTING AN EXEMPTION FROM RULE 206(4)-5(a)(1) THEREUNDER

Davidson Kempner Capital Management LLC (the "Applicant") filed an application on October 16, 2012, and an amendment and restatement thereto on July 5, 2013, for an order under section 206A of the Investment Advisers Act of 1940 ("Act") and rule 206(4)-5(e) thereunder. The order would grant an exemption under the Act to the Applicant from rule 206(4)-5(a)(1) to permit the Applicant to receive compensation from three government entities for investment advisory services provided to the government entities within the two-year period following a contribution by a covered associate of the Applicant to an official of the government entities.

On October 17, 2013, a notice of the filing of the application was issued (Investment Advisers Act Release No. IA-3693). The notice gave interested persons an opportunity to request a hearing and stated that an order granting 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 and restated, that the proposed 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. Accordingly,

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IT IS ORDERED, pursuant to section 206A of the Act and rule 206(4)-5(e) thereunder, that the exemption from rule 206(4)-5(a)(1) under the Act requested by the Applicant (File No. 803-00215) is granted, effective immediately.

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70867 / November 13, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15612

In the Matter of **JONATHAN C. GILCHRIST,** **Respondent.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS AND IMPOSING TEMPORARY SUSPENSION PURSUANT TO RULE 102(e)(3)(i)(B) OF THE COMMISSION'S RULES OF PRACTICE**

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 Jonathan C. Gilchrist ("Respondent" or "Gilchrist") pursuant to Rule 102(e)(3)(i)(B)[1] of the Commission's Rules of Practice.

II.

The Commission finds that:

A. RESPONDENT

1. Jonathan C. Gilchrist was an attorney licensed to practice law in Texas in 1990. In January 2008, his law license was suspended and he remains under suspension.

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[1] 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, temporarily suspend from appearing or practicing before it any attorney . . . who has been by name: (B) [f]ound by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party . . . to have violated (unless the violation was found not to have been willful) . . . any provision of the Federal securities laws or the rules and regulations thereunder.

B. RESPONDENT HAS BEEN FOUND TO HAVE VIOLATED THE FEDERAL SECURITIES LAWS.

2. On January 23, 2013, the Commission filed a complaint against Gilchrist in federal district court in Texas, alleging that Gilchrist had violated Sections 5(a), 5(c), 17(a)(1) and 17(a)(3) of the Securities Act, as well as Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. *SEC v. Jonathan C. Gilchrist*, Case No. 4:13-cv-163 (S.D. Tex).

3. As alleged in the complaint:

(a) Gilchrist purchased The Alternative Energy Technology Center, Inc. ("Alternative") in or around November 2007 and became its chairman and president.

(b) In late 2007 through early 2008, Gilchrest engineered a reverse merger with Meridian Biorefining, Inc. ("Meridian"), a Nevada company, and the issuance of six million unregistered shares of Meridian, at a deep discount, to Gilchrist and two entities he controlled. The offering, combined with the reverse stock split, facilitated Gilchrist's gaining control of at least 94% of Alternative's unrestricted common shares.

(c) Beginning in February 2008, Gilchrist also arranged to have Alternative's shares promoted to the general public through two touting campaigns. The combined effect of the reverse split, matched trades, and touting campaigns was that by April 1, 2008, the company's share price rose from $1.00 to $3.75 – an increase of approximately 275%. In total, Gilchrist sold 229,661 (unregistered) shares, realizing gross profits of $692,146.38. Throughout the entire period at issue, no registration statement was in effect for the company's securities and a Form D was never filed with the Commission.

4. On August 15, 2013, the Court granted the Commission's motion for summary judgment, finding that Gilchrist had violated Sections 5(a), 5(c), 17(a)(1) and 17(a)(3) of the Securities Act, as well as Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

III.

Based upon the foregoing, the Commission finds that a court of competent jurisdiction has found that Gilchrist violated the Federal securities laws within the meaning of Rule 102(e)(3)(i)(B) of the Commission's Rules of Practice. In view of this finding, the Commission deems it appropriate and in the public interest that Gilchrist be temporarily suspended from appearing or practicing before the Commission as an attorney.

IT IS HEREBY ORDERED that Gilchrist be, and hereby is, temporarily suspended from appearing or practicing before the Commission as an attorney. This Order will be effective upon service on the Respondent.

IT IS FURTHER ORDERED that Gilchrist may, within thirty days after service of this

Order, file a petition with the Commission to lift the temporary suspension. If the Commission receives no petition within thirty days after service of the Order, the suspension will become permanent pursuant to Rule 102(e)(3)(ii).

If a petition is received within thirty days after service of this Order, the Commission will, within thirty days after the filing of the petition, either lift the temporary suspension, or set the matter down for hearing at a time and place to be designated by the Commission, or both. If a hearing is ordered, following the hearing, the Commission may lift the suspension, censure the petitioner, or disqualify the petitioner from appearing or practicing before the Commission for a period of time, or permanently, pursuant to Rule 102(e)(3)(iii).

This Order shall be served upon Gilchrist personally or by certified mail at his last known address.

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9478 / November 13, 2013

SECURITIES EXCHANGE ACT OF 1934
Release No. 70869 / November 13, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3716 / November 13, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30784 / November 13, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15255

In the Matter of JOHN THOMAS CAPITAL MANAGEMENT GROUP LLC d/b/a PATRIOT28 LLC, GEORGE R. JARKESY, JR., JOHN THOMAS FINANCIAL, INC., and ANASTASIOS "TOMMY" BELESIS	ORDER GRANTING INTERIM STAY

On March 22, 2013, the Commission instituted administrative proceedings[1] against the above-named respondents pursuant to Section 8A of the Securities Act of 1933; Sections 15(b)(4), 15(b)(6), and 21C of the Securities Exchange Act of 1934; Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940; and Section 9(b) of the Investment Company Act of 1940.[2] A hearing in this matter as to respondents John Thomas Capital Management LLC

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1 *John Thomas Capital Mgmt. Grp. LLC*, Securities Exchange Act Release No. 69208, 2013 WL 1180836 (Mar. 22, 2013).

2 15 U.S.C. §§ 77h–1, 78o(b)(4), 78o(b)(6), 78u-3, 80b–3(e), 80b–3(f), 80b–3(k), 80a–9(b).

d/b/a Patriot28 LLC ("JTCM") and George R. Jarkesy, Jr. is scheduled to begin on November 18, 2013 at 26 Federal Plaza, New York, New York 10278.[3]

At a prehearing conference on October 24, 2013, the law judge denied a request by JTCM and Jarkesy to compel (i) production of *Brady*[4] and Jencks Act[5] material, (ii) designation of *Brady* and Jencks Act material in voluminous records previously produced, (iii) certification of *Brady* and Jencks Act compliance, (iv) designation of documents produced in response to subpoenas and document requests, (v) motion to continue hearing, and (vi) motion to change venue of hearing. The law judge also denied JTCM and Jarkesy's subsequent motion to certify an interlocutory appeal to the Commission and their motion to stay the hearing pending that appeal.

On October 31, 2013, JTCM and Jarksey filed a petition with the Commission for interlocutory review of the law judge's rulings. JTCM and Jarksey argue that they "cannot possibly review the enormous quantity of data" they received from the Division of Enforcement before the November 18, 2013 hearing. JTCM and Jarksey also assert that the Division has failed to produce certain materials, which respondents claim has deprived them of their due process right to a fair hearing. They further contend that, without a change of venue, they will incur significant and unnecessary legal expense, "which materially impacts [their] ability to defend themselves [and] implicates their due process right to a fair hearing." In the interest of maintaining the status quo pending our consideration of JTCM and Jarkesy's request for interlocutory review, we have determined to grant an interim stay of the hearing scheduled to begin on November 18, 2013.[6]

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3 Pursuant to Commission Rule of Practice 161(c)(2), 17 C.F.R. § 201.161(c)(2), the administrative law judge stayed the proceedings as to John Thomas Financial, Inc. and Anastasios "Tommy" Belesis while the Commission considers an offer of settlement by those two respondents. *John Thomas Capital Mgmt. Grp. LLC*, Admin. Proc. Release No. 964 (Oct. 16, 2013).

4 *Brady v. Maryland*, 373 U.S. 83 (1963).

5 18 U.S.C. § 3500.

6 *Cf. Clark T. Blizzard*, Admin. Proc. File No. 3-10007 (Mar. 5, 2002) (staying law judge's order pending nsideration by the Commission of a request to grant interlocutory review).

Accordingly, it is ORDERED that the hearing is hereby stayed pending consideration by the Commission of the petition by JTCM and Jarkesy to grant interlocutory review of the law judge's rulings.

By the Commission.

Elizabeth M. Murphy
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. 70883 / November 15, 2013

Admin. Proc. File No. 3-15059

In the Matter of the Application of

EDWARD S. BROKAW

c/o Kevin T. Hoffman
Law Offices of Kevin T. Hoffman
151 Railroad Avenue
Greenwich, CT 06830

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY PROCEEDINGS

Conduct Inconsistent with Just and Equitable Principles of Trade

Causing Firm's Books and Records to Be Inaccurate

Former registered representative of member firm of registered securities association engaged in conduct inconsistent with just and equitable principles of trade by engaging in a manipulative scheme. Representative also caused member firm's books and records to be inaccurate. *Held*, FINRA's findings of violation and imposition of sanctions are *sustained*.

APPEARANCES:

Kevin T. Hoffman, for Edward S. Brokaw.

Robert L.D. Colby, Alan Lawhead, and *Jennifer C. Brooks*, for FINRA.

Appeal filed: October 3, 2012
Last brief received: January 17, 2013

I.

Edward S. Brokaw, a former registered representative of FINRA member Deutsche Bank Securities, Inc., appeals a FINRA decision, which found that he violated NASD Rule 2110 by engaging in conduct inconsistent with just and equitable principles of trade when he failed to conduct an adequate inquiry into a customer's trading instructions.[1] FINRA also found that Brokaw violated NASD Rules 2110 and 3110 in causing Deutsche Bank's books and records to be inaccurate by failing to ensure the completion of accurate order tickets.[2] For failing to observe just and equitable principles of trade, FINRA suspended Brokaw for one year and fined him $25,000; for causing his firm's books and records violations, FINRA imposed a concurrent suspension of thirty business days and an additional $5,000 fine.[3]

The charges against Brokaw are based on six unsolicited orders to sell shares of Monogram Biosciences, Inc. common stock that Brokaw facilitated for his client and longtime friend, hedge fund manager Kevin Tang, on three successive trading days in May 2006. During this time, Tang placed orders with Brokaw to sell 50,000 shares at the open of the market and another 50,000 at the close of each day on behalf of his hedge fund, Tang Capital Partners (the "Fund"). Tape-recorded conversations that Brokaw had with his sales assistants and the firm's traders show that Brokaw believed that Tang's orders, placed as they were to coincide with the

1 On July 26, 2007, the Commission approved a proposed rule change that NASD filed seeking to amend its Certificate of Incorporation to reflect its name change to the Financial Industry Regulatory Authority, Inc. ("FINRA"), in connection with the consolidation of its member firm regulatory functions with NYSE Regulation, Inc. *See* Securities Exchange Act Release No. 56148, 2007 SEC LEXIS 1648 (July 26, 2007). Following the consolidation, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See* Exchange Act Release No. 58643 (Sept. 25, 2008), 73 Fed. Reg. 57,174 (Oct. 1, 2008). FINRA's disciplinary action was instituted after the consolidation of NASD and NYSE, but the conduct at issue took place before the consolidated rules took effect. Accordingly, NASD conduct rules apply and this opinion includes references to NASD.

2 NASD Conduct Rule 2110 requires members to observe "high standards of commercial honor and just and equitable principles of trade." NASD Rule 3110 requires member firms to maintain books and records as required by applicable law. NASD Rule 0115(a) makes NASD Rules 2110 and 3110 applicable with equal force to members and their associated persons. Under the Commission's "long-standing and judicially-recognized policy," a violation of another Commission or self-regulatory organization rule or regulation constitutes a violation of the rule prohibiting conduct inconsistent with just and equitable principles of trade. *Stephen G. Gluckman*, Exchange Act Release No. 41628, 54 SEC 175, 1999 SEC LEXIS 1395, at *22 (July 20, 1999); *see also, e.g.*, *Thomas W. Heath III*, Exchange Act Release No. 59223, 2009 SEC LEXIS 14, at *12 n.8 (Jan. 9, 2009) (citing and quoting *Gluckman*), *petition denied*, 586 F.3d 122 (2d Cir. 2009).

3 *Dep't of Enforcement v. Edward S. Brokaw*, 2012 FINRA Discip. LEXIS 53 (Sept. 14, 2012).

beginning of a fifteen-day period used to calculate the price of certain derivative securities that both Tang and Brokaw held, were being placed to manipulate the price of those derivatives. The tapes further show that Brokaw then aggressively pressed the firm's traders to execute Tang's orders as directed and, in doing so, evidenced Brokaw's participation in a scheme to manipulate the market in Monogram's stock. Participation in a scheme to manipulate the market price of a security is fundamentally at odds with high standards of commercial honor and just and equitable principles of trade.[4]

Finally, because Brokaw's office prepared misleading booking tickets in connection with Tang's orders, instead of the required order tickets, Brokaw also caused the firm's books and records to be inaccurate. We explain these findings, which are based on an independent review of the record, below.

II.

Brokaw became registered as a general securities representative in 1983 and became associated with Deutsche Bank in 2001. Tang and Brokaw were longtime friends and had been colleagues at other brokerage firms. Tang's hedge fund was one of the largest accounts that Brokaw serviced. At the time relevant here, Tang's hedge fund held approximately 3.3 million shares of Monogram stock and a much larger position—approximately 18 million units—of contingent value rights, or CVRs (which are described in more detail below). Brokaw and his family also owned approximately 215,000 Monogram CVRs. It is Brokaw's handling of Tang's orders to sell Monogram stock (and the potential impact of those sales on the price of the CVRs) that is the subject of this appeal.

A. The contingent value rights that Tang and Brokaw owned would, up to a certain point, increase in value if Monogram's stock price decreased in value.

Monogram's CVRs traded on the open market and entitled a holder to receive a maximum payment of $0.88 depending on the volume weighted average price, or VWAP, of Monogram's stock during a fifteen-trading-day pricing period from May 19, 2006 through June 8, 2006. If the fifteen-day average VWAP for Monogram was $2.90 or higher at the end of the pricing period, Monogram's CVRs would be worth nothing. If the VWAP was below $2.90, however, the payout under the CVRs would increase one penny in value for every penny the VWAP fell below $2.90—but only until the VWAP dropped to $2.02, at which point the CVRs

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4 *See Peter Martin Toczek*, Exchange Act Release No. 33176, 51 SEC 781, 1993 SEC LEXIS 3080, at *13 (Nov. 9, 1993) (finding that applicant "improperly influenced the prices on the [New York Stock] Exchange, thereby engaging in conduct inconsistent with just and equitable principles of trade").

would pay a maximum of $0.88 each.[5] Any further decrease in the VWAP below $2.02 caused no further increase to the CVRs' payout. Given the Fund's holdings of CVRs, this formula meant that each penny decrease in the VWAP between $2.90 and $2.02 would cause the fund's holdings of CVRs to increase in value by more than $181,000.[6] Tang testified that, if the CVRs were fully valued at $0.88 at the end of the pricing period, his fund would hold CVRs worth more than $16 million.

In the first half of 2006, the daily VWAP of Monogram's stock ranged from $1.37 to $2.27, but by late April and early May 2006, it hovered near the $1.60 mark. On May 8, 2006, eleven calendar days before the CVR pricing period began, Monogram announced that Pfizer, Inc. had agreed to invest $25 million in the company. On that news, the trading volume of Monogram stock more than doubled compared to the previous day, with the share price jumping from a VWAP of $1.65 on Friday, May 5, to $2.27 on Monday, May 8. In the eight trading days between Pfizer's announcement and the start of the pricing period, Monogram's VWAP remained above $2.10, with a VWAP of $2.24 on May 18, 2006, the last day before the CVR pricing period began.

B. Brokaw received orders from Tang on May 19 to sell 50,000 shares of Monogram stock at the open and close of the market.

On May 19, 2006, the first day of the CVR pricing period, Tang called Brokaw before the market opened and placed an order to sell 100,000 Monogram shares, with 50,000 shares to be sold near the open of the market and the remaining 50,000 to be sold near the close.[7] According to Brokaw, Tang informed him that he was not "price sensitive" and told him to sell the shares "quickly and aggressively."[8] These were the first orders to sell Monogram stock that Tang had placed with Deutsche Bank since October 2005, when he had sold 11,500 shares. Brokaw

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5 Monogram was required to pay the first $0.50 per CVR in cash but had the option to pay the balance (*i.e.*, up to another $0.38) in the form of Monogram stock. The company decided to redeem the CVRs entirely for cash, which the company did not announce until May 26, 2006.

6 Brokaw and his family, through their holdings of CVRs, stood to gain or lose approximately $2,150 for every penny decrease in the VWAP between $2.90 and $2.02, with a maximum value of almost $190,000 if the CVRs were fully valued at the end of the pricing period. Brokaw's personal holdings of CVRs represented more than $157,000 of that amount.

7 Tang testified that he had learned from experience that Monogram's stock had the most liquidity at the beginning and end of each day. This view was corroborated by the testimony of Thomas Lombardi, a registered representative at another FINRA member firm who was questioned by FINRA on the record. But there is no evidence that Tang ever provided such a justification or that Brokaw understood this to be true at the time he received Tang's orders.

8 Transcript ("Tr.") at 1376–77.

testified that Tang's order to sell 50,000 shares "was bigger than most" and that Tang had never before sold shares at the open and close.[9] Nor could Brokaw remember any other customer ever placing an order "in the morning and the night . . . simultaneously."[10]

Brokaw nevertheless called in Tang's order to Jennifer Watson, a Deutsche Bank trader, at 9:30 a.m. In doing so, Brokaw told Watson to sell Tang's order "as low as you want" and that, "if . . . you report this thing at one cent, that would be good, okay?"[11] When Watson replied that she could not sell the shares for a penny, Brokaw responded "[a]ll right, just get 50,000 done" and to "[j]ust sell it hard."[12] Watson relayed the order to Chad Messer, an equity trader who made a market in Monogram stock for Deutsche Bank. The firm sold Tang's 50,000 shares in increments over the course of about a minute, during which time the price of Monogram dropped from $2.06 to $1.94.

Brokaw again spoke with Watson later that afternoon and relayed Tang's order to sell a second block of 50,000 shares within five to ten minutes of the market's close. In doing so, Brokaw explained the way the CVRs were valued so that she would know "what the target price is."[13] As Brokaw told Watson during a conversation that was tape-recorded and is not in dispute, Tang's trades were part of a struggle between "good versus evil," in which the CVR holders were attempting to ensure that their investments paid maximum value:

> [Tang] wants [his order to sell executed] close to the close, and you did a great job hammering, and they all just want to hammer it again today to do the wake up call here. So what's happening, so you know what's happening, is there's these rights that are out there which are the [Monogram CVRs]. . . . And they start pricing off of the average over the next 15 days. . . . And he owns a ton of the rights, right. So and the math works that is the closer at 2.02 you get to, uh, the full value of the rights are realized at 2.02 on the stock . . . . Just so you know what the target price is [and] understand the game that's being played . . . .[14]

The firm filled Tang's end-of-the-day order in increments over ten minutes that ended at 3:58, at prices declining from $2.24 to $2.01. The 100,000 shares Tang's fund sold through

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9 *Id.* at 1583.

10 *Id.* at 1631.

11 Joint Exhibit ("JX") at 1.

12 *Id.* at 1–2.

13 *Id.* at 8–12.

14 *Id.*

Deutsche Bank accounted for 5% of the total volume of approximately 2 million shares that day.[15] The VWAP for the day was $2.08, and the Fund's shares sold at an average price of $2.00.

C. Brokaw received orders from Tang on May 22 to again sell 50,000 shares of Monogram stock at the open and close of the market.

The next trading day, May 22, Tang gave Brokaw another order to sell two blocks of 50,000 MGRM shares, again with one block each near the open and close, and again to sell them quickly and aggressively. One of Brokaw's assistants, William Ewing, relayed the order to trader David Zitman (the previous trading day's trader, Watson, had gone on maternity leave). During that telephone conversation, Ewing told Zitman that Tang wanted to sell Monogram's stock "hard" at the opening of the market and then began to explain that Tang "owns the rights . . . They're pricing the rights off the stock . . . ."[16] At that point, Ewing testified, Brokaw, who was listening to the call, signaled for Ewing to "knock it off" by swiping a hand across his throat.[17] Ewing therefore told Zitman, "Sorry, sorry, enough said, I'm not, that's, I'm not supposed to be going into that. Anyways, he's trying to, he wants to sell."[18]

Zitman entered the morning order into the firm's computer system to be executed by the equity trader. Zitman then called Brokaw to confirm the trading instructions. During that conversation, Zitman asked if he should "[t]ake the f[---]ing thing down (inaudible) a dollar?"[19] Brokaw replied, "Yeah, 50 cents, yes."[20] Zitman pressed, "He wants it to be done—and if I take the thing down to $1.50 and it bounces back to $2, he doesn't care?"[21] Brokaw confirmed, "No, right."[22] Tang's order was subsequently executed in increments at prices declining from $1.95 to $1.91.

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15 Tang was also selling Monogram shares for his fund through two other broker-dealers during the pricing period. He sold 200,000 shares through these brokers on May 19. His combined sales therefore accounted for 15% of the total Monogram volume that day.

16 JX at 23–24.

17 Tr. at 192.

18 JX at 23–24. Brokaw testified that he signaled to Ewing to end that line of conversation because he considered it inappropriate for a sales assistant to be discussing a client's strategies, and he wanted the order to be placed promptly.

19 *Id.* at 30.

20 *Id.*

21 *Id.*

22 *Id.*

Later that day, Zitman called Brokaw's office to confirm Tang's second order of the day and spoke to Ewing, who instructed Zitman to sell 50,000 shares of MGRM "as late as you can."[23] The trade, however, was not executed before the close of the market. The firm therefore filled the order by taking shares into inventory at the closing price of $1.89. This was erroneously reported to Brokaw as a trade that was completed in the market. The Fund's sales through Deutsche Bank on May 22 accounted for 4.2% of the total volume for the day.[24] The VWAP for the day was $1.96, and the Fund's shares sold at an average price of $1.91.

D. Brokaw received orders from Tang on May 23 to again sell 50,000 shares of Monogram stock at the open and close of the market.

Just before the market opened on the third day of the pricing period, May 23, Zitman called Brokaw's office to find out if Tang had placed another order to sell Monogram shares. Brokaw, who was already on the phone with Tang when Zitman called, confirmed Tang's order and relayed Tang's instructions to his partner, Mary Meyer, who then relayed them to Zitman: "Same order as yesterday."[25]

Zitman entered the order, which was filled within seconds of the market open at an average price of $1.88. Zitman called Brokaw to confirm the sales, and Brokaw told Zitman to sell another 50,000 at the close. At 3:50 p.m., Brokaw confirmed the order again with Zitman, telling him that Tang wanted him to execute the order "with a minute to go and spread it out a little bit . . . hit the bids . . . ."[26] This raised a concern for Zitman, who began the following exchange:

> Zitman: What, he's trying to mark the close?[27]
> Brokaw: Yeah.
> Zitman: You should, you should—he, he could f[---]ing be going away for a long time doing that.

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23 *Id.* at 32.

24 Together with the 205,900 shares Tang's hedge fund sold at two other brokers, the Fund's combined sales in Monogram stock accounted for 12.8% of the total volume that day.

25 JX at 43.

26 *Id.* at 47–48.

27 "Marking the close" is the manipulative practice of selling or purchasing securities near the end of the day to artificially decrease or increase the closing price of a security. *See SEC v. Masri*, 523 F. Supp. 2d 361, 369–70 (S.D.N.Y. 2007); *see also SEC v. Ficeto*, CV 11-1637-GHK, 2013 U.S. Dist. LEXIS 26223, at *25–26 (Feb. 7, 2013) (observing that marking the close is one of the "quintessential forms of market manipulation"); *Thomas C. Kocherhans*, Exchange Act Release No. 36556, 52 SEC 528, 1995 SEC LEXIS 3308, at *6 (Dec. 6, 1995) (defining "marking the close" as "the practice of attempting to influence the closing price of a stock by executing purchase or sale orders at or near the close of the market").

Brokaw: Really?
Zitman: Yeah. You can't mark the close. It's f[---]ing illegal.
Brokaw: Eh, I didn't think so.
Zitman: Yeah, f[---] it, I, no. I'm not marking the close for him.
Brokaw: No, no, no.
Zitman: I'm not giving up my f[---]ing license.
Brokaw: No, no, no, me neither. No, just sell 50 on the close.[28]

Tang's order was filled by the firm, which took the shares into its inventory at 4:11 p.m. at the day's closing price of $1.84. Monogram's VWAP for the day was $1.91, while the Fund's average selling price was $1.87. The Fund's sales of Monogram stock placed through Deutsche Bank that day accounted for approximately 3.5% of the company's total volume.[29]

E. Deutsche Bank refused to accept any more of Tang's orders to sell Monogram stock after firm personnel become concerned with Tang's orders.

Shortly after the market closed on May 23, Brokaw learned that the firm had executed Tang's orders by taking the shares into inventory rather than in the open market as Tang had requested. Brokaw called Zitman, who incorrectly told Brokaw that Tang had received an execution price of $1.89—better than the posted closing price.[30] Brokaw was not concerned with the price Tang received and stressed that "I need to know whether we were in the VWAP with the 50. That's all I need to know."[31] When Tang learned that Deutsche Bank had not executed his fund's order as he instructed, he complained to the firm, which reversed part of its purchase of Monogram shares.[32]

Concerned that Tang seemed uninterested in his execution price, while being very insistent about his trades being counted in the VWAP, Zitman raised the issue with the equity trader, Messer, who had executed Tang's order. Messer testified that he had a conversation with

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28 JX at 48.

29 Together with the 89,900 shares Tang's hedge fund sold through other brokers that day, the Fund's combined sales of Monogram stock accounted for 8.5% of the company's total volume that day.

30 On appeal, Brokaw attacks Zitman's credibility by, among other things, arguing that Zitman "lied about the execution of Mr. Tang's orders on May 23 being executed near the close when[,] in fact, they were not done until after the close by DBSI in its own inventory." Br. in Supp. of Pet. for Review at 18. But Zitman's credibility is not at issue here, because none of Zitman's testimony discussed in this opinion is disputed (*i.e.*, that he brought Tang's orders to the attention of other Deutsche Bank employees). Our opinion otherwise discusses recordings of Zitman's actual conversations, not his testimony about those conversations. *See, e.g.*, *supra* notes 19–22, 25–28, *infra* notes 37–44, and accompanying text.

31 JX at 58.

32 Because of that reversal, Tang's fund ultimately sold 50,000 shares in the market and 12,600 into Deutsche Bank inventory on May 23.

Brokaw about the trades, during which Brokaw expressed dissatisfaction that Messer had not sold all of Tang's order in the open market. Messer "didn't feel comfortable" about his conversation with Brokaw and therefore elevated the matter to a senior equity trader, William Matthews, who also questioned Brokaw about the rationale for Tang's trades.[33]

Matthews testified that Brokaw "appeared to be very angry about the way [Tang's] trade was executed," and that, "when I had the conversation with [Brokaw], I was trying to decide why it was, if the instructions were that [the trade] was on the closing price, which we did execute, why [Brokaw] would have a problem with us executing whatever way we want if we did what the instructions were."[34] Matthews explained that, after asking Brokaw about the compliance issues surrounding Tang's trades, Brokaw's anger "sort of died down," but that Matthews still "didn't feel comfortable, given the circumstances surrounding the pricing period."[35] Matthews took the matter to a member of the firm's compliance department, who, according to Matthews, "immediately just said, 'We're—It doesn't sound right. We're going to—I don't want you trading or transacting in Monogram with that client going forward.'"[36]

In a phone call the next day, Zitman asked Brokaw about his conversations the night before with Messer and Matthews regarding Tang's trades. According to tape recordings of that conversation, Brokaw responded that "they're a little worried about the way the orders are coming in, and . . . I said . . . I hear you, but you know what? This is the way this guy wants to trade."[37] Zitman expressed concern that the trades could nevertheless "be construed as a little bit suspect," to which Brokaw replied, "[Y]ou know what? It's a free country."[38] Zitman responded, "No, it's not. That's my issue. Someone could walk in here and say, hey, you have a pattern of selling the first minute and selling the last . . . minute."[39] When Brokaw replied, "So what?,"[40] Zitman explained that "there could be a compliance issue."[41] Brokaw then stated that he had told

33 Tr. at 676.

34 *Id.* at 745.

35 *Id.* at 745–46.

36 *Id.* at 748.

37 JX at 64.

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

Tang to "look into that and make sure that there isn't [a compliance issue]."[42] Contrary to his earlier explanation to Watson that Tang's trades were designed to affect Monogram's VWAP during the pricing period, Brokaw now claimed to Zitman that Tang's trading "doesn't affect the VWAP at all."[43] When Zitman explained that Tang "could be marking the close unintentionally," Brokaw responded that Tang "doesn't want to do anything illegal" and that "this is how he's handling these orders."[44]

At his disciplinary hearing, Brokaw attempted to explain his conversation with Zitman, testifying that there were "enough conversations about marking the close and things like that, you know, [the issue of manipulation] came into my mind," but "[w]hat I was upset about was that . . . I had a 50,000 share trade that got busted . . . so from a commission paying point of view, I wanted the fifty."[45] Brokaw added that he "wasn't really familiar with what the issues were" and that, "[a]s far as I was concerned, taking a market order at the beginning of the day and at the end of the day, I didn't see anything wrong, from my limited knowledge, with that practice."[46] "[I]f there was something wrong," Brokaw continued, "I was hoping that Dave Zitman or, even better, Chad Messer or Billy Matthews called me up and said, Ned, this could be construed . . . as something that could be . . . a problem here, and . . . we're not going to accept the orders."[47] But, Brokaw testified, "I didn't hear any of that."[48] He nevertheless acknowledged that, as a securities professional, he was supposed to be alert to signs that his customers could be engaged in illegal conduct.[49]

By the end of the pricing period, Tang's hedge fund had sold its entire holding of Monogram stock. After the pricing period closed, the CVRs were valued at their maximum possible price of $0.88 per right, with Tang's hedge fund receiving more than $16.3 million from its holdings of CVRs and Brokaw and his family receiving approximately $189,000 from their holdings of CVRs.

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42 *Id.*

43 *Id.*

44 *Id.* at 65.

45 Tr. at 1610–11.

46 *Id.* at 1614.

47 *Id.*

48 *Id.*

49 *Id.* at 1615 ("I agree with the statement that we're supposed to, you know, be diligent and vigilant on activities that are suspicious.").

F. Tang's trades were inaccurately recorded on booking tickets instead of order tickets.

Exchange Act Rule 17a-3 requires, among other things, that brokers record the time an order was received from a customer.[50] That requirement includes the requirement that the records be accurate,[51] which applies "regardless of whether the information itself is mandated."[52] For trades such as the ones at issue here, where an order was placed with Brokaw rather than directly with the trading desk, Deutsche Bank's procedures required Brokaw to ensure that an order ticket was created to track the details of the trade. As one of the firm's branch managers, Kbynek Kozelsky, explained, such a ticket should have reflected the time Brokaw received the order from Tang, the time the order was forwarded to the trading desk, and the time the order was executed. Instead, Brokaw's assistant, Daniel Aliperti, prepared a single, so-called "booking ticket" for each day's trades. As Brokaw's other assistant, William Ewing, testified, a booking ticket is used when a client order is placed directly with the trading desk and "was kind of seen as a dummy ticket just to make sure that everything matched up."[53] By preparing such booking tickets for Tang's orders, Brokaw's office failed to record the times when Tang placed his orders or the time his orders were executed, inaccurately aggregated each day's transactions as a single sale of 100,000 shares, and inaccurately stated that Tang placed his orders directly with the trading desk.

Brokaw acknowledged at the hearing that there was "[n]o doubt in my mind that an order ticket should have been generated" for Tang's trades, but claimed that was not his job.[54] "My

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50 17 C.F.R. § 240.17a-3(a)(6) (specifying that the memorandum of each brokerage order shall show, among other requirements, "the time the order was received; the time of entry; the price at which executed; the identity of each associated person, if any, responsible for the account; the identity of any other person who entered or accepted the order on behalf of the customer or, if a customer entered the order on an electronic system, a notation of that entry; and, to the extent feasible, the time of execution or cancellation").

51 *See Anthony A. Adonnino*, Exchange Act Release No. 48618, 56 SEC 1273, 2003 SEC LEXIS 2411, at *25 (Oct. 9, 2003) (stating that "[t]he requirement that records be kept [under Rule 17a-3] embodies the requirement that those records be true and accurate"), *aff'd*, 111 F. App'x 46 (2d Cir. 2004); *accord Fox & Co. Invs., Inc.*, Exchange Act Release No. 52697, 58 SEC 873, 2005 SEC LEXIS 2822, at *32 (Oct. 28, 2005) (finding that applicant "maintained materially inaccurate books and records in violation of Exchange Act Rule 17a-3 and NASD Conduct Rules 3110 and 2110").

52 *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Exchange Act Release No. 33367, 51 SEC 892, 1993 SEC LEXIS 3516, at *20 (Dec. 22, 1993) (citing *Sinclair v. SEC*, 444 F.2d 399, 401 (2d Cir. 1971) ("Although the Commission's rules did not specifically require that the executing brokers' names be put on the order tickets, that information was obviously material and important, and, even assuming no legal obligation to furnish the names, there was an obligation, upon voluntarily supplying that information, to be truthful.")).

53 Tr. at 201.

54 *Id.* at 1332.

job," Brokaw explained, "was not to look at order tickets and review order tickets. That was the function of my sales assistants."[55] Regarding the trade on May 19, for example, Brokaw testified, "I don't remember telling [my sales assistants] the particulars of the order, but we sit within [close] proximity of one another. And part of their function is to really look out after what I am doing and making sure those things are followed up on."[56] Brokaw also acknowledged that the booking tickets, as written, falsely stated that Tang had placed his orders directly with a trader, but again blamed his sales assistants, contending that it "was the sales practice in the office" to list orders as being placed directly with a trader, whether or not they actually had been.[57]

G. Deutsche Bank terminated Brokaw, and FINRA charged Brokaw with, among other things, market manipulation and books and records violations.

After conducting an investigation into the circumstances surrounding Tang's orders, Deutsche Bank terminated Brokaw for what it described as "questionable trading of one stock in [a] client's account."[58] When Brokaw met with his branch supervisors after being fired, Brokaw conceded that "[w]hat [he] did was stupid" and that "the tapes were bad."[59] But Brokaw did not offer an explanation for Tang's trading strategy or attempt to explain the taped conversations. Brokaw's assistant, Aliperti, had a conversation with Brokaw following Brokaw's termination, after which, Aliperti testified, he understood Brokaw to have told him that Tang's trades had been placed at the open and close of the market, during the pricing period, "to have an effect on the stock price."[60]

FINRA subsequently opened an investigation into Brokaw's conduct and eventually filed a three-cause complaint against him, charging Brokaw with (i) manipulating the price of Monogram on behalf of Tang or aiding and abetting Tang's manipulation in violation of federal antifraud provisions, Exchange Act Section 10(b) and Exchange Act Rule 10b-5, and NASD Rules 2120[61] and 2110; (ii) in the alternative to cause one, failing to make an adequate inquiry

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55 *Id.* at 1327.

56 *Id.* at 1331.

57 *Id.* at 1649.

58 Report, Edward S. Brokaw, CRD No. 1162997, at *17 (generated Oct. 15, 2013) (describing allegation related to termination from Deutsche Bank), *available at* http://www.finra.org/brokercheck.

59 Tr. at 846.

60 *Id.* at 307 ("Q: Did you understand [Brokaw] to be saying that the—that the intent was to drive the price somewhere? A: Yes.").

61 NASD Rule 2120 prohibits registered representatives from "effect[ing] any transaction in, or induc[ing] the [pu]rchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance."

into Tang's trading in violation of NASD Rule 2110; and (iii) failing to ensure the accuracy of the order tickets associated with the trades at issue in violation of NASD Rules 3110 and 2110.

After a six-day hearing, a FINRA hearing panel found that Brokaw engaged in market manipulation by placing sell orders of Monogram stock at the open and close of the market for the purpose of increasing the value of Monogram's CVRs. The hearing panel found that "the tape recorded conversations [between Brokaw and traders] provided overwhelming evidence of [Brokaw's] intent to manipulate the market for MGRM shares."[62] Because the hearing panel found that Brokaw was primarily liable for violating the antifraud provisions, it dismissed the aiding and abetting allegations asserted in cause one of the complaint and the alternative failure to make an adequate inquiry asserted under cause two. The panel further found that Brokaw failed to ensure the accuracy of order tickets. The panel barred Brokaw for these violations.

Brokaw appealed that decision to the National Adjudicatory Council, which reversed the hearing panel's finding that Brokaw engaged in manipulation. Unlike the hearing panel, which did not find credible Tang's testimony about his reasons for the seemingly manipulative trades, the NAC credited Tang's testimony about his trades.[63] The NAC thus found that FINRA staff had "set forth insufficient evidence proving that [Tang's] transactions were manipulative."[64] The NAC further found that there was "no direct evidence" that Tang ordered Brokaw to drive down the price of Monogram's shares, that Brokaw had no discretion over Tang's orders, and that Brokaw did not know what Tang's orders would be until the day of the order.[65] Because of this, the NAC concluded, FINRA staff "did not prove by a preponderance of the evidence that Brokaw intended to manipulate [Monogram's] shares."[66]

The NAC nevertheless found that, because of Brokaw's familiarity with the CVRs, the timing and size of Tang's orders were "sufficiently suspicious to put Brokaw on notice that he might be participating in a market manipulation scheme."[67] The NAC concluded that Brokaw

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62 *Dep't of Enforcement v. Edward S. Brokaw*, 2010 FINRA Discip. LEXIS 34, at *34 (June 11, 2010).

63 Tang testified that he was bearish on Monogram's stock and sold his fund's approximately three million remaining shares by the end of the fifteen-day pricing period. As noted above, Tang further testified that he placed his trades at the open and close of the market because, in his experience, Monogram had the most liquidity at those times. *See supra* note 7.

64 *Brokaw*, 2012 FINRA Discip. LEXIS 53, at *44.

65 *Id.* at *41.

66 *Id.* at *45.

67 *Id.* at *48.

violated his ethical duty under Rule 2110 by failing to conduct an adequate inquiry into Tang's orders. The NAC also upheld the hearing panel's finding that Brokaw failed to ensure the accuracy of order tickets in violation of NASD Rules 3110 and 2110. The NAC imposed a one-year suspension and $25,000 fine for Brokaw's failure to inquire into Tang's orders and imposed a 30-day suspension and a $5,000 fine for causing his firm's books and records to be inaccurate.[68] This appeal followed.

III.

A. Brokaw violated Rule 2110's requirement to observe just and equitable principles of trade by engaging in a scheme to manipulate the market.

NASD Rule 2110 requires associated persons to adhere to "high standards of commercial honor and just and equitable principles of trade." This requirement "sets forth a standard intended to encompass a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace."[69] An associated person may be found liable under this rule for either engaging in unethical conduct or acting in bad faith.[70] Unethical conduct is defined as conduct that is "[n]ot in conformity with moral norms or standards of professional conduct."[71] "Bad faith" has been defined as "[d]ishonesty of belief or purpose."[72] Willful participation in a scheme to manipulate the price of a security is the type of unethical conduct the rule is aimed to address.

We agree with the NAC's conclusion that Brokaw violated Rule 2110. However, Brokaw's violations do not solely arise out of his purported "failure to inquire" about Tang's

68 The NAC also affirmed the hearing panel's order of $13,207.85 in hearing costs.

69 *Daniel Joseph Alderman*, Exchange Act Release No. 35997, 52 SEC 366, 1995 SEC LEXIS 1823, at *7 (July 20, 1995); *see also Heath*, 2009 SEC LEXIS 14, at *13 (noting that Rule 2110 establishes broad ethical principles that focus on the "ethical implications of the [a]pplicant's conduct" (quoting *Timothy L. Burkes*, Exchange Act Release No. 32142, 51 SEC 356, 1993 SEC LEXIS 949, at *10 (Apr. 14, 1993), *petition denied*, 29 F.3d 630 (9th Cir. 1994) (Table))).

70 *Heath*, 2009 SEC LEXIS 14, at *13 (noting that "we have long applied a disjunctive 'bad faith or unethical conduct' standard to disciplinary action under the [just and equitable principles of trade] Rule"); *accord Robert E. Kauffman*, Exchange Act Release No. 33219, 51 SEC 838, 1993 SEC LEXIS 3163, at *4 n.5 (Nov. 18, 1993) (stating that, to find a violation of the just and equitable principles of trade, "[t]he most that is required is a finding of bad faith or unethical conduct").

71 *Black's Law Dictionary* (9th ed. 2009), *available at* Westlaw BLACKS.

72 *Id.*; *see also* BLACK'S LAW DICTIONARY 668 (6th ed. 1990) (defining bad faith as "not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity").

trades. Rather, Brokaw's liability stems from his deliberate unethical acts in furtherance of his scheme to manipulate the Monogram stock price.

As we have noted previously, "[m]anipulation 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."[73] By telling Deutsche Bank traders to, among other things, hammer Tang's orders "as low as you want," including for as little as $0.01, as a way to maximize the CVRs' payout, and then responding "So what?" when a trader questioned those orders, Brokaw plainly failed to conform to either moral norms or standards of professional conduct.[74]

While such unethical conduct is all that is required to find a violation of Rule 2110, the tape-recorded conversations and circumstances surrounding Tang's orders show that Brokaw also acted in bad faith. Specifically, the taped conversations make clear that Brokaw was actively engaged in a scheme to manipulate Monogram's stock price, thus displaying a dishonesty of both belief and purpose.[75] For example, when instructing one of the firm's traders to sell Tang's

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[73] *Pagel, Inc.*, Exchange Act Release No. 22280, 48 SEC 223, 1985 SEC LEXIS 988, at *21 (Aug. 1, 1985) (finding that respondents manipulated the market for a security); *cf. Michael J. Markowski*, Exchange Act Release No. 43259, 54 SEC 830, 2000 SEC LEXIS 1860, at *17 (Sept. 7, 2000) (finding that respondents manipulated the price of a stock, while observing that "[m]anipulation 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).

[74] *Cf. Kirlin, Sec., Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *66–68 (Dec. 10, 2009) (finding that an applicant acted unethically, and thus inconsistently with just and equitable principles of trade in violation of Rule 2110, by facilitating manipulative transactions); *Robert J. Prager*, Exchange Act Release No. 51974, 2005 SEC LEXIS 1558, at *33–34 (July 6, 2005) (finding that, by making no inquiries into "an abundance of warning signs that should have aroused his suspicions," registered representative aided and abetted a market manipulation and thus violated just and equitable principles of trade); *John Montelbano*, Exchange Act Release No. 47227, 2003 SEC LEXIS 153, at *21 (Jan. 22, 2003) (finding that applicants "played important roles in carrying out [a] manipulative scheme," and thus violated Rule 2110 and the antifraud provisions, where applicants "energized the sales force [of their firm] to sell speculative [securities] at inflated price levels"); *Randolph K. Pace*, Exchange Act Release No. 32153, 51 SEC 361, 1993 SEC LEXIS 960, at *22–23 (Apr. 15, 1993) (finding that, by arranging for his firm to profit from a manipulative scheme, applicant violated just and equitable principles of trade).

We also note that our cases do not require, as Brokaw asserts, a finding that he breached a duty to either a client or his firm as a predicate for finding a violation of Rule 2110. *Cf. Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (per curiam) (affirming Commission's finding that registered person violated the just and equitable principles of trade by misappropriating a club's funds and misrepresenting to the club's treasurer the location of those funds); *James A. Goetz*, Exchange Act Release No. 39796, 53 SEC 472, 1998 SEC LEXIS 499, at *11 n.9 (Mar. 25, 1998) (concluding that it was not "an injudicious exercise of NASD's discretion" to find that petitioner engaged in unethical conduct, and thus violated the just and equitable principles of trade, despite the fact that "no customer was involved and no customer's funds were jeopardized or misappropriated").

[75] *Cf. Peter W. Schellenbach*, Exchange Act Release No. 30030, 50 SEC 798, 1991 SEC LEXIS 2718, at *7 (Dec. 4, 1991) (finding that a deliberate intent to conceal his firm's net capital position from regulators established bad faith and thus violated the just and equitable principles of trade), *aff'd*, 989 F.2d 907 (7th Cir. 1993).

Monogram shares "as low as you want"[76] and "to hammer it,"[77] Brokaw explained that there was a "target price" for maximizing the value of Tang's CVR holdings and how that price was derived.[78] As Brokaw described it, "the game that's being played for the next 15 days [is] good versus evil," with the good being the CVR holders (who had an interest in dropping the price of the stock to $2.02 or below to maximize their payout under the CVRs) and the evil being Monogram (which had an interest in raising the price of its stock above $2.90 to avoid paying out the CVRs).[79] Brokaw's assistant Aliperti also testified that, after speaking with Brokaw about why Tang's trades were being placed at the open and close, Aliperti understood Brokaw as saying that "the intent [of Tang's trades] was to drive the price."[80]

Brokaw argues against liability by noting that the NAC credited Tang's testimony regarding his trading strategy and concluded that enforcement staff had failed to provide sufficient evidence to find that Tang's trades were manipulative. But those findings are in no way inconsistent with our finding that Brokaw believed that Tang was seeking to manipulate Monogram's stock price and that, by aggressively pushing Tang's orders, the stock price would drop, to the benefit of Tang and Brokaw. The record contains no evidence that Tang conveyed his purportedly legitimate motives for his suspicious trading activity to Brokaw or that Brokaw was otherwise aware of those reasons. To the contrary, the taped conversations, as noted above, make clear that Brokaw *believed* Tang was engaged in a scheme to manipulate the market and, more importantly, that Brokaw himself participated in such a scheme by taking steps to manipulate the price of Monogram's stock.[81]

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76 JX at 1.

77 *Id.* at 8.

78 *Id.* at 10.

79 *Id.* at 10–11.

80 Tr. at 307. Brokaw tries to explain away his incriminating statements by essentially arguing that he did not mean what he said. Brokaw testified, for example, that he was simply "being very glib" when he told Watson to place Tang's orders to sell for $0.01 and that he said "a lot of stupid things on these taped lines [that] obviously I am paying for." Tr. at 1379, 1397–98. On appeal, Brokaw concedes that some of his language "was colorful, and even colloquial at times," but argues that "the evidence is clear that the sales-traders understood all of the Tang orders to be market orders and no false information was ever injected into the marketplace." Br. in Supp. of Pet. for Review at 21. None of these attempted explanations alters our conclusion that the tape-recorded conversations and circumstances surrounding Tang's orders show that Brokaw, at the time of Tang's orders, was engaged in a manipulative scheme to maximize the CVRs' payout.

81 The NAC's decision to credit Tang's testimony is not entitled to any deference, because, unlike a credibility finding by an initial fact finder, the NAC did not base its decision on a first-hand observation of Tang's demeanor. *Cf. Wanda P. Sears*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521, at *7 (July 1, 2008) (noting that the credibility determination of the initial decisionmaker is entitled to considerable weight and deference, since it is

Brokaw claims he had no motive to engage in a manipulation because he had sold some of his CVRs before the pricing period began (which he claims he would not have done had he been seeking to maximize any illicit profits). He similarly argues that the value of his CVR holdings could have increased by only another $48,321.90 given their value at the start of the pricing period and that his commission on Tang's orders was only $500.[82] But Brokaw had ample other motivation to participate in a scheme to drive down Monogram's stock price. Tang was Brokaw's friend and one of his largest and most important clients. Brokaw thus derived an obvious personal benefit from keeping Tang satisfied and retaining his business by increasing the value of Tang's CVRs.[83] The more than $48,000 in additional gain that Brokaw could earn from his holdings of CVRs (and the more than $10,000 his family additionally stood to earn) after the start of the pricing period was also not insignificant, regardless of the commissions Brokaw received from Tang's orders. And there was no guarantee that the value of Brokaw's CVRs would not decrease during the pricing period. Depending on how Monogram's stock price performed, Brokaw's personal holdings of CVRs could have been worth anywhere between $0 and approximately $157,000—not an insignificant difference. Nor did it even matter whether Brokaw ultimately profited from these trades, as we have held that "the absence of profit from manipulative conduct does not negate that conduct."[84]

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based on hearing the witnesses' testimony and observing their demeanor" (quoting *John R. Butzen*, Exchange Act Release No. 36512, 52 SEC 512, 1995 SEC LEXIS 3228, at *5 n.7 (Nov. 27, 1995))). We also note that, as the hearing panel recognized, Tang's claim that he was simply trying to unload Monogram shares is belied by his insistence that Deutsche Bank reverse the May 23 sale that the firm took into its own inventory, rather than sold into the market, because the transaction would not have affected the stock's VWAP. *See Brokaw*, 2010 FINRA Discip. LEXIS 34, at *32.

82 Reply Br. in Supp. of Pet. for Review at 7 (noting that Brokaw earned $500 in commissions on Tang's trades, compared to more than $931,446 in gross commissions Brokaw earned that year). The approximately $48,000 Brokaw argues he stood to gain from the CVRs is the maximum net gain he could have earned if his personal holdings of CVRs became fully valued at $0.88, using the CVRs' $0.61 value at the start of the pricing period as the comparison point. As noted earlier, Brokaw and his family's combined holdings of CVRs, if fully valued, would be worth almost $190,000 (of which more than $157,000 represented Brokaw's personal holdings).

83 *Cf. Janet Gurley Katz*, Exchange Act Release No. 61449, 2010 SEC LEXIS 994, at *56 (Feb. 1, 2010) (noting that registered representative "derived a personal benefit by keeping [her] clients . . . happy and retaining their business").

84 *Howard R. Perles*, Exchange Act Release No. 45691, 55 SEC 686, 707 n.31 (Apr. 4, 2002) (rejecting applicants' claim that they "lacked economic or other motivation to participate or assist in a manipulative scheme"); *accord R.B. Webster Inv., Inc.*, Exchange Act Release No. 34659, 1994 SEC LEXIS 2868, at *13 (Sept. 13, 1994) (concluding that applicants intended to manipulate despite applicants' claim that they lost money on the transactions at issue—and thus acted inconsistently with just and equitable principles of trade—by observing that the Commission "d[id] not believe that a financial loss demonstrates that Applicants had no intent to manipulate").

Nor is proof of motive required where there is direct evidence of manipulative intent. It is only where direct evidence of scienter is lacking that circumstantial evidence of intent, such as motive, becomes critical. *See, e.g., ...novitch v. Kaufman*, 905 F.2d 1040, 1046 (7th Cir. 1990) (noting that where there is no "direct evidence of

We are also not persuaded by Brokaw's contention that he and Tang had no reason to manipulate Monogram's stock price because the CVRs, according to Brokaw, were likely to be fully valued at the end of the pricing period regardless of whether manipulation took place. In particular, Brokaw notes that Monogram's VWAP was at or below $2.02 (the price at which the CVRs' payout would reach its maximum value) on seventy-two out of ninety-five days in 2006 leading up to the pricing period and that Monogram's stock price had fallen to a low of $1.90 on the first day of the pricing period. But, as noted above, Monogram's VWAP had been above $2.10 all eight trading days immediately preceding the start of the pricing period (*i.e.*, after Pfizer's announcement about investing in Monogram), thus giving Tang and Brokaw an obvious incentive to put downward pressure on Monogram's stock price at the start of the pricing period.

Brokaw asserts that Tang also had no reason to drive the price of Monogram's stock below $2.02 per share because of his fund's underlying holdings. At that price, Brokaw argues, the CVRs' payout would have reached its maximum value—while the Fund's underlying holding of stock would continue to lose approximately $29,500 for each additional $0.01 drop in price. As it turned out, though, Tang liquidated his fund's entire holdings of Monogram stock by the end of the pricing period (as he testified he intended to do), which meant that Tang did not have, or intend to have, a long-term exposure to a depressed stock price.[85] Brokaw similarly argues that Tang would not have wanted to drive the price of Monogram's stock below $2.02 because Monogram had a contractual right to satisfy some of its CVR payout obligations by issuing stock. The exercise of that right, Brokaw explains, would have increased the Fund's holdings of Monogram stock, "thus increasing its potential exposure to a depressed and falling stock price."[86] But according to the CVR agreement, any shares issued by the company under the agreement were to be valued, for purposes of calculating the number of shares issued, using the same 15-day VWAP as used for valuing the underlying CVR payments. Consequently, the more that Tang and Brokaw could artificially suppress Monogram's stock price during the pricing period, the

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scienter, the court should examine whether there is indirect evidence of scienter" including examining whether there was motive to commit fraud); *Stumpf v. Garvey*, No. 03-CV-1352-PB, 02-MDL-1335-PB, 2005 U.S. Dist. LEXIS 19154, at *35 (D.N.H. Sept. 2, 2005) ("[S]cienter can be established through direct evidence" or by "'combin[ing] various facts and circumstances indicating fraudulent intent—including those demonstrating motive and opportunity.'" (quoting *Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 82 (1st Cir. 2002))); *Kas v. Caterpillar, Inc.*, 815 F. Supp. 1158, 1163 (C.D. Ill. 1992) ("If the plaintiff fails to produce direct evidence, the court should examine whether there is indirect evidence of scienter by considering whether the fraud was in the interest of the defendants or whether the defendants had a motive to defraud."). Ample such evidence of scienter exists here, including taped statements by Brokaw evidencing his intent to influence Monogram's stock price.

85 Even though the VWAP remained below $2.02 throughout the pricing period, Tang agreed with a hearing panelist's observation that the Monogram transactions were still "economically successful." Tr. at 1277.

86 Br. in Supp. of Pet. for Review at 9.

more shares that Tang and Brokaw would receive if the company decided to exercise its right to issue such shares, thus increasing the chances that Tang and Brokaw would realize a profit from any subsequent increase in the stock's price.[87]

Brokaw nonetheless claims that the facts here are "starkly different" than those in other cases in which we have found violations of Rule 2110 for conduct related to market manipulation.[88] Brokaw contends that, unlike in other cases, the trades at issue here were "done at prevailing market prices with minimal impact on the stock's price."[89] This argument misstates our case law regarding just and equitable principles of trade and manipulation. Although successfully impacting a stock's price may be evidence of manipulation, we have observed that "whether a respondent has adequate market power to successfully manipulate a market is not dispositive of whether the respondent engaged in a manipulative scheme."[90] Instead, where one engages in conduct designed to influence a stock's price (as Brokaw engaged in here), we have recognized that an applicant's "scienter renders his interference with the market illegal."[91] In

87 Brokaw also did not share Tang's disincentive to sell below $2.02, as Brokaw held only CVRs during the pricing period. Because of this, it is possible that, rather than seeking to further a manipulative scheme by Tang, Brokaw was furthering his own manipulative scheme by taking advantage of his client's desire to sell Monogram stock (*i.e.*, Brokaw could have been relaying Tang's orders even more aggressively than Tang intended, with the sole aim to increase the value of Brokaw's own CVR holdings).

88 Reply Br. in Supp. of Pet. for Review at 17.

89 *Id.* at 18. For example, Brokaw contends that the timing of the trades (at the open and close of the market) did not affect the CVRs' value because that value was based on a fifteen-day average of Monogram's stock price (*i.e.*, the VWAP) and thus did not depend on the stock price at any particular time of day. He similarly argues that the volume of shares sold in each trade was insufficient to affect the stock's price. But we note that Brokaw pushed traders to aggressively sell stock at the open and close of the market over several trading days, which could cause a long-term, aggregate impact on Monogram's VWAP. *Cf. Kocherhans*, 1995 SEC LEXIS 3308, at *7 (finding that placing orders at the end of the trading day with the purpose of influencing a stock's reported price constitutes a manipulative practice because the placing of such orders "convey[s] false information to the market as to the stock's price level and therefore as to the demand for the stock free of manipulative influences").

90 *Amr Elgindy*, Exchange Act Release No. 49389, 2004 SEC LEXIS 555, at * (Mar. 10, 2004) (finding that the record contained insufficient evidence of a manipulative scheme in that instance, but nevertheless agreeing with the NASD that "[s]uccess is not a prerequisite for a finding of manipulation "); *see also Kuehnert v. Texstar Corp.*, 412 F.2d 700, 704 (5th Cir. 1969) (observing that the definition of a manipulative device is "broad enough to encompass conduct irrespective of its outcome"); *SEC v. Marsi*, 523 F. Supp. 2d 361, 372 n.17 (S.D.N.Y. 2007) (noting that "a transaction entered with manipulative intent distorts the functioning of the market and sends a false message to its participants" and rejecting "defendant's proposed *per se* rule that open-market activity cannot be considered manipulative based solely on manipulative intent"); *SEC v. Mandaci*, No. 00-Civ-6635, 2004 U.S. Dist. LEXIS 19143, at *33 (S.D.N.Y. Sept. 27, 2004) (stating that "it is not necessary for the SEC to establish that he successfully manipulated the stock prices in order for it to succeed on its claims"); *SEC v. Martino*, 255 F. Supp. 2d 268, 287 (S.D.N.Y. 2003) (observing that "[a]n attempted manipulation is as actionable as a successful one"), *aff'd*, 94 F. App'x 871 (2d Cir. 2004).

91 *Kirlin*, 2009 SEC LEXIS 4168, at *57; *see also Markowski v. SEC*, 274 F.3d 525, 528–29 (D.C. Cir. 2001) jecting the argument that manipulation required fictitious transactions and concluding that the Commission's

other words, if someone intends to manipulate the market for a security and engages in action that furthers that intent (even if the manipulation ultimately is unsuccessful), that person has engaged in illegal market manipulation.

Nor does Brokaw accurately characterize our previous cases as involving greater involvement by the registered person in a manipulative scheme. Brokaw claims that, unlike in other cases, "there was no evidence that [Brokaw] ever caused any false information to be injected into the marketplace regarding MGRM"[92] and he "was merely communicating a client's market orders to his firm's sales-traders . . . to execute the orders at the market and to act expeditiously in accordance with Mr. Tang's instructions."[93] To find him liable under such circumstances, Brokaw argues, would effectively make him a "gatekeeper . . . judg[ing] the legitimacy of [Tang's] orders"[94] and thus "create new obligations for registered representatives well beyond what is legally required."[95] These arguments misrepresent Brokaw's obligations and conduct.

Although Brokaw may have had an obligation to make "every reasonable effort" to execute Tang's orders "promptly and fully" when he accepted them, he was under no obligation to accept his customer's order in the first place—particularly where he believed those orders to be part of a manipulative scheme.[96] Moreover, Brokaw did more than simply communicate a customer's market orders. He instead pushed the firm's traders to "hammer" the stock for as little as one penny. Brokaw even explained to a trader the motivation for doing so: by lowering Monogram's stock price, the trades would increase the value of Monogram's CVRs—going so far as to describe the trades as a battle of "good versus evil." Brokaw then expressed concern when Deutsche Bank took some of Tang's sell order into inventory (rather than selling it into the market), meaning that the transaction would not affect the stock's VWAP, despite the fact that he had been told (albeit incorrectly) that those orders had received a better execution price than the posted closing price. Brokaw also attempted to conceal the true nature of the orders by indicating

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interpretation of Exchange Act Section 10(b) was reasonable in light of "Congress's determination that 'manipulation' can be illegal solely because of the actor's purpose").

92 Reply Br. in Supp. of Pet. for Review at 21.

93 *Id.* at 14.

94 *Id.* at 24.

95 *Id.* at 3.

96 *Cf. Bateman Eichler*, Exchange Act Release No. 18401, 47 SEC 692, 1982 SEC LEXIS 2485, at *5 (Jan. 8, 1982) ("A dealer, of course, is under no obligation to accept market orders for customers. However, when it does, it must make every reasonable effort to execute them promptly and fully.").

to one of his assistants to stop talking when the assistant began to explain the manipulative intent behind the trades and by failing to ensure that the firm completed accurate order tickets. Intentionally putting in orders to impact a stock price, while also obscuring the nature of those orders, to further a manipulative scheme can in no way be construed as consistent with just and equitable principles of trade.[97] Nor, as we previously held, does our finding that Brokaw's conduct was inconsistent with just and equitable principles of trade require an accompanying finding that his conduct also amounted to a specific antifraud violation.[98]

Finally, Brokaw argues that he discharged his ethical obligations here, by "highlight[ing] the situation and educat[ing] the sales-trader, Jenner Watson, who was responsible for getting Mr. Tang's orders executed, about the pricing period involving MGRM and the CVRs as well as the likely selling pressure."[99] But nothing in Brokaw's taped conversations with Watson, nor anything else in the record, suggests any effort to question or otherwise raise a concern about Tang's orders. To the contrary, Brokaw made clear that he had no interest in questioning them. Brokaw praised Watson for "hammering" Monogram's stock and pushed her to continue doing so. On the second day of the pricing period, when a new trader replaced Watson and the pattern of Tang's orders was becoming more suspicious, Brokaw told his sales assistant to "knock it off" when the assistant began explaining the CVRs to the trading desk.[100] And when part of Tang's trade was reversed on the third day of trading and Brokaw was finally confronted with the prospect that Tang's trades "could be construed as a little bit suspect," Brokaw responded: "It's a free country"[101] and "So what?"[102] Only when told directly that "there could be a compliance issue" did Brokaw claim that he had taken some action, asserting that he had "told [Tang] to look into that and make sure that there isn't."[103] Even then, Brokaw testified, "[w]hat [he] was upset about" was that he would no longer receive a full commission.[104]

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97 *See supra* notes 74–80 and accompanying text.

98 *Toczek*, 1993 SEC LEXIS 3080, at *13 n.14 (finding that applicant violated just and equitable principles of trade by improperly influencing the price of securities despite the Commission's setting aside a finding that the same conduct also violated the antifraud provisions of the Exchange Act and rejecting applicant's argument that "to find that he engaged in conduct inconsistent with just and equitable principles of trade we must find that he also violated a specific statutory provision or regulation").

99 Reply Br. in Supp. of Pet. for Review at 4.

100 Tr. at 192.

101 JX at 64.

102 *Id.*

103 *Id.* On appeal, Brokaw does not mention this claim of having told Tang to look into whether there was a mpliance issue, and, regardless, such a vague, unsupported claim of having asked Tang to make sure he is not

It is telling that, in stark contrast to Brokaw's aggressive efforts to unquestioningly facilitate Tang's orders, Deutsche Bank almost immediately put a hold on any further trades by Tang in Monogram stock when the firm's compliance department learned about the circumstances surrounding those trades. Despite acknowledging that, as a securities professional, he was obligated to be alert to signs that his customers could be engaged in illegal conduct, Brokaw intentionally ignored this obligation in order to further a manipulative scheme. As the NAC found, this indifference to his obligation to question Tang's trading was, in its own right, inconsistent with just and equitable principles of trade.[105]

Brokaw thus cannot avoid liability by blaming his colleagues for his misconduct. Brokaw testified that "if there was something wrong" with Tang's orders, he simply hoped that someone else at the firm would have "called [him] up and said, Ned, this could be construed . . . as something that could be . . . a problem here, and . . . we're not going to accept the orders."[106] Because he "didn't hear any of that," he continued to make sure that the firm was fulfilling Tang's

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doing anything improper does not negate the finding that Brokaw believed that Tang's orders were manipulative when he placed them; nor would such an action constitute an adequate inquiry into the circumstance surrounding Tang's suspicious orders.

104 Tr. at 1610–11.

105 Given the suspicious circumstances surrounding Tang's orders, we believe that the NAC was justified in concluding that Brokaw's failure to investigate Tang's suspicious trades was itself sufficient to support a finding that he violated Rule 2110. *See Prager*, 2005 SEC LEXIS 1558, at *33 (finding registered representative violated Rule 2110 by continuing to execute trades despite being "confronted with an abundance of warning signs that should have aroused his suspicions and caused him to question [his customer's] trading"); *cf. Piper, Jaffray & Hopwood Inc. v. Ladin*, 399 F. Supp. 292, 298–99 (D. Iowa 1975) (stating that "[b]rokers are required to meet relatively strict requirements in entering their profession and they thereby gain the advantage and exclusive privilege of trading in the national securities market on behalf of a wide range of investors"). While Brokaw contends that Tang's orders represented only a small percentage of the overall market, Tang's orders were not insignificant, were larger than most orders he placed with Brokaw, and were unusually timed at the open and close of the market. Those factors, combined with Brokaw's knowledge that someone like Tang, who held CVRs, could be motivated to manipulate Monogram's stock price, plainly were sufficient to put Brokaw on notice that such an effort could be taking place. *Cf. In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 533–35 & n.133 (S.D.N.Y. 2008) (observing that manipulation can be signaled by "anything that distinguishes a transaction made for legitimate economic purposes from an attempted manipulation" and that "marking the close" by purchasing or selling shares near the close of the market is one such sign of a manipulative practice); *SEC v. Schiffer*, 97-CIV-5853, 1998 U.S. Dist. LEXIS 8579, at *30 (S.D.N.Y. June 11, 1998) (finding that the Commission had established a *prima facie* case that Schiffer violated the antifraud provisions of the securities laws by marking the close); *Richard D. Chema*, Exchange Act Release No. 40719, 53 SEC 1049, 1998 SEC LEXIS 2592, at *13–14 (Nov. 30, 1998) (finding that respondent engaged in "patently manipulative" conduct in violation of the securities laws by "artificially influencing JML's price level at the end of the day" by purchasing shares in the last ten minutes of the trading day and thus "intentionally distort[ing] the stock's market price, conveying false information to investors and the market"). We thus find that Brokaw's failure to investigate the presence of "red flags" of possible misconduct provides an alternate basis for liability under Rule 2110.

106 Tr. at 1614.

orders.[107] Yet, as we have long held, a registered person "has responsibility for his own or her own actions and cannot blame others for [his or her] own failings."[108] The record also contains evidence that Brokaw attempted to conceal the true nature of Tang's orders (and thus frustrate his colleagues' ability to monitor his compliance with appropriate laws and regulations) by telling one of his assistants to stop explaining the reasons behind the trades and by failing to ensure that the firm completed accurate order tickets describing those orders. Brokaw cannot pass the blame to others for his own unethical behavior.[109]

* * * *

Brokaw also presents several more generalized arguments about why we should reverse FINRA's findings. He complains, for instance, that FINRA engaged in overzealous prosecution when informing him (through what is known as a Wells Notice) that it had made a preliminary determination to recommend bringing a disciplinary action against him. Brokaw contends that FINRA accused him of instructing one of his sales assistants to fill out trade tickets incorrectly despite the fact that his sales assistant had testified on the record that this was not the case. FINRA's Wells process, however, is discretionary and gives potential respondents an opportunity to discuss the facts and law and to explain why formal charges are not appropriate.[110] Given that FINRA subsequently modified its allegations before filing its complaint against Brokaw, FINRA's procedures in this matter seem to have worked as intended, and we find no evidence of improper conduct by FINRA.

Brokaw similarly argues that, throughout these proceedings, FINRA "acted as if it was 'a given' that Mr. Tang had been attempting to manipulate the price of MGRM to maximize his profit on the MGRM CVRs."[111] Because of this, Brokaw argues, FINRA failed to credit Tang's

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107 *Id.*

108 *Philip L. Spartis*, Exchange Act Release No. 64489, 2011 SEC LEXIS 1693, at *34 (May 13, 2011) (quoting *Justine Susan Fischer*, Exchange Act Release No. 40335, 53 SEC 734, 1998 SEC LEXIS 1763, at *14 n.4 (Aug. 19, 1998)).

109 We are likewise not persuaded by Brokaw's argument that other brokers, at other firms, handled similar orders for Tang or that other fund managers set up hedged positions involving both Monogram common stock and Monogram CVRs. Such activities by other people neither explains nor excuses Brokaw's aggressive furthering of a manipulative scheme. Nor does a regulator's decision not to prosecute others mean that misconduct has not taken place. *Cf. infra* note 147 (noting that an agency's decision not to prosecute is a decision "generally committed to an agency's absolute discretion").

110 *See FINRA Regulatory Notice 09-17*, 2009 FINRA LEXIS 45, at *5–6 (Mar. 2009) (explaining FINRA's Wells process); *NASD Notice to Members 97-55*, 1997 NASD LEXIS 77, at *14 n.6 (Aug. 1997) (stating that the Wells process "is discretionary with the staff and is not a right or policy").

111 Br. in Supp. of Pet. for Review at 5.

"extensive testimony" about "his legitimate trading strategy based on a legitimate economic purpose."[112] But we have found no evidence that Brokaw knew of Tang's purportedly legitimate reasons for his suspicious trading activity, and, in any event, Tang's trading strategy is not relevant to our finding that Brokaw took his own steps, with his own motivations, to further a manipulative scheme.[113] Nor do we find evidence that FINRA's decision was somehow biased or unfair, and "our *de novo* review of the evidence cures whatever bias, if any, that may have existed."[114]

B. Brokaw violated Rule 3110 by causing the firm's books and records to be incomplete and inaccurate.

NASD Conduct Rule 3110 requires that FINRA member firms keep books and records as prescribed by Exchange Act Rule 17a-3.[115] As noted above, Rule 17a-3 requires, among other things, that broker-dealers record the time that an order was received from a customer.[116] This obligation to maintain certain records also includes the requirement that such records be accurate.[117] As we have explained, access to "basic source documents and transaction records"[118] is "a keystone of the surveillance of brokers and dealers by [Commission] staff and by the securities industry's self-regulatory bodies."[119] The recordkeeping requirements of the securities

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112 *Id.*

113 *See, e.g., supra* text accompanying note 81.

114 *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *75–76 (May 27, 2011). Brokaw also takes several exceptions to findings in the hearing panel decision, but "it is the decision of the NAC, not the decision of the Hearing Panel, that is the final action . . . which is subject to Commission review." *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *21 n.17 (Nov. 8, 2006). Brokaw's exceptions to the panel's decision are therefore moot.

115 *See supra* note 50 (citing requirements of Exchange Act Rule 17a-3).

116 *See supra* note 50 and accompanying text.

117 *See supra* notes 51–52 and accompanying text.

118 *Statement Regarding the Maintenance of Current Books and Records by Brokers and Dealers*, Exchange Act Release No. 10756, 1974 SEC LEXIS 3290, at *3 (Apr. 26, 1974).

119 *Edward J. Mawod & Co.*, Exchange Act Release No. 13512, 46 SEC 865, 1977 SEC LEXIS 1811, at *16 n.39 (May 6, 1977), *aff'd*, 591 F.2d 588 (10th Cir. 1979); *see also Comm'n Guidance to Broker-Dealers on the Use of Electronic Storage Media Under the Electronic Signatures in Global and Nat'l Commerce Act of 2000 with Respect to Rule 17a-4(f)*, Exchange Act Release No. 44238, 2001 SEC LEXIS 2761, at *7 (May 1, 2001) (noting that "preserved records are the primary means of monitoring compliance with applicable securities laws, including antifraud provisions and financial responsibility standards").

laws are therefore "fundamental requirements imposed on those who wish to engage in the securities business."[120]

Brokaw incorrectly argues that NASD Rule 3110 imposes no duty on him, as an associated person, for his firm's compliance with recordkeeping requirements. As noted above, the requirements of NASD Rule 3110, as well as all other NASD rules, are applicable to both FINRA members and all persons associated with FINRA members by virtue of NASD Rule 0115, which provides that "these Rules shall apply to all members and persons associated with a member. Persons associated with a member shall have the same duties and obligations as a member under these Rules."[121] Because of this, FINRA member firms and their associated persons must create and keep memoranda of all brokerage orders and any instructions given or received for the purchase or sale of securities. Indeed, Deutsche Bank's own internal manual also required client advisors (such as Brokaw) to "fully and accurately complete all applicable sections of each order ticket immediately upon receipt of an order."[122]

It is largely undisputed that Brokaw failed to fulfill these obligations. Brokaw does not dispute that, by failing to complete an order ticket as should have been done, his office created a record that failed to record the times when Tang placed his orders or the times his orders were executed, inaccurately aggregated each day's morning and afternoon orders into a single order, and inaccurately indicated that Tang placed his orders directly with the traders. Brokaw instead argues that FINRA failed to give proper weight to his long-standing practice of delegating the creation of order tickets to his assistants and that Deutsche Bank "had accepted this practice throughout his entire career there."[123] As Brokaw's branch manager testified, however, the responsibility for the accuracy of order tickets remained with the broker even if he delegated the task to his assistant.[124] That some information related to Tang's trades was reflected elsewhere in

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120 *Mark James Hankoff*, Exchange Act Release No. 24390, 48 SEC 705, 1987 SEC LEXIS 1964, at *9 (Apr. 24, 1987).

121 *See supra* note 2; *see also North Woodward Fin. Corp.*, Exchange Act Release No. 60505, 2009 SEC LEXIS 2796, at *23 & n.30 (Aug. 19, 2009) (finding applicant, who was firm's principal and financial and operations principal, liable for violating NASD Rule 3110 even though applicant, as an individual, could not be found liable for violating Exchange Act Rule 17a-3, which by its terms applies only to broker-dealers).

122 FINRA Exhibit 25B at 85; *see also supra* note 52 (noting that the requirement to keep accurate records applies regardless of whether the information entered is itself mandated).

123 Br. in Supp. of Pet. for Review at 23.

124 *Cf. Marc N. Geman*, Exchange Act Release No. 43963, 54 SEC 1226, 2001 SEC LEXIS 282, at *65–67 (Feb. 14, 2001) (rejecting officer's claim that he could not be responsible for firm's failure to memorialize the times of certain trades on order tickets because he had delegated responsibility for those tickets to someone else), *aff'd*, 334 F.3d 1183, 1195 (11th Cir. 2003).

Deutsche Bank's recordkeeping system does not alter the fact that the order tickets, for which Brokaw was responsible, were not completed as required and that the booking tickets, which were created instead, were misleading.[125]

Brokaw repeatedly testified that he did essentially nothing to ensure that the tickets were prepared correctly, and we have long held that "conduct that reflects negatively on an applicant's ability to comply with regulatory requirements fundamental to the securities industry is inconsistent with just and equitable principles of trade."[126] As discussed above, Brokaw also effectively obscured the true nature of the manipulative scheme by failing to ensure that tickets were prepared correctly. We accordingly find that Brokaw violated NASD Rules 3110 and 2110.[127]

IV.

Pursuant to Exchange Act Section 19(e)(2), we will sustain FINRA's sanction unless we find, having due regard for the public interest and the protection of investors, that the sanction is excessive or oppressive or imposes an unnecessary or inappropriate burden on competition.[128] FINRA suspended Brokaw from associating with any FINRA member firm in all capacities for one year and imposed on him a $25,000 fine for the violation of just and equitable principles of trade and concurrently suspended him for thirty business days and fined him an additional $5,000 for the books and records violations. We sustain these sanctions because, as explained

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125 *Cf. Eugene N. Owns*, Exchange Act Release No. 7370, 42 SEC 149, 1964 SEC LEXIS 540, at *4 (July 16, 1964) (finding violations of books and records requirement by observing that "[t]he fact that certain of the data required in such records might have been derived from other records maintained by registrant did not obviate the need for full compliance with [books and records] requirements"); *Associated Sec. Corp.*, Exchange Act Release No. 6315, 40 SEC 10, 1960 SEC LEXIS 337, at *20–21 (July 12, 1960) (finding violation of books and records requirements where "basic data could be derived from other records maintained by registrant" by noting that "[t]he efficacy of [the books and records requirements] would be materially diminished if persons in charge of the records could take it upon themselves to decide . . . that compliance with some of those requirements is not necessary"), *aff'd*, 293 F.2d 738 (10th Cir. 1961).

126 *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *22 (Aug. 22, 2008). Brokaw's violation of Rule 3110 also caused him to violate Rule 2110. *See supra* note 2.

127 *See Fox & Co.*, 2005 SEC LEXIS 2822, at *32 (finding that entering incorrect information in documents constituted a violation of NASD Rules 3110 and 2110); *John F. Lebens*, Exchange Act Release No. 36691, 52 SEC 606, 1996 SEC LEXIS 91, at *5 (Jan. 5, 1996) (finding that broker violated just and equitable principles of trade rule by improperly allocating losing personal trades to proprietary accounts of his firm, which had lax internal controls, and noting that "[i]t is important that broker-dealers conduct their business operations with regularity and that their records accurately reflect those operations; it is unethical conduct for their employees to take advantage of loose internal controls to prevent achievement of these principles").

128 15 U.S.C. § 78s(e)(2). Exchange Act § 19(e)(2) permits us to cancel, reduce, or remit a FINRA sanction, but does not authorize us to increase the sanction. *Id.*; *see also Gregory W. Gray*, Exchange Act Release No. 60361, 2009 SEC LEXIS 2554, at *39 n.41 (July 22, 2009) (noting that the Exchange Act does not authorize the Commission to increase an SRO disciplinary sanction).

below, we believe that they are neither excessive nor oppressive in light of Brokaw's violative conduct and that they will serve the public interest and protect investors.[129]

A. FINRA's imposition of a one-year suspension and $25,000 fine for Brokaw's violation of just and equitable principles of trade is not excessive or oppressive.

FINRA's decision to suspend and fine Brokaw for his Rule 2110 violation is consistent with FINRA's Sanction Guidelines.[130] Because the Guidelines contain no specific guideline applicable to Brokaw's violation of just and equitable principles of trade, FINRA appropriately relied on, and gave proper weight to, the Guidelines' Principal Considerations in Determining Sanctions, which are applicable to all violations.[131] In doing so, FINRA reasonably found several factors to be aggravating. FINRA found, for example, that Tang's six orders were "significant in size and notably larger than the orders [Tang] usually placed with Brokaw."[132] FINRA also noted that Brokaw not only earned commissions on Tang's trades but also profited indirectly from the value of the CVRs that he and his family held, which the NAC reasonably concluded "clouded his ability to conduct a discerning inquiry into [Tang's] trades."[133] Brokaw disputes that he was motivated by any profit, arguing that he earned less than $500 in commissions on Tang's trades (out of more than $931,446 in gross commissions Brokaw earned that year); that he and his family had held the CVRs for a long time; and that he had sold some of his and his family's CVRs before the pricing period began. Brokaw testified at the hearing, however, that he was concerned about his commission and was upset when the firm unwound Tang's trade because he would not get his full commission. And regardless of whether Brokaw sold any CVRs before the pricing period, he and his family also still owned other CVRs during the pricing period. The

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129 Brokaw does not claim, and the record does not show, that FINRA's action imposes an unnecessary or inappropriate burden on competition.

130 FINRA promulgated the Sanction Guidelines to achieve greater consistency, uniformity, and fairness in its sanctions. Although the Guidelines do not bind our consideration of the sanctions, they serve as a benchmark for our review under Exchange Act Section 19(e)(2). *Jason A. Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at *18 n.27 (Dec. 22, 2008).

131 *See* FINRA Sanction Guidelines ("Guidelines"), at 2–7 (setting forth a non-exhaustive list of factors that should be considered), available at http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf; *see also Dante J. DiFrancesco*, Exchange Act Release No. 66113, 2012 SEC LEXIS 54, at *33 (Jan. 6, 2012) (finding that, where "[t]he Guidelines contain no specific recommendation for the conduct at issue[,] . . . FINRA properly considered the Guidelines' Principal Considerations in Determining Sanctions applicable to all violations").

132 *Brokaw*, 2012 FINRA Discip. LEXIS 53, at *58 (citing Guidelines, at 7 (Principal Consideration No. 18) (directing adjudicators to consider "[t]he number, size and character of the transactions at issue")).

133 *Id.* (citing Guidelines, at 7 (Principal Consideration No. 17) (directing adjudicators to consider "[w]hether e respondent's misconduct resulted in the potential for the respondent's monetary or other gain")).

length of time that he and his family had held those CVRs did not alter the fact that those holdings became worth approximately $189,000 because of what occurred during the pricing period.

Perhaps the most aggravating factor is the nature of Brokaw's misconduct. Manipulation, we have repeatedly noted, is one of the most serious securities offenses,[134] and contrary to Brokaw's claim that there was no proof of intentional wrongdoing, the record plainly shows that Brokaw intentionally facilitated orders in an effort to manipulate the market. This intentional misconduct raises serious questions about Brokaw's commitment to the high ethical standards required of associated persons.[135] While Brokaw asserts that there was no injury to the investing public, manipulation is an offense that is "perpetrated not merely on particular customers but on the entire market."[136] And his willingness to participate in a manipulative scheme reflects a disturbing disregard for the integrity of the market in which he was effecting transactions. Moreover, "[t]he absence of . . . customer harm is not mitigating, as our public interest analysis focus[es] . . . on the welfare of investors generally."[137]

Nor do we find Brokaw's misconduct to be mitigated by his claim that he "provided full cooperation to all regulatory agencies."[138] Such cooperation was required of Brokaw as an associated person.[139] And, although the Guidelines provide that an associated person's

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134 *Kirlin*, 2009 SEC LEXIS 4168, at *85 (quoting *Montelbano*, 2003 SEC LEXIS 153, at *49 (noting that "there are few, if any, more serious offenses than manipulation")); *Markowski*, 2000 SEC LEXIS 1860, at *17 (holding that deliberate manipulation of the market is "serious" misconduct that "strikes at the heart of the pricing process on which all investors rely" and "runs counter to the basic objectives of the securities laws").

135 *Cf. Conrad P. Seghers*, Investment Advisers Act Release No. 2656, 2007 SEC LEXIS 2238, at *28 (Sept. 26, 2007) (noting that the securities industry "presents continual opportunities for dishonesty and abuse"), *petition denied*, 548 F.3d 129 (D.C. Cir. 2008); Guidelines, at 7 (Principal Consideration No. 13) (directing adjudicators to consider "[w]hether the respondent's misconduct was the result of an intentional act, recklessness or negligence").

136 *Montelbano*, 2003 SEC LEXIS 153, at *49 (affirming bars and fines of up to $50,000 for applicants' roles in a manipulative scheme); *see also Michael B. Jawitz*, Exchange Act Release No. 44357, 55 SEC 188, 2001 SEC LEXIS 1042, at *26 (May 29, 2001) (noting that "[m]arket participants, in making investment decisions, rely on the market as an independent pricing mechanism").

137 *Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *26 & n.25 (Feb. 24, 2012) (internal quotations omitted); *accord PAZ Sec. Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *17 (Apr. 11, 2008) (holding that applicants' failures to comply with NASD rule "are not mitigated because those failures did not, in themselves, produce a monetary benefit to Applicants or result in injury to the investing public"), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009); *Coastline Fin., Inc.*, Exchange Act Release No. 41989, 54 SEC 388, 1999 SEC LEXIS 2124, at *15–16 (Oct. 7, 1999) (rejecting absence of customer harm as a mitigating factor for sanctions). Here, as noted above, Brokaw and his family both profited from the CVRs.

138 Br. in Supp. of Pet. for Review at 25.

139 *Kevin M. Glodek*, Exchange Act Release No. 60937, 2009 SEC LEXIS 3936, at *28–29 n.25 (Nov. 4, 2009) (finding that associated person's cooperation with an NASD investigation "was consistent with the

"substantial assistance to FINRA" during an investigation is generally mitigating,[140] the record contains no evidence suggesting that Brokaw's cooperation rose to this level. We also do not find mitigating Brokaw's claims that he advised Watson of the CVR pricing period "to ensure both the sales traders and the equity traders were fully informed."[141] Brokaw's conversation with Watson indicates that Brokaw not only believed that Tang may have been trying to manipulate the market, but that Brokaw himself was engaged in such a scheme.

Brokaw also asks the Commission to consider what he claims have been "tremendous personal losses" that he has suffered by losing his employment in the securities industry (thus losing deferred compensation from the firm), not being able to have worked in the securities industry for more than two years, and incurring "significant legal expenses that have been unreimbursed to date."[142] We recognize that Brokaw has endured some hardships, but they are all a direct result of his deliberate misconduct.[143] Brokaw's continued effort to blame others for his regulatory failures also indicates that, despite any hardships he has suffered, including his termination from Deutsche Bank, he still does not appreciate his responsibilities as a registered person. Given the seriousness of Brokaw's misconduct, we thus find that FINRA's imposition of a one-year suspension and $25,000 fine was entirely reasonable despite his claimed hardships.

Brokaw contends that he suffered further hardship by "enduring [FINRA's] false charge that he instructed his sales assistants to put false information on the order tickets from the Wells Notice for over one year."[144] As noted above, however, a FINRA Wells Notice is a step in a discretionary process that gives potential respondents an opportunity to explain why formal charges are not appropriate—a process that appears to have worked here since FINRA subsequently dropped the allegation at issue before filing its complaint against Brokaw. We do not find Brokaw's vague assertion that he has had to respond to state regulators "as a result" of

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responsibility he agreed to fulfill when he became an associated person and does not constitute substantial assistance"); *Keyes*, 2006 SEC LEXIS 2631, at *23 (rejecting argument that lesser sanction was justified because applicant cooperated with NASD in its investigation by noting that "when Keyes registered with NASD he agreed to abide by its rules, which are unequivocal with respect to the obligation to cooperate with NASD, and compliance with this obligation is not a mitigating factor").

140 Guidelines, at 7 (Principal Consideration No. 12).

141 Br. in Supp. of Pet. for Review at 25.

142 *Id.*

143 *Cf. Craig*, 2008 SEC LEXIS 2844, at *27 ("We also do not consider mitigating the economic disadvantages Craig alleges he suffered because they are a result of his misconduct."); *Hans N. Beerbaum*, Exchange Act Release No. 55731, 2007 SEC LEXIS 971, at *20 (May 9, 2007) (finding that applicant's claims of "great economic hardship" as a result of sanctions were not mitigating).

144 Br. in Supp. of Pet. for Review at 25.

FINRA's allegation to be mitigating. FINRA's underlying investigation was a direct result of his deliberate misconduct. Given the circumstances surrounding Tang's trades, and Brokaw's role in them, it was also entirely foreseeable and reasonable that various regulators might want to investigate, and cooperating with regulatory investigations is part of the responsibility he agreed to fulfill as an associated person.[145]

Also unavailing are Brokaw's assertions that the sanctions are unfair because FINRA did not prosecute another representative at another firm, who also traded Monogram shares for Tang during the pricing period. It is well recognized "that the appropriate sanction depends upon the facts and circumstances of each particular case and cannot be determined precisely by comparison with actions taken in other proceedings or against other individuals in the same proceeding."[146] Nor are we persuaded by Brokaw's assertion that FINRA's sanctions are inconsistent with either the NAC's finding that Tang's trades were legitimate or with our decision not to pursue an enforcement action against Tang. As noted above, the NAC never concluded that Tang's trades were legitimate; it found only that FINRA enforcement staff failed to introduce sufficient evidence to support an allegation that Tang engaged in market manipulation. And our decision not to bring an enforcement action cannot be construed as a determination that Tang's trades were legal.[147] Moreover, whether Tang was engaged in manipulation is not determinative as to whether—at the time of the trades—Brokaw himself was furthering a scheme to manipulate Monogram's stock price.[148]

We are also not persuaded by Brokaw's attempts to deflect blame for his own actions. Brokaw argues that Deutsche Bank offered no training for brokers on "marking the open" or "marking the close"; that "he justifiably relied upon sales traders to ensure that client orders were executed by the equity traders properly"; and that he advised trader Watson of the CVR pricing period "to ensure both the sales traders and the equity traders were fully informed."[149] He further

145 *See supra* notes 138–140 and accompanying text (discussing obligation to cooperate with investigations).

146 *Christopher J. Benz*, Exchange Act Release No. 38440, 52 SEC 1280, 1997 SEC LEXIS 672, at *14 (Mar. 26, 1997), *petition denied*, 168 F.3d 478 (3d Cir. 1998); *see also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973) (stating that "employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases").

147 *Cf. Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (stating that an agency's decision "not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion"); *Chicago Bd. of Trade v. SEC*, 883 F.2d 525, 530–31 (7th Cir. 1989) (noting that a "[r]efusal to prosecute is a classic illustration of a decision committed to agency discretion" and that "decisions about the best use of the staff's time are for the prosecutor's judgment" (citations omitted)).

148 *See, e.g., supra* text accompanying note 81.

149 Br. in Supp. of Pet. for Review at 25.

contends that Deutsche Bank's sales-traders were the "true gatekeepers of the firm"[150] and that he expected them to inform him if something was inappropriate. None of these arguments is mitigating here. Brokaw, like all securities industry professionals, "must take responsibility for compliance" with regulatory responsibilities and "cannot be excused for lack of knowledge, understanding or appreciation of" those requirements.[151] If anything, Brokaw's repeated attempts to blame others for these deliberate failures calls into question whether he appreciates the seriousness of his misconduct and his responsibility as a registered person to comply with high standards of commercial honor.[152] Moreover, by telling one of his assistants to stop explaining the true nature of Tang's orders and by failing to ensure that accurate order tickets describing those orders were completed, Brokaw frustrated the firm's ability to monitor his regulatory compliance.[153] All of this weighs against imposition of a lesser sanction.

We further find that Brokaw's lack of prior disciplinary history does not weigh in favor of a lesser sanction. As we have repeatedly stated, a "lack of disciplinary history is not mitigating for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional."[154] Although the NAC reasonably

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150 *Id.* at 21.

151 *Guang Lu*, Exchange Act Release No. 51047, 58 SEC 43, 2005 SEC LEXIS 117, at *22 (Jan. 14, 2005) (rejecting applicant's defense that firm's president advised against complying with disclosure requirements), *aff'd*, 179 F. App'x 702 (D.C. Cir. 2006); *see also John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *54 (Feb. 10, 2012) (rejecting applicant's attempt to "lay part of the blame for her lack of disclosure on what she believes is the branch's lax review of correspondence" by "reiterate[ing] that applicants cannot shift to others the responsibility for their own compliance with applicable rules"); *Craig*, 2008 SEC LEXIS 2844, at *15 (noting that a representative "cannot shift his responsibility to comply with NASD rules to his firm").

152 *Cf. Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *64 (Nov. 9, 2012) (finding that applicant's "persistent attempts to deflect blame onto others . . . suggests that he is likely to engage in similar misconduct in the future"), *appeal filed*, No. 13-31 (2d Cir. Jan. 8, 2013); *Craig*, 2008 SEC LEXIS 2844, at *22 (finding that applicant's "failure to take responsibility for his conduct makes recurrence more likely"); *Raghavan Sathianathan*, Exchange Act Release No. 54722, 2006 SEC LEXIS 2572, at *44 (Nov. 8, 2006) (finding aggravating for purposes of sanctions that applicant repeatedly blamed others for his violative conduct), *aff'd*, 304 F. App'x 883 (D.C. Cir. 2008); *Robert Tretiak*, Exchange Act Release No. 47534, 56 SEC 209, 2003 SEC LEXIS 653, at *43–44 (Mar. 19, 2003) (finding that applicant's argument that his misconduct was excusable "indicate[s] to us that he fails to appreciate the seriousness of his misconduct and his own responsibility, as a securities principal and industry participant, for his compliance with essential regulatory requirements that serve to protect public investors"); *Clyde J. Bruff*, Exchange Act Release No. 40583, 53 SEC 880, 1998 SEC LEXIS 2266, at *17 (Oct. 21, 1998) (finding respondent's "attempts to shift blame are additional indicia of his failure to take responsibility for his actions").

153 Guidelines, at 6 (Principal Considerations in Determining Sanctions, No. 10) (directing adjudicators to consider "[w]hether the respondent attempted to conceal his or her misconduct or to lull inactivity, mislead, deceive or intimidate a customer . . . or . . . the member firm with which he or she is/was associated").

154 *Keyes*, 2006 SEC LEXIS 2631, at *23; *see also, e.g.*, *Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006) (stating that a "[l]ack of a disciplinary history is not a mitigating factor" because, as a registered person, appellant

concluded that "Brokaw's actions in this case were not otherwise reflective of his unblemished 23-year career in the securities industry," we agree with the NAC that, on balance, the factors surrounding Brokaw's misconduct strongly support imposition of a one-year suspension and a $25,000 fine.

Therefore, contrary to Brokaw's claims that the sanctions imposed are unduly harsh and severe, we find, for the reasons above, that the sanctions imposed are well within the appropriate range, will serve to impress upon Brokaw the importance of his responsibilities as a registered person, and will deter him and others within the securities profession from engaging in such misconduct.

B. FINRA's imposition of a thirty-business-day suspension and $5,000 fine for Brokaw's failure to comply with the books and records requirements is not excessive or oppressive.

FINRA's imposition of a thirty-day suspension and $5,000 fine falls squarely within the recommended ranges set forth in the Sanction Guidelines for books and records violations.[155] The order tickets that Brokaw and his office failed to create were "essential documents," which permitted Deutsche Bank and regulators to review market activity in order to protect investors.[156] As the firm's branch administrative manager and compliance officer testified, Deutsche Bank utilized order tickets in its surveillance functions and to facilitate correct billing and posting of orders to a customer's account. Without order tickets for Tang's trades, Deutsche Bank was less able to fulfill these functions. And although some information related to Tang's orders was accurately reflected in Deutsche Bank's transaction history report, the NAC correctly concluded that those records did not lessen Brokaw's responsibility to ensure that an order ticket was completed at the time of Tang's orders.[157] By failing to ensure that order tickets were created

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"was required to comply with the NASD's high standards of conduct at all times"); *John B. Busacca III*, Exchange Act Release No. 63312, 2010 SEC LEXIS 3787, at *64–65 n.77 (Nov. 12, 2010) (finding that lack of disciplinary history was not a mitigating factor), *aff'd*, 449 F. App'x 886 (11th Cir. 2011).

155 *See* FINRA Sanction Guidelines, at 29 (recommending a fine of $1,000 to $10,000 and suspension of an individual for up to thirty business days and, in egregious cases, a fine of $10,000 to $100,000 and a suspension of up to a two years or a bar).

156 *Brokaw*, 2012 FINRA Discip. LEXIS 53, at *60; *see also Richard G. Strauss*, Exchange Act Release No. 31222, 50 SEC 1316, 1992 SEC LEXIS 2402, at *4 n.5 (Sept. 22, 1992) (noting that "[o]rder tickets play an important role in the recording and settlement of a brokerage firm's transactions"); *Mawod*, 1977 SEC LEXIS 1811, at *16 n.39 (observing that accurate books and records are the "keystone of the surveillance of broker dealers").

157 *See supra* note 125 and accompanying text (noting that the fact that some information related to Tang's trades was reflected correctly elsewhere in Deutsche Bank's recordkeeping system does not excuse Brokaw's failure ensure the creation of accurate order tickets).

when he received Tang's orders, Brokaw thus undermined the accuracy of Deutsche Bank's records.

Compounding the seriousness of Brokaw's books and records failures was the fact that the booking tickets that Brokaw's office prepared in lieu of the order tickets further obfuscated the true nature of Tang's trades by misleadingly aggregating each day's morning and afternoon orders into a single order. These booking tickets also inaccurately reflected that Tang placed his orders directly with the traders and failed to record the times when Tang placed his orders or the time his orders were executed. As the NAC correctly found, this happened for every one of Tang's six orders and "serves to aggravate sanctions [by showing] that Brokaw's failure was not an isolated incident."[158] And, by earning commissions on these trades, Brokaw profited from his underlying books and records failures.[159]

Also aggravating is Brokaw's consistent attempt to blame others, including Deutsche Bank staff and his sales assistants, for his own books and records failures. Brokaw testified that it was not his job "to look at order tickets and review order tickets. That was the function of my sales assistants."[160] Brokaw further claims that it was Deutsche Bank's established practice to allow sales assistants or sales traders to complete order tickets. Regardless of whether the firm allowed this practice, it did not relieve Brokaw of his responsibility for ensuring that his sales assistants or sales traders were completing order tickets accurately.[161] Nor does the firm's acceptance of sales assistants' entering order tickets explain why Brokaw's assistants instead completed misleading booking tickets. Brokaw's attempt to blame others during the course of

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158 *Brokaw*, 2012 FINRA Discip. LEXIS 53, at *61; *see* Guidelines, at 7 (Principal Consideration No. 8) (directing adjudicators to consider "[w]hether the respondent engaged in numerous acts and/or a pattern of misconduct").

159 *See* Guidelines, at 7 (Principal Consideration No. 17) (directing adjudicators to consider "[w]hether the respondent's misconduct resulted in the potential for the respondent's monetary or other gain").

160 Tr. at 1327.

161 *See Charles E. Kautz*, Exchange Act Release No. 37072, 52 SEC 730, 1996 SEC LEXIS 994, at *16 (Apr. 5, 1996) (rejecting argument that respondent's "was an accepted practice at his Firm and approved by his supervisor"); *Michael G. Keselica*, Exchange Act Release No. 34929, 52 SEC 33, 1994 SEC LEXIS 4242, at *11 (Nov. 3, 1994) (stating that "attempts to blame others for his misconduct . . . demonstrate that [respondent] fails to understand the seriousness of . . . violations").

this disciplinary action is further evidence that he fails to appreciate his responsibilities and the high standards required of registered persons.[162] We therefore find that Brokaw's repeated failure to document Tang's orders in firm records and continued failure to take responsibility for that failure strongly supports FINRA's imposition of a thirty-business-day suspension and $5,000 fine.

An appropriate order will issue.[163]

By the Commission (Chair WHITE and Commissioners AGUILAR, GALLAGHER, STEIN and PIWOWAR).

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

162 *See supra* note 152 (citing cases).

163 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
Release No. 70883 / November 15, 2013

Admin. Proc. File No. 3-15059

In the Matter of the Application of

EDWARD S. BROKAW

c/o Kevin T. Hoffman
Law Offices of Kevin T. Hoffman
151 Railroad Avenue
Greenwich, CT 06830

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION

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

ORDERED that the disciplinary action taken by FINRA against Edward S. Brokaw is sustained.

By the Commission.

Elizabeth M. Murphy
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. 70893 / November 15, 2013

Admin. Proc. File No. 3-15346

In the Matter of the Application of

ORBIXA TECHNOLOGIES, INC.
c/o W. Hubert Plummer
Plummer & Plummer, LLP
77 Arkay Drive, Suite H
Hauppauge, NY 11788

For Review of Action Taken by

New York Stock Exchange, LLC

ORDER GRANTING MOTION TO DISMISS APPLICATION FOR REVIEW

I.

Orbixa Technologies, Inc. requests that we review New York Stock Exchange, LLC's "decision to terminate [its data access] contract with Orbixa" and to "re-invoice [Orbixa] in excess of 2.5 million dollars" for what NYSE determined were past underpayments. Orbixa asserts that "th[is] action" constitutes a denial of access reviewable under Section 19(f) of the Securities Exchange Act of 1934. In response, NYSE moves to dismiss Orbixa's application asserting, among other things, that it is untimely. As explained below, we dismiss Orbixa's application because it does not challenge any NYSE action of which Orbixa received notice in the thirty days before it filed the application, a statutory prerequisite for the review Orbixa seeks.

II.

On or about July 8, 2008, Orbixa and New York Stock Exchange, Inc., a predecessor of New York Stock Exchange, LLC, entered into an Agreement for Receipt and Use of Consolidated Network A Data and NYSE Market Data (the "Data Access Agreement" or the "Agreement"). Pursuant to its business model, Orbixa subsequently provided data that it received from NYSE to a number of individual users. Under the Data Access Agreement, Orbixa owed NYSE per-month fees for each user to whom Orbixa distributed data. These fees varied substantially depending on whether the user was classified as non-professional ($1 per month), professional ($127.25 per month for CTA Tape A Data and $30.20 per month for CTA Tape B data), or internal ($20.75 per month).

By at least July 2011, NYSE came to suspect that Orbixa was not properly reporting the status of its users. NYSE questioned Orbixa's entitlement to the preferential rates that it claimed applied to the users to whom it provided data. Following protracted discussions between Orbixa and NYSE, matters came to a head on March 27, 2012 when, pursuant to Paragraph 17 of the Data Access Agreement,[1] NYSE sent Orbixa written notice of termination of the Agreement effective April 27, 2012. The notice specifically referenced prior correspondence from NYSE to Orbixa that rejected Orbixa's reporting position and requested several categories of information relevant to the determination of amounts outstanding to NYSE. On April 4, 2012, after receipt of some of the requested information from Orbixa, NYSE billed Orbixa for back fees attributable to what it determined was Orbixa's improper reporting.

Orbixa subsequently commenced an arbitration against NYSE in which it challenged the contract termination and assertion of liability.[2] On May 23, 2012, Orbixa filed an Amended Statement of Claim and Request for Preliminary Relief in which it requested, among other things, that the arbitrator stay the termination of the Data Access Agreement and order money damages and declaratory relief supporting its interpretation of the contract. NYSE counterclaimed for amounts owing and a declaration that it was proper for it to terminate the Data Access Agreement.

The arbitrator issued a Final Award on April 29, 2013. Among other things, the Final Award (1) awarded NYSE approximately $3.5 million for data access charge underpayments and associated interest and administrative fees; (2) declared that NYSE had lawfully terminated the Data Access Agreement; and (3) denied Orbixa's claims in their entirety.

On May 29, 2013, Orbixa filed with the Commission an Application Seeking Review of the Decision of New York Stock Exchange Denying Orbixa Technologies, Inc. Access to Market Data and the Decision of the Arbitrator (the "Application"). Orbixa cited contract language providing that nothing in the Data Access Agreement's arbitration provision would "derogate[] any right" that any person "may have to appeal to the Securities and Exchange Commission any action taken or any failure to act under the [Exchange] Act, or any of its rules, . . . at any time, whether before or after the commencement of any arbitration proceeding" (the "Commission

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[1] Paragraph 17 provided that the contract would "continue[] in effect until terminated" and that either Orbixa or NYSE could "terminate th[e] Agreement . . . on 30 days' written notice to the other." This power was not unlimited. Paragraph 19(e) required NYSE to "act[] in a reasonable manner" in "provid[ing] notices and approvals" and in otherwise acting under the Agreement.

[2] *See* Data Access Agreement ¶ 16 (mandating that "[t]he parties . . . settle any controversy or claim arising out of or relating to this Agreement, or to its breach or alleged breach, by arbitration in New York, New York under the Commercial Arbitration Rules of the American Arbitration Association"); *see also infra* text associated with note 3 (noting limitation of arbitration clause).

Carve-Out").[3] Orbixa requested that we review "(1) the decision of [NYSE] to deny services to Orbixa and (2) the decision of the arbitrator in the arbitration matter between the parties."[4]

Orbixa withdrew its request that we review the arbitration award in response to NYSE's argument that the Application impermissibly attacks a binding arbitration award. NYSE had pointed out that the exclusive grounds for modification of an arbitral award are limited and set out in 9 U.S.C. §§ 10 and 11,[5] and that Exchange Act Section 19(d) permits only review of self-regulatory organization ("SRO") actions, not third party arbitration decisions.

Orbixa now exclusively challenges the termination of the Data Access Agreement and associated re-invoicing, which it characterizes as a single action preceding the arbitration. Orbixa contends that we have jurisdiction to review that action, its Application was timely, and the termination of the Data Access Agreement and re-invoicing must be reversed. Orbixa argues that NYSE's action was anticompetitive, NYSE unfairly punished Orbixa for interpreting the Data Access Agreement differently than NYSE, and NYSE violated its own and Commission rules in various ways.

NYSE asserts that Orbixa's application is untimely because Orbixa filed it more than thirty days after receiving notice of the termination of the Data Access Agreement. NYSE argues that, even if Orbixa's application were timely, it received the services to which it was entitled and there has been no denial of access allowing for review by the Commission because Orbixa received the arbitration hearing provided for in the Agreement.

III.

Exchange Act Section 19(d) provides us with the authority to review under the standard set forth in Section 19(f),[6] among other things, an SRO decision that "prohibits or limits any

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3 *See* Data Access Agreement ¶ 16.

4 Orbixa subsequently filed a federal court action seeking to vacate the arbitration award. *Orbixa Tech., Inc. v. New York Stock Exchange, LLC*, 1:2013cv05223 (S.D.N.Y. filed July 26, 2013). Orbixa voluntarily dismissed that action soon after NYSE brought to the Court's attention Orbixa's concession in papers filed in this case that Orbixa lacked a basis to challenge the arbitration award under the Federal Arbitration Act ("FAA"). Notice of Withdrawal of Complaint, *id.*, ECF No. 6 (S.D.N.Y. filed Aug. 7, 2013), *memo endorsed*, ECF No. 7 (S.D.N.Y. Aug. 9, 2013). Orbixa conceded in its briefing before us that "the Arbitrator was well qualified, knowledgeable in the securities industry and conducted a fair and impartial proceeding" and that there were "no grounds for appeal" of his award under the FAA.

5 *See Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008) (holding that FAA Sections "10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification" of an arbitration award).

6 15 U.S.C. § 78s(f).

person in respect to access to services offered by such organization."[7] But "[u]nless an appeal meets the threshold requirement for jurisdiction under Section 19(d), the standard of review under Section 19(f) is not an issue."[8] In addition, we may decline to exercise jurisdiction when an applicant fails to timely file an application for review.[9] Because, as explained below, the Application is untimely, we dismiss it without further review.[10]

A. Orbixa's Application is untimely.

We dismiss Orbixa's application as untimely because Orbixa filed it more than thirty days after receiving notice of the termination of the Data Access Agreement and associated re-invoicing. Pursuant to Exchange Act Section 19(d)(2) and Commission Rule of Practice 420(b),[11] a party that chooses to appeal an SRO action pursuant to Section 19(d)(2) must file an application for review with the Commission within thirty days after receiving notice of the action.[12] Rule 420(b), which provides the "exclusive" procedure for seeking an extension of the

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7 15 U.S.C. §§ 78s(d)(1), (2). Together, these provisions also make reviewable certain "final disciplinary sanction[s]" and bars and "deni[als] [of] membership or participation." Orbixa does not invoke any of these additional jurisdictional bases in its Application.

8 *Larry A. Saylor*, Exchange Act Release No. 51949, 58 SEC 586, 2005 WL 1560275, at *4 n.3 (June 30, 2005); *see also* Order Dismissing Application for Review, *Matthew Brian Proman*, Exchange Act Release No. 57740, 2008 WL 1902072, at *1 (Apr. 30, 2008) ("If we find that we do not have jurisdiction, we must dismiss the proceeding.") (citation omitted).

9 15 U.S.C. § 78s(d)(2); Rule of Practice 420(b), 17 C.F.R. § 201.420(b); Order Granting Mot. to Dismiss Application for Review, *Pennmont Sec.*, Exchange Act Release No. 61967, 2010 WL 1638720, at *6 (Apr. 23, 2010) (dismissing application for review as untimely without conducting a Section 19(f) review), *petition denied*, 414 F. App'x 465 (3d Cir. 2011).

10 Where an applicant timely files an application for review and makes a threshold showing of jurisdiction by, among other things, establishing a prohibition or limitation of services under Section 19(d)(1), we apply the statutory standard of review set forth in Section 19(f). Under that standard, we dismiss the application if we determine, after notice and opportunity for hearing, "[1] that the specific grounds on which such . . . prohibition or limitation is based exist in fact, [2] that such . . . prohibition or limitation is in accordance with the rules of the self-regulatory organization, and [3] that such rules are, and were applied in a manner, consistent with the purposes of" the Exchange Act. 15 U.S.C. § 78s(f); *Bloomberg, L.P.*, Exchange Act Release No. 49076, 57 SEC 265, 2004 WL 67566, at *3 (Jan. 14, 2004) (stating Exchange Act 19(f) standard). If we do not make each of these findings, or we find that the "prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of" the Exchange Act, we must issue an order to "set aside the action of the self-regulatory organization and require it to . . . grant such person access to services offered by the self-regulatory organization or member thereof." 15 U.S.C. § 78s(f).

11 15 U.S.C. § 78s(d)(2); 17 C.F.R. § 201.420(b).

12 *See* Order Granting Mot. to Dismiss Application for Review, *Julio C. Ceballos*, Exchange Act Release No. 69020, 2013 WL 772515, at *3 (Mar. 1, 2013); *see also Asensio v. SEC*, 447 F. App'x 984, 987 (11th Cir. 2011) (same). Exchange Act Section 19(d)(2) and Rule

(continued...)

filing deadline, mandates that we will grant an extension only on a showing of "extraordinary circumstances."[13]

The record establishes that Orbixa failed to file its Application within thirty days of the NYSE actions that Orbixa now challenges. On March 27, 2012, NYSE informed Orbixa in writing that it was terminating the Data Access Agreement effective April 27, 2012. On April 4, 2012, NYSE invoiced Orbixa for approximately $2.5 million of back fees. In its Application, Orbixa asserts that "NYSE's decision to terminate the contract with Orbixa and impose a punitive re-invoice in excess of $2.5 million constitutes a denial of access" subject to Commission review. Yet, Orbixa waited until May 29, 2013, over a year later, to file its application challenging that decision.

Orbixa characterizes the contract termination and associated re-invoicing as, variously, a decision to use the Data Access Agreement in a manner inconsistent with the Exchange Act, a means of putting Orbixa out of business, and a method of retaliation against Orbixa for its disagreement with NYSE on the interpretation of the Data Access Agreement. In its Application, Orbixa asserts that "NYSE has imposed adhesive contract terms which constitute Rules requiring SEC approval without ever submitting such items for SEC review and comment." Orbixa further asserts that NYSE imposed "commercially impossible fees for data services available to competitors at a fraction of the cost" and that this "constitutes discrimination and effective denial of access to essential market data exclusively within NYSE's control." Orbixa's claims thus all arise out of, or precede, NYSE's contract termination and re-invoicing. Indeed, Orbixa concedes that "the determination under review" by reason of its

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(...continued)
420(b) "require notice . . . to be filed with the Commission so that the Commission can determine whether to review the sanction on its own motion." *Ceballos*, 2013 WL 772515, at *5 n.10. "[T]he failure of an SRO to file the required notice does not prevent Commission review." *MFS Sec. Corp.*, Exchange Act Release No. 47626, 56 SEC 380, 2003 WL 1751581, at *6 n.13 (Apr. 3, 2003) (citing *William J. Higgins*, Exchange Act Release No. 24429, 48 SEC 713, 1987 WL 757509, at *5 n.29 (May 6, 1987)), *aff'd*, 380 F.3d 611 (2d Cir. 2004). Likewise, an SRO's failure to file notice with the Commission of the decision under review does not extend the applicant's deadline to file an application for review. *See* Order Dismissing Application for Review, *Boston Options Exch. Group, LLC*, Exchange Act Release No. 59927, 2009 WL 1347419, at *5 n.7 (May 14, 2009) (dismissing application for review as untimely under Exchange Act Section 11A(b)(5), although SRO argued "that it ha[d] taken no action prohibiting or limiting" access to services and thus filed no notice with the Commission); *see also Pennmont Sec.*, 2010 WL 1638720, at *3 & *6 n.19 (rejecting argument that SRO's failure to file amended order with the Commission "tolled the thirty-day filing period" where substantially similar original order had been filed, and finding that "[e]ven if the thirty-day filing deadline ran from the date" of the amended order, "[the] application [wa]s still substantially untimely").

[13] *See* 17 C.F.R. § 201.420(b); *see also Lance E. Van Alstyne*, Exchange Act Release No. 40738, 53 SEC 1093, 1998 WL 830817, at *4 (Dec. 2, 1998) ("In the interests of finality, only under extraordinary circumstances will we authorize the filing of a late appeal from an SRO action that is subject to the Section 19(d)(1) filing requirement.").

Application "predated the arbitration" and that "[t]he damage to Orbixa has its origin in the termination letter dated March 27, 2012." The only action that Orbixa identifies within the thirty days prior to the filing of its Application is the arbitration award. And Orbixa has now withdrawn its request that we review the arbitration award.[14] Its application is thus untimely.

Moreover, Orbixa does not request that we exercise our right pursuant to Section 19(d)(2) to extend the time for it to file its application for review. Because nothing in Orbixa's papers or the record remotely approaches the showing of "extraordinary circumstances" necessary to merit relief under our standard, we decline to grant an extension here.[15]

B. Orbixa's contrary arguments do not establish that its Application was timely.

Orbixa largely fails to respond to NYSE's argument that its Application is untimely, and its limited attempts to avoid dismissal on this basis lack merit. First, Orbixa asserts that "the arbitration [wa]s required by the contract" and it had to "exhaust its contractual remedies before seeking SEC review." According to Orbixa, "[t]he arbitration clause explicitly required Orbixa to participate in arbitration while reserving its rights under the Securities law[s], which includes [its] application for review to the Commission." But the arbitration provision in the Data Access Agreement did not require Orbixa to pursue arbitration before filing an application for review. Rather, the arbitration provision does not "derogate[] any right" a party "may have to appeal to the Securities and Exchange Commission any action taken or any failure to act under the 1934 Act, or any of its rules, . . . at any time, whether *before* or after the commencement of any arbitration proceeding."[16] Orbixa thus cannot credibly maintain that it was required to arbitrate its dispute with NYSE before requesting our review under Section 19; the contract specifically contemplated that Orbixa might seek Commission review before initiating an arbitration. Moreover, the Data Access Agreement does not (and cannot) amend Exchange Act Section 19(d)(2) to extend the deadline for filing an application for review until after the conclusion of a prior-filed arbitration. The Commission Carve-Out merely recognizes that the Data Access Agreement does not waive Orbixa's statutory right to timely seek review of the SRO actions

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[14] Orbixa concedes that it has no basis to challenge the arbitration award. *See supra* note 4. We also observe that the arbitration award was not action taken by NYSE as required for our jurisdiction under Section 19(d)(2). *See* 15 U.S.C. § 78s(d)(2) (providing jurisdiction with respect to actions referenced in Exchange Act 19(d)(1)); Exchange Act Section 19(d)(1), 15 U.S.C. § 78s(d)(1) (specifying, among other things, action where an SRO "prohibits or limits any person in respect to access to services offered by such organization or member thereof").

[15] *See supra* note 13 and associated text; *Pennmont Sec.*, 2010 WL 1638720, at *4 ("[A]n extraordinary circumstance under Rule of Practice 420(b) may be shown where the reason for the failure timely to file was beyond the control of the applicant that causes the delay."); *see also id.* at *6 (contemplating that a "critical legal issue . . . could potentially rise to the level of an extraordinary circumstance"); *MFS Sec.*, 2003 WL 1751581, at *3 & n.17 (accepting untimely application for review where "Court of Appeals . . . asked for the Commission's views as to whether the NYSE's actions" comported with relevant statute and rules and the application "present[ed] novel facts and legal issues").

[16] Commission Carve-Out, Data Access Agreement ¶ 16 (emphasis added).

identified in Exchange Act Section 19(d)(1). Orbixa chose not to bring its challenge to NYSE's action before us in a timely manner.[17] The Data Access Agreement did not prevent Orbixa from filing a timely application, and it does not excuse Orbixa's belated filing.

Second, Orbixa argues that NYSE "has not adequately explained the termination" of the Data Access Agreement because NYSE's notice to Orbixa did not contain a sufficiently detailed explanation of the basis for termination of the contract. Exchange Act Section 6(d)(2) requires exchanges to provide persons who have been "prohibited or limited with respect to access to services offered by the exchange" with "a statement setting forth the specific grounds" on which the prohibition or limitation "is based."[18] Prior to the termination, NYSE had informed Orbixa orally and in writing that it disagreed with Orbixa's method of calculation of the per-user fees due NYSE. The termination letter referenced the prior correspondence and stated that Orbixa had not yet responded to it in detail. And in the termination notice itself, NYSE informed Orbixa that it was terminating the Data Access Agreement under Section 17 of the Agreement. Under these circumstances, NYSE adequately provided notice of the "specific grounds" of the contract termination to Orbixa.[19] Orbixa had sufficient notice to subsequently challenge NYSE's decision in state court injunctive and private arbitration proceedings and before us on a number of bases. We thus reject Orbixa's arguments that its Application should not be dismissed as untimely.

C. Orbixa's remaining arguments lack merit.

Orbixa's remaining arguments also lack merit. Orbixa asserts that we should review its claim that NYSE violated Exchange Act Rule 17a-1 by failing to maintain required documents. We cannot independently review this contention under Section 19.[20] Moreover, because we decline jurisdiction over this review proceeding, "we cannot consider [Orbixa's] procedural issues in this context."[21] And even if NYSE's purported non-compliance with document

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[17] *Cf. Pennmont Sec.*, 2010 WL 1638720, at *5 ("Applicants elected to pursue their objections in the federal courts rather than filing an application for review with the Commission. Having made this election, Applicants cannot complain at this stage about the consequences of their choices.").

[18] 15 U.S.C. § 78f(d)(2).

[19] Orbixa also asserts that "NYSE never properly informed Orbixa of the termination" of the Data Access Agreement "as required by Section 19(d)(1)" of the Exchange Act. But Section 19(d)(1) specifies the notice that an SRO must provide to the Commission when, among other things, it "prohibits or limits any person in respect to access to services" offered by the SRO. 15 U.S.C. § 78s(d)(1). In such a case, Exchange Act Rule 19d-1(b) provides that the notice required by Exchange Act Section 6(d)(2) shall be sufficient. 17 C.F.R. § 240.19d-1(b). The other Rule 19d-1 notice provisions do not apply here.

[20] *See* 15 U.S.C. § 78s(d)(1) (not specifying failure to maintain documents among reviewable SRO actions).

[21] *See Russell A. Simpson*, Exchange Act Release No. 40690, 53 SEC 1042, 1998 WL 801399, at *4 (Nov. 19, 1998); *see also id.*, 53 SEC at 1048 n.13 ("Because we lack review jurisdiction, we do not consider the merits of Simpson's allegations of rule violations.").

retention regulations were reviewable under Section 19(d), it would be too late for Orbixa to challenge it under the statute because Orbixa was aware of the alleged violation more than thirty days before it filed its Application.

Finally, Orbixa argues that it would violate Exchange Act Section 19(f) to dismiss this proceeding without a hearing as defined in that section. But because Orbixa failed to file a timely application for review, it is not entitled to review under Section 19(f).[22] For the same reason, we need not consider Orbixa's claim that the record that NYSE submitted is incomplete.

Accordingly, for the reasons set forth above,[23] IT IS ORDERED that New York Stock Exchange, LLC's motion to dismiss the application for review filed by Orbixa Technologies, Inc. is GRANTED.[24]

By the Commission.

Elizabeth M. Murphy
Secretary

By: Lynn M. Powalski
Deputy Secretary

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22 *See supra* notes 8 & 9 and accompanying text.

23 We have considered all the arguments advanced by the parties. We need not reach NYSE's arguments for dismissal not addressed above. We reject or sustain the parties' remaining arguments to the extent that they are inconsistent or in accord with the views expressed herein.

24 In its Application, Orbixa requested a stay of the challenged action pending our review but did not support this request as required by our Rules of Practice. *See* Rule of Practice 401(a), 17 C.F.R. § 201.401(a) (providing that a stay must be sought by "written motion" that "state[s] the reasons for the relief requested and the facts relied upon, and, if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements or copies thereof"). We now deny Orbixa's request as moot.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3718 / November 15, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15614

In the Matter of CARLENE B. VEARA, 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 Carlene B. Veara ("Respondent" or "Veara").

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 her 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.

II.

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

1. Veara is a resident of South Yarmouth, Massachusetts. From June 2009 to May 17, 2010, Veara was a person associated with Morgan Stanley Smith Barney, LLC, ("Morgan Stanley") an investment adviser (File No. 8-68191) and broker-dealer (File No. 801-70103) registered with the Commission.

2. The Massachusetts Securities Division (the "Division") is a division of Massachusetts' Office of the Secretary of State. On June 28, 2012, the Division entered a Consent Order in an administrative action entitled In the Matter of Carlene B. Veara, Inc., Docket No. E-2010-0034 (the "Massachusetts Consent Order"). The Massachusetts Consent Order found that Veara violated Section 204(a)(2)(G) of Massachusetts General Law Chapter 110A, the Massachusetts Uniform Securities Act. The Massachusetts Consent Order permanently barred Veara from functioning as an investment adviser, investment adviser representative or broker-dealer or broker-dealer agent in the Commonwealth of Massachusetts as such terms are defined by the Massachusetts Uniform Securities Act;

3. The Massachusetts Consent order found that Veara conducted an outside business activity without disclosing the activity to Morgan Stanley. Further, the Massachusetts Consent Order found that Veara transferred $177,000 from the account of a 98 year-old customer to Veara's outside business activity without the customer's informed consent.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act that Respondent Veara be, and hereby is: barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

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.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-70892; File No. 4-668)

November 15, 2013

Joint Industry Plan; BATS Exchange, Inc., BATS-Y Exchange, Inc., BOX Options Exchange LLC, C2 Options Exchange, Incorporated, Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., International Securities Exchange, LLC, Miami International Securities Exchange LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, The NASDAQ Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE MKT LLC, NYSE Arca, Inc. and Topaz Exchange, LLC; Notice of Filing of Proposed National Market System Plan Governing the Process of Selecting a Plan Processor and Developing a Plan for the Consolidated Audit Trail

I. Introduction

Pursuant to Section 11A of the Securities Exchange Act of 1934 ("Exchange Act" or "Act")[1] and Rule 608 thereunder ("Rule 608"),[2] notice is hereby given that on September 3, 2013, BATS Exchange, Inc., BATS-Y Exchange, Inc., BOX Options Exchange LLC, C2 Options Exchange, Incorporated, Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., International Securities Exchange, LLC, Miami International Securities Exchange LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, The NASDAQ Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE MKT LLC, NYSE Arca, Inc., and Topaz Exchange, LLC (collectively, "SROs" or "Participants") filed with the Securities and Exchange Commission ("Commission") the proposed National Market System ("NMS") Plan Governing the Process of Selecting a Plan Processor and Developing a Plan for the Consolidated Audit Trail ("Plan"). A copy of the Plan

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1 15 U.S.C. 78k-1.

2 17 CFR 242.608.

attached as Exhibit A hereto. The Commission is publishing this notice to solicit comments on the Plan.

II. Background

On July 11, 2012, the Commission adopted Rule 613 under the Exchange Act[3] to require the SROs to jointly submit an NMS plan (the "CAT NMS Plan") to create, implement, and maintain a consolidated order tracking system, or consolidated audit trail, with respect to the trading of NMS securities, that would capture customer and order event information for orders in NMS securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution.[4] Rule 613 outlines a broad framework for the creation, implementation, and maintenance of the consolidated audit trail, including the minimum elements the Commission believes are necessary for an effective consolidated audit trail.[5] In instances where Rule 613 sets forth minimum requirements for the consolidated audit trail, the Rule provides flexibility to the SROs to draft the requirements of the CAT NMS Plan in a way that best achieves the objectives of the Rule.[6]

As described in more detail below, the SROs concluded that publication of a request for proposal was necessary to ensure that potential alternative solutions to creating the consolidated audit trail can be presented and considered by the SROs and that a detailed and meaningful cost/benefit analysis can be performed, both of which are required considerations to be addressed in the CAT NMS Plan. The SROs also decided, for the reasons set forth below, to file the Plan

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3 17 CFR 242.613.

4 Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722 (August 1, 2012) ("Adopting Release").

5 Id. at 45742.

6 Id.

govern how the SROs will proceed with formulating and submitting the CAT NMS Plan—and, as part of that process, how to review, evaluate, and narrow down the bids submitted in response to the request for proposal—and ultimately choosing the plan processor that would build, operate, and maintain the consolidated audit trail.

III. Description of the Plan

Set forth in this Section III is the statement of the purpose of the Plan, along with the information required by Rule 608(a)(4) and (5) under the Exchange Act,[7] prepared and submitted by the SROs with the Plan to the Commission.[8]

A. Statement of Purpose

Rule 613 requires the Participants to "jointly file . . . a national market system plan to govern the creation, implementation, and maintenance of a consolidated audit trail and central repository."[9] The Plan being submitted for approval by the Participants governs the process of selecting a Plan Processor for the consolidated audit trail and developing the CAT NMS Plan.

As adopted, Rule 613 "expand[ed] the set of solutions that could be considered by the SROs for creating, implementing, and maintaining a consolidated audit trail and [provided] the SROs with increased flexibility in how they choose to meet the requirements of the adopted

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7 See 17 CFR 242.608(a)(4) and (a)(5).

8 See Letter from the SROs, to Elizabeth Murphy, Secretary, Commission, dated August 23, 2013.

9 17 CFR 242.613(a)(1). Rule 613(a) requires that the Participants jointly file the CAT NMS Plan "on or before 270 days from the date of publication of the Adopting Release in the Federal Register." The release adopting Rule 613 was published in the Federal Register on August 1, 2012. See Adopting Release, supra note 4. On March 7, 2013, the Commission provided a temporary exemption to the Participants to permit them to file the CAT NMS Plan by December 6, 2013. See Exchange Act Release No. 69060 (March 7, 2013), 78 FR 15771 (March 12, 2013) ("Exemptive Order"); see also Letter from Robert L.D. Colby, Chief Legal Officer, FINRA, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, dated February 7, 2013 ("Exemptive Letter").

ule."[10] As the Commission noted in the Adopting Release, because of this expanded solution set, "the adopted Rule now requires the [Participants] to provide much more information and analysis to the Commission as part of their [CAT NMS Plan] submission."[11] Specifically, these requirements were incorporated into Rule 613 as a series of twelve "considerations" that the Participants must address in the CAT NMS Plan, including:

- the specific details and features of the CAT NMS Plan;
- the Participants' analysis of the CAT NMS Plan's costs and impact on competition, efficiency, and capital formation;
- the process in developing the CAT NMS Plan;
- information about the implementation of the CAT NMS Plan; and
- milestones for the creation of the consolidated audit trail.

As part of the discussion of these "considerations," the Participants must include "cost estimates for the proposed solution, and a discussion of the costs and benefits of alternative [sic] solutions considered but not proposed."[12] In addition, the Commission noted that Rule 613 requires that the [Participants]: (1) Provide an estimate of the costs associated with creating, implementing, and maintaining the consolidated audit trail under the terms of the [CAT NMS Plan] submitted to the Commission for its consideration; (2) discuss the costs, benefits, and rationale for the choices made in developing the [CAT NMS Plan] submitted; and (3) provide

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10 Adopting Release, supra note 4 at 45725.

11 Id. See also id. at 45789.

12 Id. at 45789.

their own analysis of the submitted [CAT NMS Plan's] potential impact on competition, efficiency, and capital formation.[13]

The Commission stated that these detailed requirements are "intended to ensure that the Commission and the public have sufficiently detailed information to carefully consider all aspects of the [CAT NMS Plan] ultimately submitted by the [Participants]."[14] Indeed, the Commission expressed its expectation that "the [Participants] will seriously consider various options as they develop the [CAT NMS Plan] to be submitted to the Commission for its consideration."[15]

In light of the numerous specific requirements of Rule 613, on March 7, 2013, the Commission granted the Participants an extension of the time in which to file the CAT NMS Plan so that the Participants could ensure that all potential options for the consolidated audit trail would be considered. As noted in the Exemptive Letter, the Participants concluded that publication of a request for proposal ("RFP") was necessary to ensure that potential alternative solutions to creating the consolidated audit trail can be presented and considered by the Participants and that a detailed and meaningful cost/benefit analysis can be performed, both of which are required considerations to be addressed in the CAT NMS Plan.

The Participants published the RFP on February 26, 2013, and requested that any potential bidders notify the Participants of their intent to bid by March 5, 2013. Thirty-one firms

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13 Id. at 45726.

14 Id. at 45725.

15 Id. at 45725 and 45789.

submitted an intent to bid in response to the publication of the RFP; four of the firms were Participants or Affiliates of Participants.[16]

The Plan is intended to govern how the Participants will proceed with formulating and submitting the CAT NMS Plan—and, as part of that process, reviewing, evaluating, and narrowing down the Bids submitted in response to the RFP—and ultimately choosing the Plan Processor. Because of the important regulatory obligations that exist for each Participant with respect to the creation and operation of the consolidated audit trail, it is essential that each Participant contribute to the development of the CAT NMS Plan. The Participants recognize, however, that Participants or Affiliates of Participants may also be Bidders seeking to serve as the Plan Processor or may be included as part of a Bid. The Participants have sought to mitigate these potential conflicts of interest by including in the Plan multiple provisions, which are described below, designed to balance these competing factors. The Participants believe that the Plan achieves this balance by allowing all Participants to participate meaningfully in the process of creating the CAT NMS Plan and choosing the Plan Processor while imposing strict requirements to ensure that the participation is independent and that the process is fair and transparent.

Section III of the Plan establishes the overall governance structure the Participants have chosen.[17] Specifically, the Participants propose establishing an Operating Committee responsible for formulating, drafting, and filing with the Commission the CAT NMS Plan and

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16 Since that time, six firms—including one Participant and one Affiliate of a Participant—have formally notified the Participants that they will not submit Bids as primary bidders. A list of firms that submitted an intent to bid is located on the Participants' website at catnmsplan.com.

17 Section I of the Plan sets forth the definitions used throughout the Plan. Section II of the Plan lists the Participants, as well as establishing the requirements to admit new Participants or to withdraw as a Participant.

r ensuring the Participants' joint obligations under Rule 613 are met in a timely and efficient manner. As set forth in Section III(B) of the Plan, each Participant will select one individual and one substitute to serve on the Operating Committee; however, other representatives of each Participant are permitted to attend Operating Committee meetings. Section III of the Plan also establishes the procedures for the Operating Committee, including provisions regarding meetings, Participants' voting rights, and voting requirements.

Sections V and VI of the Plan[18] set forth the process for the Participants' evaluation of Bids and the selection process for narrowing down the Bids and choosing the Plan Processor.[19] Pursuant to these Sections, the evaluation of Bids and selection of the Plan Processor will be performed by a Selection Committee composed of one senior officer from each Participant (referred to as the "Voting Senior Officer").[20] Because of the potential conflicts of interest noted ove, the Plan includes multiple requirements to increase the independence of the Voting Senior

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18 Section IV of the Plan governs amendments to the Plan. In general, except with respect to the addition of new Participants, any change to the Plan requires a written amendment that sets forth the change, is executed by over two-thirds of the Participants, and is approved by the Commission pursuant to Rule 608 or otherwise becomes effective under Rule 608.

19 Initial steps in the evaluation and selection process will be performed pursuant to the Plan; the final two rounds of evaluation and voting, as well as the final selection of the Plan Processor, will be performed pursuant to the CAT NMS Plan. The sections of the CAT NMS Plan governing these final two voting rounds are set forth in Sections VI(D) and (E) of the Plan and will be incorporated into the CAT NMS Plan. The Participants believe it is essential that the entire process be laid out in the Plan so that the Commission can consider and approve the entire evaluation and selection process, even though the final two voting rounds, including the selection of the Plan Processor, will not be conducted until after the approval of the CAT NMS Plan.

In the case of Affiliated Participants, one individual may be (but is not required to be) the Voting Senior Officer for more than one or all of the Affiliated Participants.

Officer who participates on the Selection Committee on behalf of a Bidding Participant.[21] The criteria set forth in Section V(D) of the Plan include requirements concerning the Voting Senior Officer's job responsibilities, decision-making authority, and reporting, and require that the Bidding Participant establish functional separation between its Plan responsibilities and its business/commercial (including market operations) functions. In addition, the criteria prohibit any disclosure of information regarding the Bid to the Voting Senior Officer and prohibit the Voting Senior Officer from disclosing any non-public information gained in his or her role as such. These criteria are intended to insulate the Voting Senior Officer from any inside knowledge regarding the Bid (while also preventing any information about the evaluation process from being shared with staff preparing the Bidding Participant's Bid) and to reduce any potential personal motivation that may exist that could improperly influence a Voting Senior Officer's decisions.[22]

Because of the integral role played by the Selection Committee, any action requiring a vote by the Selection Committee under the Plan can only be taken in a meeting in which all Participants entitled to vote are present. All votes taken by the Selection Committee are

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21 The Plan defines a "Bidding Participant" broadly to include any Participant that (1) submits a Bid; (2) is an Affiliate of an entity that submits a Bid; or (3) is included, or is an Affiliate of an entity that is included, as a Material Subcontractor as part of a Bid. A "Material Subcontractor" is "any entity that is known to the Participant to be included as part of a Bid as a vendor, subcontractor, service provider, or in any other similar capacity and, excluding products or services offered by the Participant to one or more Bidders on terms subject to a fee filing approved by the SEC, (1) is anticipated to derive 5% or more of its annual revenue in any given year from services provided in such capacity; or (2) accounts for 5% or more of the total estimated annual cost of the Bid for any given year." The Plan provides that "[a]n entity will not be considered a 'Material Subcontractor' solely due to the entity providing services associated with any of the entity's regulatory functions as a self-regulatory organization registered with the SEC."

22 As described below, even with the independence criteria in place, the Plan also requires recusal from certain votes.

confidential and non-public, and a Participant's individual votes will not be disclosed to other Participants or to the public. For this reason, the Plan provides that votes of the Selection Committee will be tabulated by an independent third party approved by the Operating Committee. Moreover, the Participants do not anticipate that aggregate votes or anonymized voting distribution numbers will be provided to the Participants following votes by the Selection Committee.

The Plan divides the review and evaluation of Bids and selection of the Plan Processor into four separate stages. After Bids are received,[23] Section VI(A) of the Plan provides that the Selection Committee will review all submitted Bids to determine which Bids are Qualified Bids (i.e., Bids that contain sufficient information to allow the Voting Senior Officers to meaningfully assess and evaluate the Bid).[24] At this initial stage, if two-thirds or more of the Participants determine that a Bid does not meet the threshold for a Qualified Bid, the Bid will be eliminated from further consideration. The Participants believe this initial step will ensure that only those Bids meeting a minimum level of detail and sufficiency will move forward in the process, and insufficient Bids can be eliminated.

Following the elimination of Bids that are not Qualified Bids, each Qualified Bidder will be provided the opportunity to present its Bid to the Selection Committee. After the Qualified

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23 The Participants anticipate that Bids must be submitted four weeks after the Commission approves the Plan.

24 The Plan defines a Qualified Bid as "a Bid that is deemed by the Selection Committee to include sufficient information regarding the Bidder's ability to provide the necessary capabilities to create, implement, and maintain a consolidated audit trail so that such Bid can be effectively evaluated by the Selection Committee." The Plan provides that, "[w]hen evaluating whether a Bid is a Qualified Bid, each member of the Selection Committee shall consider whether the Bid adequately addresses the evaluation factors set forth in the RFP, and apply such weighting and priority to the factors as such member of the Selection Committee deems appropriate in his or her professional judgment."

Bidders have made their presentations, the Selection Committee will establish a "shortlist" of Bids that will move on in the process. The Plan provides that, if there are six or fewer Qualified Bids submitted, all of those Bids will be selected as "Shortlisted Bids."[25] If there are more than six but fewer than eleven Qualified Bids, the Selection Committee will choose five Shortlisted Bids, and if there are eleven or more Qualified Bids, the Selection Committee will choose 50% of the Qualified Bids as Shortlisted Bids.[26]

When voting to select the Shortlisted Bids from among the Qualified Bids, each Voting Senior Officer must rank his or her selections, and the points assigned to the rankings increase in single-point increments. Thus, for example, if five Shortlisted Bids are to be chosen, each Participant will vote for its top five choices in rank order, with the first choice being given five points, the second choice four points, the third choice three points, the fourth choice two points, and the fifth choice one point. The Participants considered numerous alternative voting procedures but determined that the proposed process appropriately balances the need to differentiate among Qualified Bids while also ensuring that each Qualified Bid receives due consideration for inclusion as a Shortlisted Bid since each Voting Senior Officer must select multiple Qualified Bids for inclusion as a Shortlisted Bid. Further, while the Participants believe that the independence indicia sufficiently address any potential conflicts of interest that may arise with respect to Bids with which a Participant is affiliated, the proposed process will further

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25 In the Letter submitted by the SROs describing the Plan, the SROs state that the Plan provides that, if there are fewer than six Qualified Bids submitted, all of those bids will be selected as Shortlisted Bids. See supra note 8. The Commission notes, however, that Section IV(B)(2) of the Plan states, "If there are six or fewer Qualified Bids, all such Qualified Bids shall be Shortlisted Bids." (emphasis added)

26 The Plan provides that, if there is an odd number of Qualified Bids, the number of Shortlisted Bids to be chosen will be rounded up to the next whole number (e.g., if there are thirteen Qualified Bids, seven Shortlisted Bids will be selected). In the event of a tie to select the Shortlisted Bids, all such tied Qualified Bids will be Shortlisted Bids.

mitigate potential conflicts because each Voting Senior Officer must select multiple unaffiliated Qualified Bids. The Participants believe this step is appropriate both to ensure that Bidders submit a complete and thorough Bid initially and so that Qualified Bidders will know whether they have a realistic opportunity to be selected as the Plan Processor after the CAT NMS Plan is approved.

To further reduce the impact of potential conflicts of interest in choosing Shortlisted Bids, the Plan also provides that at least two Non-SRO Bids must be included as Shortlisted Bids, provided there are two Non-SRO Bids that are Qualified Bids.[27] If, following the vote, no Non-SRO Bids have been selected as Shortlisted Bids, the Plan requires that the two Non-SRO Bids receiving the highest cumulative votes be added as Shortlisted Bids. If, in this scenario, a single Non-SRO Bid was a Qualified Bid, that Non-SRO Bid would be added as a Shortlisted Bid.

Following the selection of Shortlisted Bids, the Participants will identify the optimal proposed solution(s) for the consolidated audit trail for inclusion in the CAT NMS Plan for submission to the Commission. Following approval of the CAT NMS Plan by the Commission, the Selection Committee will determine, by majority vote, which Shortlisted Bidders will be provided the opportunity to revise their Bids in light of the provisions in the final, approved CAT NMS Plan. In making a decision whether to permit a Shortlisted Bidder to revise its Bid, the Selection Committee will consider the provisions in the CAT NMS Plan as well as the content of the Shortlisted Bidder's initial Bid. To reduce potential conflicts of interest, the Plan also provides that if a Bid submitted by or including a Bidding Participant or an Affiliate of a Bidding

[27] The Plan defines a "Non-SRO Bid" as "a Bid that does not include a Bidding Participant." See supra note 21.

Participant is a Shortlisted Bidder, that Bidding Participant will be recused from all votes regarding whether a Shortlisted Bidder will be permitted to revise its Bid.

After any permitted revisions have been received, the Selection Committee will select the Plan Processor from the Shortlisted Bids in two rounds of voting where, subject to the recusal provision described below, each Participant has one vote. In the first round, each Participant will select a first and second choice, with the first choice receiving two points and the second choice receiving one point. The two Shortlisted Bids receiving the highest cumulative scores in the first round will advance to the second round.[28] In the event of a tie, the tie will be broken by assigning one point per vote to the tied Shortlisted Bids, and the Shortlisted Bid with the most votes will advance. If this procedure fails to break the tie, a revote will be taken on the tied Bids with each vote receiving one point. If the tie persists, the Participants will identify areas for discussion, and revotes will be taken until the tie is broken.

Once two Shortlisted Bids have been chosen, the Participants will vote for a single Shortlisted Bid from the final two to determine the Plan Processor. If one or both of the final Bids is submitted by or includes a Bidding Participant or an Affiliate of a Bidding Participant, the Bidding Participant must recuse itself from the final vote. In the event of a tie, a revote will be taken. If the tie persists, the Participants will identify areas for discussion and, following these discussions, revotes will be taken until the tie is broken. As set forth in Section VII of the Plan, following the selection of the Plan Processor, the Participants will file with the Commission a statement identifying the Plan Processor and including the information required by Rule 608.

B. Governing or Constituent Documents

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28 Each round of voting throughout the Plan is independent of other rounds.

Not applicable.

C. Implementation of Plan

The terms of the Plan will be operative immediately upon approval of the Plan by the Commission. The Participants have announced that Bids must be submitted four weeks after the Commission's approval of the Plan. The Participants will begin reviewing and evaluating the Bids pursuant to Section VI of the Plan upon receipt of the Bids.

The Participants anticipate that it will take seven months to evaluate the Bids and submit the CAT NMS Plan to the Commission pursuant to Sections VI(A) and (B) of the Plan.[29] As noted above, upon approval of the CAT NMS Plan, the Plan will automatically terminate. The review of revised Shortlisted Bids and the selection of the Plan Processor will be undertaken as set forth in Sections VI(D) and (E) of the Plan as those sections are incorporated into the CAT NMS Plan.

D. Development and Implementation Phases

Not applicable.

E. Analysis of Impact on Competition

The Plan does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Participants do not believe that the Plan introduces terms that are unreasonably discriminatory for the purposes of Section 11A(c)(1)(D) of the Exchange Act. As noted in Section A, the Participants are aware that potential conflicts of

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29 The Participants recognize that a seven-month timeframe is inconsistent with the current obligation to submit the CAT NMS Plan by December 6, 2013. The Participants anticipate filing an exemptive request with the Commission to extend the date.

interest are raised because a Participant, or an affiliate of a Participant, may be both submitting a Bid (or participating in a Bid) and participating in the evaluation of Bids to select the Plan Processor. As described in Section A, the Plan includes multiple provisions designed to mitigate the potential impact of these conflicts by imposing restrictions on the Voting Senior Officer and by requiring the recusal of Bidding Participants for certain votes taken by the Selection Committee. In addition, the Plan requires that at least two Non-SRO Bids be Shortlisted Bids to ensure Non-SRO Bids are given full and fair consideration.

F. Written Understanding or Agreements Relating to Interpretation of, or Participation in, Plan

The Participants have no written understandings or agreements relating to interpretations of, or participation in, the Plan other than those set forth in the Plan itself. Section III(F)(2)(a) of the Plan provides that interpretations of the Plan require approval by a majority of Participants entitled to vote. Section II(B) of the Plan sets forth how any entity registered as a national securities exchange or national securities association under the Exchange Act may become a Participant.

G. Approval of Amendment of the Plan

Not applicable.

H. Terms and Conditions of Access

Each currently approved national securities exchange and national securities association subject to Rule 613(a)(1) is a Participant in the Plan. Section II(B) of the Plan provides that any entity approved by the Commission as a national securities exchange or national securities association under the Exchange Act after the effectiveness of the Plan shall become a Participant by satisfying each of the following requirements: (1) effecting an amendment to the Plan by executing a copy of the Plan as then in effect (with the only change being the addition of the new articipant's name in Section II of the Plan) and submitting such amendment to the Commission for approval; and (2) providing each then-current Participant with a copy of such executed Plan.

I. Method of Determination and Imposition, and Amount of, Fees and Charges

Not applicable.

J. Method and Frequency of Processor Evaluation

Not applicable.

K. Dispute Resolution

The Plan does not include specific provisions regarding resolution of disputes between or among Participants. Section III(B) of the Plan provides for each Participant to designate an individual to represent the Participant as a member of an Operating Committee. Section III(A) of the Plan provides that the Operating Committee is responsible for: (1) formulating, drafting, d filing with the Commission the CAT NMS Plan; and (2) ensuring the Participants' obligations under Rule 613 are met in a timely and efficient manner. Within the areas of its responsibilities and authority as set forth in the Plan, decisions made or actions taken by the Operating Committee, directly or by duly delegated individuals or Subcommittees, shall be binding upon each Participant, without prejudice to the rights of any Participant to seek redress from the Commission pursuant to Rule 608 or in any other appropriate forum.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the 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. Please include File Number 4-668 on the subject line.

Paper comments:

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

All submissions should refer to File Number 4-668. 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 website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the Plan that are filed with the Commission, and all written communications relating to the 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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the Participants' principal offices. 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 4-668 and should be submitted on or before [insert date 30 days from publication in the Federal Register].

By the Commission.

Kevin M. O'Neill

Kevin O'Neill
Deputy Secretary

EXHIBIT A

NATIONAL MARKET SYSTEM PLAN GOVERNING THE PROCESS OF SELECTING A PLAN PROCESSOR AND DEVELOPING A PLAN FOR

THE CONSOLIDATED AUDIT TRAIL

SUBMITTED TO

THE SECURITIES AND EXCHANGE COMMISSION

PURSUANT TO RULE 608 OF REGULATION NMS

UNDER THE

SECURITIES EXCHANGE ACT OF 1934

Table of Contents

Consolidated Audit Trail: Plan Processor Evaluation and Selection Plan

Preamble

This Plan governs the process of: (1) evaluating and selecting a Plan Processor for the consolidated audit trail; and (2) developing a national market system plan pursuant to SEC Rule 613 to create, implement, and maintain a consolidated audit trail. This Plan will automatically terminate upon the SEC's approval of the CAT NMS Plan. The Participants developed this Plan pursuant to Rule 608(a)(3) of Regulation NMS under the Exchange Act, which authorizes the Participants to act jointly in preparing, filing, and implementing national market system plans.

I. <u>Definitions</u>

(A) An “Affiliate” of an entity means any entity controlling, controlled by, or under common control with such entity.

(B) “Affiliated Participant” means any Participant controlling, controlled by, or under common control with another Participant.

(C) “Bid” means a proposal submitted by a Bidder in response to the RFP.

(D) “Bidder” means any entity, or any combination of separate entities, submitting a Bid.

(E) “Bidding Participant” means a Participant that: (1) submits a Bid; (2) is an Affiliate of an entity that submits a Bid; or (3) is included, or is an Affiliate of an entity that is included, as a Material Subcontractor as part of a Bid.

(F) “CAT NMS Plan” means the NMS Plan to be jointly submitted to the Commission by the Participants pursuant to paragraph (a)(1) of SEC Rule 613.

(G) “Commission” or “SEC” means the United States Securities and Exchange Commission.

(H) “Exchange Act” means the Securities Exchange Act of 1934, as amended.

(I) “Material Contract” means any contract resulting in a total cost to all Participants of more than $1,000,000.

(J) “Material Subcontractor” means any entity that is known to the Participant to be included as part of a Bid as a vendor, subcontractor, service provider, or in any other similar capacity and, excluding products or services offered by the Participant to one or more Bidders on [illegible]s subject to a fee filing approved by the SEC, (1) is anticipated to derive 5% or more of its annual revenue in any given year from services provided in such capacity; or (2) accounts for 5%

more of the total estimated annual cost of the Bid for any given year. An entity will not be considered a "Material Subcontractor" solely due to the entity providing services associated with any of the entity's regulatory functions as a self-regulatory organization registered with the SEC.

(K) "NMS Plan" shall have the same meaning as "[n]ational market system plan" provided in Rule 600(b)(43) of Regulation NMS under the Exchange Act.

(L) "Non-SRO Bid" means a Bid that does not include a Bidding Participant.

(M) "Operating Committee" shall have the meaning provided in Section III of the Plan.

(N) "Participant" means a party to the Plan.

(O) "Plan" means the plan set forth in this instrument, as amended from time to time in accordance with its provisions.

(P) "Plan Processor" means the entity jointly selected by the Participants pursuant to SEC Rule 613, the Plan, and the CAT NMS Plan to perform the consolidated audit trail processing functions required by SEC Rule 613 and set forth in the RFP.

(Q) "Qualified Bid" means a Bid that is deemed by the Selection Committee to include sufficient information regarding the Bidder's ability to provide the necessary capabilities to create, implement, and maintain a consolidated audit trail so that such Bid can be effectively evaluated by the Selection Committee. When evaluating whether a Bid is a Qualified Bid, each member of the Selection Committee shall consider whether the Bid adequately addresses the evaluation factors set forth in the RFP, and apply such weighting and priority to the factors as such member of the Selection Committee deems appropriate in his or her professional judgment. The determination of whether a Bid is a Qualified Bid shall be determined pursuant to the ess set forth in Section VI of the Plan.

(R) "Qualified Bidder" means a Bidder that has submitted a Qualified Bid.

(S) "RFP" means the "Consolidated Audit Trail National Market System Plan Request for Proposal" published by the Participants on February 26, 2013, as amended from time to time.

(T) "Selection Committee" means the committee formed pursuant to Section V of the Plan.

(U) "SEC Rule 608" means Rule 608 of Regulation NMS under the Exchange Act.

(V) "SEC Rule 613" means Rule 613 of Regulation NMS under the Exchange Act.

(W) "Shortlisted Bid" means a Bid submitted by a Qualified Bidder and selected as a Shortlisted Bid by the Selection Committee pursuant to Section VI(B) of the Plan.

(X) "Shortlisted Bidder" means a Qualified Bidder that has submitted a Bid selected a Shortlisted Bid.

(Y) "Voting Senior Officer" means the senior officer of a Participant chosen to serve on the Selection Committee pursuant to Section V of the Plan.

II. Participants

(A) List of Participants

The Participants are as follows:

(1) BATS Exchange, Inc.

(2) BATS Y-Exchange, Inc.

(3) BOX Options Exchange LLC

(4) C2 Options Exchange, Incorporated

(5) Chicago Board Options Exchange, Incorporated

(6) Chicago Stock Exchange, Inc.

(7) EDGA Exchange, Inc.

(8) EDGX Exchange, Inc.

(9) Financial Industry Regulatory Authority, Inc.

(10) International Securities Exchange, LLC

(11) Miami International Securities Exchange LLC

(12) NASDAQ OMX BX, Inc.

(13) NASDAQ OMX PHLX LLC

(14) The Nasdaq Stock Market LLC

(15) National Stock Exchange, Inc.

(16) New York Stock Exchange LLC

(17) NYSE MKT LLC

(18) NYSE Arca, Inc.

(19) Topaz Exchange, LLC

(B) <u>Admission of New Participants</u>

Any entity approved by the SEC as a national securities exchange or national securities association under the Exchange Act after the effectiveness of the Plan shall become a Participant by satisfying each of the following requirements: (1) effecting an amendment to the Plan by executing a copy of the Plan as then in effect (with the only change being the addition of the new Participant's name in Section II of the Plan) and submitting such amendment to the SEC for approval; and (2) providing each then-current Participant with a copy of such executed Plan. The amendment shall be effective when it is approved by the SEC in accordance with SEC Rule 608 or otherwise becomes effective pursuant to SEC Rule 608.

(C) Withdrawal of Participants

(1) A Participant may withdraw from the Plan upon written notice to each of the other Participants of no less than 30 days. The written notice must include the legal basis for the Participant's withdrawal from the Plan, including, if applicable, any required approvals or orders issued by the SEC.

(2) Withdrawal of a Participant shall be effectuated by an amendment to the Plan, including, if applicable, approval of any such amendment by the SEC.

(3) Notwithstanding a Participant's withdrawal from the Plan, the Participant shall remain liable for, and shall pay upon demand:

(a) its proportionate share of any costs, including those resulting from any Material Contracts, accrued or incurred before the effectiveness of the Participant's withdrawal;

(b) its proportionate share of any liabilities arising while the organization was a Participant that are based on actions jointly undertaken by the Participants pursuant to the Plan or in furtherance of the Participants' obligations pursuant to SEC Rule 613; and

(c) any costs incurred as a result of the Participant's withdrawal from the Plan.

(4) Except as aforesaid, a withdrawing Participant shall have no further obligation under the Plan or to any of the other Participants with respect to the period following the effectiveness of its withdrawal.

1. Operating Committee

(A) Authority

The Operating Committee shall be responsible for: (1) formulating, drafting, and filing with the SEC the CAT NMS Plan; and (2) ensuring the Participants' obligations under SEC Rule 613 are met in a timely and efficient manner. Within the areas of its responsibilities and authority as set forth in the Plan, decisions made or actions taken by the Operating Committee, directly or by duly delegated individuals or Subcommittees, shall be binding upon each Participant, without prejudice to the rights of any Participants to seek redress from the SEC pursuant to SEC Rule 608 or in any other appropriate forum.

(B) Composition

(1) Each Participant shall select from its staff one individual (the "primary representative") to represent the Participant as a member of the Operating Committee, together with a substitute(s) for such individual. In the case of Affiliated Participants, one individual may be the primary representative for all or some of the Affiliated Participants, and another individual may be the substitute for all or some of the Affiliated Participants.

(2) Regular meetings of the Operating Committee may be attended by each Participant's primary representative and its substitute(s), and may be attended by other representatives of the Participant.

(3) Any organization that is not a Participant but has an actively pending Form 1 Application on file with the Commission to become a national securities exchange will be permitted to appoint one primary representative and one alternate representative to attend regularly scheduled Operating Committee meetings in the

capacity of a non-voting observer/advisor. If the organization's Form 1 Application is withdrawn, returned, or otherwise not actively pending with the Commission for any reason, then the organization will no longer be eligible to be represented in the Operating Committee meetings. The Operating Committee shall have the discretion, in limited instances, to deviate from this policy if, as indicated by majority vote, the Operating Committee agrees that circumstances so warrant.

(4) Nothing in this section or elsewhere within the Plan shall authorize any person or organization other than Participants and their representatives to participate on the Operating Committee in any manner.

(C) <u>Meetings</u>

(1) <u>Quorum</u>

(a) Any action requiring a vote can only be taken at a meeting in which a quorum of all Participants is present. For actions requiring a majority vote of all Participants, a quorum of greater than 50% of all Participants entitled to vote must be present at the meeting before such a vote may be taken. For actions requiring at least a two-thirds vote of all Participants, a quorum of at least two-thirds of all Participants entitled to vote must be present at the meeting before such a vote may be taken.

(b) For purposes of establishing a quorum, a Participant is considered present at a meeting only if a Participant's primary representative or substitute is either in physical attendance at the meeting or is participating by conference telephone or other acceptable electronic means.

(c) Any Participant recused from voting on a particular action pursuant to Paragraph (E) below shall not be considered to be "entitled to vote" for purposes of establishing whether a quorum is present for a vote to be taken on that action.

(2) <u>Frequency</u>

Meetings of the Operating Committee shall be held as needed at such times and locations as shall from time to time be determined by the Operating Committee. Meetings may be held by conference telephone or other acceptable electronic means if all Participants entitled to vote consent thereto in writing or by other means the Operating Committee deems acceptable.

(3) <u>Written Consent</u>

Any action may be taken without a meeting if a consent in writing, setting forth the action so taken, is sent to, via physical or electronic means, and agreed to by all Participants entitled to vote with respect to the subject matter thereof. The action taken shall be effective when the minimum number of Participants entitled to vote have approved the action, unless the consent specifies a different effective date.

(4) <u>Minutes</u>

Minutes of each meeting of the Operating Committee shall be taken.

(5) <u>Subcommittees</u>

In addition to the Selection Committee established pursuant to Section V of the Plan, the Operating Committee may establish any Subcommittees it deems necessary in fulfilling its obligations under the Plan. Membership on any Subcommittee is open to any

Participant indicating a desire to participate. Minutes of each meeting of any Subcommittee shall be taken.

(D) Voting Rights

(1) Unless recused pursuant to Paragraph (E) below, each Participant shall have one vote on all matters considered by the Operating Committee.

(2) Where one individual represents more than one Affiliated Participant, either as the primary representative or as a substitute, such individual will have the right to vote on behalf of each such Affiliated Participant. The substitute(s) may participate in deliberations of the Operating Committee and shall be considered a voting member thereof only in the absence of the primary representative.

(E) Conflicts and Recusals

A Participant may recuse itself from voting on any matter under consideration by the Operating Committee if the Participant determines that voting on such matter raises a conflict of interest. Except as provided in Sections V(B)(2) and V(B)(3) of the Plan, no Participant is automatically recused from voting on any matter.

(F) Voting Requirements

(1) Supermajority Voting Requirements

The following actions require approval by at least two-thirds of Participants entitled to vote:

(a) Amendments to the Plan, other than amendments to add a new Participant; and

(b) Material Contracts.

(2) Majority Voting Requirements

The following actions require approval by a majority of Participants entitled to vote:

(a) Interpretations of the Plan; and

(b) Any other matters not specified as requiring a supermajority vote.

(G) Interpretations of Regulations

Interpretative questions arising during the time for which the Plan is operative will be presented to the Operating Committee, which will determine whether to seek interpretive guidance from the Commission or other regulatory body and, if so, in what form.

(H) Delegated Authority

Within the areas of its responsibilities, the Operating Committee may delegate an individual or Subcommittee to make decisions or take action on behalf of the Operating Committee. Any decision made or action taken by such duly delegated individual or Subcommittee within the scope of such delegation shall be binding upon each Participant.

IV. Plan Amendments

(A) General Amendments

Except with respect to the addition of new Participants, any proposed change in, addition to, or deletion from the Plan shall be effected by means of a written amendment to the Plan that: (1) sets forth the change, addition, or deletion; (2) is executed by over two-thirds of the Participants; and (3) is approved by the SEC pursuant to SEC Rule 608, or otherwise becomes effective under SEC Rule 608.

(B) New Participants

With respect to new Participants, an amendment to the Plan may be effected by the new national securities exchange or national securities association in accordance with Section II of the Plan.

V. Selection Committee

The Participants shall establish a Selection Committee in accordance with this Section V to: (1) evaluate and review Bids; and (2) select the Plan Processor.

(A) Composition

Each Participant shall select from its staff one senior officer ("Voting Senior Officer") to represent the Participant as a member of a Selection Committee. In the case of Affiliated Participants, one individual may be (but is not required to be) the Voting Senior Officer for more than one or all of the Affiliated Participants. Where one individual serves as the Voting Senior Officer for more than one Affiliated Participant, such individual will have the right to vote on behalf of each such Affiliated Participant.

(B) Voting

(1) Unless recused pursuant to Paragraph (2) or (3) below, each Participant shall have one vote on all matters considered by the Selection Committee.

(2) No Bidding Participant shall vote on whether a Shortlisted Bidder will be permitted to revise its Bid pursuant to Section VI(D)(1) below if a Bid submitted by or including the Participant or an Affiliate of the Participant is a Shortlisted Bid.

(3) No Bidding Participant shall vote in the second round set forth in Section VI(E)(4) below if a Bid submitted by or including the Participant or an Affiliate of the Participant is part of the second round.

(4) All votes by the Selection Committee shall be confidential and non-public. All such votes will be tabulated by an independent third party approved by the Operating Committee, and a Participant's individual votes will not be disclosed to other Participants or to the public.

(C) <u>Quorum</u>

(1) Any action requiring a vote by the Selection Committee can only be taken at a meeting in which all Participants entitled to vote are present. Meetings of the Selection Committee shall be held as needed at such times and locations as shall from time to time be determined by the Selection Committee. Meetings may be held by conference telephone or other acceptable electronic means if all Participants entitled to vote consent thereto in writing or by other means the Selection Committee deems acceptable.

(2) For purposes of establishing a quorum, a Participant is considered present at a meeting only if the Participant's Voting Senior Officer is either in physical attendance at the meeting or is participating by conference telephone or other acceptable electronic means.

(3) Any Participant recused from voting on a particular action pursuant to Paragraph (B) above shall not be considered "entitled to vote" for purposes of establishing whether a quorum is present for a vote to be taken on that action.

(D) Qualifications for Voting Senior Officer of Bidding Participants

The following criteria must be met before a Voting Senior Officer is eligible to represent a Bidding Participant and serve on the Selection Committee:

(1) the Voting Senior Officer is not responsible for the Bidding Participant's market operations, and is responsible primarily for the Bidding Participant's legal and/or regulatory functions, including functions related to the formulation and implementation of the Bidding Participant's legal and/or regulatory program;

(2) the Bidding Participant has established functional separation of its legal and/or regulatory functions from its market operations and other business or commercial objectives;

(3) the Voting Senior Officer ultimately reports (including through the Bidding Participant's CEO or Chief Legal Officer/General Counsel) to an independent governing body that determines or oversees the Voting Senior Officer's compensation, and the Voting Senior Officer does not receive any compensation (other than what is determined or overseen by the independent governing body) that is based on achieving business or commercial objectives;

(4) the Voting Senior Officer does not have responsibility for any non-regulatory functions of the Bidding Participant, other than the legal aspects of the organization performed by the Chief Legal Officer/General Counsel or the Office of the General Counsel;

(5) the ultimate decision making of the Voting Senior Officer position is tied to the regulatory effectiveness of the Bidding Participant, as opposed to other business or commercial objectives;

(6) promotion or termination of the Voting Senior Officer is not based on achieving business or commercial objectives;

(7) the Voting Senior Officer has no decision-making authority with respect to the development or formulation of the Bid submitted by or including the Participant or an Affiliate of the Participant; however, the staff assigned to developing and formulating such Bid may consult with the Voting Senior Officer, provided such staff members cannot share information concerning the Bid with the Voting Senior Officer;

(8) the Voting Senior Officer does not report to any senior officers responsible for the development or formulation of the Bid submitted by or including the Participant or by an Affiliate of the Participant; however, joint reporting to the Bidding Participant's CEO or similar executive officer by the Voting Senior Officer and senior staff developing and formulating such Bid is permissible, but the Bidding Participant's CEO or similar executive officer cannot share information concerning such Bid with the Voting Senior Officer;

(9) the compensation of the Voting Senior Officer is not separately tied to income earned if the Bid submitted by or including the Participant or an Affiliate of the Participant is selected; and

(10) the Voting Senior Officer, any staff advising the Voting Senior Officer, and any similar executive officer or member of an independent governing body to which the Voting Senior Officer reports may not disclose to any person any non-public information gained during the review of Bids, presentation by Qualified Bidders, and selection process. Staff advising the Voting Senior Officer during the Bid review, presentation, and selection process may not include the staff, contractors, or

subcontractors that are developing or formulating the Bid submitted by or including a Participant or an Affiliate of the Participant.

VI. RFP Bid Evaluation and Plan Processor Selection

(A) Initial Bid Review to Determine Qualified Bids

(1) The Selection Committee shall review all Bids in accordance with the process developed by the Selection Committee.

(2) After review, the Selection Committee shall vote on each Bid to determine whether such Bid is a Qualified Bid. A Bid that is deemed unqualified by at least a two-thirds vote of the Selection Committee will not be deemed a Qualified Bid and will be eliminated individually from further consideration.

(B) Selection of Shortlisted Bids

(1) Each Qualified Bidder shall be given the opportunity to present its Bid to the Selection Committee. Following the presentations by Qualified Bidders, the Selection Committee shall review and evaluate the Qualified Bids to select the Shortlisted Bids in accordance with the process in this Paragraph (B).

(2) If there are six or fewer Qualified Bids, all such Qualified Bids shall be Shortlisted Bids.

(3) If there are more than six Qualified Bids but fewer than eleven Qualified Bids, the Selection Committee shall select five Qualified Bids as Shortlisted Bids, subject to the requirement in Paragraph (d) below. Each Voting Senior Officer shall select a first, second, third, fourth, and fifth choice from among the Qualified Bids.

(a) A weighted score shall be assigned to each choice as follows:

- First – 5 points
- Second – 4 points
- Third – 3 points
- Fourth – 2 points
- Fifth – 1 point

(b) The five Qualified Bids receiving the highest cumulative scores will be Shortlisted Bids.

(c) In the event of a tie to select the five Shortlisted Bids, all such tied Qualified Bids will be Shortlisted Bids.

(d) To the extent there are Non-SRO Bids that are Qualified Bids, the Shortlisted Bids selected pursuant to this Section VI(B)(3) must, if possible, include at least two Non-SRO Bids. If, following the vote set forth in this Section VI(B)(3), no Non-SRO Bid was selected as a Shortlisted Bid, the two Non-SRO Bids receiving the highest cumulative votes (or one Non-SRO Bid if a single Non-SRO Bid is a Qualified Bid) shall be added as Shortlisted Bids. If one Non-SRO Bid was selected as a Shortlisted Bid, the Non-SRO Bid receiving the next highest cumulative vote shall be added as a Shortlisted Bid.

(4) If there are eleven or more Qualified Bids, the Selection Committee shall select fifty percent of the Qualified Bids as Shortlisted Bids, subject to the requirement in Paragraph (d) below. If there is an odd number of Qualified Bids, the number of Shortlisted Bids chosen shall be rounded up to the next whole number (e.g., if there are thirteen Qualified Bids, then seven Shortlisted Bids will be selected). Each Voting Senior Officer shall select as many choices as Shortlisted Bids to be chosen.

(a) A weighted score shall be assigned to each choice in single point increments as follows:

- Last – 1 point
- Next-to-Last – 2 points
- Second-from-Last – 3 points
- Third-from-Last – 4 points
- Fourth-from-Last – 5 points
- Fifth-from-Last – 6 points

For each additional Shortlisted Bid that must be chosen, the points assigned will increase in single point increments.

(b) The fifty percent of Qualified Bids (or, if there is an odd number of Qualified Bids, the next whole number above fifty percent of Qualified Bids) receiving the highest cumulative scores will be Shortlisted Bids.

(c) In the event of a tie to select the Shortlisted Bids, all such tied Qualified Bids will be Shortlisted Bids.

(d) To the extent there are Non-SRO Bids that are Qualified Bids, the Shortlisted Bids selected pursuant to this Section VI(B)(4) must, if possible, include at least two Non-SRO Bids. If, following the vote set forth in this Section VI(B)(4), no Non-SRO Bid was selected as a Shortlisted Bid, the two Non-SRO Bids receiving the highest cumulative votes (or one Non-SRO Bid if a single Non-SRO Bid is a Qualified Bid) shall be added as Shortlisted Bids. If one Non-SRO Bid was selected as a Shortlisted Bid, the Non-SRO Bid receiving the next highest cumulative vote shall be added as a Shortlisted Bid.

(C) Formulation of the CAT NMS Plan

(1) The Selection Committee shall review the Shortlisted Bids to identify optimal proposed solutions for the consolidated audit trail and provide descriptions of such proposed solutions for inclusion in the CAT NMS Plan. This process may, but is not required to, include iterative discussions with Shortlisted Bidders to address any aspects of an optimal proposed solution that were not fully addressed in a particular Bid.

(2) The Participants shall incorporate information on optimal proposed solutions in the CAT NMS Plan, including cost-benefit information as required by SEC Rule 613.

(D) Review of Shortlisted Bids Under the CAT NMS Plan

(1) Following approval of the CAT NMS Plan by the SEC, Shortlisted Bidders may be permitted to revise their Bids based on the provisions in the approved CAT NMS Plan, including further discussions if determined to be necessary by the Selection Committee. A Shortlisted Bidder will be permitted to revise its Bid only upon approval by a majority of the Selection Committee, subject to the recusal provision in Section V(B)(2) above, that revisions are necessary or appropriate in light of the content of the Shortlisted Bidder's initial Bid and the provisions in the approved CAT NMS Plan. A Shortlisted Bidder may not revise its Bid unless approved to do so by the Selection Committee pursuant to this paragraph.

(2) The Selection Committee shall review and evaluate all Shortlisted Bids, including any permitted revisions thereto submitted by Shortlisted Bidders. In performing the review and evaluation, the Selection Committee may consult with the Advisory Committee established pursuant to paragraph (b)(7) of SEC Rule 613.

(E) Selection of Plan Processor Under the CAT NMS Plan

(1) Under the CAT NMS Plan, there will be two rounds of voting by the Selection Committee to select the Plan Processor from among the Shortlisted Bidders. Each round shall be scored independently of prior rounds of voting, including the scoring to determine the Shortlisted Bids under Section VI(B) of the Plan.

(2) Each Participant shall have one vote in each round, except that no Bidding Participant shall be entitled to vote in the second round if the Participant's Bid, a Bid submitted by an Affiliate of the Participant, or a Bid including the Participant or an Affiliate of the Participant is considered in the second round. Until the second round, Bidding Participants may vote for any Shortlisted Bid.

(3) First Round Voting by the Selection Committee

(a) In the first round of voting, each Voting Senior Officer shall select a first and second choice from among the Shortlisted Bids.

(b) A weighted score shall be assigned to each choice as follows:

- First – 2 points
- Second – 1 point

(c) The two Shortlisted Bids receiving the highest cumulative scores in the first round will advance to the second round.

(d) In the event of a tie that would result in more than two Shortlisted Bids advancing to the second round, the tie will be broken by assigning one point per vote, with the Shortlisted Bid(s) receiving the highest number of votes advancing to the second round. If, at this point, the Shortlisted Bids remain tied, a revote will be taken with each vote receiving one point. If the revote results in a tie, the Participants shall identify areas for further discussion and, following any such discussion, voting will continue until two Shortlisted Bids are selected to advance to the second round.

(4) Second Round Voting by the Selection Committee

(a) In the second round of voting, each Voting Senior Officer, subject to the recusal provisions in Paragraph (E)(2) above, shall vote for one Shortlisted Bid.

(b) The Shortlisted Bid receiving the most votes in the second round shall be selected, and the proposed entity included in the Shortlisted Bid to serve as the Plan Processor shall be selected as the Plan Processor. .

(c) In the event of a tie, a revote will be taken. If the revote results in a tie, the Participants shall identify areas for further discussions with the two Shortlisted Bidders. Following any such discussions, voting will continue until one Shortlisted Bid is selected.

VII. Implementation

Within two months after effectiveness of the CAT NMS Plan, the Participants will jointly select the winning Shortlisted Bid and the Plan Processor pursuant to the process set forth in Section VI of the Plan and as incorporated into the CAT NMS Plan. Following the selection of the Plan Processor, the Participants will file with the Commission a statement identifying the Plan Processor and including the information required by SEC Rule 608.

VIII. Applicability of the Exchange Act

The rights and obligations of the Participants in respect of the matters covered by the Plan shall at all times be subject to any applicable provisions of the Exchange Act, as amended, and any rules and regulations promulgated thereunder.

IX. Counterparts and Signatures

The Plan may be executed in any number of counterparts, no one of which need contain all signatures of all Participants, and as many of such counterparts as shall together contain all such signatures shall constitute one and the same instrument.

IN WITNESS WHEREOF, this Plan has been executed as of the 23rd day of August 2013 by each of the parties hereto.

BATS EXCHANGE, INC.	BATS Y-EXCHANGE, INC.
BY: ________________	BY: ________________
BOX OPTIONS EXCHANGE LLC	C2 OPTIONS EXCHANGE, INCORPORATED
BY: ________________	BY: ________________
CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED	CHICAGO STOCK EXCHANGE, INC.
BY: ________________	BY: ________________
EDGA EXCHANGE, INC.	EDGX EXCHANGE, INC.
BY: ________________	BY: ________________
FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.	INTERNATIONAL SECURITIES EXCHANGE, LLC

BY: ____________________

BY: ____________________

MIAMI INTERNATIONAL SECURITIES EXCHANGE, LLC

BY: ____________________

NASDAQ OMX BX, INC.

BY: ____________________

NASDAQ OMX PHLX LLC

BY: ____________________

THE NASDAQ STOCK MARKET LLC

BY: ____________________

NATIONAL STOCK EXCHANGE, INC.

BY: ____________________

NEW YORK STOCK EXCHANGE LLC

BY: ____________________

NYSE MKT LLC

BY: ____________________

NYSE ARCA, INC.

BY: ____________________

TOPAZ EXCHANGE, LLC

BY: ____________________

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70896 / November 19, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15615

In the Matter of HouseRaising, Inc., iElement Corporation, InforMedix Holdings, Inc., Nortia Capital Partners, Inc., and PC Universe, 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") against the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS[1]

1. HouseRaising, Inc. ("HRAI") (CIK No. 1168940) is a dissolved North Carolina corporation located in Charlotte, North Carolina with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). HRAI is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2007, which reported a net loss of $4,600,813 for the prior nine months. On April 8, 2008, HRAI filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Western District of North Carolina, which was still pending as of November 18, 2013. As of November 18, 2013, the common stock of HRAI was quoted on OTC Link (formerly "Pink

[1]The short form of each issuer's name is also its stock symbol.

Sheets") operated by OTC Markets Group Inc. ("OTC Link"), had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. iElement Corporation ("IELE") (CIK No. 1043105) is a revoked Nevada corporation located in Wilton Manors, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). IELE is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended December 31, 2008, which reported a net loss applicable to common shareholders of $383,138 for the prior nine months. As of November 18, 2013, the common stock of IELE was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. InforMedix Holdings, Inc. ("IFMX") (CIK No. 1123458) is a revoked Nevada corporation located in Rockville, Maryland with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). IFMX is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2008, which reported a net loss applicable to common shares of $2,336,529 for the prior nine months. As of November 18, 2013, the common stock of IFMX was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Nortia Capital Partners, Inc. ("NCPI") (CIK No. 1089773) is a Nevada corporation located in Alpharetta, Georgia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). NCPI is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended January 31, 2009, which reported a net loss of $147,992 for the prior nine months. As of November 18, 2013, the common stock of NCPI was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. PC Universe, Inc. ("PCUV") (CIK No. 1124802) is a revoked Nevada corporation located in Boca Raton, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). PCUV is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2009, which reported a net loss of $166,989 for the prior six months. As of November 18, 2013, the common stock of PCUV was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

6. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, 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 as required by Commission ules, did not receive such letters.

7. 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, and Rule 13a-13 requires issuers to file quarterly reports.

8. As a result of the foregoing, 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 hereof are true and, in connection therewith, 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 revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

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 Respondents 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 Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, 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 Respondents personally or by certified, gistered, or Express Mail, or by other means permitted by the Commission 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.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

November 19, 2013

In the Matter of **HouseRaising, Inc.,** **iElement Corporation,** **InforMedix Holdings, Inc.,** **Nortia Capital Partners, Inc., and** **PC Universe, 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 HouseRaising, Inc. because it has not filed any periodic reports since the period ended September 30, 2007.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of iElement Corporation because it has not filed any periodic reports since the period ended December 31, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of InforMedix Holdings, Inc. because it has not filed any periodic reports since the period ended September 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Nortia Capital Partners, Inc. because it has not filed any periodic reports since the period ended January 31, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of PC Universe, Inc. because it has not filed any periodic reports since the period ended June 30, 2009.

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 companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EST on November 19, 2013, through 11:59 p.m. EST on December 3, 2013.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3719 / November 19, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15616

In the Matter of **AGAMAS CAPITAL MANAGEMENT, LP,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 203(e) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

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) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") against Agamas Capital Management, LP ("Agamas" 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 Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

Summary

This matter concerns hedge fund adviser Agamas's failure to adopt and implement written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act, as required by Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, concerning three important areas of private fund management: (i) valuation of fund assets, (ii) the accuracy of disclosures to fund investors about the valuation practice, and (iii) cross trades between clients. At its peak, Agamas managed almost $900 million in assets through the Agamas Continuum Master Fund, Ltd. (the "Continuum Fund") and a separately managed account ("SMA") designed to emulate the risk and asset profile and performance of the Continuum Fund.

The Continuum Fund traded in a wide range of securities, including those whose prices were non-widely quoted in the market, such as mortgage-backed securities ("MBS"), asset-backed securities ("ABS"), collateralized debt obligations ("CDOs"), and convertible bonds. To price these securities, Agamas adopted detailed valuation procedures that were disclosed in the fund's offering materials to investors. However, from January 2007 through December 2008, Agamas failed to fully document the basis for its frequent use of discretion in pricing the fund's MBS, ABS, and other non-widely-quoted securities as required by the valuation procedures. In addition, Agamas failed to adopt policies and procedures to review its investor disclosures periodically to ensure they accurately described Agamas's valuation practice. Lastly, Agamas failed to adopt policies and procedures to manage conflicts of interest arising from executing cross trades between the Continuum Fund and the SMA.

Respondent

Agamas Capital Management, LP ("Agamas") is a Delaware limited partnership located in New York, New York. At all relevant times, Agamas served as investment adviser for the Continuum Fund. From October 2007 through December 2008, Agamas also served as investment adviser for one SMA. Agamas was registered as an investment adviser with the Commission from January 2006 through December 2009, when the firm withdrew its registration and wound down operations.

Other Relevant Entity

Agamas Continuum Master Fund, Ltd. (the "Continuum Fund") is a Cayman Islands exempted company that operated as a hedge fund with three feeder funds: Agamas Continuum Fund, LP (onshore), Agamas Continuum Fund (Cayman), Ltd. (offshore), and Agamas Continuum Unit Trust (offshore, yen-denominated).

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[1] 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.

Facts

A. Overview of Agamas's Advisory Business

Agamas was formed by three individuals in November 2004 and the Continuum Fund was launched shortly thereafter. The Continuum Fund's stated primary objective was to generate high, risk-adjusted absolute returns that were uncorrelated to traditional fixed income and equity portfolios. Agamas employed a relative value strategy in managing the Continuum Fund and traded in a wide range of assets including MBS, ABS, CDOs, convertible bonds, derivatives, and other fixed income and equity instruments. Agamas registered with the Commission as an investment adviser in January 2006.

Each of Agamas's three principals was responsible for managing a certain portion of the Continuum Fund portfolio, with oversight of the entire portfolio exercised by Agamas's chief investment officer. Agamas also formed a Pricing Committee that was responsible for final pricing and valuation of the Continuum Fund's holdings. The Pricing Committee, which met on a monthly basis, was comprised of Agamas's three principals and chaired by Agamas's chief investment officer. Final authority over pricing was held by Agamas's chief financial officer, who also served as Agamas's chief compliance officer.

In October 2007, Agamas took on another client, a $50 million SMA for a large global investment management firm. According to the SMA's advisory agreement, Agamas was to manage the SMA to emulate the risk and asset profile and performance of the Continuum Fund.

At its peak in February 2008, the Continuum Fund had approximately $830 million in assets and approximately 50 investors, most of which were institutional. In April 2009, Agamas began liquidating the Continuum Fund due to redemption requests and the decreased viability of the fund's relative value strategy as a result of the global financial crisis; Agamas completed the fund's liquidation later that same year. Several months earlier in August 2008, the SMA notified Agamas that it was terminating their advisory agreement; Agamas completed the liquidation of the SMA by the end of 2008.

B. Failure to Implement Policies and Procedures Regarding the Discretionary Valuation of Non-Widely Quoted Securities

At the Continuum Fund's inception, Agamas adopted detailed written procedures for valuing the Continuum Fund's portfolio, including positions in MBS, ABS, CDOs, convertible bonds, and other securities whose prices were non-widely quoted by an established over-the-counter service or recognized broker-dealers. As described below, however, Agamas deviated from its valuation procedures by failing to fully document its repeated use of discretion in valuing the fund's non-widely quoted securities.

Agamas's Stated Valuation Procedures

Agamas's procedures for valuing the Continuum Fund's assets were disclosed to investors in the fund's Private Placement Memorandum ("PPM"). For the fund's MBS, ABS, and other non-widely quoted securities, the PPM set forth a detailed, objective valuation methodology that involved calculating a weighted average of available quotes from independent broker-dealers. Specifically, the PPM stated:

> Valuation of [s]ecurities and other instruments held by the [Continuum Fund] is determined generally in accordance with the following guidelines:
>
> For Non Widely Quoted Securities (e.g. CMOs, Convertible Bonds, Asset Backed Securities, Mortgage Backed Securities), the Investment Manager will determine fair value by obtaining quotes from at least five (5) broker-dealers that are market makers in the related asset class, or the Partnership's prime brokers or lending agents or from pricing services, and using a valuation equal to the mean of the valuations provided by such independent parties after discarding the highest "ask" price and the lowest "bid" price of the valuations obtained. In the case of "mids", such "mid" pricing will be doubled for purposes of calculating the mean. If quotations are not in the form of prices or valuations, the securities will be valued using well known third party market calculators (e.g. Bond Studio or Bloomberg) or internally developed calculators based upon the above data.

The PPM then explained in cascading fashion how Agamas was to proceed if it could not obtain five independent broker-dealer quotes. Different methods applied if Agamas obtained (i) at least three but less than five quotes, (ii) two quotes, (iii) one quote, or (iv) no outside quotes.

Lastly, the PPM contained provisions that required Agamas to use its good faith discretion in certain circumstances, but also required full documentation of Agamas's basis for discretionary valuation. One such discretionary provision set forth in the PPM stated:

> If the Investment Manager in its reasonable judgment believes that any pricing does not accurately reflect the value of such security or other asset (including, but not limited to, situations where the price is set by reference to an exchange in a different time zone), the Investment Manager will value such security or other asset at its fair market value as determined in good faith by the Investment Manager. Whenever the Investment Manager prices a security independent of third party valuations, the Investment Manager will fully document the basis for such valuation and allow inspection of such documentation at the Investment Manager's place of business, by any investor who requests it.

Agamas did not modify or update its written valuation procedures once they were adopted for the Continuum Fund.

Agamas's Valuation Practice

From January 2007 through December 2008, including during the global financial crisis, Agamas routinely used its discretion to price the Continuum Fund's non-widely quoted securities. This practice was different in several ways from the detailed, objective procedures contained in the PPM.

Shortly after month-end, Agamas received the broker-dealer quotes, which were typically bid-side or mid-market quotes rather than bid/ask quotes. In many instances, Agamas received more than five quotes for each security; all quotes were entered manually into spreadsheets by Agamas. Agamas then converted all bid-side quotes into "mid" quotes,[2] and reviewed all of the mid quotes for each security. For certain securities, Agamas frequently discarded quotes that were deemed outliers without documenting its rationale. Agamas then averaged the remaining mid prices to determine a final price for the security. In some cases, Agamas's portfolio managers decided that the final price did not reflect the true market price, and then overrode the price. Agamas's Pricing Committee, which met monthly to finalize valuation of the fund's portfolio, consistently ratified the portfolio managers' recommended prices and quote overrides.

Although the Continuum Fund's PPM required Agamas to fully document the basis for valuing securities independently, Agamas failed to do so. For certain securities, Agamas did not adequately document its rationale for converting bid-side quotes to mid quotes, or why certain broker-dealer quotes were outliers to be discarded. Nor did Agamas adequately document its reasons for overriding final price calculations. Moreover, Agamas's Pricing Committee, which was responsible for the Continuum Fund's final pricing and valuation, did not maintain records adequately explaining its valuation decisions.

For example, Agamas consistently discarded a higher number of low quotes than high quotes when pricing the Continuum Fund's MBS holdings. During 2007 and 2008, Agamas discarded more than five times as many low MBS quotes (3,111) as high MBS quotes (557). On an average monthly basis, 85% of the MBS quotes Agamas excluded were low quotes and only 15% were high quotes. Agamas did not adequately document its rationale for this significant use of discretion when valuing the fund's MBS holdings. By failing to follow its own procedures set forth in the Continuum Fund's PPM, Agamas was not reasonably positioned to demonstrate whether its use of discretion was resulting in fair valuation of the fund's assets.

C. Failure to Adopt and Implement Policies and Procedures to Ensure Accuracy of Investor Disclosures

Agamas did not adopt and implement written policies and procedures reasonably designed to ensure that its valuation disclosures to Continuum Fund investors were accurate. As described above, the Continuum Fund's PPM laid out detailed, objective procedures for pricing non-widely quoted securities based on statistical calculation principles. In practice, however, from January 2007 through December 2008 Agamas was primarily using its discretion in fair valuing certain of the fund's non-widely quoted securities without fully documenting its rationale and methodology.

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[2] A mid quote was determined by Agamas to approximate the mean of a broker-dealer bid/ask quote.

As a result of not having reasonably designed policies and procedures, Agamas did not review the fund's PPM and other investor disclosures on a regular basis to determine whether they were potentially inaccurate and misleading in describing Agamas's valuation practices.

D. Failure to Adopt and Implement Policies and Procedures Governing Cross Trades Between Clients

In October 2007, almost three years after forming the Continuum Fund, Agamas took on a $50 million SMA that was to emulate the risk and asset profile and performance of the Continuum Fund. The SMA's advisory agreement with Agamas specifically permitted cross trades with the Continuum Fund under certain conditions, and the Continuum Fund's PPM generally disclosed that potential conflicts of interest may arise if Agamas began advising separate accounts with similar investment strategies.

From December 2007 through November 2008, Agamas executed 32 cross trades between the Continuum Fund and the SMA. Agamas used many of these cross trades to provide diversification to the SMA and to effect the SMA's liquidation. However, Agamas failed to adopt written policies and procedures reasonably designed to manage conflicts of interest when executing cross trades between clients.

<u>Cross Trades to Cure Breach of SMA's Exposure Limit</u>

In June 2008, the SMA client notified Agamas that a particular Alternative-A position ("Alt-A") in its account was in breach of the single security exposure limit provided in the SMA's advisory agreement.[3] The breach had occurred as a result of a previous cross trade in May 2008 of the same Alt-A security from the Continuum Fund to the SMA.

The SMA's owner instructed Agamas to reduce the Alt-A position by approximately $20 million as soon as possible. Because the breaching Alt-A position was relatively large, Agamas needed not only to reduce the position but also to find replacement Alt-A securities for the SMA. By that time, however, the MBS market had deteriorated and no other buyers or sellers were readily available at what Agamas deemed to be acceptable prices.

In late July 2008, Agamas decided to rectify the breach by trading $19.6 million of the breaching Alt-A position from the SMA back to the Continuum Fund in exchange for an equivalent amount of smaller, different Alt-A positions with substantially identical fundamentals. These cross trades, executed through unaffiliated broker-dealers, enabled the SMA to resolve its breach, obtain greater diversification in its overall Alt-A holdings, and continue emulating the Continuum Fund's risk and asset profile. The Continuum Fund was left with a larger position in the specific Alt-A security, but with less diversification in its overall Alt-A holdings. However, Agamas failed to have written policies and procedures in place to determine the pricing of the cross trades and whether the transactions were in the best interests of both clients.

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[3] Alt-A securities were backed by mortgage pools with credit risk levels between those of prime and subprime home loans.

Cross Trades to Liquidate SMA

In August 2008, the SMA client notified Agamas that it was terminating the advisory agreement and instructed Agamas to liquidate the SMA's holdings. Agamas complied and, by October 2008, had sold most of the SMA's portfolio in the market.

With no immediate buyers for the remaining securities in the SMA's portfolio, Agamas decided to have the Continuum Fund purchase those securities from the SMA. From mid-October through mid-November 2008, Agamas caused the Continuum Fund to purchase 10 convertible bond positions and 6 Alt-A positions for approximately $5.6 million in cash. Before executing these cross trades through unaffiliated broker-dealers, Agamas sought broker-dealer quotes, but did not receive any offers to purchase the securities at prices that Agamas believed represented fair value. Aside from e-mails with broker-dealers, Agamas maintained no other records documenting its pricing methodology.

Agamas failed to have written policies and procedures in place to determine the pricing of the cross trades and whether the transactions were in the best interests of both clients. The trades enabled the SMA to liquidate its portfolio in the midst of the global financial crisis, when the market for MBS and other fixed income instruments was illiquid. Although the Continuum Fund ultimately profited from these cross trades, they added more illiquid positions to the Continuum Fund portfolio shortly after fund investors approved a temporary lockup of the fund.[4]

Violations

Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder require registered investment advisers to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and its rules.

Agamas willfully[5] violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder by failing to: (i) implement written policies and procedures reasonably designed to prevent improper valuation of the Continuum Fund's assets; (ii) adopt and implement written policies and procedures reasonably designed to prevent Agamas from making inaccurate disclosures to investors in offering materials; and (iii) adopt and implement written policies and procedures reasonably designed to prevent unfair cross trades between clients.

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4 In August 2008, Agamas, citing illiquid market conditions and $120 million in pending redemption requests, sent Continuum Fund investors a proxy letter proposing and recommending that investors approve a temporary, six-month lockup period for the fund. The lockup was to run from September 2008 through March 2009. Continuum Fund investors approved the temporary lockup, and all pending redemption requests were cancelled.

5 A willful violation of the securities laws means merely "'that the person charged with the duty knows what he is doing.'" *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 [illegible]C. Cir. 1949)). There is no requirement that the actor "'also be aware that he is violating one of the Rules or [illegible].'" *Id.* (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)).

Undertakings

Respondent Agamas undertakes to complete the following actions:

Notice to Continuum Fund Investors and Other Accounts. Within thirty (30) calendar days following the entry of this Order, Agamas shall mail or email a copy of the Order to all limited partners/shareholders/unit holders in the Continuum Fund and its feeder funds, Agamas Continuum Fund, LP, Agamas Continuum Fund (Cayman), Ltd., and Agamas Continuum Unit Trust, and to all other Agamas advisory clients during any portion of the period from January 1, 2007 through December 31, 2008. Agamas shall include a cover letter in a form not unacceptable to the Commission's staff, and use commercially reasonable efforts to obtain an acknowledgment of receipt.

Certification of Compliance by Respondent. Agamas shall certify, in writing, compliance with the undertaking set forth above. The certification shall provide written evidence of compliance with the undertaking in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance, including, but not limited to: (i) the name and contact information of all Continuum Fund investors and Agamas advisory clients that were provided a copy of the Order, and (ii) copies of all other documents provided to Continuum Fund investors and advisory clients. The Commission staff may make reasonable requests for further evidence of compliance, and Agamas agrees to provide such evidence. The certification and supporting material shall be submitted to Anthony S. Kelly, Assistant Director, Asset Management Unit, Division of Enforcement, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-010, or such other address as the Commission staff may provide, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than thirty (30) calendar days from the date of the completion of the undertaking.

IV.

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

Accordingly, pursuant to Sections 203(e) and 203(k) of the Advisers Act, it is hereby ORDERED that:

A. Respondent Agamas cease and desist from committing or causing any violations and any future violations of Section 206(4) of the Advisers Act and Rule 206(4)-7 promulgated thereunder.

B. Respondent Agamas is censured.

C. Respondent Agamas shall, within ten (10) calendar days of the entry of this Order, pay a civil money penalty in the amount of $250,000.00 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Payment must be made in one of the following ways:

(1) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(2) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payment by check or money order must be accompanied by a cover letter identifying Agamas Capital Management, LP as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Anthony S. Kelly, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-5010.

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9480 / November 20, 2013

SECURITIES EXCHANGE ACT OF 1934
Release No. 70904 / November 20, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15211

In the Matter of GREGG C. LORENZO, FRANCIS V. LORENZO, and CHARLES VISTA, LLC, Respondents.	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTIONS 15(b), 21B, AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AS TO RESPONDENTS GREGG C. LORENZO AND CHARLES VISTA, LLC**

I.

On February 15, 2013, the Securities and Exchange Commission ("Commission") instituted proceedings against Gregg C. Lorenzo ("Gregg Lorenzo"), Francis V. Lorenzo ("Frank Lorenzo"), and Charles Vista, LLC ("Charles Vista") (collectively "Respondents") pursuant to Section 8A of the Securities Act of 1933("Securities Act") and Sections 15(b), 21B, and 21C of the Securities Exchange Act of 1934 ("Exchange Act").

II.

Respondents Gregg Lorenzo and Charles Vista (collectively, the "Settling Respondents") have 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 them and the subject matter of these proceedings, which are admitted, the Settling Respondents consent to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist

Order Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b), 21B, and 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

On the basis of this Order and the Offer, the Commission finds[1] that

Summary

1. Beginning in or about September 2009, Respondents Gregg Lorenzo, Frank Lorenzo, and Charles Vista, a broker-dealer controlled by Gregg Lorenzo, made fraudulent misrepresentations to several customers of Charles Vista to induce them to invest in convertible debentures issued by a start-up waste management company called Waste2Energy Holdings, Inc. ("W2E").

2. In telephone conversations with at least three Charles Vista customers, Gregg Lorenzo attempted to convince them to purchase highly risky W2E debentures by (a) making false, misleading, and unfounded statements designed to create the impression that the debentures were less risky than they actually were, and (b) making unfounded positive predictions about the upside of the investment, including the future price of W2E stock and the likelihood that the stock would trade on the NASDAQ.

3. Frank Lorenzo also engaged in fraudulent efforts to sell the W2E debentures to Charles Vista customers, by sending at least two Charles Vista customers emails containing false and/or misleading statements concerning W2E's assets and alleged contracts.

4. Charles Vista committed fraud through the actions of Gregg Lorenzo and Frank Lorenzo, described above.

Respondents

5. Gregg Lorenzo, age 30, has been the indirect owner of Charles Vista -- a formerly registered broker-dealer – from February 2009 through the present. Gregg Lorenzo operated and controlled Charles Vista as a broker-dealer through at least June 2013, and he was listed as a registered representative at Charles Vista. He resides in Staten Island, New York. From April 2002 through February 2009, Gregg Lorenzo was a registered representative associated with various other broker-dealers registered with the Commission. In 2005, Gregg Lorenzo settled civil fraud and other charges with the State of Montana -- related to his employment at a brokerage firm -- and agreed to withdraw his securities license in Montana for two years and pay a $35,000 fine. In February 2007, the National Association of Securities Dealers found that Gregg Lorenzo had violated agreements with the New Jersey and Indiana securities authorities, which had

[1] The findings herein are made pursuant to the Settling Respondents' Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

imposed strict supervision requirements on Gregg Lorenzo. In February 2008, Gregg Lorenzo entered into a consent order with the Iowa Securities and Regulated Industries Bureau requiring heightened supervision of Gregg Lorenzo and precluding him from performing supervisory responsibilities for two years. In a July 16, 2009 Agreement and Order with the Idaho Department of Finance, *Idaho v. John Thomas Financial, et al.*, Docket No. 2008-7-11, the Idaho Securities Division sanctioned Gregg Lorenzo for negligently failing to disclose the Iowa consent order in his form U-4. The order directed Gregg Lorenzo to withdraw his application for registration as an investment adviser representative and to pay a civil penalty of $1,250. On June 18, 2013, the Financial Industry Regulatory Authority ("FINRA") barred Gregg Lorenzo from associating with any FINRA member firm for his refusal to appear for an on-the-record interview (pursuant to FINRA Rule 8210) regarding a FINRA investigation of Charles Vista.

6. Frank Lorenzo, age 52, resides in Westwood, New Jersey and is currently registered with Hunter Wise Securities, LLC, a registered broker-dealer based in Irvine, California. Frank Lorenzo works at the firm's New York City office. Frank Lorenzo holds Series 7 and 63 licenses. He began working at Mercer Capital in February 2007 and then followed Gregg Lorenzo to John Thomas Financial and Charles Vista. Frank Lorenzo acted as an investment banker at Mercer Capital, John Thomas Financial and Charles Vista.

7. Charles Vista is a registered broker-dealer controlled by Gregg Lorenzo. In February 2009, through an entity that he owned, Gregg Lorenzo purchased a registered broker-dealer shell company called DC Evans and Company LLC ("DC Evans") and renamed it Charles Vista, LLC. On December 16, 2009, FINRA denied Charles Vista's application to transfer membership from DC Evans to Charles Vista. On August 10, 2010, FINRA upheld its earlier decision, citing Gregg Lorenzo's regulatory history. On June 24, 2013, Charles Vista filed a Form BDW (request for withdrawal from broker-dealer registration) with the Central Registration Depository operated by FINRA. In 2009 and 2010, Charles Vista participated in offerings of W2E debentures convertible to W2E stock, which is a penny stock.

Other Relevant Entities

8. According to W2E's SEC filings, W2E is a Delaware corporation formed in 2008 as Maven Media Holdings, Inc. ("Maven Media"). In May 2009, Maven Media's wholly-owned subsidiary, Waste2Energy Acquisition Co., acquired Waste2Energy, Inc., a privately held Delaware corporation that held 95% of the issued and outstanding shares of EnerWaste International Corporation ("EWI"), a company that manufactured a so-called "Batch Oxidation System" for converting waste into energy. EWI owned 50% of EnerWaste Europe, Ltd. ("EWE"), a company based in Iceland that operated a waste processing facility in that country. In April 2008, Waste2Energy, Inc. formed a wholly-owned subsidiary, EnerWaste, Inc., to acquire the other 50% of the stock of EWE. In July 2009, Maven Media (which prior to the acquisition of Waste2Energy, Inc. had been a shell corporation with publicly registered stock) changed its name to Waste2Energy Holdings, Inc. Shortly thereafter, W2E's stock began to be quoted on the Over-The-Counter Bulletin Board ("OTCBB").

W2E's Operations and Financial Condition

9. According to W2E's SEC filings, Waste2Energy, Inc. was incorporated in Delaware on April 10, 2007. On August 27, 2007, Waste2Energy, Inc. filed a Form D notice that it was engaged in a $6 million private offering of securities pursuant to Rule 506 of Regulation D, 17 C.F.R. § 230.506. According to its September 4, 2007 private placement memorandum, Waste2Energy, Inc. was formed to acquire 95% of the "issued and outstanding shares of capital stock" of EWI.

10. According to W2E's SEC filings, Waste2Energy, Inc. completed the EWI acquisition in or about November 2007, thereby acquiring 50% of EWE. Through EnerWaste, Inc., Waste2Energy acquired the remaining 50% of the stock of EWE. Waste2Energy, Inc.'s total purchase price for EWE was $8 million, which it paid in roughly equal parts in cash, W2E stock and a W2E promissory note.

11. According to W2E's SEC filings, when Waste2Energy, Inc. acquired EWE, EWE had a contract with Ascot Environmental Ltd. ("Ascot") to develop a waste-to-energy facility in the Dargaval area of Dumfries, Scotland. In 2008, W2E took over this contract through its Isle of Man subsidiary, Waste2 Energy Limited.

12. On June 30, 2009, W2E filed a Form 8-K with the SEC that contained its first "unaudited" public post-merger financial statements. The financial statements stated, among other things, that, as of December 31, 2008, W2E had total assets of $13,987,764, total liabilities of $9,563,673, and that W2E "had been operating at a substantial operating loss each year since inception." Of the nearly $14 million in assets as of December 31, 2008, W2E attributed over $10 million to "intangibles" (including a $1.9 million deferred tax liability), $0.5 million to goodwill, and $3 million to "cost and estimated earnings of billings on uncompleted contracts." The Form 8-K also disclosed that EWE had been placed in involuntary receivership in February 2009. The filing listed $28,171 in cash as of December 31, 2008 and further disclosed that W2E's current business operations were dependent on generating substantial revenues from one customer, Ascot, which subjected W2E to "significant financial and other risks in the operation of our business." The anticipated revenue from the contract with Ascot, at the time it was entered into, was less than $15 million, and by the time the Form 8-K was filed in June 2009, the contract was operating at a net loss for W2E. Furthermore, by September 2009, W2E had received all, or virtually all, of the payments it was entitled to under its contract with Ascot.

13. On October 1, 2009, W2E filed an amended Form 8-K ("Form 8K/A") and its Form 10-Q for the period ended June 30, 2009. The financial statements contained in the October 1 filings included "unaudited" numbers for the period ended June 30, 2009 and, apparently, audited numbers for the period ended March 31, 2009. For the period ended March 31, 2009, W2E reported total assets of $367,581 (including $27,360 in cash), total liabilities of $6,676,163, and an operating loss of $1,972,637. For the period ended June 30, 2009, W2E reported total assets of $660,408 (including $54,543 in cash), total liabilities of $3,942,356, and an operating loss of $1.5 million. The alleged $11 million in intangible assets and goodwill that

W2E had reported in the Form 8-K that it filed June 30, 2009 were no longer reported as assets on the balance sheet that appeared in its October 1, 2009 Form 10-Q and Form 8-K/A filings.

14. W2E's October 1, 2009 Form 8-K/A explained the complete write-off of $11 million in intangibles and goodwill as follows:

> In January 2009, the Company engaged a consultant to assist in the evaluation of the Dargavel project [for Ascot] due to continued delays and concerns over the design and plans for the facility, as well as the progress and ability to complete the project in accordance with the contract. The initial plans, designs, and knowhow that were the foundation of the project plan also served as the basis of the Technology assets we acquired with the purchase of [EWE]. The conclusion reached was that the Company needed to completely change the project plans, technology and controls that would enable the company to deliver the project according to the contract specifications. As a result, management made a determination that the value of the assets acquired were of no value and the Company's IP platform would be built on a new set of plans, design specifications and technology that was developed starting in January through the expected conclusion of the project in late 2009. As a result, an impairment charge in the amount of $10,538,029 was recorded to write-off the value of the Technology.
>
> Additionally, when the Company acquired [EWE], Goodwill was assigned based on the value of the workforce. At the time of the Iceland economic collapse and subsequent termination of the contract between EWE and the company, and the signing of the new contract with another Company subsidiary, the majority of the workforce where the value was place did not continue on with the Dargavel project or any other efforts supporting the continued development of the Technology and knowhow of the business. As a result of the above, management determined that Goodwill was impaired and an impairment in the amount of $496,594 was recorded to write-off the value of the Goodwill.

15. On November 16, 2009, W2E filed a Form 10-Q for the period ending September 30, 2009. In this filing, W2E reported that as of September 30, 2009, the value of all of W2E's assets was $905,582, its total liabilities were $6,510,247, and it had an accumulated deficit of $23,675,381. The value of contracts receivable was listed as zero and unbilled amounts due on uncompleted contracts was $499,857.

W2E's $15 Million Debenture Offering

16. From in or about September 2009 through May 2010, Gregg Lorenzo's firm, Charles Vista, was the exclusive placement agent for an issuance of 12% W2E debentures, with a

maximum issuance amount of $15 million (the "Debentures"). The Debentures were convertible to W2E stock, which is a penny stock.

17. Charles Vista's financial interest in the Debentures offering was considerable. According to documents attached to some of W2E's SEC filings, Charles Vista was to receive (1) a 10% "commission" on the gross proceeds of all Debentures sales; (2) a 3% "expense allowance" on the same proceeds; (3) a consulting fee of $10,000 per month for twelve months starting "at the initial closing" of the Debentures offering; (4) an "investment banking fee equal to $125,000 for each $2,500,000 of Debentures sold, up to a total of $750,000"; (5) another 13% commission/expense allowance "upon the exercise of the Warrants issued to the purchasers of the Debentures"; and (6) a "warrant to purchase up to 4.5 %" of W2E's outstanding shares "proportionate to [the] amount of Debentures sold" (at a $.01 exercise price).

18. Charles Vista sent potential investors written materials concerning W2E and the Debentures, including a lengthy private offering memorandum ("POM") prepared by W2E, Charles Vista, and their respective attorneys. The POM stated that the Debentures "are highly speculative in nature, involve a high degree of risk and should be purchased only by persons who can afford to lose their entire investment." The POM also listed a number of individual risks concerning investment in the Debentures.

19. In addition to the POM, investors received, and were required to sign, a subscription agreement that contained risk disclosures similar to the POM.

Gregg Lorenzo's False Statements to Investors

20. Gregg Lorenzo personally attempted to sell the Debentures to numerous potential investors. In his oral sales pitches to at least three potential investors, Lorenzo made false and misleading statements designed to (i) ameliorate concerns about the investment's downside risk by misrepresenting W2E's financial condition and business prospects; and (ii) make the Debentures' stock conversion feature appear valuable by making baseless predictions about the future price of the company's stock and its future listing on a major exchange.

Investor A

21. Gregg Lorenzo spoke to Investor A several times, including in a recorded telephone conversation on September 23, 2009. During that telephone conversation, Gregg Lorenzo knowingly or recklessly made the following materially false and/or misleading statements to induce Investor A to purchase the Debentures:

(a) Discussing W2E, Gregg Lorenzo falsely told Investor A that "right now they have a contract. They have a contract that's totaling $100 to $200 million, but I don't know how fast they're going to get that money, so I can't really say what type of cash roll they're going to generate."

(b) Gregg Lorenzo made the following statements to assure Investor A that investment in the Debentures was not as risky as the written risk disclosures had made it seem, and that Investor A will "get [his] money back" because W2E allegedly would have "$7 million" in cash to repay debenture holders regardless of its future revenue:

> But I got to tell you this. If this is a private placement, and there weren't protective features in the transaction, and it wasn't somewhat of an insurance policy, I would tell you, you're right, don't do it. But the fact that there is and you get the benefit of having a debenture and it being senior and being in front of everything else that this company has, accrued salary, shareholders, you name it, and it's the only debt the company will have on their book, I mean, I– it's hard really -- it's hard to really put this into a very, very risky category despite what those documents read because at the end of the day, . . . this company is still going to have close to $7 million in the bank, and I'm talking no revenue at all.
>
> So I understand where you're coming from, but there is nothing in this market, there is nothing in this industry in my opinion with you being a client of my firm that can do what this deal can do for you because I'm telling you now, with our reputation on the line, me saying this to you, if you don't want to convert because you feel that the market is not there, the company hasn't executed, you are getting your money back.
>
> They're going to be left with these – close to or exactly the amount of cash that they were given. Now again, I, I'm going to hold them accountable to pay this money back out of revenue.
>
> * * *
>
> But I look at it like this. I'll be honest with you. Based on their burn rate, and what they're going to get left with, they're still going to have close to $7 million in cash. If I have to raise a measly 8 million bucks to help them at worst case scenario, I'm not worried about that. These are the – this is the worst case scenario that I can possibly think of. I just – I just don't see that happening. I, you know, I, I'm sorry. And if they do, I am prepared as the chairman of Charles Vista to make sure that the investors get paid back.
>
> * * *
>
> You know, the odds of you being successful are, are highly likely.
>
> * * *

> I also want you to know that this is a very, very strong transaction.
>
> * * *
>
> I will make sure that you get paid back your money in this transaction. I don't believe that you will even take back your money. I have full confidence you will convert this note into stock at a dollar because the stock will be trading at a significant premium with liquidity because the company has executed their business plan.
>
> * * *
>
> And you're going to have a year to watch it for yourself. I don't have to say anything. The proof will be in the pudding, and you'll be able to decide what you want to do. It's like, it's like being able to place a bet and making a decision if you want to keep that bet a year from now.
>
> * * *
>
> But you are getting your money back, and you're going to get your final interest payment, and you are getting your warrants up front, and you'll be able to decide if you want to keep going. That [other] stock cannot offer you that. No public stock can offer you that. It's just not out there.

(c) During the September 23, 2009 telephone call with Investor A, Gregg Lorenzo also made the following baseless prediction regarding W2E's alleged future listing on NASDAQ: "I believe [W2E] will be a NASDAQ trading stock within 12 months. I believe they will meet the listing requirements."

(d) On the same call, Gregg Lorenzo also made equally baseless statements concerning the future price of W2E's stock, into which the Debentures could be converted. He told Investor A that "I have full confidence you will convert this note into stock at a dollar because the stock will be trading at a significant premium with liquidity because [W2E] has executed their business plan." Later in the call, while trying to convince Investor A to invest $75,000 more than he already had decided to invest in the Debentures, Gregg Lorenzo stated that an additional $75,000 means "150,000 more shares in a company that could potentially be $5 to $10 a share within 12 months. And that's what I'm looking at. You're giving up on that, and I just don't want you to do that. 150,000 shares at $5 is almost a million dollars to you. It's 700, it's close to $750,000."

(e) Gregg Lorenzo also told Investor A on September 23, 2009 that he was in possession of favorable non-public information concerning W2E, stating: "I can tell you things that are not even public yet that I shouldn't tell you, but it's not going to make a difference. You're going to want to see these things happen."

(f) Finally, Lorenzo falsely told Investor A on September 23, 2009 that the "debenture [was] senior and being in front of everything else that [W2E] has, accrued salary, shareholders, you name it, and it's the only debt the company will have on their book."

22. Gregg Lorenzo had no reasonable basis for making the statements set forth in paragraph 21 above because, as he knew or recklessly disregarded:

(a) W2E never had a contract for "$100 to $200 million"; its only substantial contract, with Ascot, was worth less than $15 million at the outset, and as of September 23, 2009, when Lorenzo had the call with Investor A, W2E already had received all, or virtually all, payments due under that contract.

(b) W2E's last public filing prior to September 23, 2009 -- its May 28, 2009 Form 8-K -- reported, not that the company had "$7 million in the bank" as Lorenzo told Investor A, but that (i) as of December 31, 2008, W2E had only $28,171 in cash; and (ii) as of May 28, 2009, the company had only $194,369 in cash. Furthermore, W2E's Form 10-Q for the period that ended June 30, 2009 (filed October 1, 2009) reported that the company had only $54,543 in cash and less than $700,000 in total assets; and W2E's Form 10-Q for the period ended September 30, 2009 (filed November 16, 2009) reported total assets of $905,582, total liabilities of $6,510,247, an accumulated deficit of $23,675,381, contracts receivable valued at zero, and unbilled amounts due on uncompleted contracts at $499,857.

(c) and (d) W2E was an extremely speculative stock — it was a start-up company at an early stage of development, and its financial condition was extremely precarious. Furthermore, on September 23, 2009 — the day that Gregg Lorenzo made his stock price and NASDAQ listing predictions to Investor A — W2E filed a Form 8-K reporting that on August 20, 2009, FINRA had notified the company that if it did not file a delinquent Form 10-Q by September 21, its stock could be de-listed from the OTCBB, a trading venue with much less demanding listing requirements than the NASDAQ. In addition, the POM reported that (1) the "sole member of our board of directors was a defendant in prior litigation arising [sic] alleging violation of the Federal Securities laws, which may prevent or make more difficult listing on a national exchange and/or NASDAQ"; and, after further describing the litigation, (2) "[t]here can be no assurance that [the Director's] actions and/or involvement in the prior litigation will not negatively impact and/or prevent [W2E's] ability to be listed on an exchange and/or NASDAQ, even if [W2E] were to meet such listing qualifications, which it will not for the foreseeable future."

(e) No "non-public information concerning W2E" existed, and none of W2E's public statements after September 23, 2009 indicate that any such undisclosed favorable information about the company existed on or around September 23, 2009.

(f) As Gregg Lorenzo knew, as of September 23, 2009, W2E had millions of dollars in debt on its books that was senior to the debt W2E was issuing through the Debentures offering.

23. On September 25, 2009 and October 1, 2009, Investor A invested a total of $200,000 in the Debentures.

Investor B

24. In or about August, 2009, Gregg Lorenzo spoke to Investor B concerning the Debentures. During his conversations with Investor B, Lorenzo knowingly or recklessly falsely told investor B that he would make several times his money if he invested in the Debentures.

25. After speaking to Gregg Lorenzo, Investor B invested $200,000 in the Debentures.

Investor C

26. In or about April and May 2010, Gregg Lorenzo made the following false or misleading statements to Investor C, for which there was no reasonable basis. He told Investor C that:

(a) If he invested in the Debentures, Investor C was guaranteed to get the principal invested in the Debentures back plus interest after one year; and

(b) W2E would be doing very well in a year, at which point Investor C would have the option to convert the Debentures into W2E stock.

27. After speaking to Gregg Lorenzo, Investor C invested a total of $125,000 in the Debentures: $25,000 on April 1, 2010 and $100,000 on May 12, 2010.

The Fraudulent Emails to Investors

28. As stated in paragraphs 13-14 above, on October 1, 2009, W2E filed an amended Form 8-K and its Form 10-Q for the period ended June 30, 2009. Those filings stated that W2E had written off almost all of its previously-reported assets (totaling approximately $14 million) as of June 30, 2009, consisting primarily of $11 million in "intangibles" and "goodwill."

29. On October 1 and the morning of October 2, Frank Lorenzo notified Charles Vista's brokers (including Gregg Lorenzo) by email of W2E's October 1, 2009 filings and included links in his email to the W2E filings on the SEC's website.

30. On October 2, 2009, Frank Lorenzo's assistant, acting on behalf of, and at the direction of, either Frank Lorenzo or Gregg Lorenzo, or both, sent emails to Investor B and another

Charles Vista client with the subject-heading "W2E Debenture Deal Points." The emails, designed to solicit those clients' investments in the Debentures, purported to "summarize several key points of the Waste2Energy Holdings, Inc. Debenture Offering," and contained the following false and/or misleading statements concerning W2E:

> There are 3 layers of protection:
>
> (I) The Company has over $10 mm in confirmed assets
> (II) The Company has purchase orders and LOI's [letters of intent] for over $43 mm in orders
> (III) Charles Vista has agreed to raise additional monies to repay these Debenture holders (if necessary)

31. The first statement was false because, by October 1, 2009, W2E had written off nearly all of its assets, and had no "$10 mm in confirmed assets."

32. The second statement was misleading because, as of October 1, 2009, W2E had only a single, non-binding, letter of intent for $43 million and negligible "purchase orders."

33. The third statement was misleading because, when it was made, it was far from certain that W2E could sell the full $15 million in Debentures it was offering, much less "raise additional monies to repay [those] Debenture holders."

34. At the time that Frank and/or Gregg Lorenzo caused Charles Vista to send the October 2, 2009 emails to potential W2E investors, they each knew, or recklessly disregarded, that the statements excerpted in paragraph 30 above were false and/or misleading statements about W2E.

35. On October 5, 2009, Frank Lorenzo and Gregg Lorenzo received an email authored by the Chief Financial Officer of W2E, Craig Brown, which expressly informed them of the "write-off of all of [W2E's] intangible assets . . . of about $11 million."

36. On October 14, 2009, Frank Lorenzo sent two additional emails to Charles Vista customers that contained the very same false and misleading statements that were in the October 2, 2009 emails. Frank Lorenzo sent the October 14 emails to solicit investments in the Debentures.

37. At the time Frank Lorenzo sent the October 14 emails, he knew, or recklessly disregarded, that the statements contained in those emails about W2E were false and/or misleading.

38. At least one of the recipients of Frank Lorenzo's October 14, 2009 emails invested in the Debentures after receiving the email.

Violations

39. As a result of the conduct described above, the Settling Respondents willfully violated Section 17(a) of the Securities Act, which makes it unlawful for any person in the offer or sale of any securities, directly or indirectly, to employ any device, scheme, or artifice to defraud, or to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

40. As a result of the conduct described above, the Settling Respondents willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which make it unlawful for any person, directly or indirectly, to employ any device, scheme, or artifice to defraud, to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

41. As a result of the conduct described above, Respondent Charles Vista violated Section 15(c)(1) of the Exchange Act, which prohibits a broker or dealer from effecting any transaction in, or inducing or attempting to induce the purchase or sale of, any security by means of any manipulative, deceptive, or other fraudulent device or contrivance, defined in Rule 15c1-2 to include any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, and Rule 10b-3(a), which makes it unlawful for any broker or dealer, directly or indirectly, to use or employ, in connection with the purchase or sale of any security, any act, practice, or course of business defined by the Commission to be included within the term "manipulative, deceptive, or other fraudulent device or contrivance," as such term is used in Section 15(c) of the Exchange Act.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act, and Sections 15(b), 21B and 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondent Gregg Lorenzo cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; and

Respondent Charles Vista cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, and Sections 10(b) and

15(c)(1) of the Exchange Act and Rules 10b-5 and 10b-3(a) thereunder.

B. Respondent Gregg Lorenzo be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and
>
> barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

C. Any reapplication for association by Gregg Lorenzo 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 Gregg Lorenzo, 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.

D. Respondents Gregg Lorenzo and Charles Vista shall, within three business days of the entry of this Order, pay disgorgement of $130,000 and prejudgment interest of $20,000 ("Disgorgement Payment") to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600.

E. Gregg Lorenzo shall, within three business days of the entry of this Order, pay a civil penalty in the amount of $375,000 ("Lorenzo Penalty Payment") to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

F. Charles Vista shall, within three business days of the entry of this Order, pay a civil penalty in the amount of $4,350,000 ("Charles Vista Penalty Payment") to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

G. Payment of the Disgorgement Payment, the Lorenzo Penalty Payment, and the Charles Vista Penalty Payment must be made in one of the following ways:

(1) the Settling Respondents may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(2) the Settling Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying the paying Respondent as a respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Robert J. Keyes, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, Rm. 400, New York, N.Y. 10281-1022.

H. Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, a Fair Fund is created for the disgorgement, interest and penalties referenced in paragraphs IV.D., IV.E., and IV.F. above. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, the Settling Respondents agree that in any Related Investor Action, they shall not argue that they are entitled to, nor shall they benefit by, offset or reduction of any award of compensatory damages by the amount of any part of the Settling Respondents' payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, the Settling Respondents agree that they shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against the Settling Respondents by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9481 / November 20, 2013

SECURITIES EXCHANGE ACT OF 1934
Release No. 70908 / November 20, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3720 / November 20, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30802 / November 20, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15617

In the Matter of LARRY C. GROSSMAN and GREGORY J. ADAMS, Respondents.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, SECTIONS 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940

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 Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("the Company Act") against Larry C. Grossman ("Grossman") and Gregory J. Adams ("Adams") (collectively "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Grossman, age 58, resides in Tarpon Springs, Florida, and was the founder, managing partner, and sole owner of Sovereign International Asset Management, Inc. ("Sovereign") until October 2008, when he sold Sovereign, along with related entities, to Adams. Grossman previously held a number of securities licenses, all of which lapsed prior to the conduct at issue. Grossman is currently the principal manager of Sovereign International Pension Services, Inc., an IRA administrator ("SIPS").

2. Adams, age 58, resides in Palm Harbor, Florida and was Sovereign's managing partner and owner from October 2008 to its dissolution. Adams bought Sovereign, along with other related entities, from Grossman in October 2008. He currently owns and manages Sovereign Private Wealth, Inc., an investment adviser that was registered with the Commission until December 17, 2012 (at which point it had approximately $15 million in assets under management). Adams is the managing director of Weybridge Capital, which manages the Sheffield family of funds registered and licensed in the British Virgin Islands. On May 15, 2013, Adams filed a Chapter 7 bankruptcy petition.

B. OTHER RELEVANT ENTITIES AND INDIVIDUALS

3. Sovereign International Asset Management, Inc. ("Sovereign"), a Florida corporation with its principal place of business in Clearwater, Florida, was incorporated by Grossman in 2001. Sovereign registered with the Commission as an investment adviser on June 21, 2002. In October 2008, Grossman sold Sovereign to Adams. At all relevant times, Sovereign was owned, managed, and controlled solely by either Grossman or Adams. On June 28, 2012, Sovereign filed for Chapter 7 bankruptcy in the United States Bankruptcy Court for the Middle District of Florida. Sovereign was administratively dissolved by the State of Florida at the end of September of 2012. Pursuant to Section 203(h) of the Advisers Act, the Commission canceled Sovereign's registration on February 6, 2013.

4. Sovereign International Asset Management, LLC ("SIAM, LLC") is a limited liability company Grossman formed in April 1999 and registered in Anguilla. Grossman sold SIAM, LLC to Adams in conjunction with the sale of Sovereign in October 2008.

5. Anchor Holdings, LLC (Florida) ("AH Florida") is a limited liability company registered in Florida in 2005. Grossman sold AH Florida to Adams in October 2008. It was dissolved in September 2012.

6. Anchor Holdings, LLC (Nevis) ("AH Nevis") is a company Grossman formed and registered in Nevis in September 2004. Grossman sold AH Nevis to Adams in conjunction with the sale of Sovereign in October 2008.

7. Nikolai Simon Battoo ("Battoo"), age 41, is the principal of BC Capital Group, S.A. (Panama) and BC Capital Group Limited (Hong Kong), collectively referred to herein as "BC Capital." Through BC Capital, Battoo operates offshore hedge funds. He also offers managed account services through Private International Wealth Management ("PIWM"). Battoo is not registered with the Commission in any capacity. Battoo was named as a defendant in a fraud action the Commission filed on September 6, 2012, SEC v. Nikolai S. Battoo, et al., 12CV7125, N.D. Ill.

8. Anchor Hedge Fund Limited ("Anchor Hedge Fund") was incorporated in the British Virgin Islands in September 2002. Grossman was a consultant to Anchor Hedge Fund and, along with Battoo, a member of its investment advisory board until at least July 2008.

9. Anchor Hedge Fund Management Limited ("AHF Management"), formed in Hong Kong in 2004, was the investment manager of Anchor Hedge Fund.

C. BACKGROUND

1. Sovereign's Operations

10. Sovereign was an investment adviser registered with the Commission since June 2002. At its peak in 2008, Sovereign reported it had $85 million in assets under management. Sovereign was a small organization run by Grossman, Sovereign's sole control person, until Grossman sold it to Adams in October 2008. Sovereign employed a small staff of less than ten people. No one at Sovereign was a registered representative associated with a broker-dealer during the relevant period.

11. Sovereign and Grossman targeted retirees seeking to invest their money offshore, and most of Sovereign's clients were retired individuals with self-directed IRAs. In Sovereign's promotional materials, Grossman represented to clients that Sovereign "use[d] an extensive investment selection process that [was] not only qualitative but incorporate[d] a significant due diligence process as well." In fact, Sovereign, Grossman, and later Adams advised their clients to invest almost exclusively in funds and accounts managed or controlled by Battoo, regardless of their clients' investment objectives.

12. Specifically, from August 2003 until at least October 2008, Grossman recommended to Sovereign clients that they invest almost exclusively in several of Battoo's offshore funds: Anchor Hedge Fund Classes A, B, C and E (the "Anchor Funds"); FuturesOne Diversified Fund Ltd., ("FuturesOne") a mutual fund formed in the British Virgin Islands (Battoo was the sole member and Chairman of its investment advisory board) (collectively, the "Battoo Funds"); and in PIWM, a managed account.

2. Grossman Forms AH Florida

13. Grossman formed AH Florida in 2005, using the identical name of another entity he had formed in Nevis a year before. Sovereign, through Grossman and later Adams (after he acquired AH Florida), instructed clients seeking to invest in the Battoo Funds and PIWM to transfer their money to AH Florida's account at a bank in Florida. Sovereign gave clients a document called "Anchor Hedge Fund Application for Shares," in which AH Florida was identified as an intermediary, and also included a wire transfer form authorizing a transfer to AH Florida's account. But Grossman and Adams never told clients, either in writing or orally, that Sovereign would pool client funds into a bank account in the name of AH Florida, an entity owned by Grossman (and later Adams). Clients completed an application for the individual shares they wanted to purchase.

14. After pooling client funds in AH Florida's bank account, Grossman (and later Adams) transferred the funds offshore to the Battoo Funds and PIWM in the name of AH Nevis. Because of the similarity in names, clients believed that the AH Florida account was an account belonging to Anchor Hedge Fund. Although Grossman, and later Adams, gave Battoo the names of the clients investing in his funds, the investments were nevertheless made in the name of AH Nevis, which was owned by Grossman (and later Adams).

15. Sovereign's clients never received statements from a qualified custodian or from Sovereign regarding the investment funds deposited in AH Florida's bank account. Although Sovereign sent statements to clients regarding their purported investments in the Battoo Funds, there were no surprise annual exams of Sovereign during the relevant period.

3. Grossman Sells Sovereign to Adams

16. On October 1, 2008, Grossman sold Sovereign to Adams. On October 14, 2008, Adams emailed a letter signed by Grossman to Sovereign clients—most of whom had invested exclusively in the Battoo Funds and PIWM —in which Grossman wrote that he "want[ed] to reiterate that our hedge fund investments are 'Fund of Funds' that are highly diversified with different managers, styles and strategies."

17. The letter introduced Adams and informed clients that Adams had been named Sovereign's President and Chief Investment Officer. The letter stated Grossman would remain Managing Director of SIPS, which was "only a few doors from [Adams'] office." He would also remain on Sovereign's Board of Advisers and was "actively involved in the day-to-day strategy development as needed."

18. Grossman remained listed as an associated person in Sovereign's Form ADV Part II, dated October 30, 2008. After the sale, and until approximately March 2009, Grossman continued to act on behalf of Sovereign as a paid consultant. Moreover, SIPS, the company Grossman controls, continued to serve as an IRA administrator for Sovereign's clients.

D. GROSSMAN AND ADAMS'S MISSTATEMENTS AND OMISSIONS TO INVESTORS

1. Misstatements and Omissions about Compensation

19. Grossman met Battoo in 2002. Not long thereafter, on January 17, 2003, Sovereign sent an email to its clients stating that Sovereign had taken on an active role as an investment adviser to Battoo's Anchor Hedge Fund. Sovereign represented to its clients that it received no additional compensation but was "privy to and part of many investment decisions that are made."

20. More so than an investment adviser to Anchor Hedge Fund, Sovereign was a referral source for Battoo and his offshore funds. Grossman, from August 2003 until at least March 2009, when he stopped acting as a paid consultant, and Adams, from October 2008 until August 2010, advised Sovereign's clients to invest or remain invested almost exclusively in the Battoo Funds and PIWM.

21. Sovereign's clients invested primarily in Anchor Funds, which was a fund of funds, and PIWM. Thus, Sovereign's clients paid multiple layers of fees when they invested in Anchor Funds. Sovereign's clients, however, received little or no additional benefits in exchange for these extra fees. For example, they did not receive any meaningful diversification across different fund manager styles as is typically offered by a fund of funds because many of Anchor Funds' sub-funds were managed, controlled, or advised by Battoo. Like those clients who invested in Anchor Funds, clients who invested in PIWM also paid fees on fees because PIWM invested in sub-funds that were managed, controlled, or advised by Battoo.

a. The Referral and Consulting Agreements

22. From August to December 2003, Grossman signed three referral and one consulting agreements, on behalf of SIAM, LLC, with funds and entities Battoo owned or controlled: (1) a referral agreement between SIAM, LLC and Anchor Hedge Fund (the "Anchor Referral Agreement"); (2) a referral agreement between SIAM, LLC and FuturesOne (the "FuturesOne Referral Agreement"); (3) a referral agreement between SIAM, LLC and BC Capital Group S.A. (Panama), which managed the PIWM account (the "PIWM Referral Agreement"); and (4) a consulting agreement between Grossman and Anchor Hedge Fund's investment manager (the "Consulting Agreement"). Under the Consulting Agreement, Grossman's duties included advising Anchor Hedge Fund's investment manager, analyzing the performance of Anchor Hedge Fund's investments, and preparing materials for monthly reports, among other things.

23. The first three of these agreements triggered referral fees to Sovereign, paid to SIAM LLC, while the fourth agreement triggered consulting fees paid directly to Grossman. Grossman and Adams did not disclose this compensation to the Sovereign investors.

24. The four written agreements included: (a) the Anchor Referral Agreement, effective August 1, 2003, pursuant to which Anchor Hedge Fund paid SIAM, LLC a 1% sales load for Anchor Hedge Fund Classes A and B and a 2% sales load for Anchor Hedge Fund Classes E and I; (b) the FuturesOne Referral Agreement, effective September 1, 2003, pursuant to which FuturesOne paid SIAM, LLC for each referred investor a 2% sales load and 50% of fees earned by Innovative Financial Holdings Limited ("Innovative"), the investment manager of FuturesOne; (c) the PIWM Referral Agreement, effective November 1, 2003, pursuant to which BC Capital Group, S.A. (Panama) agreed to pay SIAM, LLC 50% of the 1%-2% annual fee the advisor earned in PIWM; and (d) the Consulting Agreement, effective December 1, 2003, pursuant to which AHF Management paid Grossman a percentage of the management fee charged by Anchor Hedge Fund and a performance fee related to new net profits.

25. A fourth referral agreement, not in writing, between Anchor Hedge Fund and SIAM LLC, provided that SIAM LLC would receive the initial sales load of 4.5% charged to Sovereign's clients upon their investments in Anchor Hedge Fund and in PIWM. Anchor Hedge Fund made these payments in lump sums.

26. Pursuant to these agreements, beginning at least in 2004, Battoo paid Sovereign through SIAM, LLC's account in Denmark for referrals of clients to the Battoo Funds and PIWM. After the sale of Sovereign to Adams, and continuing through 2010, Battoo continued to pay Sovereign through SIAM, LLC, now owned by Adams.

b. <u>Grossman and Adam's Misrepresentations and Omissions Concerning the Referral and Consulting Agreements</u>

27. While they were control persons of Sovereign, Grossman and Adams misrepresented compensation they received from Battoo related entities and thus failed to adequately disclose their conflicts of interest to Sovereign's clients.

28. For example, Sovereign did not timely provide the Form ADV Part II to all its clients as required under Advisers Act Rule 204-3 and its clients did not otherwise consent to delivery through a website. Further, the Form ADV Part II either omitted, or contained misleading statements regarding additional compensation. More specifically, in one version of Sovereign's Form ADV Part II (dated March 26, 2008), Sovereign represented in Item 13 ("Additional Compensation") that neither Sovereign nor a related person, <u>i.e.</u>, SIAM, LLC (an entity with common control), received additional compensation. In a later section, Sovereign disclosed that it "<u>may</u> receive incentive or subscription fees from certain investment companies" (emphasis added). This disclosure was misleading because SIAM, LLC and Grossman were actually receiving compensation under the referral and consulting agreements. Sovereign also represented that it would notify clients of any and all fees paid to Sovereign. Yet, Sovereign failed to provide any notice to its clients of the fees paid to Grossman and SIAM, LLC.

29. Sovereign's Form ADV Part 1 was also misleading, even after Adams purchased Sovereign in October 2008. Although Sovereign for the first time

disclosed in its 2009 Form ADV Part 1, under "Compensation Arrangements," its referral fees, that disclosure was misleading. For example, the disclosure was made in response to questions on the form about Sovereign's advisory business as opposed to more specific questions intended to elicit information about Sovereign's involvement in other business activities which could create potential conflicts of interest.

30. For many years, Sovereign's investment advisory agreements ("IAA") were also misleading and failed to contain any disclosures regarding the receipt of transaction-based compensation. Like the Form ADV Part II, the IAA explicitly stated that Sovereign "will notify clients in advance of any investments the nature of any and all fees charged to the client and/or paid to Advisor." Sovereign gave this IAA to clients at the same time that it received compensation for referring its clients to Battoo. Yet, Sovereign did not disclose these fees to clients.

31. In August 2006, Sovereign revised its IAA and disclosed that Sovereign "may receive performance-based compensation from certain investment companies." However, this language did not provide adequate notice because it does not cover transaction-based compensation, such as referral fees to Sovereign or SIAM, LLC for recommending that clients invest in certain funds.

Misrepresentations and Omissions about Compensation During Grossman's Ownership

32. During Grossman's ownership of Sovereign, the company made the following misleading disclosures about compensation:

(a) Sovereign's 2006 IAA stated that "[t]he Advisor [Sovereign] may receive performance-based compensation from certain investment companies." This disclosure was misleading because (i) it omitted the fact that SIAM, LLC (which was under common control with Sovereign) received referral fees (sales load and management fees) from Anchor Hedge Fund and FuturesOne, and referral fees (management fees) from BC Capital related to PIWM; (ii) it did not disclose that SIAM, LLC received the initial 4.5% sales load Anchor Hedge Fund and PIWM charged to Sovereign's clients; and (iii) Sovereign did not disclose that Grossman was in fact receiving advisory fees (based upon a percentage of management and performance related fees) from AHF Management, Anchor Hedge Fund's investment manager;

(b) Sovereign's 2006 IAA also stated that "Advisor [Sovereign] will notify clients in advance of any investments the nature of any and all fees charged to the client and/or paid to Advisor." This disclosure was misleading because Sovereign never notified its clients that it was in fact receiving compensation for referring them to Anchor Hedge Fund, FuturesOne, and BC Capital;

(c) Sovereign's 2006 and 2008 Forms ADV Part II (and brochures) stated that "Sovereign may receive incentive or subscription fees from certain investment companies." This disclosure was misleading because it omitted the fact that SIAM, LLC was already receiving referral fees from Anchor Hedge Fund, FuturesOne, and BC Capital;

(d) Sovereign's 2006 and 2008 Forms ADV Part II (and brochures) also stated that "Sovereign may receive performance-based compensation from certain investment companies." This disclosure was misleading because Sovereign did not disclose that Grossman was in fact receiving advisory fees (based upon a percentage of management and performance related fees) form AHF Management;

(e) Sovereign's 2006 and 2008 Forms ADV Part II (and brochures) further stated that "Sovereign will notify clients in advance of any investments the nature of any and all fees charged to the client and/or paid to Sovereign." This disclosure was misleading because Sovereign never notified its clients that SIAM, LLC was in fact receiving compensation for referring them to Anchor Hedge Fund, FuturesOne, and BC Capital;

(f) Sovereign also stated the following in its brochure: (i) in Item 13, that Sovereign (or a related person) did not have an arrangement whereby it is paid cash or received an economic benefit (including commissions, equipment, or non-research services) from a non-client in connection with giving advice to clients; (ii) in Item 8, that Sovereign did not have an arrangement with an investment company that was material to its advisory business or its clients; and (iii) in Item 9, that Sovereign (or a related person) did not recommend to clients that they buy or sell securities or investment products in which the applicant or a related person has some financial interest. These disclosures were misleading because (i) SIAM, LLC received referral fees from Anchor Hedge Fund, FuturesOne and BC Capital when Sovereign recommended investments in these funds and in a managed account to its clients; (ii) the brochure did not disclose that SIAM, LLC received the initial 4.5% sales load Anchor Hedge Fund and PIWM charged to Sovereign's clients; and (iii) Grossman (a related person) was in fact receiving advisory fees (based upon a percentage of management and performance related fees) from AHF Management; and

(g) Sovereign's 2004, 2005, 2006, 2007, and 2008 Forms ADV Part 1 did not contain any compensation disclosure, and stated the following: (i) in Item 6 B. (1), that Sovereign was not actively engaged in any other business not listed in item 6A (other than giving investment advice); (ii) in Item 6 B. (3), that Sovereign did not sell products or provide services other than investment advice to its clients; and (iii) in Item 9, that Sovereign did not have a related person that had custody of its advisory clients' cash or securities. These disclosures were misleading because Sovereign was actively referring its advisory clients to Anchor Hedge Fund, FuturesOne, and BC Capital (since at least November 2003); because Sovereign (acting as an unregistered broker-dealer) received transaction-based compensation for selling securities in Anchor Hedge Fund, FuturesOne, and BC Capital; and because by 2005 AH Florida had custody of Sovereign clients' investments funds or money.

Misrepresentations and Omissions about Compensation During Adams's Ownership

33. During Adams's ownership of Sovereign, the company made the following misleading disclosures about compensation:

(a) Sovereign's 2009 IAA stated that "[t]he Advisor [Sovereign] may receive performance-based compensation from certain investment companies." This disclosure was misleading because (i) it omitted the fact that SIAM, LLC (which was under common control with Sovereign) received referral fees (sales load and management fees) from Anchor Hedge Fund and FuturesOne, and referral fees (management fees) from BC Capital related to PIWM; and (ii) it did not disclose that SIAM, LLC received the initial 4.5% sales load Anchor Hedge Fund and PIWM charged to Sovereign's clients;

(b) Sovereign's 2009 IAA also stated that Advisor [Sovereign] will notify clients in advance of any investments the nature of any and all fees charged to the client and/or paid to Advisor." This disclosure was misleading because Sovereign never notified its clients that it was in fact receiving compensation, through SIAM, LLC, for referring them to Anchor Hedge Fund, FuturesOne, and BC Capital;

(c) Sovereign's 2009 and 2010 Forms ADV Part II (and brochures) stated that "Sovereign may receive incentive or subscription fees from certain investment companies." This disclosure was misleading because it omitted the fact that SIAM, LLC was already receiving referral fees from Anchor Hedge Fund, FuturesOne, and BC Capital;

(d) Sovereign's 2009 and 2010 Forms ADV Part II (and brochures) further stated that "Sovereign will notify clients in advance of any investments the nature of any and all fees charged to the client and/or paid to Sovereign." The third disclosure was misleading because Sovereign never notified its clients that it was in fact receiving compensation, through SIAM, LLC, for referring them to Anchor Hedge Fund, FuturesOne, and BC Capital;

(e) Sovereign also stated the following in its brochure: (i) in Item 13, that Sovereign (or a related person) did not have an arrangement whereby it is paid cash or received an economic benefit (including commissions, equipment, or non-research services) from a non-client in connection with giving advice to clients; (ii) in Item 8, that Sovereign did not have an arrangement with an investment company that was material to its advisory business or its clients; and (iii) in Item 9, that Sovereign (or a related person) did not recommend to clients that they buy or sell securities or investment products in which the applicant or a related person has some financial interest. These disclosures were misleading because (i) SIAM, LLC received referral fees from Anchor Hedge Fund, FuturesOne and BC Capital when Sovereign recommended investments in these funds and in a managed account to its clients; (ii) Sovereign did not disclose that SIAM, LLC received the initial 4.5% sales load Anchor Hedge Fund and PIWM charged to

Sovereign's clients; and (iii) Grossman (a related person) was in fact receiving advisory fees (based upon a percentage of management and performance related fees) from AHF Management; and

(f) Sovereign's 2009 and 2010 Form ADV Part 1 stated in Item 5 (Information About Your Advisory Business-Compensation Arrangements) that "Sovereign receives referral fees for selection of other advisers." This disclosure was misleading because it did not disclose Sovereign's compensation arrangements with Anchor Hedge Fund, FuturesOne, and BC Capital Group, and because the statement was made in response to questions on the form about Sovereign's advisory business as opposed to more specific questions intended to elicit information about Sovereign's involvement in other business activities which could create potential conflicts of interest, such as Item 6.B.1. (Other Business Activities).

2. <u>Grossman and Adams Misled Clients to Invest In Anchor Hedge Funds</u>

34. Beginning in August 2003, Grossman recommended Anchor Hedge Fund Classes A, B, C, and E to Sovereign's clients. In or around October 2008, Adams advised clients to retain their investments in Anchor Hedge Fund. However, Grossman and Adams both knowingly or recklessly misrepresented the risk and independence of the funds.

a. <u>Cross Portfolio Liability</u>

35. From 2003 until he sold Sovereign in 2008, Grossman recommended the Battoo Funds (and Anchor Hedge Fund in particular) and PIWM, to Sovereign clients, almost exclusively. After purchasing Sovereign, Adams told clients to retain their investments. Written materials, including PPMs, described Anchor Fund Classes A and B to clients as moderately risky investments with goals of long-term capital appreciation and preservation. These classes, however, were subject to high risk. In fact, the assets of each class were available to meet the liabilities of the other classes, something that was not disclosed in the PPM. As a result, the investments in market neutral Anchor Classes A and B could be used to cover liabilities, including claims by investors and third parties, incurred by the higher risk and more volatile Anchor Class C. Sovereign did not disclose the exposure between the classes to clients who sought only moderately risky investments.

b. <u>Anchor Hedge Fund Class A Did Not Invest in Diversified, Independently-Administered, and Audited Funds</u>

36. From at least 2005 until October 2008, Grossman recommended Anchor Class A as a safe fund that invested in a diversified selection of hedge funds and would deliver expected returns in all market conditions. According to its 2005 PPM, Class A invested into "a portfolio of well-established independently administered and audited hedge funds to be used to access the [fund's] investment objectives."

37. The PPM also stated that Class A invested into a portfolio of market neutral equity hedge investing and other alternative investments funds, "including funds investing both long and short in public equity investments and indexes, both in the USA and globally; with underlying holdings generally including but not being limited to bank deposits, fixed income securities, spot and forward foreign exchange contracts, equities, exchange traded funds, options, derivatives, government and corporate debt and other financial instruments." The PPM also stated that Class A would be administered by Folio Administrators, Ltd., but omitted to disclose that this entity was closely affiliated with Battoo and thus was not independent. For instance, its director was also on BC Capital's board and on Anchor Hedge Fund's professional advisory board.

38. Grossman provided other written materials to Sovereign clients, including PowerPoint presentations, which described Class A as a market neutral fund with minimal portfolio volatility and an investment objective to "achieve absolute returns of 10%-12% per annum."

39. In addition to written misstatements, Grossman orally told Sovereign's clients in 2006 that Anchor Class A was a very safe fund with an outstanding return and track record over a number of years. Similarly, Adams orally told clients in November 2008 that Anchor A was extremely safe and a "good place" to be.

40. In fact, Anchor Fund Class A did not invest in independently administered and audited hedge funds. Indeed, the asset verification reports came from parties related to Battoo, not from independent third parties. Anchor Hedge Fund's administrator generated the asset verification reports based on information provided by the custodian for Battoo and BC Capital. The administrator and custodian were controlled and managed by the same individuals who managed and administered Battoo's funds. They also shared the same post office boxes as Anchor Hedge Fund and signed the referral and consulting agreements with SIAM, LLC and Grossman.

41. Grossman also knew that the last independent auditor report Sovereign received for Anchor Fund Class A was for the year ended December 31, 2007. Battoo did not provide any other audited financial statements and later told Adams he would not because the information was confidential and proprietary. Yet, Grossman continued to promote Anchor even after he became a consultant to Sovereign.

42. The investments in Anchor Fund Class A were also far from diversified. Class A did not invest in what its PPM represented, such as fixed income securities, exchange traded funds, or government and corporate debt. In fact, after Battoo suspended redemptions for investments in Anchor Fund Class A in December 2008, he claimed Anchor Fund Class A had invested substantially all of its assets with Bernard Madoff.

43. During the relevant period, Grossman and Battoo were the sole members of the Anchor Fund Class A Investment Advisory Board. As a member of

Anchor Hedge Fund's Investment Advisory Board and as an investment adviser to Sovereign's clients, Grossman knew that Class A did not invest in funds that were independently administered or audited, or diversified as described in the PPM. Grossman recommended that clients invest (or remain invested) in Anchor A as late as October 22, 2008. Adams continued to advise clients to retain their investments in Anchor A, even after (1) the suspension called into question Battoo's previous representation to Adams that only 2% of the fund had exposure to the Madoff Ponzi scheme and (2) Battoo refused to file a proof of claim or provide Adams with supporting documentation of the fund's investments.

c. Liquidity Issues with and Suspension of Anchor Fund Class C

44. Shortly before the Madoff scandal erupted in the press, Anchor Hedge Fund suspended redemptions of Anchor Fund Class C. On October 13, 2008, Anchor Hedge Fund sent a letter to its Class C shareholders, notifying them that it was suspending redemptions of Anchor Fund Class C because it was switching its portfolio from one bank to another. This supposed change began at the end of 2007 but was delayed because of "deteriorating financial market conditions." The letter also stated that Anchor Hedge Fund would "begin processing redemptions as soon as it is practical."

45. Nevertheless, Grossman continued to advise Sovereign's clients to invest or retain their investments in the Battoo's Funds. However, when Grossman sold Sovereign to Adams in October 2008, Grossman, who was a consultant to Anchor Hedge Fund and a member of its investment advisory board, at a minimum knew that requests for redemptions in Anchor Fund Class C for June 30, 2008 had not yet been honored. In fact, internal Sovereign emails reflect that as of late September 2008 Sovereign was still waiting for redemptions in Class C. Yet, on October 14, 2008, the day after Sovereign was notified of the suspension of redemptions of Anchor C shares, Grossman described Sovereign's investment, which included Anchor Hedge Fund, to Sovereign clients as funds that "will experience an incredible bounce. . . . Patience will be rewarded."

46. After Anchor Hedge Fund suspended redemptions of Anchor C shares, Adams did not question the reason for the suspension. Instead, Adams simply accepted Battoo's assurances and represented to Sovereign's clients in writing that the suspension was due to Société Générale's failure to timely process a transfer of the custodial relationship for Anchor Fund C. A few weeks after the suspension, Battoo met with Adams and proposed exchanging Class C shares for PIWM shares. Shortly thereafter, Adams recommended the swap to Sovereign's clients without conducting sufficient due diligence concerning PIWM.

3. Adams's Misstatements and Omissions Regarding the PIWM Swap

47. Battoo proposed the swap shortly after Anchor Hedge Fund suspended redemptions of Class C shares. On October 28, 2008, Battoo visited Sovereign's offices and met with Adams. At this meeting, Battoo offered to exchange interests in PIWM's "Market Neutral" managed account for Sovereign clients' investments

in shares of Anchor Hedge Fund Classes B, C, and E and in FuturesOne. By October 2008, these funds in Anchor Hedge Fund and FuturesOne had become illiquid or had substantially decreased in value.

48. Under the terms of the swap, Sovereign investors were to receive an interest, or an equivalent value-in-kind participation, in PIWM valued at amounts equal to the pre-impairment values of their hedge fund shares. In exchange, Battoo demanded a lock up period of 18 months. Nevertheless, Adams said the swap was advisable because he believed PIWM "Market Neutral" was similar to Anchor Class A which was a market neutral fund that had supposedly performed well in the past.

49. Although Adams had served on PIWM's advisory board since October 2008 he failed to conduct any due diligence concerning PIWM's investments before recommending the swap to Sovereign's clients. Had he done so, he would have known that PIWM's investments were almost entirely in funds and accounts managed or controlled by Battoo, including the funds being exchanged in the swap.

50. Rather than conduct independent due diligence about PIWM's investments, Adams simply requested more information from Battoo, which Battoo refused to provide. Nevertheless, Adams, who received referral fees from PIWM, signed the swap agreement and recommended the swap to Sovereign's clients. More specifically, Adams recommended that Sovereign clients swap their Anchor Class C shares for PIWM managed account interests using an account value as of August 31, 2008. Furthermore, Adams assured clients who invested in Anchor C that the swap was "a generous offer in light of a situation [Battoo] did not create."

51. In November, 2008, Adams further represented to Sovereign clients that: (1) the suspension of Anchor C was due to Société Générale's failure to process the transfer of the custodial relationship for Anchor Class C; (2) PIWM had much better performance than Anchor Class C and, by exchanging the shares, clients would avoid the losses incurred in September and October 2008; and (3) The resulting interests in PIWM were subject to an 18 month lock-up.

52. Before Adams executed the swap agreement on January 30, 2009, Adams failed to disclose to clients that: (1) underlying investments for PIWM were in other funds almost all managed or controlled by Battoo, including Anchor and FuturesOne, and thus there was no diversification of management style and no reason to expect better investment performance; (2) PIWM's sub-funds were illiquid and suspended purportedly due to the Madoff Ponzi scheme (including Anchor Class A and Galaxy Fund Class C) or had incurred such significant losses that the sub-fund was also being exchanged for PIWM (Anchor Class E).

53. On January 30, 2009, three months after Battoo proposed the swap and almost two months after Battoo suspended redemptions of Anchor Class A purportedly due to the Madoff scandal, Adams executed an agreement in which AH Nevis transferred to PIWM its shares of Anchor Hedge Fund (all classes except for A) and of FuturesOne.

54. Later, in the fall of 2009, a year after the swap was proposed by Battoo, Adams was still receiving vague and conflicting responses from Battoo as to the start date of the lock up period and whether it was 18 months or 24 months. Despite this disagreement, Adams continued to advise clients to retain their investments in the Battoo Funds and PIWM.

55. Beginning in 2010, Battoo refused to permit withdrawals from PIWM, in part because of a dispute over the lock-up period. In November 2011, Battoo publicly claimed to investors that losses incurred in the MF Global bankruptcy triggered the refusal to permit withdrawals from PIWM.

E. GROSSMAN AND ADAMS IGNORED RED FLAGS

56. Before the suspensions of the Battoo Funds and the PIWM swap agreement, Grossman and Adams failed adequately to research or investigate a number of red flags about Battoo and his funds.

57. Grossman knew prior to the October 13, 2008 suspension of Anchor C that Anchor Hedge Fund had not honored redemption requests for Class C shares submitted in the spring of 2008. Instead of questioning and investigating the failures to redeem and even after Sovereign was notified of the suspension, Grossman continued advising clients to invest in Anchor Hedge Fund.

58. According to Anchor Hedge Fund PPMs, shareholders were entitled to receive annual audited financial reports upon request. However, in 2008 Grossman and Adams knew Battoo ceased providing to investors independently-audited financial statements regarding the Battoo Funds. The last independent auditor report Sovereign received from Anchor Hedge Fund for Anchor Class C was for the year ended December 31, 2006 and for Anchor Classes A and B was for the year ended December 31, 2007. Battoo did not provide any other audited financial statements and told Adams he would not because the information was confidential and proprietary. Nevertheless, Sovereign, Grossman, and Adams continued to recommend Battoo's funds to their clients.

59. Anchor Hedge Fund PPMs also entitled investors to receive asset verification reports from independent third parties upon request. However, Grossman and Adams knew asset verification reports came from parties related to Battoo, not from independent third parties. The reports were generated by Anchor Hedge Fund's administrator and based on information provided by the custodian for Battoo and BC Capital. The administrator and custodian were controlled and managed by the same individuals who managed and administered Battoo's funds and shared the same post office boxes as Anchor Hedge Fund and PIWM. In addition, these individuals signed the referral and consulting agreements with SIAM, LLC and Grossman. Despite this lack of independence, undisclosed to investors, Grossman and Adams failed to investigate the figures Battoo provided to them. Instead, they touted the performance of the Battoo Funds to their clients.

60. Finally, Adams failed independently to investigate Anchor Hedge Fund even after Battoo suspended redemptions of Anchor Class A and subsequently refused to file a claim in the Madoff recovery proceedings or provide information regarding its losses.

F. VIOLATIONS

61. As a result of the conduct described above, Grossman and Adams willfully violated Section 17(a) of the Securities Act which prohibits fraudulent conduct in the offer and sale of securities.

62. As a result of the conduct described above, Grossman and Adams willfully violated Section 15(a) of the Exchange Act, which prohibits an unregistered broker-dealer from making 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, and willfully aided and abetted and caused violations of Section 15(a) of the Exchange Act.

63. As a result of the conduct described above, Grossman and Adams willfully violated Sections 206(1) and 206(2) of the Advisers Act, which prohibit fraudulent conduct by investment advisers and impose on investment advisers a fiduciary duty to act in "utmost good faith," to fully and fairly disclose all material facts, and to use reasonable care to avoid misleading clients.

64. As a result of the conduct described above, Grossman and Adams willfully violated Section 206(3) of the Advisers Act, which prohibits an investment adviser from "acting as a broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client . . . without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction."

65. As a result of the conduct described above, Grossman and Adams willfully aided and abetted and caused violations of Section 206(4) of the Advisers Act, which prohibits fraudulent, deceptive, or manipulative conduct by an investment adviser, and Rule 206(4)-2 promulgated thereunder, which requires that an investment adviser maintain each client's funds in bank accounts containing only those client funds, notify its clients as to the name and address of the custodian of client funds and manner in which their funds are maintained, and have client funds and securities verified by an independent public accountant at least once a year without prior notice to the investment adviser.

66. As a result of the conduct described above, Grossman and Adams willfully aided and abetted and caused violations of Rule 204-3 of the Advisers Act, which requires investment advisers to deliver a brochure and one or more brochure supplements to each client or prospective client that contains all information required by Part II of Form ADV.

67. As a result of the conduct described above, Grossman and Adams willfully violated Section 207 of the Advisers Act which makes it unlawful "for any person willfully to make any untrue statements of material fact in any registration application or report filed with the Commission under Section 203 or 204.

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 hereof 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 Respondents pursuant to Section 8A of the Securities Act including, but not limited to, disgorgement and civil penalties pursuant to Section 8A of the Securities Act;

C. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Section 15(b) of the Exchange Act including, but not limited to, disgorgement and civil penalties pursuant to Section 21B of the Exchange Act;

D. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Sections 203(f) and 203(k) of the Advisers Act including, but not limited to, disgorgement and civil penalties pursuant to Section 203 of the Advisers Act;

E. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Section 9(b) of the Investment Company Act;

F. Whether, pursuant to Section 8A of the Securities Act, Section 21C of the Exchange Act, and 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 Section 17(a) of the Securities Act, Section 15(a) of the Exchange Act, and Sections 206(1), 206(2), 206(3), 206(4), and 207 of the Advisers Act and Rules 204-3 and 206(4)-2 thereunder, whether Respondents should be ordered to pay a civil penalty pursuant to Section 8A(g) of the Securities Act, Section 21B(a) of the Exchange Act, Section 203(i) of the Advisers Act, and whether Respondents should be ordered to pay disgorgement and prejudgment interest pursuant to Section 8A(e) of the Securities Act, Sections 21B(e) and 21C(e) of the Exchange Act, and Section 203(j) 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 their Answers 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 answers, 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.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Commissioner Gallagher
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9482 / November 22, 2013

SECURITIES EXCHANGE ACT OF 1934
Release No. 70923 / November 22, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15619

In the Matter of

JOSEPH P. DOXEY and WILLIAM J. DANIELS,

Respondents.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTIONS 15(b)(6)(A) 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 Section 8A of the Securities Act of 1933 ("Securities Act") and Sections 15(b)(6)(A) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Joseph P. Doxey ("Doxey"), and pursuant to Section 8A of the Securities Act and Section 15(b)(6)(A) against and William J. Daniels ("Daniels").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Doxey, 58 years old, is a resident of Boca Raton, Florida. Doxey founded Pure H20 Bio-Technologies, Inc. in 1989 and has served as the company's chairman, chief executive officer, president and director since its inception. Doxey participated in an offering of Pure H20 Bio-Technologies, Inc. stock, which is a penny stock.

2. Daniels, 44 years old, is a resident of Port Richey, Florida and was the sole officer, director and shareholder of Observation Capital, LLC during the relevant

time period. During the period 1991 through 2000, Daniels worked as a registered representative at broker-dealers and held Series 7 and 63 licenses. Daniels participated in an offering of Pure H20 Bio-Technologies, Inc. stock, which is a penny stock.

B. OTHER RELEVANT ENTITIES

1. Pure H20 Bio-Technologies, Inc. ("Pure H20"), incorporated in Florida in 1989 and headquartered during the relevant period in Boca Raton, Florida, purported to be developing the Integrated Hospital Potable Water Disinfection System ("IHPWDS"), a water disinfection system that would be used for residential, commercial, hospital, and medical facilities. The State of Florida dissolved Pure H20 in 2011 for non-payment of fees; the company was revivified in 2013 and is currently listed as active by the Florida Department of State. The company's common stock is quoted on the OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc.

2. Observation Capital, LLC is an inactive Texas limited liability company which purportedly maintained its principal office in Texas during the relevant time period.

C. DOXEY'S MATERIALLY FALSE PRESS RELEASES

1. From April 2008 through May 2009, Doxey drafted and caused Pure H20 to disseminate six press releases which stated that certification of the IHPWDS by an independent product certification laboratory was expected in three to four months or within the quarter the release was issued, or was underway. The press releases were issued on April 1, 2008; October 22, 2008; January 29, 2009; March 3, 2009; April 1, 2009; and May 4, 2009.

2. The press releases identified the independent product certification laboratory as the "[U.S. Environmental Protection Agency's] contractor National Sanitation Foundation." This entity, which had actually changed its name some years prior to the press releases at issue to NSF International ("NSF"), had developed a protocol for certifying water purifiers. Certification pursuant to the protocol was not legally required during the relevant time period, but was regarded by Pure H20 personnel as critical to marketing a water purification system to hospitals and medical facilities. The NSF certification was widely recognized in the water treatment industry as providing third-party quality assurance.

3. Pursuant to the protocol, NSF would test a product to ensure that it reduced potentially harmful contaminants and organisms; did not leach contaminants into the water; generated drinkable water; and was structurally sound and would not leak or burst during use. As part of the certification, NSF would also visit the production facility to ensure that the product was being manufactured in a manner consistent with information submitted to NSF.

4. Each of the six press releases was materially false and misleading because the NSF certification process never commenced. Pure H20 never completed its pre-certification testing, which was critical to proceeding with NSF certification, chiefly because Pure H20 was short of funds by mid-2008. Pure H20 never submitted to NSF the information necessary -- including the IHPWDS product, product specifications, and precertification test results -- for NSF to perform a product certification. In addition, the time required to complete certification was beyond that referenced in the press releases, and prior to March 2009, the company did not have the funds necessary to build a manufacturing facility, the inspection of which was a requirement for certification. The press releases exaggerated the status of an implied governmental regulatory certification for Pure H20's product. Lastly, a material omission in the press releases was the failure to disclose the company's lack of resources to complete precertification testing, pay for a manufacturing facility, and pay for NSF certification.

5. Each press release had the effect of materially increasing either Pure H20's stock price and/or trading volume over the prior day's trading.

6. Doxey had final authority over the distribution of each press release; controlled the substance of and substantially participated in drafting, if not drafted in its entirety, each of the materially false press releases; and directed their dissemination to the public via a wire service and by having them posted on Pure H20's web site.

7. In addition to misrepresentations and omissions to the general public made through press releases, Doxey misrepresented the facts to Daniels in inducing him to purchase Pure H20 securities. In late summer 2008, Daniels read Pure H20's April 2008 press release, and came away with the impression that the IHPWDS was beyond development stage and that NSF certification was expected to be completed successfully in a few short months, after which the IHPWDS would be released into the market. He met with Doxey in late summer 2008. Although Doxey did disclose to Daniels that the company needed funds to finance the NSF certification, he falsely represented to Daniels that the IHPWDS was completely built, that an inventory of product had been amassed, and that the IHPWDS was then undergoing NSF certification.

8. Doxey knew, or was reckless in not knowing, that a) his actions constituted a device, scheme or artifice to defraud; b) the statements he made in press releases and to Daniels contained material misrepresentations and omissions; and c) he engaged in acts, practices and a course of business that operated as a fraud upon PureH20's investors.

D. UNREGISTERED OFFERS AND SALES

1. From October 2008 through May 2009, Doxey orchestrated twelve private placements of Pure H20 stock to Daniels on behalf of Observation Capital, LLC, which ultimately paid $57,654 for nearly 360 million shares of Pure H20. At no time was a registration statement pertaining to any of the twelve offerings on file or in effect with the Commission.

2. Doxey handled every aspect of the offerings and sales, including negotiating the terms with Daniels; documenting or having the transactions documented; being the sole officer and director of the company to sign the subscription agreements on behalf of Pure H20; procuring legal opinions that the sales were exempt from registration and that the shares should be issued without restrictive legend; and instructing Pure H20's transfer agent to issue the shares to the investor.

3. Each of the twelve offerings was effected purportedly pursuant to Rule 504(b)(1)(iii) of Regulation D of the Securities Act. However, this exemption was unavailable because neither Daniels nor Observation Capital qualified as an "accredited investor" under Regulation D. Additionally, no other exemption from registration applied to the twelve offerings.

4. Within days of receiving each of the twelve offerings' allotment of shares, Observation Capital, at Daniels' direction and under his control as its sole owner, officer and director, began selling the shares into the market, ultimately selling over 258 million of those shares over the course of six months and generating $73,900.46 in illicit proceeds.

E. <u>VIOLATIONS</u>

1. As a result of the conduct described above, Doxey willfully violated Section 10(b) of the Exchange Act and Rules 10b-5(a), (b) and (c) thereunder, which prohibit fraudulent conduct in connection with the purchase or sale of securities, and willfully violated Sections 17(a)(1), (2) and (3) of the Securities Act, which prohibits fraudulent conduct in the offer and sale of securities.

2. As a result of the conduct described above, Doxey and Daniels willfully violated Sections 5(a) and 5(c) of the Securities Act, which prohibit the direct or indirect sale or offer for sale of securities unless a registration statement has been filed or is in effect.

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 hereof are true and, in connection therewith, to afford Respondents an opportunity to establish any defenses to such allegations;

B. Whether, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Respondent Doxey should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 5(a), 5(c), 17(a)(1), 17(a)(2) and 17(a)(3) of the Securities Act and Section 10(b) of the Exchange Act and Rules 10b-5(1), (2) and (3) thereunder;

C. Whether, pursuant to Section 8A of the Securities Act, Respondent Daniels should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 5(a) and 5(c) of the Securities Act;

D. What, if any, remedial action is appropriate against Respondents, including, but not limited to, civil penalties pursuant to Section 8A(g) of the Securities Act and Section 21B(a) of the Exchange Act and disgorgement pursuant to Section 8A(e) of the Securities Act;

E. Whether, pursuant to Section 21C(f) of the Exchange Act, Respondent Doxey should be prohibited, conditionally or unconditionally, and permanently or for such period of time as it shall determine, from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act, or that is required to file reports pursuant to Section 15(d) of the Exchange Act;

F. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Section 15(b)(6)(A) 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 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 Answers 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.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Commissioner Piwowar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
November 22, 2013

In the Matter of	
Pure H20 Bio-Technologies, Inc.,	**ORDER OF SUSPENSION OF TRADING**
File No. 500-1	

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Pure H20 Bio-Technologies, Inc. because questions have arisen as to its operating status, if any.

The Commission is of the opinion that the public interest and the protection of the 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 securities of the above-listed company is suspended for the period from 9:30 a.m. EST on November 22, 2013, through 11:59 p.m. EST on December 6, 2013.

By the Commission.

Elizabeth M. Murphy
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. 70921 / November 22, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15618

In the Matter of SOUTHERN USA RESOURCES, INC., Respondent.	ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND REVOKING REGISTRATION OF SECURITIES

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 Southern USA Resources, Inc. ("Southern USA" 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[1] that:

A. Southern USA, is a Delaware corporation headquartered in Ashland, Alabama. Southern USA is a smaller reporting company under Rule 12b-2 of the Exchange Act. The common stock of Southern USA has been registered under Section 12(g) of the Exchange Act since July 2012. Southern USA's securities were quoted on the OTC Link, operated by OTC Markets Group Inc., under the symbol "SUSA," until March 1, 2013, when the Commission ordered that trading in the securities be temporarily suspended. Southern USA's securities are currently being traded via "grey market," over-the-counter sales.

B. Southern USA has failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1, 13a-11, and 13a-13 thereunder while its common stock was registered with the Commission in that it has not filed an Annual Report on Form 10-K since March 30, 2012; has not filed a Form 10-Q for any fiscal period subsequent to its fiscal quarter ending September 30, 2012; and has not filed a Form 8-K disclosing the resignation of its principal executive officer on March 12, 2013, its principal financial officer on March 12, 2013, and its certifying accountant on March 4, 2013.

C. Southern USA has failed to comply with Rule 13a-15 under the Exchange Act while its common stock was registered with the Commission in that it has failed to maintain internal controls over financial reporting or disclosure controls and procedures.

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 of 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.

[1] The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding any other person or entity in this or any other proceeding.

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.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-70919; File No. S7-04-09)

November 22, 2013

ORDER EXTENDING TEMPORARY CONDITIONAL EXEMPTION FOR NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATIONS FROM REQUIREMENTS OF RULE 17g-5 UNDER THE SECURITIES EXCHANGE ACT OF 1934 AND REQUEST FOR COMMENT

I. Introduction

On May 19, 2010, the Securities and Exchange Commission ("Commission") conditionally exempted, with respect to certain credit ratings and until December 2, 2010, nationally recognized statistical rating organizations ("NRSROs") from certain requirements in Rule 17g-5(a)(3)[1] under the Securities Exchange Act of 1934 ("Exchange Act"), which had a compliance date of June 2, 2010.[2] Pursuant to the Order, an NRSRO is not required to comply with Rule 17g-5(a)(3) until December 2, 2010 with respect to credit ratings where: (1) the issuer of the structured finance product is a non-U.S. person; and (2) the NRSRO has a reasonable basis to conclude that the structured finance product will be offered and sold upon issuance, and that any arranger linked to the structured finance product will effect transactions of the structured finance product after issuance, only in transactions that occur outside the U.S. ("covered transactions").[3] On November 23, 2010, the Commission extended the conditional temporary exemption until December 2, 2011.[4] On November 16, 2011, the Commission extended the conditional temporary exemption until December 2, 2012.[5] On November 26, 2012, the

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1 See 17 CFR 240.17g-5(a)(3).

2 See Exchange Act Release No. 62120 (May 19, 2010), 75 FR 28825 (May 24, 2010) ("Order").

3 See id. at 28827-28 (setting forth conditions of relief).

4 See Exchange Act Release No. 63363 (Nov. 23, 2010), 75 FR 73137 (Nov. 29, 2010) ("First Extension Order").

5 See Exchange Act Release No. 65765 (Nov. 16, 2011), 76 FR 72227 (Nov. 22, 2011) ("Second Extension Order").

Commission extended the conditional temporary exemption until December 2, 2013.[6] The Commission is extending the temporary conditional exemption exempting NRSROs from complying with Rule 17g-5(a)(3) with respect to rating covered transactions until December 2, 2014.

II. Background

Rule 17g-5 identifies, in paragraphs (b) and (c) of the rule, a series of conflicts of interest arising from the business of determining credit ratings.[7] Paragraph (a) of Rule 17g-5[8] prohibits an NRSRO from issuing or maintaining a credit rating if it is subject to the conflicts of interest identified in paragraph (b) of Rule 17g-5 unless the NRSRO has taken the steps prescribed in paragraph (a)(1) (i.e., disclosed the type of conflict of interest in Exhibit 6 to Form NRSRO in accordance with Section 15E(a)(1)(B)(vi) of the Exchange Act[9] and Rule 17g-1)[10] and paragraph (a)(2) (i.e., established and is maintaining and enforcing written policies and procedures to address and manage conflicts of interest in accordance with Section 15E(h) of the Exchange Act).[11] Paragraph (c) of Rule 17g-5 specifically prohibits seven types of conflicts of interest. Consequently, an NRSRO is prohibited from issuing or maintaining a credit rating when it is subject to these conflicts regardless of whether it had disclosed them and established procedures reasonably designed to address them.

In December 2009, the Commission adopted subparagraph (a)(3) to Rule 17g-5. This provision requires an NRSRO that is hired by an arranger to determine an initial credit rating for

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6 See Exchange Act Release No. 34-68286 (Nov. 26, 2012), 77 FR 71201 (Nov. 29, 2012) ("Third Extension Order").

7 17 CFR 240.17g-5(b) and (c).

8 17 CFR 240.17g-5(a).

9 15 U.S.C. 78o-7(a)(1)(B)(vi).

10 17 CFR 240.17g-1.

11 15 U.S.C. 78o-7(h).

a structured finance product to take certain steps designed to allow an NRSRO that is not hired by the arranger to nonetheless determine an initial credit rating – and subsequently monitor that credit rating – for the structured finance product.[12] In particular, under Rule 17g-5(a)(3), an NRSRO is prohibited from issuing or maintaining a credit rating when it is subject to the conflict of interest identified in paragraph (b)(9) of Rule 17g-5 (i.e., being hired by an arranger to determine a credit rating for a structured finance product)[13] unless it has taken the steps prescribed in paragraphs (a)(1) and (2) of Rule 17g-5 (discussed above) and the steps prescribed in new paragraph (a)(3) of Rule 17g-5.[14] Rule 17g-5(a)(3), among other things, requires that the NRSRO must:

- Maintain on a password-protected Internet Web site a list of each structured finance product for which it currently is in the process of determining an initial credit rating in chronological order and identifying the type of structured finance product, the name of the issuer, the date the rating process was initiated, and the Internet Web site address where the arranger represents the information provided to the hired NRSRO can be accessed by other NRSROs;
- Provide free and unlimited access to such password-protected Internet Web site during the applicable calendar year to any NRSRO that provides it with a copy of the

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12 See 17 CFR 240.17g-5(a)(3); see also Exchange Act Release No. 61050 (Nov. 23, 2009), 74 FR 63832 (Dec. 4, 2009) ("Adopting Release") at 63844-45.

13 Paragraph (b)(9) of Rule 17g-5 identifies the following conflict of interest: issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument. 17 CFR 240.17g-5(b)(9).

14 17 CFR 240.17g-5(a)(3).

certification described in paragraph (e) of Rule 17g-5 that covers that calendar year;[15] and

- Obtain from the arranger a written representation that can reasonably be relied upon that the arranger will, among other things, disclose on a password-protected Internet Web site the information it provides to the hired NRSRO to determine the initial credit rating (and monitor that credit rating) and provide access to the Web site to an NRSRO that provides it with a copy of the certification described in paragraph (e) of Rule 17g-5.[16]

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15 Paragraph (e) of Rule 17g-5 requires that an NRSRO seeking to access the hired NRSRO's Internet Web site during the applicable calendar year must furnish the Commission with the following certification: The undersigned hereby certifies that it will access the Internet Web sites described in 17 CFR 240.17g-5(a)(3) solely for the purpose of determining or monitoring credit ratings. Further, the undersigned certifies that it will keep the information it accesses pursuant to 17 CFR 240.17g-5(a)(3) confidential and treat it as material nonpublic information subject to its written policies and procedures established, maintained, and enforced pursuant to section 15E(g)(1) of the Act (15 U.S.C. 78o-7(g)(1)) and 17 CFR 240.17g-4. Further, the undersigned certifies that it will determine and maintain credit ratings for at least 10% of the issued securities and money market instruments for which it accesses information pursuant to 17 CFR 240.17g-5(a)(3)(iii), if it accesses such information for 10 or more issued securities or money market instruments in the calendar year covered by the certification. Further, the undersigned certifies one of the following as applicable: in the most recent calendar year during which it accessed information pursuant to 17 CFR 240.17g-5(a)(3), the undersigned accessed information for [Insert Number] issued securities and money market instruments through Internet Web sites described in 17 CFR 240.17g-5(a)(3) and determined and maintained credit ratings for [Insert Number] of such securities and money market instruments; or the undersigned previously has not accessed information pursuant to 17 CFR 240.17g-5(a)(3) 10 or more times during the most recently ended calendar year.

16 In particular, under paragraph (a)(3)(iii) of Rule 17g-5, the arranger must represent to the hired NRSRO that it will: maintain the information described in paragraphs (a)(3)(iii)(C) and (a)(3)(iii)(D) of Rule 17g-5 available at an identified password-protected Internet Web site that presents the information in a manner indicating which information currently should be relied on to determine or monitor the credit rating; provide access to such password-protected Internet Web site during the applicable calendar year to any NRSRO that provides it with a copy of the certification described in paragraph (e) of Rule 17g-5 that covers that calendar year, provided that such certification indicates that the nationally recognized statistical rating organization providing the certification either: determined and maintained credit ratings for at least 10% of the issued securities and money market instruments for which it accessed information pursuant to paragraph (a)(3)(iii) of Rule 17g-5 in the calendar year prior to the year covered by the certification, if it accessed such information for 10 or more issued securities or money market instruments; or has not accessed information pursuant to paragraph (a)(3) of Rule 17g-5 10 or more times during the most recently ended calendar year; post on such password-protected Internet Web site all information the arranger provides to the NRSRO, or contracts with a third party to provide to the NRSRO, for the purpose of determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument, at the same time such information is provided to the NRSRO; and post on such password-protected Internet Web site all information the

The Commission stated in the Adopting Release that subparagraph Rule 17g-5(a)(3) is designed to address conflicts of interest and improve the quality of credit ratings for structured finance products by making it possible for more NRSROs to rate structured finance products.[17] For example, the Commission noted that when an NRSRO is hired to rate a structured finance product, some of the information it relies on to determine the rating is generally not made public.[18] As a result, structured finance products frequently are issued with ratings from only the one or two NRSROs that have been hired by the arranger, with the attendant conflict of interest that creates.[19] The Commission stated that subparagraph Rule 17g-5(a)(3) was designed to increase the number of credit ratings extant for a given structured finance product and, in particular, to promote the issuance of credit ratings by NRSROs that are not hired by arrangers.[20] The Commission's goal in adopting the rule was to provide users of credit ratings with more views on the creditworthiness of structured finance products.[21] In addition, the Commission stated that Rule 17g-5(a)(3) was designed to reduce the ability of arrangers to obtain better than warranted ratings by exerting influence over NRSROs hired to determine credit ratings for structured finance products.[22] Specifically, by opening up the rating process to more NRSROs, the Commission intended to make it easier for the hired NRSRO to resist such pressure by

arranger provides to the NRSRO, or contracts with a third party to provide to the NRSRO, for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument at the same time such information is provided to the NRSRO.

17 Adopting Release at 63844.

18 Id.

19 Id.

20 Id.

21 Id.

22 Id.

increasing the likelihood that any steps taken to inappropriately favor the arranger could be exposed to the market through the credit ratings issued by other NRSROs.[23]

Rule 17g-5(a)(3) became effective on February 2, 2010, and the compliance date for Rule 17g-5(a)(3) was June 2, 2010.

III. Extension of Conditional Temporary Extension

In the Order, the Commission requested comment generally, but also on a number of specific issues.[24] The Commission received six comment letter in response to this solicitation of comment.[25] The commenters expressed concern that the extraterritorial application of Rule 17g-5(a)(3) could, in the commenter's view, among other things, disrupt local securitization markets,[26] inhibit the ability of local firms to raise capital,[27] and conflict with local laws.[28] Several commenters also requested that the conditional temporary exemption be extended or made permanent.[29] The First Extension Order again solicited public comment on issues raised in

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23 Id.

24 See Order at 28828.

25 Letter from Masamichi Kono, Vice Commissioner for International Affairs, Financial Services Agency, Japan, dated Nov. 12, 2010 ("Japan FSA Letter"); Letter from Masaru Ono, Executive Director, Securitization Forum of Japan, dated Nov. 12, 2010 ("SFJ Letter"); Letter from Rick Watson, Managing Director, Association for Financial Markets in Europe / European Securitisation Forum, dated Nov. 11, 2010 ("AFME Letter"); Letter from Jack Rando, Director, Capital Markets, Investment Industry Association of Canada, dated Sep. 22, 2010 ("IIAC Letter"); Letter from Christopher Dalton, Chief Executive Officer, Australian Securitisation Forum, dated Jun. 27, 2010 ("AuSF Letter"); Letter from Takefumi Emori, Managing Director, Japan Credit Rating Agency, Ltd. ("JCR"), dated Jun. 25, 2010 ("JCR Letter").

26 See Japan FSA Letter; SFJ Letter; AFME Letter; JCR Letter; AuSF Letter.

27 See AFME Letter; JCR Letter; AuSF Letter.

28 See Japan FSA Letter; AFME Letter; JCR Letter; AuSF Letter; IIAC Letter. With respect to local laws, we note that the European Commission in recent months has issued a relevant proposal for amendments to the European Union Regulation on Credit Ratings. See "Regulation of the European Parliament and of the Counsel on amending Regulation (EC) No 1060/2009 on credit rating agencies" (available at http://ec.europa.eu/internal_market/securities/docs/agencies/100602_proposal_en.pdf).

29 See Japan FSA Letter; SFJ Letter; AFME Letter; JCR Letter.

connection with the extra-territorial application of Rule 17g-5(a)(3).[30] One commenter requested that the Order be made permanent, citing many of the same reasons set forth in prior comment letters.[31] The Second Extension Order again solicited public comment on issues raised in connection with the extra-territorial application of Rule 17g-5(a)(3).[32] Commenters supported the exemption regarding the extra-territorial application of the Rule,[33] with one of those commenters again requesting that the Order be made permanent.[34] The Third Extension Order again solicited public comment on issues raised in connection with the extra-territorial application of Rule 17g-5(a)(3). No comments were received.

Given the continued concerns about potential disruptions of local securitization markets, and because the Commission's consideration of the issues raised will benefit from additional time to engage in further dialogue with interested parties and to monitor market and regulatory developments, the Commission believes extending the conditional temporary exemption until December 2, 2014 is necessary or appropriate in the public interest, and is consistent with the protection of investors.

IV. Request for Comment

The Commission believes that it would be useful to continue to provide interested parties opportunity to comment. Comments may be submitted by any of the following methods:

Electronic Comments

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30 See Letter from Tom Deutsch, Executive Director, American Securitization Forum, and Chris Dalton, Chief Executive Officer, Australian Securitization Forum, dated Aug. 9, 2011 ("ASF/AuSF Letter 1"); Letter from Jack Rando, Director, Capital Markets, Investment Industry Association of Canada, dated Nov. 2, 2011 ("IIAC Letter 2").

31 See ASF/AuSF Letter 1.

32 Letter from Chris Barnard to the Commission, dated Nov. 23, 2011 ("Barnard Letter"); Letter from Tom Deutsch, Executive Director, American Securitization Forum and Chris Dalton, Chief Executive Officer, Australian Securitisation Forum, dated Aug. 28, 2012 ("ASF/AuSF Letter 2").

33 See Barnard Letter; ASF/AuSF Letter 2.

34 See ASF/AuSF Letter 2.

- Use the Commission's Internet comment form (http://www.sec.gov/rules/exorders.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-04-09 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7-04-09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/exorders.shtml). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F St. NE, Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. 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.

V. Conclusion

For the foregoing reasons, the Commission believes it would be necessary or appropriate in the public interest and consistent with the protection of investors to extend the conditional temporary exemption exempting NRSROs from complying with Rule 17g-5(a)(3) with respect to rating covered transactions until December 2, 2014.

ACCORDINGLY,

IT IS HEREBY ORDERED, pursuant to Section 36 of the Exchange Act, that a nationally recognized statistical rating organization is exempt until December 2, 2014 from the requirements in Rule 17g-5(a)(3) (17 CFR 240.17g-5(a)(3)) for credit ratings where:

(1) The issuer of the security or money market instrument is not a U.S. person (as defined under Securities Act Rule 902(k)); and

(2) The nationally recognized statistical rating organization has a reasonable basis to conclude that the structured finance product will be offered and sold upon issuance, and that any arranger linked to the structured finance product will effect transactions of the structured finance product after issuance, only in transactions that occur outside the U.S.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

SECURITIES AND EXCHANGE COMMISSION

Release No. 34-70929; IA-3721; File No. 4-670

Proxy Advisory Firm Roundtable

AGENCY: Securities and Exchange Commission.

ACTION: Notice of roundtable discussion; request for comment.

SUMMARY: The Securities and Exchange Commission will host a roundtable about proxy advisory firms. The panel will be asked to discuss topics including the current state of proxy advisory firm use by investment advisers and institutional investors and potential changes that have been suggested by market participants. Panelists will also be invited to discuss any new ideas.

The roundtable discussion will be held in the multi-purpose room of the Securities and Exchange Commission headquarters at 100 F Street, NE, Washington DC on December 5, 2013 from 9:30 a.m. to approximately 1:30 p.m. The public is invited to observe the roundtable discussion. Seating will be available on a first-come, first-serve basis. The roundtable discussion will also be available via webcast on the Commission's website at www.sec.gov.

DATES: The roundtable discussion will take place on December 5, 2013. The Commission will accept comments regarding issues addressed at the roundtable until January 10, 2014.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's internet comment form (http://sec.gov/rules/other.shtml); or
- Send an email to rule-comments@sec.gov. Please include File Number x-xxx on the subject line.

Paper Comments:

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

All submissions should refer to File Number 4-670. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please only use one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/other.shtml). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. 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.

FOR FURTHER INFORMATION CONTACT: Sara Cortes, Senior Special Counsel, Division of Investment Management, at 202-551-6700, or Raymond Be, Special Counsel, Division of Corporation Finance, at 202-551-3500, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy

Secretary

Dated: November 22, 2013

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70931 / November 22, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15620

In the Matter of

Byrnee K. Baylor, Esq.

Respondent.

ORDER INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS AND IMPOSING TEMPORARY SUSPENSION PURSUANT TO RULE 102(e)(3)(i)(A) OF THE COMMISSION'S RULES OF PRACTICE

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 Rule 102(e)(3)(i)(A)[1] of the Commission's Rules of Practice against Byrnee K. Baylor, Esq. ("Respondent" or "Baylor").

II.

The Commission finds that:

1. Brynee K. Baylor, age 39, is an attorney licensed to practice law in the District of Columbia and was a partner in Baylor & Jackson PLLC, a law firm with offices in Washington, DC.

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[1] 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, temporarily suspend from appearing or practicing before it any attorney . . . who s been by name: (A)[p]ermanently enjoined by any court of competent jurisdiction, by reason his or her misconduct in an action brought by the Commission, from violating any provision of the Federal securities laws or of the rules and regulations thereunder.

2. On November 30, 2011, the Commission filed a complaint against Baylor and others in the United States District Court for the District of Columbia (the "Court") charging that Baylor (1) violated Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. Section 77e(a), 77e(c), and 77q(a); (2) violated Sections 10(b) and 15(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78j(b), 78o(a) and Rule 10b-5, 17 C.F.R. 240.10b-5, thereunder; and (3) aided and abetted violations of Sections 5(a), 5(c) and 17(a) of the Securities Act, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder. The Commission's complaint against Baylor alleged, among other claims, that she and others defrauded at least thirteen investors of approximately $2.1 million in a "prime bank scheme." The complaint also alleged that Baylor and others unlawfully offered unregistered, nonexistent securities for sale without registering as brokers or dealers, and that they used investors' funds for their own personal use.

3. On August 26, 2013, the Court entered a final judgment against Baylor, permanently enjoining her from: (1) future violations of Sections 5(a), 5(c) and 17(a) of the Securities Act; (2) future violations of Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder; and (3) aiding and abetting violations of Sections 5(a), 5(c) and 17(a) of the Securities Act, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder. Securities and Exchange Commission v. Milan Group, Inc., et al., Case 1:11-cv-02132-RMC (D.D.C.). Baylor was also ordered to pay disgorgement and prejudgment interest of $2,752,759.64 and a $746,266 civil penalty. The Court also enjoined Baylor from promoting investment programs and imposed an officer and director bar against her.

III.

Based upon the foregoing, the Commission finds that a court of competent jurisdiction has permanently enjoined Brynee K. Baylor, an attorney, from violating the Federal securities laws within the meaning of Rule 102(e)(3)(i)(A) of the Commission's Rules of Practice. In view of these findings, the Commission deems it appropriate and in the public interest that Brynee K. Baylor be temporarily suspended from appearing or practicing before the Commission.

IT IS HEREBY ORDERED that Byrnee K. Baylor be, and hereby is, temporarily suspended from appearing or practicing before the Commission as an attorney. This Order shall be effective upon service on the Respondent.

IT IS FURTHER ORDERED that Byrnee K. Baylor may within thirty days after service of this Order file a petition with the Commission to lift the temporary suspension. If the Commission within thirty days after service of the Order receives no petition, the suspension shall become permanent pursuant to Rule 102(e)(3)(ii).

If a petition is received within thirty days after service of this Order, the Commission shall, within thirty days after the filing of the petition, either lift the temporary suspension, or set the matter down for hearing at a time and place to be designated by the Commission, or both. If a hearing is ordered, following the hearing, the Commission may lift the suspension, censure the petitioner, or disqualify the petitioner from appearing or practicing before the Commission for a period of time, or permanently, pursuant to Rule 102(e)(3)(iii).

This Order shall be served upon Byrnee K. Baylor personally or by certified mail at her last known address.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

November 25, 2013

IN THE MATTER OF LIFE STEM GENETICS 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 Life Stem Genetics Inc. because of questions regarding the accuracy of assertions by the company, and by others, including in press releases to investors concerning, among other things, the company's operations.

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 securities of the above-listed company is suspended for the period from 9:30 a.m. EST, on November 25, 2013 through 11:59 p.m. EST, on December 9, 2013.

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9485 / November 25, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15621

In the Matter of **CURT KRAMER, MAZUMA CORPORATION, MAZUMA FUNDING CORPORATION, AND MAZUMA HOLDING CORPORATION,** **Respondents.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), against Curt Kramer, Mazuma Corporation, Mazuma Funding Corporation, and Mazuma Holding Corporation (together, the "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offer, the Commission finds[1] that:

1. **Curt Kramer**, a resident of Glen Head, New York, is the sole officer and registered agent of Mazuma Corporation, Mazuma Holding Corporation, and Mazuma Funding Corporation.

2. **Mazuma Corporation** is a Minnesota corporation with its principal place of business in Great Neck, New York.

3. **Mazuma Funding Corporation** is a New York corporation with its principal place of business in Great Neck, New York.

4. **Mazuma Holding Corporation** is a Texas corporation with its principal place of business in Great Neck, New York.

5. From about August 2006 through about January 2010, the Respondents purchased from Laidlaw Energy Group, Inc. ("Laidlaw") more than two billion shares of Laidlaw, representing over 80% of Laidlaw's outstanding shares, in 35 tranches, and resold these shares to the public. The Respondents claimed to rely on an exemption from registration pursuant to Rule 504 of Regulation D, 17 C.F.R. § 230.504.

6. The Respondents purchased the Laidlaw shares at a significant discount from the then-prevailing market prices. The discount made it highly likely that the Respondents could immediately re-sell the Laidlaw shares to the public for a short-term profit.

7. No registration statement was filed as to any of the shares that Laidlaw offered and sold to Respondents and which Respondents subsequently resold into the public market, and because of the integration of Respondents' purchases as set forth below, no exemption from registration was applicable to the transactions.

8. The 35 Laidlaw share transactions were separated by weeks or months with no six-month gap in Laidlaw's offering of securities to the Respondents. These transactions were, in reality, a single, integrated offering through which Laidlaw raised a total of $1,259,550, and therefore exceeded the $1 million limit under Rule 504.

9. After the Respondents met the $1 million limit under Rule 504, the Respondents continued to acquire and sell additional Laidlaw shares. The Respondents profited $126,963 from these transactions.

[1] The findings herein are made pursuant to Respondents' Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

10. From about April 2009 through about June 2010, Mazuma Holding Corporation ("Mazuma Holding") and Kramer acquired over 1 billion shares of Bederra Corporation ("Bederra") in 21 separate transactions from the principal of Bederra's transfer agent, who had misappropriated the Bederra share certificates.

11. Mazuma Holding and Kramer purchased the Bederra shares at a significant discount from the then-prevailing market prices. The discount made it highly likely that Mazuma Holding and Kramer could immediately re-sell the Bederra shares to the public for a short-term profit.

12. Mazuma Holding and Kramer resold the shares to the public for a profit of $934,404.

13. No registration statement was filed as to any of the Bederra shares offered and sold to Kramer and Mazuma Holding, and which Mazuma Holding and Kramer subsequently resold into the market, and no exemption from registration was applicable to these transactions.

14. The Respondents used the mails and other means of interstate commerce in connection with these offers and sales of Laidlaw and Bederra shares.

15. As a result of the conduct described above, Kramer, Mazuma Corporation, Mazuma Holding Corporation and Mazuma Funding Corporation violated Sections 5(a) and 5(c) of the Securities Act, which prohibit the direct or indirect sale or offer for sale of securities through the mails or interstate commerce unless a registration statement has been filed or is in effect.

Undertaking

Respondents Curt Kramer, Mazuma Corporation, Mazuma Holding Corporation, and Mazuma Funding Corporation, have undertaken to:

Forgo directly or indirectly, including, but not limited to, through any entity owned or controlled by any of the Respondents, participating in any issuance, purchase, offer, or sale of any security made pursuant to, or claiming, an exemption under Rule 504 of Regulation D, 17 C.F.R. § 230.504.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 8A of the Securities Act, Respondents cease and desist from committing or causing any violations and any future violations of Sections 5(a) and 5(c) of the Securities Act.

B. Kramer and Mazuma Holding shall, within 5 days of the entry of this Order, jointly and severally pay disgorgement of $934,404 plus prejudgment interest of $109,865 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600.

C. Kramer, Mazuma Corporation, Mazuma Holding Corporation, and Mazuma Funding Corporation shall, within 5 days of the entry of this Order, jointly and severally pay disgorgement of $126,963 plus prejudgment interest of $18,746 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600.

D. Kramer, Mazuma Corporation, Mazuma Holding Corporation, and Mazuma Funding Corporation shall, within 5 days of the entry of this Order, pay civil money penalties totaling $273,000, as follows: $13,000 (Kramer), $65,000 (Mazuma Corp.), $130,000 (Mazuma Holding) and $65,000 (Mazuma Funding) to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717.

E. The foregoing payments must be made in one of the following ways:

(1) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;[2]
(2) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(3) Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Curt Kramer, Mazuma Corporation, Mazuma Holding Corporation, and Mazuma Funding Corporation as Respondents in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Michael Paley, Assistant Regional Director,

[2] The minimum threshold for transmission of payment electronically is $50,000.00 as of April 1, 2012. This threshold will be increased to $1,000,000 by December 31, 2012. For amounts below the threshold, respondents must make payments pursuant to option (2) or (3) above.

Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, NY, 10281.

F. Respondents shall comply with the undertaking enumerated in Section III above.

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3723 / November 25, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15622

In the Matter of **PAUL ANTHONY MOZICATO,** **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 Paul Anthony Mozicato ("Mozicato" 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.

III.

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

1. From 2001 to 2010, Mozicato was employed as a registered representative of Equity Services, Inc. ("Equity Services") which is dually registered with the Commission as a broker-dealer and an investment adviser. Mozicato was employed at an Equity Services branch in East Hartford, Connecticut. Mozicato, 60, is a resident of Hartford, Connecticut.

2. On August 21, 2012, Mozicato consented to an order issued by the Connecticut Department of Banking in In the Matter of Paul Anthony Mozicato., No. CO-12-8026-S, permanently barring Mozicato from the securities and investment adviser business in Connecticut.

3. The order alleged Mozicato procured $15,000 from an elderly Connecticut resident for the purported purpose of investing her monies in a higher yielding investment for which she was not suitable; failed to record the investor's name or information about the transaction in Equity Services' books and records; and rather than investing the investor's monies as represented, Mozicato converted such sums to his own use. The order stated that Equity Services had repaid the investor and Mozicato had reimbursed Equity Services. The order also stated that Mozicato acknowledged that he willfully violated Sections 36b-4(a) and 36b-4(b) of the Connecticut Uniform Securities Act.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Mozicato be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

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 or any state securities commission (or any agency or officer performing like functions), whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
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. 70939 / November 25, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15624

In the Matter of JOHN B. GUYETTE, 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 John B. Guyette ("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.

III.

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

1. Guyette, age 73, resides in Greeley, Colorado. During the relevant period (at least January 2006 to November 2009), he was also a registered representative associated with Community Bankers Securities, LLC, a subsidiary of AIC, Inc., and a broker-dealer registered with the Commission. During the relevant period, he held Series 7, 24, 27, and 63 securities licenses.

2. On September 10, 2013, a final judgment was entered by consent against Guyette, permanently enjoining him 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, in the civil action entitled Securities and Exchange Commission v. AIC, Inc. et al., Civil Action Number 3:11-cv-00176, in the United States District Court for the Eastern District of Tennessee.

3. The Commission's complaint (including as amended, and referred to together as the "complaint") alleged, among other things, that in connection with the sale of AIC preferred stock and promissory notes, Guyette knew or was reckless in not knowing that he misrepresented and omitted material information concerning the AIC preferred stock and promissory notes. Among other things, and as alleged in the complaint, Guyette failed to disclose to investors the material risks associated with their AIC investments, he never discussed the speculative nature of the investments or the likelihood of loss on the investments, and he misled investors by telling them that AIC investments were safe and that AIC was well-financed and financially secure—all without any reasonable basis. The complaint also alleged that Guyette sold unregistered securities.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Guyette be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent; and barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70938 / November 25, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3724 / November 25, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15623

In the Matter of JOHN R. GRAVES, Respondent.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND 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 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against John R. Graves ("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 and Section 203(f) of the Investment Advisers Act of 1940, 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. Graves, age 54, resides in Oakdale, Louisiana. From approximately August 2009 to December 2009 ("relevant period"), Graves was the Vice President of Business Development at AIC, Inc. ("AIC"), a privately-held holding company based in Richmond, Virginia. During the relevant period, he was also a registered representative associated with Community Bankers Securities, LLC, an AIC subsidiary and broker-dealer registered with the Commission. During the relevant period, he held Series 4, 6, 7, 24, 26, 53, and 65 securities licenses. In addition, he was the President of Compass Financial Advisors, LLC, an investment advisory firm registered with the Commission.

2. On September 9, 2013, a final judgment was entered by consent against Graves, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act 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. AIC, Inc. et al., Civil Action Number 3:11-cv-00176, in the United States District Court for the Eastern District of Tennessee.

3. The Commission's complaint (including as amended, and referred to together as the "complaint") alleged, among other things, that in connection with the sale of AIC preferred stock and promissory notes, Graves knew or was reckless in not knowing that he misrepresented and omitted material information concerning the safety and risks associated with the investments and the financial condition of AIC to investors, including his brokerage customers and investment advisory clients. Among other things, and as alleged in the complaint, Graves failed to disclose that he had a personal financial interest in AIC and, despite the fact that he believed AIC was a speculative investment, did not disclose that fact to investors. The complaint also alleged that Graves sold unregistered securities.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act that Respondent Graves be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent; and barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in

activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Rel. No. 9486 / November 25, 2013

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 70942 / November 25, 2013

Admin. Proc. File No. 3-14266

In the Matter of

JOHNNY CLIFTON
11680 Stephenville Drive
Frisco, TX 75035

ORDER DENYING MOTIONS FOR RECONSIDERATION, THE INTRODUCTION OF NEW EVIDENCE, AND A NEW HEARING

On July 12, 2013, we issued an opinion ("the July 12 Opinion") and order finding that from 2009 to 2010 Johnny Clifton, president, chief executive officer, and principal of MPG Financial, LLC, a former Commission-registered broker-dealer, violated Section 17(a) of the Securities Act of 1933[1] by making and causing to be made material misrepresentations and omissions in the offer and sale of oil-and-gas limited partnership interests.[2] We also found that Clifton violated Section 15(b) of the Securities Exchange Act of 1934[3] by failing to supervise a sales representative with a view to detecting and preventing the sales representative's Securities Act Section 17(a) violations.[4] For these violations, we found it to be in the public interest to bar Clifton from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, to order him to cease and desist from violating Securities Act Section 17(a), and to assess a $150,000 civil money penalty.

Clifton thereafter timely moved for reconsideration of the July 12 Opinion. By order dated October 9, 2013 ("the October 9 Order"), we denied the motion, finding, among other things, that Clifton failed to show any manifest error of fact or law warranting our reconsideration of the

1 15 U.S.C. § 77q(a).

2 *Johnny Clifton*, Securities Act Rel. No. 9417, 2013 WL 3487076, at *1 (July 12, 2013).

3 15 U.S.C. § 78o(b).

4 *Clifton*, 2013 WL 3487076, at *1.

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issues resolved in the July 12 Opinion.[5] On October 29, 2013, Clifton filed a second motion for reconsideration of the July 12 Opinion, supported by motions for the introduction of new evidence and a new hearing (collectively, "the October 29 Motions").

Our Rule of Practice 470 provides that a motion for reconsideration "shall be filed within ten days after service of the order complained of."[6] Clifton already filed such a motion and received a decision on that motion on October 9, 2013. Our rules of practice do not provide for a second motion to reconsider the same decision. Moreover, the second reconsideration motion is untimely because it was brought more than three months after the July 12 Opinion.[7]

Clifton argues that reconsideration is nonetheless warranted based on "newly discovered evidence" consisting of handwritten notes of former MPG Financial sales representatives and a disclaimer that Clifton purportedly read to investors during a December 23, 2009 conference call. He also complains, for the first time, that the Commission failed to consider as mitigating factors that he suffered job and holiday-related stress.

Under Rule 470, we will accept only such additional evidence that "the movant could not have known about or adduced before entry of the order subject to the motion for reconsideration."[8] Clifton's October 29 Motions do not meet this standard. They fail to explain why the handwritten notes or the disclaimer could not have been discovered before the Commission issued the July 12 Opinion; indeed, it appears that with reasonable diligence this evidence could have been produced at the hearing before the administrative law judge. Nor do they explain Clifton's failure to raise his argument about job and holiday-related stress in his prior briefs to the Commission.[9]

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5 *Johnny Clifton*, Corrected Order Denying Motions for Reconsideration and a Stay, Securities Act Rel. No. 9465, 2013 WL 5553865 (Oct. 9, 2013).

6 17 C.F.R. § 201.470(b).

7 *See Institutional Networks Corp. and National Association of Securities Dealers, Inc.*, Order Denying Second Request for Reconsideration, Securities Exchange Act Rel. No. 21832, 1985 WL 545574, at *1 n.10 (Mar. 8, 1985) (considering a second motion for reconsideration to be untimely; "[t]o treat [the motion] otherwise would be to allow repeated attacks on the finality of the Commission decisions in contravention of the purposes of administrative economy"). Even if the Commission were to construe Clifton's motion as seeking reconsideration of the October 9 Order, rather than the July 12 Opinion, the motion would still be untimely because it was brought outside the ten-day period set forth in Rule 470(b). *See* 17 C.F.R. § 201.470(b).

8 *Johnny Clifton*, 2013 WL 5553865, at *1 & n.11.

9 *See Richard G. Cody*, Order Denying Motion for Reconsideration, Exchange Act Rel. No. 65235, 2011 WL 3840536, at *2 n.8 (Aug. 31, 2011) (reiterating that "reconsideration is properly denied when respondents cite arguments and authority in a motion for reconsideration that could have been, but were not, developed in the original briefs").

Accordingly, for the reasons stated here and in the October 9 Order, IT IS ORDERED that the motions for reconsideration, the introduction of new evidence, and a new hearing filed by Johnny Clifton be, and they hereby are, DENIED.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Lynn M. Powalski
Deputy Secretary

Commissioner Aguilar
Commissioner Piwowar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70944 / November 26, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3726 / November 26, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30810 / November 26, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15626

In the Matter of

PARALLAX INVESTMENTS, LLC, JOHN P. BOTT, II, AND F. ROBERT FALKENBERG,

Respondents.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 15(b)(6) OF THE SECURITIES EXCHANGE ACT OF 1934, SECTIONS 203(e), 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940 AND NOTICE OF HEARING

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 Section 15(b)(6) of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Parallax Investments, LLC ("Parallax"), John P. Bott, II ("Bott"), and F. Robert Falkenberg ("Falkenberg"), (collectively, "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. <u>SUMMARY</u>

1. Parallax, an investment adviser registered with the Commission from March 2010 to ovember 2012, willfully violated antifraud, custody and compliance provisions of the Advisers

Act and the rules thereunder. From at least 2009 through 2011 ("relevant period"), Parallax: engaged in thousands of securities transactions with advisory clients on a principal basis through an affiliated broker-dealer, without providing prior written disclosure to, or obtaining consent from, the clients; failed timely to provide pooled investment vehicle investors with audited financial statements as required by the Advisers Act custody rule; failed to adopt, implement, and annually review written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder; and failed to establish, maintain, and enforce a written code of ethics that met applicable regulatory requirements.

2. Bott and Falkenberg willfully aided and abetted and caused Parallax's violations. During the relevant period, Bott was Parallax's sole owner and manager, and Falkenberg was Parallax's chief compliance officer ("CCO").

B. RESPONDENTS

3. **Parallax** is a Texas limited liability company based in Houston, Texas. Parallax was created in 1998 and became a Commission-registered investment adviser on March 9, 2010. Effective November 26, 2012, it terminated its Commission registration. As of December 2012, it managed 370 accounts on a discretionary basis and had approximately $81 million in assets under management.

4. **Bott**, age 61, resides in Houston, Texas. Bott is the sole owner and manager of Parallax, an investment adviser that was registered with the Commission from March 9, 2010 to November 26, 2012. He is also an officer and 40% owner of Mutual Money Investments, Inc. d/b/a Tri-Star Financial ("TSF"), an affiliated broker-dealer registered with the Commission.

5. **Falkenberg**, age 51, resides in Allen, Texas. He was a broker-dealer and investment adviser examiner for the State of California Department of Corporations for 13 years before joining FINRA in 2003. Upon his departure from FINRA in 2008, Falkenberg formed a compliance consulting firm, Falkenberg Ventures Corporation d/b/a Solid Rock Consulting ("SRC"); he is SRC's sole owner and employee. He later became CCO of Parallax (January 2010 to September 2011) and TSF (October 2010 to April 2013).

C. OTHER RELEVANT ENTITY

6. **TSF** is a Texas corporation based in Houston, Texas. TSF has been a Commission-registered broker-dealer since 1993 and is jointly owned by Bott and two other individuals.

D. FACTS

Background

7. Parallax provides discretionary investment advisory services to individuals and entities, including a private fund, Parallax Capital Partners, LP ("PCP"). Parallax's investment strategy focused almost exclusively on fixed income securities, such as mortgage-backed bonds.

To execute this strategy, Parallax relied on TSF, its affiliated broker-dealer, for fixed income analysis and trade execution.

8. Bott makes investment recommendations to Parallax clients and, upon the clients' consent, TSF executes the transactions. During the relevant period, TSF used its inventory account to purchase mortgage-backed bonds for Parallax advisory clients and then transferred the bonds to the applicable client account. TSF charged the advisory clients a sales credit for the trades, which was essentially a percentage mark-up (or mark-down). Bott, a registered representative of TSF for the trades, received 55% of the sales credit generated by each trade.

9. In January 2010, Bott hired Falkenberg, to become Parallax's CCO. Falkenberg had little if any practical experience with the regulatory requirements applicable to Commission-registered investment advisers when he joined Parallax.

10. Bott has overall responsibility for ensuring that Parallax complies with its regulatory requirements, including Advisers Act requirements. Bott assigned to Falkenberg, as CCO, the responsibility for establishing and administering Parallax's compliance program under Bott's direction. Falkenberg, however, devoted approximately nine hours per month to Parallax's compliance program. He did not maintain a permanent office at Parallax and delegated daily compliance tasks to other employees in his absence. Falkenberg served as Parallax's CCO during the relevant period.

Parallax Engaged in Thousands of Principal Transactions without Making Required Disclosures and Obtaining Client Consent

11. From at least January 2009 through November 2011, Parallax, through TSF, engaged in at least 2,000 principal transactions with its advisory clients ("Parallax Principal Transactions") without providing prior written disclosure to clients that it would effect the trades on a principal basis, or obtaining consent from clients.

12. TSF collected approximately $1.9 million in gross sales credits from the Parallax Principal Transactions. TSF paid approximately $1 million to Bott for the Parallax Principal Transactions while retaining the rest. None of the gross sales credits was paid to Parallax.

13. Bott initiated and executed the Parallax Principal Transactions. He knew that Parallax did not provide written disclosures to, or obtain consent from, Parallax clients before completing the Parallax Principal Transactions. A compliance manual purchased by Parallax in 2009 contained a chapter on principal transactions that described the policies and procedures for such transactions under Section 206(3) of the Advisers Act. However, Bott failed to read the manual before an SEC examination in April 2011.

Parallax Failed to Comply with the Custody Rule

14. Parallax serves as the adviser to PCP, a private fund with approximately $8.7 million in total assets as of December 31, 2012.[1] PCP's portfolio substantially consists of fixed income products that are generally thinly traded and hard to value, such as inverse floating securities.

15. As a registered investment adviser, Parallax was required to comply with the custody rule as set forth in Rule 206(4)-2 of the Advisers Act. During the relevant period, the custody rule required that an adviser to a private fund must either obtain an annual surprise exam or distribute annual audited financial statements to its investors. In lieu of a surprise annual examination, Parallax elected to distribute GAAP-compliant financial statements audited by a PCAOB-registered auditor to each of PCP's limited partners within 120 days of the fund's fiscal year end. Because PCP's fiscal year end is December 31, Parallax was required to distribute audited 2010 financial statements to PCP's limited partners no later than April 30, 2011.

16. Parallax failed to distribute the 2010 PCP audited financial statements by the April 30, 2011 deadline. Instead, Parallax distributed the 2010 financial statements in early June 2011, more than a month after they were due. PCP's auditor did not begin the 2010 Parallax audit until April 27, 2011. Even though Falkenberg knew about the 120-day deadline by at least February or March 2011, he failed to take any steps to ensure that Parallax met the deadline.

17. Parallax's 2010 financial statement audit was not performed by a PCAOB-registered auditor. Falkenberg knew about the private fund auditor requirements as early as the third quarter of 2010, but he took no steps to ensure that PCP's auditor was PCAOB-registered. By mid-April 2011, Falkenberg discovered that PCP's current auditor was not PCAOB-registered. Falkenberg alerted Bott to the problem, but they decided to go ahead and use the current auditor for the 2010 audit even though they knew the auditor was not PCAOB-registered.

18. Parallax's 2010 financial statements contained fair value disclosures that did not conform with GAAP. As PCP's auditor completed his audit of PCP in late May 2011, he circulated a draft of the financial statements for Parallax's review. Both Bott and Falkenberg reviewed the financial statements and noted that the mortgage-backed securities, which comprised 94% of the fund's value, were categorized as Level One securities under ASC 820 – Fair Value Measurements and Disclosures. A Level One designation indicates that there are quoted prices in active markets for identical assets. Falkenberg told Bott that he believed a Level Two designation (which indicates that quoted prices in active markets do not exist for the identical asset, but the asset's fair value can be calculated directly or indirectly based on observable market inputs) was more appropriate given the difficulty in valuing the securities. Neither Bott nor Falkenberg discussed the valuation issue with the auditor. Instead, Bott ordered that the financial statements – with the Level One designation – be sent to PCP investors.

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[1] Parallax Capital, LP is the general partner of PCP. Parallax, in turn, serves as the general partner of Parallax Capital, LP.

19. In August 2011, following an SEC examination, Parallax hired a PCAOB-registered auditor to re-issue PCP's 2010 audited financial statements. Although this auditor did not make any adjustments to the financial statement values, it categorized the fund's mortgage-backed securities as Level Two securities. The auditor issued its audit report for the 2010 PCP financial statements on October 25, 2011, and it was subsequently distributed to PCP investors.

Parallax Failed to Adopt and Implement Written Compliance Policies and Procedures and a Written Code of Ethics

20. For nearly two years after registering with the Commission, Parallax failed to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act. Parallax also failed to perform an annual review of the adequacy of such policies and procedures and the effectiveness of their implementation. Finally, Parallax failed to establish, maintain and enforce a written code of ethics that meets the minimum standards set out in Advisers Act Rule 204A-1. Parallax did not adopt and implement policies and procedures and a code of ethics until December 2011.

21. Following a 2009 Texas State Securities Board ("TSSB") examination of Parallax, the TSSB issued a deficiency letter to Bott citing, among other things, Parallax's failure to establish and maintain written supervisory procedures. In response, Bott approved the purchase of an "off the shelf" compliance manual that was not tailored to Parallax's business (the "2009 Manual"). Bott knew that the 2009 Manual was not tailored to Parallax's business when he hired Falkenberg in January 2010. After Falkenberg became Parallax's CCO, he reviewed the 2009 Manual and concluded that it needed updating.

22. Falkenberg prepared periodic compliance memos addressed to Bott to highlight the "progress and status of compliance efforts" at Parallax. Falkenberg prepared a total of three memos that covered the first and second quarters of 2010 and the full year of 2010.

23. Falkenberg's compliance memos to Bott were brief, consisting of two to three pages. Falkenberg stated in each of them that the 2009 Manual needed to be revised and tailored to the business. Falkenberg's first compliance memo dated April 2010 and emailed to Bott noted explicitly that the 2009 Manual needed "to be updated and made effective." Bott occasionally asked Falkenberg about the status of the compliance manual update and Falkenberg consistently told him that he was working on it. Falkenberg, however, never tailored the 2009 Manual to Parallax's business.

24. Parallax failed to conduct an annual review of its policies and procedures. In late March 2011, Falkenberg received a document request from Commission examination staff in advance of their planned April 2011 examination of Parallax. One of the items requested was documentation for any annual or interim reviews of Parallax's policies and procedures. In response, Falkenberg told exam staff that he performed the 2010 annual review in February 2011 and documented that review in an annual compliance memo. Falkenberg's undated 2010 annual compliance memo states in relevant part:

> Rule 206(4)-7 requires that any Advisor registered with the Commission perform at least an annual review of our compliance

> procedures. We are also required to record and report any violations of our firm's Code of Ethics under Rule 204A-1 ("Material Compliance Matters"). **This memo documents that I have performed that review and reported significant compliance events and Material Compliance Matters.** [emphasis added]

25. The meta data for Falkenberg's 2010 annual compliance memo indicates that Falkenberg created and completed the memo in approximately four hours on Friday, April 8, 2011, not February 2011. Falkenberg drafted the memo after exam staff had notified Parallax of its impending exam and just three days before exam staff was scheduled to begin field work. In addition, the memo is undated and contains no reference to when the annual review was supposedly performed. Falkenberg never emailed the 2010 annual compliance memo to Bott.

26. Parallax failed to establish, maintain, and enforce a written code of ethics. While Parallax's 2009 Manual contained a section titled "Code of Ethics," the ethics policy was never established, maintained or enforced. In addition, Parallax failed to (a) identify and designate all access persons, (b) obtain written acknowledgments from all access persons, and (c) require all access persons to report their securities transactions and holdings as required by Advisers Act Rule 204A-1.

E. VIOLATIONS

27. As a result of the conduct described above, Parallax willfully violated Section 206(3) of the Advisers Act, which prohibits an investment adviser from executing securities transactions with a client on a principal basis without disclosing to such client in writing, before the completion of such transaction, the capacity in which it is acting and obtaining the consent of the client to such transaction.

28. As a result of the conduct described above, Bott willfully aided and abetted and caused Parallax's violations of Section 206(3) of the Advisers Act.

29. As a result of the conduct described above, Parallax willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-2 thereunder, which requires an investment adviser with custody of client funds or securities to adequately safeguard those assets by implementing specific procedures.

30. As a result of the conduct described above, Bott and Falkenberg willfully aided and abetted and caused Parallax's violations of Section 206(4) of the Advisers Act and Rule 206(4)-2 thereunder.

31. As a result of the conduct described above, Parallax willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, which require that an investment adviser adopt and implement written policies and procedures reasonably designed to prevent violation of the Advisers Act and the rules thereunder.

32. As a result of the conduct described above, Bott and Falkenberg willfully aided and abetted and caused Parallax's violations of Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

33. As a result of the conduct described above, Parallax willfully violated Section 204A of the Advisers Act and Rule 204A-1 thereunder, which require that an investment adviser establish, maintain and enforce a written code of ethics.

34. As a result of the conduct described above, Bott and Falkenberg willfully aided and abetted and caused Parallax's violations of Section 204A of the Advisers Act and Rule 204A-1 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 and cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof 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 Bott and Falkenberg pursuant to Section 15(b) of the Exchange Act including, but not limited to, disgorgement and civil penalties pursuant to Section 21B of the Exchange Act;

C. What, if any, remedial action is appropriate in the public interest against Parallax pursuant to Section 203(e) of the Advisers Act including, but not limited to, disgorgement and civil penalties pursuant to Section 203 of the Advisers Act;

D. What, if any, remedial action is appropriate in the public interest against Bott and Falkenberg pursuant to Section 203(f) of the Advisers Act including, but not limited to, disgorgement and civil penalties pursuant to Section 203 of the Advisers Act;

E. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Section 9(b) of the Investment Company Act including, but not limited to, disgorgement and civil penalties pursuant to Section 9 of the Investment Company Act; and

F. 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(3), 206(4) and 204A of the Advisers Act and Rules 206(4)-2, 206(4)-7, and 204A-1 thereunder, whether Respondents should be ordered to pay a civil penalty pursuant to Section 203(i) of the Advisers Act, and whether Respondents should be ordered to pay disgorgement pursuant to Section 203 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.

Elizabeth M. Murphy
Secretary

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

Commissioner Aguilar
Commissioner Gallagher
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3725 / November 26, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30809 / November 26, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15625

In the Matter of AMBASSADOR CAPITAL MANAGEMENT, LLC and DEREK H. OGLESBY, 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 9(b) AND 9(f) OF THE INVESTMENT COMPANY ACT OF 1940

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 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against Ambassador Capital Management, LLC and Derek H. Oglesby (collectively "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

1. This case involves misconduct and compliance failures in the operation of Ambassador Money Market Fund (AMMF), a money market fund series offered by Ambassador Funds (Ambassador Funds) and managed by Ambassador Capital Management (ACM). ACM and Derek Oglesby, the portfolio manager principally responsible for AMMF, violated the federal securities laws by repeatedly making false statements to AMMF's Board of Trustees regarding the level of risk in AMMF's portfolio, including statements regarding maturity restrictions, exposure to European issuers, and diversification.

2. In addition, ACM and Oglesby caused AMMF's failure to comply with Rule 2a-7 of the Investment Company Act of 1940, which limits the amount of risk that money market fund portfolios can have. Specifically, ACM and Oglesby caused AMMF's failure to comply with Rule 2a-7's risk limitations by purchasing securities posing more than a "minimal credit risk" under ACM's own guidelines, as well as securities which violated Rule 2a-7's conditions on issuer diversification, and by failing to subject AMMF's portfolio to appropriate stress testing. As a result, AMMF was not authorized to use the amortized cost method of valuing securities (under which it priced its securities at $1 a share) and hold itself out as a money market fund under the Investment Company Act.

3. Finally, ACM caused Ambassador Funds' failure to implement adequate written compliance policies under Rule 38a-1 of the Investment Company Act. ACM failed to follow Ambassador Funds' compliance procedures regarding the minimal credit risk determination for securities purchased for AMMF's portfolio. Accordingly, ACM caused Ambassador Funds to violate Rule 38a-1.

A. Respondents

4. Ambassador Capital Management, LLC is a Michigan limited liability company with its principal place of business in Detroit, Michigan. ACM has been registered with the Commission as an investment adviser since 1998. ACM's advisory clients include governmental entities, pension and profit sharing plans and charities. According to its latest Form ADV, ACM has approximately $1.1 billion in assets under management in 25 accounts. ACM generates income for its clients primarily by investing in fixed-income securities.

5. Derek H. Oglesby, age 36, is a resident of Bloomfield Hills, Michigan. He is a portfolio manager at ACM and a chartered financial analyst. Oglesby was responsible for managing AMMF's portfolio and its day-to-day operations from 2009 until its liquidation in June 2012. Oglesby currently works as Director of Quantitative Research at ACM and is responsible for managing the shorter-term and longer-term portfolios for ACM.

B. Other Relevant Entities

6. Ambassador Money Market Fund (AMMF or "the Fund") was Ambassador Funds' prime money market fund series which operated from 2000 until its liquidation in June 2012.

7. Ambassador Funds is a Delaware business trust with its principal place of business in Detroit, Michigan. Ambassador Funds is an open-end diversified management investment company registered with the Commission since 2000.

C. **The Commission's 2011 Compliance Examination**

8. As of October 2011, AMMF consistently had generated a return which significantly exceeded that for the prime money market funds in its peer group. In addition, AMMF also owned securities issued by Dexia, SA, a French-Belgian bank, after it was taken into receivership by France, Luxembourg and Belgium on October 10, 2011. Further, AMMF held the asset backed commercial paper of a troubled German bank and two Italian issuers.

9. Given these concerns, in November 2011, the Commission conducted a compliance examination of AMMF. During that examination, the *Wall Street Journal* reported that Moody's issued negative ratings actions on 12 German banks, two of which sponsored asset-backed commercial paper held by AMMF. However, ACM's chief investment officer was unaware of these downgrades.

10. ACM also provided the Commission's compliance examiners with compliance policies and procedures which did not address recent amendments to Rule 2a-7.

D. **ACM's Operation of AMMF**

11. ACM has been the investment adviser to Ambassador Funds since 2000. AMMF was Ambassador Funds' money market fund from 2000 until its liquidation on June 30, 2012. Between January 1, 2009 and June 30, 2012, Ambassador Funds made numerous filings with the Commission, on behalf of AMMF, which identified AMMF as a money market fund.

12. AMMF's total net assets fluctuated significantly during the last several years of its operations. Between 2010 and 2012, the total dollar value of AMMF ranged from a low of $130.9 million to a high of $388 million.

13. Ambassador Funds paid ACM a management fee of .2% based on the average net daily assets of the Fund. ACM agreed to waive the Fund's expenses, to the extent required, so that the Fund's 1-day yield did not fall below .02%.

14. AMMF was designed to appeal to Michigan municipalities. In compliance with Michigan law, AMMF was permitted to invest in, among other things, U.S. Treasury instruments, certificates of deposit and asset-backed commercial paper.

15. AMMF generally invested in asset-backed commercial paper. However, after the financial crisis of 2008, the supply of asset-backed commercial paper decreased, which limited the number of investment options available to AMMF. As a result, AMMF's portfolio generally consisted of between 15-25 different holdings.

16. From time to time, more than half of the shareholders' investments in AMMF came from just two municipalities, the City of Detroit and Washtenaw County, Michigan. These municipalities invested in AMMF in order to manage cash in connection with municipal bond fferings and general operations, and in pursuit of liquidity and security.

E. AMMF's Board

17. From August 2010 until June 2012, the Board of Trustees of Ambassador Funds included four independent Trustees, who previously served on the board of a related fund.

18. When AMMF was organized in 2000, the Board delegated responsibility for the day-to-day operations of AMMF to ACM. This delegation expressly included the determination of "minimal credit risk" for all portfolio securities, a condition of compliance with Rule 2a-7.

19. The Board required ACM to use its own criteria to make the determination of minimal credit risk. AMMF also directed ACM to "prepare, maintain and preserve a written record of its determination regarding an investment's minimal credit risks."

20. ACM created and maintained a list of securities issues that had been approved after their purchase by the Fund (the "approved list"). The Board ratified the approved list on a quarterly basis. The "approved list" contained very limited information, such as the issuer name, support institution name, NRSRO rating, dealers and industry category for each issuer on the list. The approved list did not include any summary of ACM's credit analyses.

21. In addition, AMMF's Board required that representatives of ACM appear at Board meetings and make representations regarding the minimal credit risk of issuers on the approved list. However, in practice ACM merely offered boilerplate representations regarding the short-term credit rating of the securities purchased.

F. ACM Deceived the AMMF Board

22. ACM repeatedly and knowingly deceived the Board about risks in the AMMF portfolio by withholding important information from the Board regarding the credit risk of portfolio securities, and by making false and misleading statements to the Board regarding AMMF's exposure to asset-backed commercial paper potentially affected by the Eurozone Crisis in 2011 and the diversification of AMMF's portfolio.

1. ACM Withheld Information Regarding the Credit Risk of Portfolio Securities

23. Between June 2009 and May 2012, ACM repeatedly withheld important information from the AMMF Board regarding the determination of "minimal credit risk" in two different ways. First, ACM exceeded its own maturity restrictions for securities held in AMMF's portfolio. Second, ACM purchased securities for AMMF without making a determination that the security posed a "minimal credit risk."

a. ACM Exceeded Its Own Maturity Restrictions for Portfolio Securities

24. In an attempt to limit risk exposure in the Fund, ACM often imposed an internal restriction on the holding period for a security. Since AMMF generally held its securities until

maturity, the holding period is known as a maturity restriction. ACM failed to disclose to the Board that it regularly exceeded these internal maturity restrictions on portfolio securities.

25. For example, in 2009 AMMF held asset-backed commercial paper issued by White Point Funding, Inc. ("White Point"). In a credit research report dated June 2009 and signed by Oglesby, ACM concluded that:

> White Point Funding, Inc. is structured with some risk factors due to its lack of diversification and the current credit crisis taking place globally. The portfolio is comprised of 100% credit cards and *should only be purchased between 1-3 days to avoid long-term risk exposure*. This credit represents risk. (emphasis added)

ACM provided this report to AMMF's auditors in August 2009.

26. Despite concluding that AMMF should purchase White Point with a one to three day maturity range, ACM bought White Point on 14 different occasions during 2009 with maturities ranging anywhere between 7 and 85 days. Between June 2009 and July 2010, ACM purchased White Point on at least 5 occasions with a maturity period exceeding 30 days.

27. ACM never disclosed to AMMF's Board that the Fund was violating its own maturity restriction regarding White Point, or that ACM had determined that White Point "represents risk."

28. In 2010, ACM created its own rating for issuers of securities, using a scale of "A," "B" and "C." These ratings corresponded with maturity periods for the Fund's portfolio securities, and represented ACM's own assessment of an appropriate holding period for each security. In an October 2011 response to a Standard & Poor's (S&P) inquiry regarding AMMF, Oglesby explained the ratings as follows:

> Tier 1(A) = no maturity restriction
> Tier 1(B) = 30 day maturity restriction
> Tier 1(C) = 7 day maturity restriction

29. From 2010 until May 2012, AMMF purchased numerous securities that it had assigned a "C" rating, with a purported 7 day maturity restriction. On dozens of occasions, AMMF purchased C-rated securities and held them for more than 7 days. Indeed, AMMF often held C-rated securities for more than a month at a time. These securities were often among the highest yielding securities in AMMF's portfolio.

30. Oglesby reported regularly to the Board regarding the Fund's portfolio during the time period AMMF had maturity restrictions in place. However, Oglesby did not inform the Board that ACM often exceeded its own maturity restrictions for C-rated securities.

b. ACM Purchased Securities for AMMF Without Making a Minimal Credit Risk Determination

31. ACM also failed to disclose to the Board that it repeatedly purchased portfolio securities without making a determination that the securities posed a minimal credit risk. To comply with Rule 2a-7(c)(11)(iii) of the Investment Company Act, a money market fund must make a written record of its analysis and determination that a portfolio security presents minimal credit risk, and retain the written record for at least three years. Likewise, ACM's own Rule 2a-7 guidelines and procedures required ACM to make a written record of its minimal credit risk determinations.

32. Despite the condition of Rule 2a-7(c)(11)(iii) and ACM's own requirement, ACM's credit analyses for portfolio securities often omitted any finding that the security represented minimal credit risk. Throughout 2009 and 2010, many ACM credit analyses concluded that a security presented "risk," "some risk" or "moderate risk."

33. In 2009, ACM determined that more than 50 securities held in AMMF's portfolio posed "moderate," "slightly moderate" or "some" risk, or otherwise indicated no conclusion regarding risk at all. In 2010 and 2011, ACM purchased asset-backed commercial paper for AMMF from more than 15 issuers without making a determination that the securities posed a minimal credit risk. Generally, the portfolio securities that ACM determined had more than a minimal credit risk also had significantly higher credit spreads and thus yield than the securities for which ACM concluded there was a minimal credit risk.

2. *ACM misled AMMF's Board about the Fund's Eurozone holdings*

34. On two occasions, Oglesby made false and misleading statements to the Board regarding AMMF's exposure to institutions located in financially-troubled European countries. By mid-2011, many investors became concerned that certain European countries (particularly Portugal, Italy, Greece and Spain) would be unable to repay their debts. This same concern also extended to financial institutions based in the economically-troubled countries of Europe.

35. During this sovereign debt crisis, U.S.-based money market funds experienced substantial redemptions, with some funds experiencing redemptions of 20% or more of their assets in the summer of 2011. At least twice in 2011, Oglesby assured AMMF's Board that ACM was making efforts to limit the Fund's exposure to European issuers in financially-troubled European countries.

36. During an August 8, 2011 Board meeting, Oglesby reviewed the performance of AMMF and discussed the impact of the Eurozone credit crisis. According to the draft Board minutes, Oglesby explained that:

> The last year has been very tough. Liquidity is better, but as a result, rates are lower, and we have record low interest rates. The short term markets have been hard, and Europe has played a huge roll (sic) in that risk assessment. They [ACM] are trying to stay away from Greece, Spain, Italy and other countries doing poorly in the credit area. Finding

gains on the approved list is a challenge. Positioning is being done on long term and short term. They [ACM] are forced to buy European paper, but are picking the better countries: England and Germany.

37. At the next Board meeting on November 14, 2011, Oglesby stated that AMMF:

> [had] limited exposure to European markets, including that the [AMMF] has no assets issued in the Greek marketplace and had minimal second-hand exposure to the Italian market (and that the asset in question would be off the books of [AMMF] as of mid-November, after which time [AMMF] would have no exposure to the Italian market).

38. These reports were misleading. In fact, ACM purchased Italian-affiliated asset-backed commercial paper for AMMF throughout 2011, and held $22.5 million in Italian-affiliated asset-backed commercial paper on August 8, 2011. This investment represented 9% of AMMF's portfolio. And between August 9 and November 13, 2011, ACM made more than 100 purchases of asset-backed commercial paper issued by affiliates of Italian banks and ENI, a utility closely connected to the Italian government.

39. At the time of the November 14, 2011 Board meeting, AMMF's holdings in ENI (the "asset in question") were due to mature on November 16th and 18th. However, ACM continued to purchase ENI-sponsored asset-backed commercial paper after the holdings matured. Between December 1, 2011 and May 9, 2012, ACM purchased ENI-sponsored asset-backed commercial paper more than 25 times. Neither ACM nor Oglesby ever informed the Board that the Fund continued to purchase Italian-sponsored asset-backed commercial paper.

3. ACM Misled AMMF's Board Regarding Issuer Diversification in AMMF

40. In November 2011, ACM also deceived the Board regarding the concentration of issuers within its portfolio. AMMF often held securities purchased from a small number of issuers. Frequently, the securities of a single issuer represented more than 5% of the Fund's portfolio.

41. This usually occurred as a result of redemptions from the Fund, which reduced the total assets of the Fund and increased the percentage of individual holdings.[1] Such "passive breaches" of the issuer diversification limit expose a money market fund to an additional level of risk.

42. On September 30, 2011, the City of Detroit redeemed $25 million from AMMF, so that the City could meet payroll obligations. The size of the City of Detroit's redemption caused a significant decline in AMMF's net assets, which in turn caused the Fund to exceed the 5% limit as to the issuers of three securities which ACM purchased just before the redemption.

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[1] Rule 2a-7(c)(4)(i)(A) prohibits a money market fund from having more than 5% of its total assets invested in the securities of any one issuer, as measured at the time of purchase.

43. At AMMF's November 14, 2011 Board meeting, ACM provided false and misleading information regarding the diversification of issuers in the Fund's portfolio. According to the Board minutes:

> The Board was informed by ACM that, as a result of an uncharacteristically large one-day redemption of $25 million, which redemption occurred at 11:59 a.m. Eastern Standard Time (or one minute before the shareholder services deadline), the percentage of Money Market Fund assets invested in the securities of a single issuer climbed to above 5% with respect to several issuers. However, all purchases made prior to such event were made within the 5% limitation and, following the maturity of certain securities in the Money Market Fund's portfolio on October 3, 2011 (the next business day after the redemption), no more than 5% of the assets of the Money Market Fund were invested in the securities of any one issuer.

44. However, the statement that by October 3, 2011, no more than 5% of the Fund's assets were invested in the securities of any one issuer, was false. On October 3, 2011, AMMF held the securities of just 21 different issuers and 10 of these issuers represented more than 5% of AMMF's portfolio.

G. AMMF Exceeded Rule 2a-7's Issuer Diversification Limit

45. ACM has admitted that AMMF violated Rule 2a-7's condition on issuer diversification at the time of purchase on six different occasions in 2009. More specifically, between February and December 2009, ACM caused AMMF to exceed the issuer diversification limit in connection with the purchases of ten different securities on six separate dates. On at least two occasions, AMMF exceeded the 5% issuer diversification limit at the time of purchase for securities issued by White Point.

H. AMMF's Failure to Implement Written Compliance Policies and Procedures

46. On February 23, 2010, the Commission adopted significant amendments to Rule 2a-7 which, among other things, tightened the rule's conditions pertaining to portfolio maturity, quality and liquidity and added an additional condition for Rule 2a-7 compliance regarding portfolio stress testing by money market funds. In the final rule release, the Commission discussed the purpose of the amendments:

> We believe these amendments will make money market funds more resilient and less likely to break a buck. They will further limit the risks money market funds may assume by, among other things, requiring them to increase the credit quality of fund portfolios and to reduce the weighted average maturity of their portfolios and by requiring for the first time that all money market funds maintain liquidity buffers that will help them withstand sudden demands for redemptions. The rule amendments require fund managers to stress test their portfolios against potential economic shocks such as sudden increase in interest rates, heavy redemptions, and potential defaults.

47. Compliance with Rule 2a-7(c)(10)(v)(A) is conditioned on the Fund implementing written procedures providing for periodic stress testing of the fund's ability to maintain a stable NAV in light of several hypothetical scenarios. However, AMMF did not fully implement written stress testing procedures until May 21, 2012.

I. ACM Failed to Perform Appropriate Stress Testing

48. To comply with Rule 2a-7(c)(10)(v) AMMF needed to conduct stress-testing that included hypothetical scenarios outlined in the rule, including, but not limited to "a change in short-term interest rates, an increase in shareholder redemptions, a downgrade of or default on portfolio securities, and the widening or narrowing of spreads between yields on an appropriate benchmark the fund has selected for overnight interest rates and commercial paper and other types of securities held by the fund."

49. AMMF's first stress test occurred in February 2011. Oglesby prepared AMMF's initial stress test, but he omitted some important hypothetical scenarios specifically included in Rule 2a-7(c)(10)(v). Even though one of AMMF's major shareholders was a financially distressed municipality (the City of Detroit) and the cash invested in AMMF fluctuated substantially throughout 2010 and 2011, Oglesby omitted an analysis of an increase in shareholder redemptions.

50. In addition, the February 2011 stress test also failed to include the impact of a downgrade of portfolio securities, another scenario identified in the 2010 Rule 2a-7 amendments. Since AMMF regularly purchased and held securities exposed to the Eurozone financial crisis, some of which were downgraded during the crisis, the risk of downgrades on portfolio securities should have been part of the Fund's testing.

51. Because Ambassador Funds failed to comply with various conditions of Rule 2a-7 as described above, during the relevant period AMMF was not entitled to use the amortized cost method for pricing its securities, but did so. On each day that AMMF did not meet the conditions of Rule 2a-7(c), the Fund should have provided redeeming shareholders with NAVs calculated in accordance with Rule 22c-1, rather than the amortized-cost price of $1 per share. Similarly, purchasing shareholders should have bought the Fund's shares at NAV rather than $1 per share.

J. Violations

1. As a result of the conduct described above, ACM willfully violated, and Oglesby willfully aided and abetted and caused ACM's violations of, Sections 206(1) and (2) of the Advisers Act, which make it unlawful for any investment adviser, by use of the mails or instrumentalities of interstate commerce, directly or indirectly, to employ any device, scheme or artifice to defraud any client or prospective client, or to engage in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client.

2. As a result of the conduct described above, ACM and Oglesby caused Ambassador Funds' violations of Rule 22c-1 of the Investment Company Act, which makes it unlawful for registered investment companies issuing redeemable securities, persons designated in such issuer's

prospectus as authorized to consummate transactions in such securities, and principal underwriters of, or dealers in such securities, to sell, redeem, or repurchase such securities except at a price based on the current net asset value of such security.

3. As a result of the conduct described above, ACM caused Ambassador Funds' violations of Rule 38a-1 of the Investment Company Act, which requires that registered investment companies implement written policies and procedures reasonably designed to prevent violation of the federal securities laws by the fund, including policies and procedures that provide for the oversight of compliance by the fund's investment adviser.

4. As a result of the conduct described above, ACM and Oglesby caused Ambassador Funds' violations of Section 34(b) of the Investment Company Act, which prohibits any person from making any untrue statement of a material fact in any report, account, record, or other document filed or required to be kept under Section 31(a) of the Investment Company Act, and also prohibits any person filing or keeping those documents from omitting to state any fact necessary in order to prevent the statements made in those documents from being misleading. Rule 2a-7(b)(1) under the Investment Company Act provides, in part, that it shall be an untrue statement of material fact within the meaning of Section 34(b) for a registered investment company to hold itself out to investors as a money market fund unless it meets the conditions of paragraphs (c)(2), (c)(3), (c)(4) and (c)(5) of the Rule.

5. As a result of the conduct described above, ACM and Oglesby caused Ambassador Funds' violations of Section 35(d) of the Investment Company Act, which prohibits any registered investment company from adopting as a part of its name or title any word or words that the Commission finds to be materially deceptive or misleading. Rule 2a-7(b)(2) under the Investment Company Act provides, in part, that it shall constitute the use of a materially deceptive name within the meaning of Section 35(d) for a registered investment company to adopt the term "money market" as part of its name or to adopt a name that suggests that it is a money market fund unless it meets the conditions of paragraphs (c)(2), (c)(3), (c)(4) and (c)(5) of the Rule.

6. As a result of the conduct described above, ACM and Oglesby caused Ambassador Funds' violations of Section 31(a) of the Investment Company Act and Rule 31(a)-1 thereunder, which requires each registered investment company to maintain and keep current "other records," which Rule 31(a)-1(b)(12) states shall be construed to include documents "required by the applicable rule or rules."

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 hereof 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 Respondent ACM pursuant to Section 203(e) of the Advisers Act including, but not limited to, disgorgement and civil penalties pursuant to Section 203 of the Advisers Act;

C. What, if any, remedial action is appropriate in the public interest against Respondent Oglesby pursuant to Section 203(f) of the Advisers Act including, but not limited to, disgorgement and civil penalties pursuant to Section 203 of the Advisers Act;

D. What, if any, remedial action is appropriate in the public interest against Respondents ACM and Oglesby pursuant to Section 9(b) of the Investment Company Act including, but not limited to, disgorgement and civil penalties pursuant to Section 9 of the Investment Company Act;

E. Whether, pursuant to Section 203(k) of the Advisers Act, and Section 9(f) of the Investment Company Act, Respondent ACM should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 206(1) and (2) of the Advisers Act and for causing Ambassador Funds' violations and any future violations of Sections 31(a), 34(b), and 35(d) of the Investment Company Act and Rules 22c-1, 31(a)-1, and 38a-1 thereunder, whether Respondent ACM should be ordered to pay a civil penalty pursuant to Section 203(i) of the Advisers Act, and Section 9(d) of the Investment Company Act, and whether Respondent ACM should be ordered to pay disgorgement pursuant to Section 203 of the Advisers Act and Section 9 of the Investment Company Act; and

F. Whether, pursuant to Section 203(k) of the Advisers Act, and Section 9(f) of the Investment Company Act, Respondent Oglesby should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 206(1) and (2) of the Advisers Act and for causing Ambassador Funds' violations and any future violations of Sections 31(a), 34(b), and 35(d) of the Investment Company Act and Rules 22c-1 and 31(a)-1 thereunder, whether Respondent Oglesby should be ordered to pay a civil penalty pursuant to Section 203(i) of the Advisers Act and Section 9(d) of the Investment Company Act, and whether Respondent Oglesby should be ordered to pay disgorgement pursuant to Section 203 of the Advisers Act and Section 9 of the Investment Company 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 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/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 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.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Commissioner Piwowar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3727 / November 26, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15627

In the Matter of **TRI-STAR ADVISORS, INC., WILLIAM T. PAYNE, AND JON C. VAUGHAN,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 203(e) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940 AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940 AND NOTICE OF HEARING**

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) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Tri-Star Advisors, Inc. ("TSA"), William T. Payne ("Payne"), and Jon C. Vaughan ("Vaughan"), (collectively, "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. SUMMARY

1. TSA, an investment adviser registered with the Commission since November 2009, willfully violated antifraud and compliance provisions of the Advisers Act and the rules thereunder. From July 2009 through July 2011 ("relevant period"), TSA: engaged in thousands of securities transactions with advisory clients on a principal basis through an affiliated broker-dealer, without providing prior written disclosure to, or obtaining consent from, the clients; and failed to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act.

2. Payne and Vaughan caused TSA's violations. During the relevant period, Payne was TSA's CEO, and Vaughan was TSA's President.

B. RESPONDENTS

3. **TSA** is a Texas corporation based in Houston, Texas. TSA became a Commission-registered investment adviser on November 17, 2009. As of December 2012, it managed 313 accounts on a non-discretionary basis and had approximately $162 million in assets under management.

4. **Payne**, age 57, resides in Sugarland, Texas and is the CEO of TSA. He is also the President and 40% owner of Mutual Money Investments, Inc. d/b/a Tri-Star Financial ("TSF"), an affiliated broker-dealer registered with the Commission.

5. **Vaughan**, age 42, resides in Houston, Texas and is the President of TSA. He is also the Vice President and 20% owner of TSF.

C. OTHER RELEVANT ENTITY

6. **TSF** is a Texas corporation based in Houston, Texas. TSF has been a Commission-registered broker-dealer since 1993 and is jointly owned by Payne, Vaughan and another individual.

D. FACTS

7. TSA provides investment advisory services to individuals and entities. TSA's investment strategy focused almost exclusively on fixed income securities, such as mortgage-backed bonds. To execute this strategy, TSA relied on TSF, its affiliated broker-dealer, for fixed income analysis and trade execution.

8. Payne and Vaughan make investment recommendations to TSA clients and, upon the clients' consent, TSF executes the transactions. During the relevant period, TSF used its inventory account to purchase mortgage-backed bonds for TSA advisory clients and then transferred the bonds to the applicable client account. TSF charged the advisory clients a sales credit for the trades, which was essentially a percentage mark-up (or mark-down). Payne and Vaughan, registered representatives of TSF for the trades, received 55% of the sales credit generated by each trade.

9. Payne and Vaughan are responsible for ensuring that TSA complies with its regulatory requirements, including Advisers Act requirements.

10. From July 2009 through July 2011, TSA, through TSF, engaged in 2,212 principal transactions with its advisory clients ("TSA Principal Transactions") without providing prior written disclosure to clients that it would effect the trades on a principal basis, or obtaining consent from clients.

11. TSF collected approximately $1.9 million in gross sales credits from the TSA Principal Transactions. TSF paid approximately $1 million to Payne and Vaughan for the TSA Principal Transactions while retaining the rest. None of the gross sales credits was paid to TSA.

12. Payne and Vaughan initiated and executed the TSA Principal Transactions. They knew that TSA did not provide written disclosures to, or obtain consent from, TSA clients before completing the TSA Principal Transactions.

13. During the relevant period, TSA failed to adopt and implement written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act provision regarding principal transactions. TSA's compliance manual did not contain any policies and procedures addressing principal transactions.

E. VIOLATIONS

14. As a result of the conduct described above, TSA willfully violated Section 206(3) of the Advisers Act, which prohibits an investment adviser from executing securities transactions with a client on a principal basis without disclosing to such client in writing, before the completion of such transaction, the capacity in which it is acting and obtaining the consent of the client to such transaction.

15. As a result of the conduct described above, Payne and Vaughan caused TSA's violations of Section 206(3) of the Advisers Act.

16. As a result of the conduct described above, TSA willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, which require that an investment adviser adopt and implement written policies and procedures reasonably designed to prevent violation of the Advisers Act and the rules thereunder.

17. As a result of the conduct described above, Payne and Vaughan caused TSA's violations of Section 206(4) of the Advisers Act and Rule 206(4)-7 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 and cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof 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 TSA pursuant to Section 203(e) of the Advisers Act including, but not limited to, disgorgement and civil penalties pursuant to Section 203 of the Advisers Act;

C. What, if any, remedial action is appropriate in the public interest against TSA pursuant to Section 9(b) of the Investment Company Act including, but not limited to, disgorgement and civil penalties pursuant to Section 9 of the Investment Company Act; and

D. 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(3) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, whether Respondents should be ordered to pay a civil penalty pursuant to Section 203(i) of the Advisers Act, and whether Respondents should be ordered to pay disgorgement pursuant to Section 203 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.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chair White
Commissioner Gallagher not participating
Commissioner Piwowar Disapproved

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC – 30808; 812-14232]

RBS Securities Inc. and Citizens Investment Advisors; Notice of Application and Temporary Order

November 25, 2013

Agency: Securities and Exchange Commission ("Commission").

Action: Temporary order and notice of application for a permanent order under section 9(c) of the Investment Company Act of 1940 ("Act").

Summary of Application: Applicants have received a temporary order exempting them from section 9(a) of the Act, with respect to an injunction entered against RBS Securities Inc. ("RBS Securities") on November 25, 2013, by the United States District Court for the District of Connecticut (the "District Court") until the Commission takes final action on an application for a permanent order. Applicants also have applied for a permanent order.

Applicants: RBS Securities and Citizens Investment Advisors ("Citizens IA"), a separately identifiable department of RBS Citizens, N.A. (each an "Applicant" and collectively, the "Applicants").[1]

Filing Date: The application was filed on November 7, 2013, and amended on November 25, 2013.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by

[1] Applicants request that any relief granted pursuant to the application also apply to any existing company of which RBS Securities is an affiliated person within the meaning of section 2(a)(3) of the Act (an "Affiliated Person") and to any other company of which RBS Securities may become an Affiliated Person in the future (together with the Applicants, the "Covered Persons") with respect to any activity contemplated by Section 9(a) of the Act.

writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on December 20, 2013, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

Addresses: Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090; Applicants: RBS Securities, 600 Washington Boulevard, Stamford, CT 06901; Citizens IA, c/o RBS Citizens Financial Group Inc., 101 Park Avenue, 10th Floor, New York, NY 10178.

For Further Information Contact: David J. Marcinkus, Senior Counsel, at 202-551-6882 or David P. Bartels, Branch Chief, at 202-551-6821 (Division of Investment Management, Chief Counsel's Office).

Supplementary Information: The following is a temporary order and summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at http://www.sec.gov/search/search.htm, or by calling (202) 551-8090.

Applicants' Representations:

1. RBS Securities, a Delaware corporation, is registered as a broker-dealer under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and is an indirect wholly-owned subsidiary of the Royal Bank of Scotland Group plc ("RBSG"). RBS Securities does not serve as investment adviser, depositor or principal underwriter to any registered investment company. Citizens IA, an investment adviser registered under

the Investment Advisers Act of 1940, is a separately identifiable department of RBS Citizens, N.A., which is an indirect wholly-owned subsidiary of RBSG and bank subsidiary of RBS Citizens Financial Group, Inc. ("CFG"). CFG is a wholly-owned subsidiary of RBSG. Citizens IA serves as investment sub-adviser to one management investment company registered under the Act, Aquila Narragansett Tax-Free Income Fund (the "Fund"). The Applicants and other Covered Persons may, if the relief is granted, in the future act in any of the capacities contemplated by section 9(a) of the Act subject to the conditions of the temporary order and the permanent order.

2. On November 7, 2013, the Commission filed a complaint (the "Complaint") against RBS Securities in the District Court in a civil action captioned *Securities and Exchange Commission v. RBS Securities Inc.* The Complaint alleged that RBS Securities violated sections 17(a)(2) and (3) of the Securities Act of 1933 (the "Securities Act") arising out of a single offering of residential mortgage-backed securities in 2007 (the "Conduct"). In settlement of this action, RBS Securities submitted an executed Consent of Defendant RBS Securities Inc. (the "Consent"). In the Consent, RBS Securities agreed to the entry of a final judgment, without admitting or denying the allegations made in the Complaint (other than those relating to the jurisdiction of the District Court over it and the subject matter, solely for the purposes of this action). On November 25, 2013, the District Court entered a judgment against RBS Securities (the "Judgment")[2] that enjoined RBS Securities from violating, directly or indirectly, sections 17(a)(2) and (a)(3) of the Securities Act (the "Injunction"). Additionally, pursuant to the

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[2] *Securities and Exchange Commission v. RBS Securities Inc.*, Case Number 1:13-cv-01643-WWE (D. Conn. Nov. 25, 2013).

Judgment, RBS Securities will pay disgorgement, prejudgment interest and a civil monetary penalty.

Applicants' Legal Analysis:

1. Section 9(a)(2) of the Act, in relevant part, prohibits a person who has been enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of a security, or in connection with activities as an underwriter, broker or dealer, from acting, among other things, as an investment adviser or depositor of any registered investment company, or a principal underwriter for any registered open-end investment company, registered UIT, or registered face-amount certificate company (such activities, collectively, "Fund Services Activities"). Section 9(a)(3) of the Act makes the prohibition in section 9(a)(2) applicable to a company, any Affiliated Person of which has been disqualified under the provisions of section 9(a)(2). Section 2(a)(3) of the Act defines "affiliated person" to include, among others: (A) any person directly or indirectly owning, controlling, or holding with power to vote, five per centum or more of the outstanding voting securities of such other person; (B) any person five per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; and (C) any person directly or indirectly controlling, controlled by, or under common control, with the other person. Applicants state that RBS Securities is an Affiliated Person of Citizens IA. Applicants state that, taken together, sections 9(a)(2) and 9(a)(3) would have the effect of precluding Citizens IA from acting as a sub-adviser to the Fund.

2. Section 9(c) of the Act provides that, upon application, the Commission shall grant an application for exemption from the disqualification provisions of section 9(a) of the Act if it is established that these provisions, as applied to the Applicants, are

unduly or disproportionately severe or that the conduct of the Applicants has been such as not to make it against the public interest or the protection of investors to grant the exemption. Applicants have filed an application pursuant to section 9(c) seeking a temporary and permanent order exempting them and other Covered Persons from the disqualification provisions of section 9(a).

3. Applicants believe they meet the standard for exemption specified in section 9(c). Applicants state that the prohibitions of section 9(a) as applied to them would be unduly and disproportionately severe and that the conduct of the Applicants has been such as not to make it against the public interest or the protection of investors to grant the exemption from section 9(a).

4. Applicants state that the Conduct did not involve any of the Applicants' Fund Service Activities. Applicants state that RBS Securities does not serve in any of the capacities described in section 9(a) of the Act. In addition, Applicants state that the Conduct did not involve the Fund, or the assets of the Fund, with respect to which the Applicants provided Fund Service Activities.

5. Applicants also state to the best of their knowledge (i) none of the current directors, officers, or employees of Citizens IA that are involved in providing Fund Service Activities (or any other persons in such roles during the time period covered by the Complaint) had knowledge of or participated in the conduct alleged in the Complaint to have constituted the violations that provide a basis for the Injunction; (ii) the directors, officers and employees at RBS Securities who participated in the conduct alleged in the Complaint to have constituted the violations that provide a basis for the Injunction have had no, and will not have any, involvement in providing Fund Service Activities on behalf of the Applicants or other Covered Persons; and (iii) because the personnel of

Citizens IA did not participate in the conduct alleged in the Complaint to have constituted the violations that provide a basis for the Injunction, the shareholders of the Fund were not affected any differently than if the Fund had received services from any other non-affiliated investment adviser or principal underwriter.

6. Applicants submit that they have taken sufficient remedial actions to address the conduct that served as the basis for the Injunction and that granting the exemption requested is consistent with the public interest and the protection of investors.

7. Applicants state that the inability of Citizens IA to continue providing Fund Service Activities to the Fund would result in the Fund and its shareholders facing potential hardship. Applicants state that they will distribute to the board of trustees of the Fund (the "Board") written materials describing the circumstances that led to the Injunction, any impact on the Fund, and the application. The written materials will include an offer to discuss the materials at an in-person meeting with the Board, including the directors who are not "interested persons" of the Fund as defined in section 2(a)(19) of the Act, and their independent legal counsel as defined in rule 0-1(a)(6) under the Act. Applicants state that they will provide the Board with the information concerning the Injunction and the application that is necessary for the Fund to fulfill its disclosure and other obligations under the federal securities laws.

8. Applicants state that if Citizens IA were barred from providing investment advisory services to the Fund, the effect on its businesses and employees would be severe. Applicants state that Citizens IA has committed substantial capital and other resources to establish an expertise in sub-advising registered investment companies. Applicants further state that prohibiting Citizens IA from providing Fund Service Activities would not only adversely affect its business, but would also adversely affect its

employees that are involved in those activities. Applicants state that many of these employees could experience significant difficulties in finding alternative fund-related employment.

9. Applicants state that Applicants and certain other affiliated persons of the Applicants have previously received an order under section 9(c) of the Act, as the result of conduct that triggered section 9(a), as described in greater detail in the application.

Applicants' Condition:

Applicants agree that any order granting the requested relief will be subject to the following condition:

Any temporary exemption granted pursuant to the application shall be without prejudice to, and shall not limit the Commission's rights in any manner with respect to, any Commission investigation of, or administrative proceedings involving or against, Covered Persons, including without limitation, the consideration by the Commission of a permanent exemption from section 9(a) of the Act requested pursuant to the application or the revocation or removal of any temporary exemptions granted under the Act in connection with the application.

Temporary Order:

The Commission has considered the matter and finds that the Applicants have made the necessary showing to justify granting a temporary exemption.

Accordingly,

IT IS HEREBY ORDERED, pursuant to section 9(c) of the Act, that Applicants and any other Covered Persons are granted a temporary exemption from the provisions of section 9(a), solely with respect to the Injunction, subject to the condition in the application, from November 25, 2013, until the Commission takes final action on their application for a permanent order.

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

Chair White
Commissioner Gallagher
not participating
Commissioner Piwowar
Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9487 / November 26, 2013

SECURITIES EXCHANGE ACT OF 1934
Release No. 70949 / November 26, 2013

In the Matter of

The Royal Bank of Scotland Group plc,

Respondent.

ORDER UNDER SECTION 27A(b) OF THE SECURITIES ACT OF 1933 AND SECTION 21E(b) OF THE SECURITIES EXCHANGE ACT OF 1934, GRANTING WAIVERS OF THE DISQUALIFICATION PROVISIONS OF SECTION 27A(b)(1)(A)(ii) OF THE SECURITIES ACT OF 1933 AND SECTION 21E(b)(1)(A)(ii) OF THE SECURITIES EXCHANGE ACT OF 1934 AS TO THE ROYAL BANK OF SCOTLAND GROUP PLC AND ITS AFFILIATES

The Royal Bank of Scotland Group plc ("RBSG") has submitted a letter on behalf of itself and its affiliates, dated October 28, 2013, for a waiver of the disqualification provisions of Section 27A(b)(1)(A)(ii) of the Securities Act of 1933 (the "Securities Act") and Section 21E(b)(1)(A)(ii) of the Securities Exchange Act of 1934 (the "Exchange Act") arising from the settlement of a civil injunctive action filed by the Commission against a subsidiary of RBSG known as RBS Securities Inc. ("RBS").

On November 7, 2013, the Commission filed a civil injunctive action in U.S. District Court for the District of Connecticut against RBS for violating the antifraud provisions of the federal securities laws. The complaint alleged that the violations resulted from certain misstatements and omissions made by RBS to the investing public in 2007 in promoting its $2.2 billion offering of a subprime residential mortgage-backed security. RBS allegedly misled investors about the quality and safety of their investments by claiming that the subprime loans backing the multi-billion dollar offering were "generally" in compliance with the lender's underwriting guidelines when RBS knew or should have known at the time that almost 30% of the loans backing the offering deviated so much from the lender's underwriting guidelines that they should have been kicked out of the offering entirely. On November 25, 2013, pursuant to RBS's consent, the U.S. District Court for the District of Connecticut entered a Final Judgment permanently enjoining RBS from violating Sections 17(a)(2) and (3) of the Securities Act, and requiring RBS to pay disgorgement, prejudgment interest and a penalty.

The safe harbor provisions of Section 27(A)(c) of the Securities Act and Section 21E(c) of the Exchange Act are not available for any forward looking statement that is "made with respect to the business or operations of an issuer, if the issuer . . . during the 3-year period preceding the date on which the statement was first made . . . has been made the subject of a judicial or administrative decree or order arising out of a governmental action that (I) prohibits future violations of the antifraud provisions of the securities laws. . . ." Section 27A(b)(1)(A)(ii) of the Securities Act and Section 21E(b)(1)(A)(ii) of the Exchange Act. The disqualifications may be waived "to the extent otherwise specifically provided by rule, regulation, or order of the Commission." Section 27A(b) of the Securities Act and Section 21E(b) of the Exchange Act.

Based on the representations set forth in RBSG's letter, the Commission has determined that, under the circumstances, the request for a waiver of the disqualifications resulting from the entry of the Final Judgment is appropriate and should be granted.

Accordingly, **IT IS ORDERED**, pursuant to Section 27A(b) of the Securities Act and Section 21E(b) of the Exchange Act, that a waiver from the disqualification provisions of Section 27A(b)(1)(A)(ii) of the Securities Act and Section 21E(b)(1)(A)(ii) of the Exchange Act as to RBSG and its affiliates resulting from the entry of the Final Judgment is hereby granted.

By the Commission.

Elizabeth M. Murphy
Secretary

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

Chair White
Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9488 / November 27, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3728 / November 27, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30814 / November 27, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15629

In the Matter of **MARIE L. HUBER and JESS E. JONES,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

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 Section 8A of the Securities Act of 1933 ("Securities Act"), Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940, against Marie L. Huber ("Huber") and Jess E. Jones ("Jones").

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 Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Section 203(f) of the Investment Advisers Act of

1940, and Section 9(b) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers the Commission finds that:

Respondents

1. Marie L. Huber, age 35, resides in Cambridge, Massachusetts. From January 2007 to February 2011, Huber was an analyst at "Hedge Fund Adviser A." Huber has not been associated with a registered investment adviser since that time. Huber has a Bachelor's degree in Biochemistry and a Master's degree in Bioscience Enterprise from Cambridge University in the United Kingdom. Huber is not a registered adviser and does not hold any securities licenses.

2. Jess E. Jones, age 34, resides in Reno, Nevada. From June 2007 to January 2011, Jones was an analyst at "Hedge Fund Adviser B." Jones's focus was the health care industry. Jones has a Bachelor's degree from the University of Utah in Salt Lake City, Utah, and an M.D. and a Master's Degree in Business Administration from Columbia University in New York, New York. Jones is not a registered adviser and does not hold any securities licenses.

Other Relevant Entities

1. "Hedge Fund Adviser A" (hereinafter referred to as "HFA-A") is an investment adviser that has been registered with the Commission since 2009. HFA-A is a Delaware corporation with its principal office in New York, New York.

2. "Hedge Fund Adviser B" (hereinafter referred to as "HFA-B") is an investment adviser that has been registered with the Commission since 2006. HFA-B is a Delaware corporation with its principal office in New York, New York.

3. Dendreon Corporation ("Dendreon") is a Delaware corporation with its principal office in Seattle, Washington. Dendreon is a biotechnology company that developed and markets Provenge (Sipuleucel-T), which is an immunotherapy treatment for late-stage prostate cancer. Provenge is Dendreon's only commercialized product. Dendreon has common stock registered with the Commission under Section 12(b) of the Exchange Act. The company's common stock (symbol "DNDN") trades on the NASDAQ Stock Market.

Background

1. On April 29, 2010, the Food and Drug Administration ("FDA") approved Provenge for the treatment of late-stage prostate cancer. In early June 2010, the FDA released documents related to its decision to approve Provenge ("the FDA

documents"). After reviewing and analyzing the FDA documents, Huber concluded that the Provenge treatment was hastening the death of patients. In June 2010, Huber began drafting a report for HFA-A, entitled "Provenge PhIII Trials – The Alternative Explanation of Survival Results" (hereinafter referred to as the "Alternative Explanation"), which set forth her analysis.[1] Huber shared her draft report with a number of individuals, including Respondent, Jess Jones.

2. During the period of June 17, 2010 through July 12, 2010, Huber purchased $125,431 in July Dendreon put options and $110,627 in August put options.[2] Huber also purchased put options in her mother's account, and shared her analysis with friends and family who subsequently traded in Dendreon securities. The July put options that Huber purchased were set to expire on July 17, 2010, and had strike prices ranging from $10 to $30. All of the put options were "out-of-the-money" and most of them had strike prices of $25 or less. Dendreon common stock was selling in the low to mid $30s at the time. During the same period, Jones purchased $3,095 in July Dendreon put options and $36,651 in August put options. The put options that Jones purchased were also out-of-the-money and had strike prices ranging from $21 to $30. In addition, Jones advised family and friends to purchase Dendreon put options.[3]

3. On June 30, 2010, the Centers for Medicare & Medicaid Services ("CMS") opened a national coverage analysis for Provenge, and requested public comments concerning the efficacy of Provenge and whether it should be covered by Medicare and/or Medicaid. Huber encouraged HFA-A to submit the report she prepared on Provenge to CMS. In early July 2010, HFA-A had not yet determined when to submit the Alternative Explanation to CMS in response to the request for comments. As the July 17, 2010 put option expiration date neared, Respondents were concerned that HFA-A was not going to submit the report to the CMS website prior to the expiration of their put options. As a result, Respondents arranged to disseminate the Alternative Explanation on their own prior to option expiration.

4. On July 12, 2010, Huber gave Jones a flash drive which contained documents relating to the Alternative Explanation, including copies of the Alternative Explanation, a distribution list of email addresses, and a version of the email text that Jones subsequently used to disseminate the report.[4]

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1 A version of the Alternative Explanation was subsequently published in the "Journal of the National Cancer Institute" on February 22, 2012. The findings in this Order do not address the conclusions set forth in the Alternative Explanation.

2 Huber did not receive approval for these trades as required by HFA-A's trading policies.

3 Jones did not receive approval for these trades as required by HFA-B's trading policies.

4 That evening, Jones created an email account using the name Aaron Adams and Dendreon's ticker symbol DNDN (aa.adams.dndn@gmail.com) and sent emails attaching the Alternative Explanation to seven individuals in the financial community. Those emails contained the following message: "Thought you guys might want to see this before everyone else . . . [.]" The following day, on July 13, Jones anonymously posted the Alternative Explanation on the Pharmalot blog and the Yahoo! DNDN Message Board.

5. On the evening of July 14, 2010, Jones created an email account using the name Jonathan White and Dendreon's ticker symbol DNDN (jon.white.dndn@gmail.com) and sent emails attaching the Alternative Explanation to more than 450 email addresses from a distribution list that Huber had provided. Most of the email recipients were affiliated with the medical and pharmaceutical industries, and approximately 15 of the recipients were in the financial industry. The "Jonathan White" emails contained the following text, the substance of which was contained on the flash drive which Huber provided to Jones:

> BCC list: 500 members of the medical, scientific, regulatory, and legal communities
>
> Dear Colleague,
> The document attached . . . was written by a group of scientists and physicians whose concern for their safety has forced them into hiding. In it they postulate a design flaw in the Provenge PhIII trials with potentially profound implications. Those who previously voiced legitimate scientific concerns regarding this drug had their lives threatened, were forced to employ body-guards and have been traumatized into silence. Every dissenting voice is squashed. This fear extended to the FDA reviewers, who stated if it doesn't get approved this time, there will be bloodshed. It is our constitutional right to express our opinions. If money and power can scare dissenters into silence, it is a sad day indeed for our nation and for humankind.
>
> I call upon you to read this argument and make your own independent, critical assessment of its merits. If you see the merit of the concerns it voices, I call upon you to express those views to the FDA and CMS (Leslye Fitterman, PHD; Leslye.fitterman3@cms.hhs.gov) who have been trusted with the power of protecting the American public.
>
> In my personal opinion (and that of select esteemed colleagues) that a legitimate concern has been raised, which is that the immune cells that are explicitly removed from placebo patients in the Provenge trials could have significantly compromised these patients and their ability to fight their cancer. This possibility must be explored as an alternative explanation for these trial results, because if it is right, it implies that Provenge treatment is harmful to patients because of all the immune cells that are lost during this treatment, and not prolonging life at all!
>
> If any of you reach the same independent assessment of this piece as I do, it is our moral obligation to have a voices heard and demand this matter is investigated. We must stand up against those that

wish to use the power of the sword to threaten legitimate scientific discourse and concern for patient safety. We cannot allow the big money invested in this drug to feed on the fear and desperation of cancer patients and their families to co-opt their voice to silence those very people that are trying to protect them.

Sincerely,
A concerned physician, scientist and citizen

p.s. Scientific progress since 1999, when the FDA agreed to the design of these trials, has significantly increased our understanding of immune aging. Now that we know that the aged immune system cannot replace lost cells in the way that the youthful immune system can, we should identify the possible mistakes of our earlier ignorance. We infected thousands of people with HIV and Hepatitis C through blood infusions before we discovered that these are blood-bourn pathogens. We gave thalidomide to thousands of pregnant women before we understood that this was causing birth defects. We used epo to drive hemoglobin levels to unhealthy levels until we learned that this is harmful. We make mistakes, and scientific progress reveals those mistakes. The sooner we rectify earlier mistakes, the sooner we curtail the unintentional harm we are causing.

6. On July 14, 2010, Dendreon shares closed at $33.99 on volume of 4,042,300. On July 15, 2010, after the "Jonathan White" emails were sent, Dendreon shares fell 7.2% intraday ($31.54) and closed down 4.5% ($32.45).[5] Trading volume on July 15 was 9,084,700, nearly double the average volume for the three trading days before and after July 15. That day, Huber sold 376 July put option contracts with strike prices of $27 and $30 for total proceeds of $2,841, and Jones sold 50 August put option contracts with a strike price of $28 for proceeds of $8,522. However, Huber and Jones suffered significant trading losses because the vast majority of their put option contracts remained unsold or unexercised because they were so far "out-of-the-money."

7. On July 14, Huber told her boss at HFA-A that there had been a "leak" of the Alternative Explanation. Huber told her boss and colleagues that she did not know who "leaked" the Alternative Explanation, but that given the "leak," HFA-A should quickly submit to CMS as public comment the most up-to-date version of the report. On July 15, 2010, on HFA-A's behalf, outside counsel submitted the Alternative Explanation to CMS on behalf of an unidentified client, and CMS posted the report on its website as part of the public comments.[6]

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[5] On July 15, the pharmaceutical sector was slightly up (0.1%), and the DJIA, S&P 500, and NASDAQ were flat (<0.001%).

[6] The submission contained a disclosure stating that the report "was prepared by an investment adviser which may from time to time have a long or short interest in companies that are directly or indirectly affected by

8. The text of the July 14 "Jonathan White" emails omitted to state material facts necessary to make the statements made not misleading. The emails stated that the Alternative Explanation was "written by a group of scientists and physicians" and was signed "A concerned physician, scientist and citizen." These statements were materially misleading because the Respondents were hedge fund analysts who held Dendreon put option contracts that were about to expire. These facts were material because investors would have considered the identity, motive, and financial self-interest of Respondents important to assessing the report and any decision to buy or sell the securities of Dendreon.

9. Section 17(a)(2) of the Securities Act prohibits any person, in the offer or sale of any securities, to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. As a result of the conduct described above,[7] Respondents willfully[8] violated Section 17(a)(2) of the Securities Act.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act, Section 203(f) of the Advisers Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondents Huber and Jones cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) of the Securities Act.

B. Respondents Huber and Jones be, and hereby are suspended for six months from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent, and prohibited for six months from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter.

C. Respondents Huber and Jones shall each, within 10 days of the entry of this

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the matters referred to in this paper." The findings in this Order do not address this disclosure.

7 The Respondents' conduct described above was, at a minimum, negligent. Negligent conduct can violate Section 17(a)(2). See, e.g., SEC v. Hughes Capital Corp., 124 F.3d 449, 453-54 (3d Cir. 1997).

8 A willful violation of the securities laws means merely "'that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.'" Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949)).

Order, pay a civil money penalty in the amount of $25,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

(1) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(2) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying them as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Brian O. Quinn, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-5030.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary